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THE ISLE OF MAN AND THE CHANNEL ISLANDS - A STUDY OF THEIR STATUS UNDER CONSTITUTIONAL, INTERNATIONAL AND EUROPEAN LAW

by

SIMON A. HORNER

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BADIA FIESOLANA, SAN DOMENICO (FI)

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Badia Fiesolana
50016 San Domenico (FI)
Italy

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PREFACE

This paper deals with the issues arising out of the special status of the Channel Islands and the Isle of Man in the fields of Constitutional, International and European Law.

The work has been undertaken in the context of a more general study, for the purposes of a doctoral thesis, on the subject of dependent and diminutive territories associated with the European Communities.

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Chapter 1 - Introduction and Historical Background

I. Introduction

In this paper, I propose to examine the legal aspects of the special status enjoyed by the Isle of Man and the Channel Islands as internally self-governing territories of the British Isles.

Major emphasis will be placed on the special relationship which was negotiated on behalf of the Islands when Britain acceded to the European Communities and in particular the operation of the provisions in practice.

Firstly, however, I shall consider the Islands in the context of their status within the British constitutional system since the principles which govern this relationship are the cornerstones of any study in a related field such as the European Communities.

In addition, the following two international law aspects will be treated:- i) The effect of growing international regulation on the Islands' constitutional relationship with the United Kingdom. ii) The possibility of categorising the Islands in international legal terms and an assessment of whether such a categorisation coincides with any internal constitutional definition arrived at. This should allow one to reach certain conclusions about the Islands' status in the long term.

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II. The Isle of Man - Historical Background

The Isle of Man, situated in the Irish Sea and almost equidistant from the four 'home' countries of the United Kingdom, boasts one of the oldest Parliaments in the world and has a history of political autonomy which has survived, although not entirely unscathed, the forces which unified the British Isles politically in the past millenium. In this respect, it is unique - all the other island groups with similar Nordic and/or Celtic backgrounds have found themselves incorporated into the unitary state of Great Britain and in the process, have been relegated to the status of local authority areas with powers derived solely from and vulnerable to the Westminster Parliament.

While never totally suppressed, Manx independence has not, in recent history, amounted to complete unfettered sovereignty and the British Government, operating through the Monarch as 'Lord of Man' has, from time to time, imposed its will on the Island.

Their principal action in this respect, came in the acquisition of the Lordship by the Crown in 1765[1]. This was done by what was effectively an ultimatum to the existing Lord, the Duke of Atholl and was accompanied by legislative enactments which curtailed the independent sovereignty which the Lord had exercised together with Tynwald, the Manx Parliament.

The purpose of these measures was to put to an end the smuggling trade which had developed and which had brought

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a measure of prosperity to the Island at the expense of the British Exchequer[2].

Manx law had previously been amended to encourage trade in goods which were ultimately destined to be smuggled to Britain and, on account of the revenue which accrued to the Island from this commerce, the activity was acquiesced in by successive Lords of Man.

In 1767, the British Government also imposed taxation over the heads of Tynwald and this can probably be regarded as the low point in Manx autonomy[3].

The last two centuries has seen the Manx Parliament gradually regain its lost powers, while at the same time undergoing a popular democratisation reflecting the franchise reforms which occurred in the U.K. in the nineteenth and early twentieth centuries.

During the nineteenth century, a practice developed in the Isle of Man which illustrates their continuing capacity to extract financial advantage out of their legal and physical separation from the United Kingdom. The Island attracted significant numbers of immigrants from England who were bad debtors and whose creditors were unable to pursue them. Since these people generally brought money with them and hence, contributed to the Manx economy, laws were passed to protect them[4]. This disreputable practice was ended after a time.

Today the Island is once again in the position of offering a favourable financial environment due to its low and relatively uncomplicated tax structure and it is this which is the basis for its present prosperity.

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The Isle of Man has a distinctly separate legal system the foundation of which is its customary or 'breast' law[5]. Accordingly, there are certain fundamental differences[6] between the Manx and English legal systems although overall, there are broad areas of similarity. Nowadays, legislation is the more important source of law and this originates at Westminster or, more commonly, in the local Manx legislature, Tynwald[7].

III. The Channel Islands - Historical Background

The Channel Islands, which lie off the North-West coast of France, have a somewhat different history. They are the only remnants of the Duchy of Normandy still under the English Crown having initially been attached in 1106 and formally annexed in 1254. They have never been incorporated however, into the English (or United) Kingdom and accordingly:

> "...the right of the Sovereign to legislate by Order in Council...is based on the powers exercised by the Dukes of Normandy"[8].

The Common Law of the Islands is the 'ancienne coutume' of the Duchy of Normandy[8a] although this has, of course, been superceded in large measure over the centuries, by the development of local customs, insular legislation and Orders in Council emanating from London.

The Channel Islands have traditionally enjoyed a substantial degree of local independence and this has been consolidated by successive English monarchs, anxious to ensure their continued loyalty after the loss, in 1204, of continental Normandy.

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was consistent with the constitutional rights of the Island[13].

Clearly, this view may be held to apply equally to Guernsey which has acquired analogous Charter rights over the centuries.

In essence, therefore, the Islands' existing independence results, not from the gradual acquisition of competences previously exercised by the metropolitan power, but from the continued guarantee of a pre-existing sovereignty. Admittedly, this has been adapted to meet the changing circumstances of democratic evolution but it remains, in principle, as a result of the maintenance of the status quo[14].

IV. Summary

Notwithstanding their different historical backgrounds, it would be difficult nowadays to justify drawing any practical distinctions between the Channel Islands and the Isle of Man, in terms of their relationship with the United Kingdom and they may be treated together for most purposes.

The historical differences, however, should not be completely ignored since they may offer some explanation for the different attitudes which are adopted in the Islands. Until very recently, the Isle of Man could be said to have been 'catching up' on the Channel Islands, as far as domestic autonomy is concerned[15] and in certain other respects, it continues to lag behind[16].

Clearly, it is also important to treat the Islands of Jersey and Guernsey separately since they form independent jurisdictions and have deviated on a number of important

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This sensitivity to Island opinion was manifested in various Royal Charters[9] which exempted the Islands from English taxation, provided unrestricted access to English markets and, in general, laid the foundations for their present domestic autonomy[10].

The immunity granted to insular products from English, and later U.K., customs duties was historically, perhaps the most significant privilege granted to the Islands and this ancient right has been reaffirmed several times in subsequent legislation[11].

Nowadays, however, one would probably identify the Islands' fiscal autonomy as the single most important factor contributing to their present economic strength.

It would appear that the internal independence of the Islands rests on a firmer legal and historical foundation than that of the Isle of Man. This was illustrated in a successful petition presented to the Privy Council by the States (Parliament) of Jersey in 1853[12], following an attempt to impose three Orders in Council on the Island. These were aimed at reforming Jersey's judicial and police system and the costs incurred were to be borne by the States. The States, however, refused to put these orders into effect, citing the Island's immunity from British taxation as their justification. They were willing, instead to implement their own legislation which differed in certain respects. The Privy Council's conclusion was that there were serious doubts whether the use of the prerogative in this field, without the States consent,

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matters, not least with regard to the question of EEC accession. The other two Channel Islands with a substantial measure of self-government are Alderney and Sark, both of which have small populations and only limited economic activity. For this reason, they will not be considered as such. In most respects, the issues raised which affect the two largest Channel Islands are similarly pertinent to the smaller islands in the group.

Some basic facts about the Isle of Man, Jersey and Guernsey are set out in Appendix I.

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Chapter 1 - Footnotes.

1. The Isle of Man Purchase Act, 1765 (5 Geo.3 c 21)
2. See R.H. Kinvig, The Isle of Man - A Social, Cultural and Political History p.120
3. 1767 (7 Geo.3 c 45)
4. Kinvig supra p.132
5. So called because it is 'the law residing in the breasts of the judges' See K.R. Simmonds, The British Islands and the Community, II - The Isle of Man, 7 C.M.L.Rev. 1970 p.454 at 457
6. The Manx have their own distinct law of real property.. For a brief comparison of Manx and English law, see Chloros, Bibliographical Guide to the Law of the United Kingdom, Channel Islands and Isle of Man, p.237
7. For a more comprehensive constitutional history of the Isle of Man, see D.G. Kermode, Devolution at Work, A

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Case Study of the Isle of Man, Chapter 3 and 4.

8. From Volume 6 of the Minutes of Evidence taken before the Commission on the Constitution, p.228, Memorandum by the States of Guernsey submitted on the 28th April, 1970.

8a The principal codification of this is 'Le Grand Coustumier du Pays et Duche de Normandie' published in 1539. See, K.R. Simmonds, the Law of the Channel Islands, III Some Aspects of the Application of United Kingdom Legislation to the Channel Islands, The Solicitor Quarterly, 1963(2), pp.33-46

9. In particular, a Royal Charter granted by Elizabeth I in 1559 which consolidated and extended the rights and privileges of Channel Islanders.

10. See Colin Powell, The Channel Islands and the Common Market, the Three Banks Review, 1972, Number 95, page 49 at the Introduction.

11. In particular, the following three Acts:
    - An Act for continuing the duties on malt...and to obviate a doubt concerning goods imported from the Islands of Jersey, Guernsey, Alderney and Sark, 1716 (3 Geo.1 c 4)
    - The Customs Consolidation Act, 1876 s.156
    - the Customs and Excise Act, 1952, s.37

12. In re the States of Jersey (1853) 9 Moo. P.C.C. 187

13. ibid at p.262

14. For a more comprehensive constitutional history of Jersey, see the Jersey Report, 1967 Section C at p.42, commissioned by the States of Jersey.

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14. For instance, until recently, the Manx Lieutenant-Governor was far less of a figurehead than his Channel Islands counterparts. It was only in 1980 that he ceased to preside over sittings of the Legislative Council.

15. This is particularly so in the field of finance. The Isle of Man is considerably less developed as a financial centre and is some way behind in the legislative area. e.g. with regard to Depositor Protection.

16. Alderney (population 2,000) and Sark (population 500), together with the smaller Channel Islands of Herm, Jethou, Lihou and Brechou, are dependencies of Guernsey. Sark is largely autonomous except with regard to certain criminal matters, and has its own legislature called the Chief Pleas. Alderney has its own States, but also has two representatives in the Guernsey States, the latter being responsible for Police, Public Health and Administration on Alderney.

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Chapter 2 - The Relationship between the Islands and the United Kingdom; a study of the Constitutional Situation

I. Introduction

In embarking upon an examination of the constitutional situation of the Channel Islands and the Isle of Man, it is necessary at the outset, to distinguish between two avenues of inquiry which exist, the first dealing with the internal constitutional situation of the Islands and the second with the rules and conventions which govern their relations with the United Kingdom.

Whilst there is clearly some interaction between these two fields, they may to a large extent be assessed separately. The former involves consideration of traditional constitutional legal theory encompassing the scope of powers of the insular authorities vis a vis individuals under their jurisdiction. The latter is, in essence, a study of inter-governmental relations and accordingly, is more concerned with the delimitation of powers between different authorities.

There are two principal ways in which these fields may be seen to overlap. Firstly, where a constitutional link exists between the citizens of the Islands and the metropolitan government[1] and secondly, in the sense that the insular governments are constrained in their actions vis a vis individual islanders by the checks imposed on them in their relationship with the United Kingdom.

Examples of this interaction are assessed in the following discussion but major emphasis is placed upon the latter aspect

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of the constitutional system mentioned, namely the relationship between the two principal political authorities operating in this arena. A brief review of the internal constitutional structure of the Islands is to be found at Appendix VI.

The first step will be to look at the Islands' classification under the U.K. Constitution as 'dependencies of the Crown' and whether the term used is indicative of a precise legal form or of a more general concept encompassing a wider range of entities with a particular common characteristic.

I will then consider in greater detail, the agreed principles of the relationship, the principles over which there is some dispute and the dichotomy which arises in this field, using as a reference point, the governmental inquiries which were conducted in the late 1960s and early 1970s[2]. It is important to recognise that, in these inquiries, attention tended to be focussed upon aspects of the system over which there was disagreement. In order to put these in context, it is therefore appropriate to describe the central aspects of the relationship in its normal functioning. It should be emphasised from the beginning that the relationship between the Islands and the U.K. is a highly stable one and the problem areas constitute exceptions to a general rule of harmony.

This will be followed by an examination of insular autonomy, concentrating on three specific subjects which have resulted in disagreements between Britain and the Islands in the past: (i) 'Non-interference' by Westminster and the extent to which this has become a binding norm or convention (ii) The question of access for the Islands to judicial protection for their autonomy and (iii) The debate over a formal delimitation of

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powers.

With respect to these three areas, the final outcome of the argument must be seen in the light of British constitutional theory and practice, and this will be considered.

On a more general level, it should be possible to assess, from a historical point of view, the present nature of insular autonomy.

Finally, I will return to the question of terminology in seeking to characterise the Islands' constitutional status by reference to their relationship with the United Kingdom, and to existing legal forms which are adopted by states for the government and administration of territories over which they exercise sovereignty.

II. Dependencies of the Crown

The formal constitutional definition of the status of the Channel Islands and the Isle of Man is that they are 'dependencies of the Crown' which are neither colonies nor part of the United Kingdom[3]. This special link with the Crown, as distinct from absorption or annexation by the British state, is one which the Islanders are keen to stress and there is a tendency, therefore, to reject the existence of any constitutional link with the Government of the U.K.[4] This may be the case in theory but in practice, the very fact that the Islands owe allegiance to the Sovereign offers a legal avenue for the British Government to involve itself in their affairs.

In reality, the Crown is the least powerful element in the United Kingdom's tri-partite Parliamentary system. By established convention, the Queen accepts the advice of her

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Ministers and the exercise of the Crown prerogative is controlled by the Cabinet.

In contrast to Westminster legislation, there is no convention which requires the sovereign to give the Royal Assent to insular legislation and, on the advice of her Privy Councillors[5], she will withhold such assent if the measure appears repugnant to the British Government[6].

Similarly, the Queen is unable independently to refuse the passage of an Order in Council, the device used to extend Westminster legislation to the Islands.

Thus, for practical purposes, one must accept the indivisibility of the Sovereign and the British Government where insular matters are concerned and, arising out of this, there is clearly a legal relationship between the Islands and the metropolitan government. Accordingly, there is little to be gained in distinguishing 'dependencies of the Crown' from other dependencies of the United Kingdom, at least in terms of the control which may be exercised from Westminster. While the formal procedures may differ, the scope of action of the U.K. cannot be presumed from the terminology employed.

The next stage is to consider whether a legal definition exists for the term 'dependency'. In this respect, there is little to be gained from an examination of the international legal doctrine. The term is not utilised in this sphere for the technical purpose of portraying a particular defined set of legal and constitutional circumstances. Indeed, there are very few writers who utilise the word except in the purely descriptive sense to indicate the existence of a relationship between two entities, one a state and the other a territory which lacks the

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full attributes of sovereignty[7].

As is discussed in Chapter 3, attempts at more precise terminology are not always successful. Notwithstanding this, it may be asserted that 'dependent states'[8], 'non-self-governing territories'[9], 'colonies'[10], 'protectorates'[11] etc. (terms which are by no means mutually exclusive), all display in their constitutional structures, elements of dependency in a legal sense.

There may, of course, be a further form of dependency established between sovereign states. This may be termed 'factual dependency' and will generally occur where a weaker state finds itself economically dependent upon a more powerful one. Such a situation may be said to characterise the relations between ex-colonial powers and many of their recently independent colonies.

In order to obtain a more precise definition of 'dependency', it is worth looking at the constitutional practice and usage of existing metropolitan powers. From an examination of the terminology employed, it is clear that the term is used in the legal sense, only by the United Kingdom to describe its non-metropolitan territories. Australia and the United States have 'external territories', New Zealand uses the term 'associated territories' while the French expression is 'territoires d'outre-mer'.

In the U.K. context, the word is also employed in relation to very small entities in special relationship with a larger territory which is, itself in a situation of legal dependence vis a vis Britain. Thus, South Georgia, Ascension Island and Alderney are dependencies of the Falkland Islands, St. Helena and Guernsey respectively.

It is accordingly very difficult to ascribe to the term, as

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it is used in the British constitution, anything other than a loose legal meaning. A 'dependency' in fact, may be any territory which is not fully sovereign in its own right and which at the same time, is not incorporated into the metropolitan area of the state on which it is dependent. In the context of British dependencies, the most important legal characteristic is the ultimate supremacy[12] of the U.K. This concept is discussed further in section IV of this Chapter but for present purposes, it is sufficient to note that 'dependency' in U.K. terms connotes the unlimited capacity to legislate on the part of the ultimate 'parent' state (as opposed to the intermediate 'parent' dependency'.)

III. Principles of the Constitutional Relationship

Periodically, studies have been conducted into the various aspects of the relationship between the U.K. and the island dependencies of the Crown. The most recent of these was the Royal Commission on the Constitution which reported in 1973[13]. This exercise was conducted principally as a result of the upsurge of nationalism in Scotland and Wales but the terms of reference included a mandate to consider whether any changes were desirable in the relationship between the United Kingdom on the one hand and the Channel Islands and the Isle of Man on the other. The principles of the relationship are contained in Chapter 31 of the Royal Commission's majority report[14] but a more concise summary, reproduced in Appendix II, is to be found in an earlier study relating specifically to the Isle of Man and conducted by a joint working party of the United Kingdom and Manx Governments[15].

Within these agreed principles, a certain ambiguity arises. In the first place, the Crown has ultimate responsibility for the good government of the Islands and this is manifested in practical terms by Westminster's ultimate legislative

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supremacy[16]. Notwithstanding this, the insular authorities enjoy complete autonomy over matters which do not 'transcend' their own frontiers[17].

There is clearly a potential for conflict in these principles and their ability to exist side by side has been largely dependent upon the restraint of the British Government.

The dichotomy has been highlighted, however, in recent times as a result of the United Kingdom's acknowledged responsibility for the international relations of the Islands[18]. The Royal Commission observed that:

> "There is an increasing tendency for international agreements to deal with matters hitherto regarded as purely domestic and requiring domestic legislation for their implementation"[19].

Another feature they noted was the great difficulty being experienced in negotiating optional territorial application clauses for multi-lateral treaties. Without such a device, a treaty signatory is deemed to be signing on behalf of all territories for whose external relations it is responsible.

Thus, it has only recently become clear that the existing constitutional relationship embodies a principle which has the potential for eroding the autonomy of the Islands and the insular authorities are understandably concerned about the vulnerability of their independence to this development.

In addition to the agreed principles set out in Appendix II, there were certain disputed areas which were raised by the Isle of Man in their evidence to the Stonham Working Party[20]. Of particular interest in this context was the disagreement over the extent to which constitutional conventions limit direct

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legislation by Parliament at Westminster, for the Isle of Man. In addition, there were the related issues of the extension of U.K. statutes to the Island when uniformity of legislation was considered desirable and the use of the Royal Prerogative in making Orders in Council for the Island.

In Section V of this Chapter, I propose to discuss in more detail, the legal nature of insular autonomy, bearing in mind the agreed and disputed principles discussed above.

The growth of international regulation, and the specific problems which have arisen in this area will be considered in Chapter 3.

IV. The Normal Functioning of the Relationship

It is important to bear in mind throughout this study that, notwithstanding the legal problems which have arisen, the relationship between the United Kingdom and the Islands is essentially a stable one. It is therefore, appropriate to devote some consideration to its 'normal' operation.

Firstly, in identifying the arenas which actually involve interaction between the Westminster and insular authorities, one can adopt two categories:

(i) Interaction at the administrative level and

(ii) Interaction involving legislation.

(i) In this area, it could be postulated that, since Britain is responsible for the good government of the Islands, it is entitled to monitor the administrative activity of the insular authorities, in order to ensure the maintenance of 'good government'. In reality, however, there is little evidence of close scrutiny

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of this nature. The United Kingdom is clearly the dominant 'partner' in the constitutional system but overt supervision of this kind would be provocative and largely unnecessary. With established democratic institutions and politicians who are, by necessity, closer to their electorate, good administrative government, if one takes this to mean responsive, accessible and open government is, in fact, more likely to be achieved on the Islands, than in the U.K. itself.

With regard to the Isle of Man, the situation at the beginning of this century was very different. In addition to the positive control exercised by the U.K. Treasury over Manx financial matters, it was said of the Home Office that:

> "(its) rein...has been so tight...that neither a ream of paper nor a bottle of ink can be purchased without the Home Office's permission"[21].

As Kermode has noted however, there has been a gradual loosening of control and nowadays there are "few complaints about the way in which the Home Office (performs) its duties"[22].

Accordingly, at the administrative level, the relationship is an informal one in which contacts are maintained between the insular authorities and London, allowing public servants in the former, access to their U.K. counterparts where necessary. The larger British administration will clearly have a wider range of expertise and the U.K., therefore, can play an advisory part, giving guidance to the Islands. This is, in fact, how the Home Office has stated its role, as regards the Isle of Man. In their evidence to the Macdermott Commission[23], they saw their function as one of "seeking, so far as is practicable, to help the Isle of Man to manage its own affairs, rather than that of

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direct management"[24]. An analogous role may be presumed in the case of the Channel Islands.

There are also a number of practical ways in which the Islands can receive help from the United Kingdom. In particular, officials may, from time to time, be seconded to the Islands to render specialist assistance in a specific area. This has occurred recently in the fields of customs, banking supervision and broadcasting.

(ii) The second area of interaction relates to legislation and this is clearly more formal in the sense that a set of procedures exists at the stage of enactment, both where insular legislation is submitted to the Sovereign for Royal Assent and where the intention is to extend U.K. legislation to the Islands. Looking firstly at insular legislation, the requirement for Royal Assent means that, in practice, the Home Office must approve all Bills emanating from the Islands. This knowledge will clearly influence insular legislators in their assessment of the acceptability of a particular proposal. Prior consideration of Bills by the Home Office, before their submission for Royal Assent also results from time to time in changes in the provisions and this informal procedure offers a means of circumventing open conflict in all but the most serious cases.

Where it is proposed to extend U.K. legislation to the Islands, Britain has committed itself to prior consultation, wherever possible. It would be an overstatement to describe this as a formal procedure since no specific mechanism has been set up to implement the commitment and occasionally, a U.K. law will be extended without consultation and this does not in any way undermine its legal authority or applicability. The usual practice, however,

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is for consultation to take place between U.K. officials and insular politicians or civil servants.

In addition to the above two forms of interaction, two other elements in the relationship deserve brief mention. Firstly, the position of the Lieutenant-Governor on all three Islands may be regarded as the principal channel of communication between the Home Secretary and the insular authorities. All information passing from United Kingdom Government Departments and 'vice versa' are sent via the respective Lieutenant-Governors. The weight of their advice in British Government circles is not easy to ascertain but, as Kermode has observed:

> "...the combination of control of information and secrecy surrounding this aspect of his work..." (i.e. as chief communicator) "...suggests a role far removed from that of the Queen whom he represents"[25].

Secondly, in the judicial sphere, the Appeal Courts of all three Islands, include judges who are members of the English Bar. Final appeal rests with the Judicial Committee of the Privy Council. Somewhat connected with this is the fact that long-term prisoners are incarcerated in the U.K. by arrangement with the Home Office. Thus, there is clearly a working relationship established with regard to the application and enforcement of law.

The overall picture is, however, one of substantial freedom in the Islands, for them to manage their own affairs accompanied by varying degrees of contact in which the United Kingdom frequently advises but only rarely imposes. It is a relationship which suits both parties; the islands because they have access to help but are not subject to undue interference and the U.K.

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(in particular the Home Office) because difficulties are kept to a minimum and they are able to devote their attention to what they perceive as more important issues.

V. The Nature of Insular Autonomy

The principles of the constitutional relationship, set out in Appendix II offer little guidance as to the exact legal nature of insular autonomy. Indeed, they might be said to obscure the situation by establishing that both the U.K. and the insular authorities enjoy competence over certain fields in the sense that the Islands have complete internal autonomy while the United Kingdom has ultimate legislative supremacy.

The situation can, perhaps, best be clarified with reference to three specific topics which, it is submitted, point to the legal dominance of the U.K. These are (i) the question of a convention of non-interference, (ii) the judicial protection of insular autonomy and (iii) the debate over the formal delimitation of powers.

(i) A Convention of Non-interference

In discussing the possibility that the U.K. is governed by a convention of non-interference, with respect to domestic matters affecting the Islands, it is necessary to mention briefly, the nature of a convention under the British constitutional system. O. Hood Phillips refers to conventions as "rules of political practice which are regarded as binding, by those whom they concern, especially the sovereign and statesmen, but which would not be enforced by the courts if the matter came before them"26

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There can be little doubt that conventions form the basis of the British Constitution and, given that they are unenforceable in courts of law, emphasis must be placed upon the binding element recognised by the actors operating in the constitutional arena.

In essence, conventions, in order to be upheld, rely on self-regulatory activity or abstinence by the interested actors. Two reasons may be postulated for the willingness of the 'Sovereign and statesmen' to conform to conventions. Firstly, although there are no legal sanctions in the event of a breach, the potential political repercussions may, in fact, represent an equally potent sanction, inducing the actors to conform. The second consideration, which is arguably of equal importance, is respect for the constitution itself and a recognition of the need to maintain its conventional basis in the absence of entrenched written rules.

In either case, it is submitted that, in order to justify the term 'convention', a rule must be recognised as binding upon those to whom it applies.

Moving to the specific topic under discussion, one sees that the extent to which Westminster is bound by convention not to interfere in the domestic affairs of the Islands is a matter of some dispute.

During the deliberations of the Stonham Working Party[27], the Manx representatives asserted that there was such a constitutional convention but this was not conceded by the British side and was subsequently recorded as an area of disagreement. This was then reflected in the first part of Tynwald's memorandum to the Royal Commission on the Constitution, which was in fact, a document

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of joint evidence by Tynwald and the Home Office[28].

It was in the evidence submitted by the States of Jersey to the Royal Commission, that the case in favour of a binding convention was argued most strongly. As a general principle, Jersey conceded that:

"The United Kingdom Parliament retains ultimate legislative authority in all those parts of Her Majesty's Dominions over which it has not renounced its sovereignty"[29].

With regard to self-governing territories outside the United Kingdom, however, the Jersey States came to the following conclusion.

"(P)arliamentary sovereignty is, to a very large extent, a legal abstraction, having only a remote connection with political realities. Far more important than the theoretical omni-competence of Parliament, is the fact that sovereignty is qualified by a duty to observe constitutional conventions or binding usages"[30].

There was no doubt in the minds of the Jersey representatives that Westminster would be acting unconstitutionally, should it decide to impose taxation, or some other 'domestic' legislation on the Island.

Guernsey also initially used the term 'constitutional convention' but they later accepted their autonomy as a 'de facto position'[31] which had been acknowledged by the British Government at their request[32].

The view of the Home Office and the Foreign and Commonwealth Office was set out in their memorandum of evidence, in the following terms:

"So long as Her Majesty's Government has a responsibility

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for the good government of the Islands, it is essential for the United Kingdom to retain its residual power to legislate, if need be on matters that are domestic to the Islands"[33].

After studying these conflicting views the Royal Commission came out in favour of the British Government, although somewhat ambiguously in that they repeatedly referred to the practice of non-interference as a convention. Despite this, the Commission believed that "there were no circumstances in which (the British Government) would be precluded from exercising (its) powers"[34].

Thus, while the term 'convention' is accepted, the United Kingdom does not appear to be bound by it. By such a loose use of terminology, the Royal Commission has arguably debased a concept which is fundamental to the British Constitution and have rendered it, in practice, indistinguishable from the 'de facto position' suggested by Guernsey[35].

It is submitted that, in fact, by insisting on its continued legal capacity to intervene, the United Kingdom is explicitly denying the existence of a binding convention. All that exists, in effect, is a practice of non-interference to which the United Kingdom normally adheres, in order to avoid political difficulties with the Islands, but which it is prepared to abandon where wider interests are at stake.

In the ensuing discussion, it may be noted that, despite this conclusion, the term 'convention' is used liberally to describe the United Kingdom's practice of non-interference, even by those authorities which insist that the U.K. may ultimately intervene in any area.

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(ii) Protection of Insular Autonomy by Petition to Her Majesty in Council

The opportunity to petition Her Majesty in Council, on any grievance, is one of the aspects of the constitutional relationship which is highly valued in the Islands, forming as it does, a practical example of the direct link historically maintained with the monarch.

In reality, this access to the Crown is something of a myth since a petition must be channelled through the Home Secretary who has the capacity to prevent it going any further. Furthermore, a petition which is deemed worthy of consideration by the Privy Council is heard, not by the Judicial Committee but by a Special Committee which is appointed in practice, by the Government in London.

The procedure has, in fact been used to complain about some act or omission of the Island authorities[36], but I propose to assess here, the extent to which it can be viewed as a quasi-judicial mechanism for the protection of insular autonomy.

In the nineteenth century, several situations involving the States of Jersey could be invoked to support this hypothesis[37]. There were three cases in particular in which the Privy Council was called upon to consider the domestic competence of the Island vis a vis the Crown's ultimate legislative supremacy and all of them involved the imposition of measures by Order in Council, without the consent of the States. It is significant that the arguments in these cases were substantially the same as those presented to the Royal

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Commission on the Constitution[38] and, in each instance, the U.K. Government drew back from confrontation by removing the offending orders.

Developments in the twentieth century have tended, however, to undermine the 'judicial' character of the right of petition and it must now be regarded more in terms of a political procedure forthe airing of grievances.

The clearest evidence of this change is to be found in the treatment of a petition from Tynwald in 1967. The United Kingdom intended to extend to the Isle of Man, an Act dealing with Marine Broadcasting offences, notwithstanding Tynwald's opposition to it[39]. The Manx therefore decided to petition the Queen in Council and the request was duly forwarded, via the Home Secretary, to the Privy Council. The committee which dealt with it, however, was composed entirely of ministers in the Westminster Government[40]. Given that they represented one of the parties to the dispute, it would be difficult to ascribe any judicial character to the proceedings without manifestly exposing a breach of the principle 'nemo iudex in sua causa'. To the surprise of no-one, the petition in question was rejected.

In addition to the above mentioned change, there are two further developments which could lead one to assert that Jersey's successes in the nineteenth century have now been superceded.

The first is the already mentioned restatement of Westminster's overall power, contained in the Royal Commission's Report. This may be no more legally authoritative than the pronouncements, in the last century, of the Privy Council

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Committees but it has the advantage of being more recent.

The second item, which is more likely to have the status of a precedent, is a statement made in 1968, by Lord Reid,[41] while giving judgement in a case before the Judicial Committee of the Privy Council. This related to the internal competence of the Government in Southern Rhodesia and one must, therefore, bear in mind the particular events surrounding the Unilateral Declaration of Independence.

Lord Reid said:

> "The learned judges" (i.e. of Southern Rhodesia) "refer to the statement of the United Kingdom Government in 1961,..setting out the convention that the Parliament of the United Kingdom does not legislate without the consent of the Government of Southern Rhodesia on matters within the competence of the Legislative Assembly. That was a very important convention but it had no effect in limiting the legal power of Parliament"[42]

Lord Reid would also seem to favour a loose definition of the 'convention' concept but with regard to the supremacy question, he is unequivocal. So long as the United Kingdom retains ultimate authority in theory, it can ultimately use it in practice.

Given this situation, one might justifiably question the necessity, from a legal point of view, for an independent, judicial-type structure, to which the Islands could direct their grievances.

The Royal Commission nevertheless expressed some coneern at the absence of an objective petitions procedure and recommended a new system "whereby petitions could be

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referred to a body which included some independent members"[43]. This new body, it was suggested, could be called 'the Council for the Islands' and it "would combine the function of conciliation with that of giving advice to the Committee of the Privy Council on petitions from the Islands"[44].

In political terms, such a Council might prove to be valuable as a forum for discussion but it would clearly do nothing to strengthen the tenuous legal foundation on which insular autonomy is so evidently based. To date, the recommendation has not been implemented.

(iii) Definition of Domestic Competence and the Debate over a Formal Delimitation of Powers.

Given the existence of a policy of non-interference in the domestic sphere, a question which is of significance is the exact scope of the Islands' domestic powers. At the outset it should be stressed that these are very considerable at present and, given the harmonious relationship between London and the insular authorities, there is no immediate prospect of a substantial erosion.

There has been pressure in the recent past, however, for a clarification of the respective powers of the Islands and of the United Kingdom.

In their submissions to the Stonham Working Party[45] and the Royal Commission[46], the Manx and Jersey authorities proposed that Westminster legislation be enacted, setting out a formal division of competences, in order to put the matter beyond doubt.

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This was done with an eye to the encroachment of international law obligations as well as to the possibility of the United Kingdom acting in defence of its own interests and eroding the Islands' autonomy in the process.

The proposals put forward[47], highlighted the problems of finding agreement over a strict demarcation of competences. Jersey gave the assurance that all it wished was:

> "...to have aspects of the Island's relationship, hitherto regulated by constitutional convention and usage, asserted, crystallised and fortified"[48]

Yet the Island then went on to suggest that Parliament could somehow preclude itself from altering or repealing the proposed Act, without the consent of the States of Jersey[49]. This is obviously inconsistent with the ultimate capacity of Westminster to intervene and, as has been shown, there is no inclination in London to abandon this principle.

Tynwald was less confident in its representations, acknowledging the existing doubt which surrounded the respective powers of the Isle of Man and the United Kingdom. They then proceeded to recommend legislation which would have given the Island a status, similar to that of the Associated States of the Caribbean[50], something which was equally unrealistic in the light of the British stance.

Thus, it was clear from the outset that the more radical aspects of the proposals would be unacceptable to the UK Government. In their response, they stated two overriding reasons for their opposition to a formal division of powers. Firstly, they asserted that the effect of such action would

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be to "leave Her Majesty's Government...responsibility... without power"[51]. In certain circumstances, they envisaged the United Kingdom lacking the legislative authority to ensure the implementation of international law obligations while continuing in law to be responsible for the Islands' external relations.

Their second objection was that there would be 'awesome' practical difficulties in distinguishing areas of responsibility with 'any degree of precision'. Once again, they pointed to the international field with its 'continually shifting frontier' between domestic and international matters[52].

With regard to this second point, a question which arises is why it should be more difficult to formalise and clarify the Islands' autonomy than to undertake afresh, the devolution of substantial powers to a particular region of the United Kingdom. The Kilbrandon Report rejected the former solution for the Islands while recommending the latter for Scotland and Wales.

It was also put to the Commission that a precedent existed in the form of countries which had federal constitutions, without intolerable pressures arising out of international obligations. The Commission sought to distinguish the two situations, however, by reference to the range of independent powers enjoyed by the 'devolved' unit and came to the conclusion that, because the Islands had significantly greater powers than the average federal entity, the risk of conflict was potentially greater, in the event of a legislative division of competence[53].

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On the face of it, this argumentation displays a curious attitude to the utility of legal mechanisms for regularising de facto autonomy. In reality, however, the Commission is merely reflecting the fact that entrenched legislation is alien to the British Constitutional system. In effect, it was inconceivable that Westminster could enact a measure purporting to bind future Parliaments, so long as the Crown remained responsible for the good government of the Islands.

Another important objection to the Manx and Jersey proposal, which was recognised by the Royal Commission, was that it would introduce an element of rigidity into the Islands' relations with the United Kingdom[54]. This was the view of the States of Guernsey who indicated in their evidence, their preference for the existing 'flexible' system of unwritten principles[55]. As the Kilbrandon Report noted:

> "The loss of this flexibility, and the replacement of a largely informal relationship by a more formal one would, we think, to be worthwhile, have to bring some very solid advantages to the Islands"[56].

In the event, they deemed the advantages insufficient and, bearing in mind the lack of insular unanimity, they had little difficulty in recommending the status quo.

It is of interest to speculate whether some lesser legislative measure might not have been possible. Removing the more radical aspects of the Islands' proposals, there remains the fundamental proposition that insular powers should be set out in an Act of Parliament. Such an act could

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have included a provision establishing the primacy of the U.K. Government together with a clause allowing the latter to derogate from the agreed division of responsibilities in pursuit of international obligations. It would thus have avoided the problem of 'responsibility without power' invoked by the United Kingdom and, although falling short of the Islands' aspirations, would have offered two useful guarantees.

Firstly, a written statement, enjoying the status of an Act of Parliament, and setting out the areas of insular competence, would offer some protection from a political point of view.

Secondly, a procedure would be established to ensure proper consultation, in the event of a derogation being required. One of the potential concerns of the Islands relates, not so much to the action of the British Government (although this is clearly important), but to their possible failure to engage in discussions prior to a decision being taken[57]. This system could accordingly have benefitted both sides by reducing the likelihood of confrontation.

The 'awesome' practical difficulties which were envisaged would also be alleviated by the U.K.'s express retention of its residual authority since the consequences of any particular division of powers would not be so serious for the U.K. Government.

In any event, one might be justified in concluding that the more 'awesome' the practical difficulties are, the more important it is to resolve them. The British Government did not, however, follow this line of reasoning.

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The one argument which continues to hold good relates to the loss of flexibility in the existing relationship and it is this factor which might cast some doubt on the willingness of Jersey and the Isle of Man to see a lesser measure enacted.

At present, the undefined nature of the Islands' powers allows them to legislate in any field, so long as they do not incur the displeasure of the Westminster Government. This allows them to be responsive to changing circumstances and to intervene in new areas where appropriate. A strict delimitation of powers would curtail this ability and, in the absence of entrenched rights of enactment over certain agreed sectors, this could effectively result in a diminution of insular power.

It is probable that the loss of flexibility would only have been acceptable (to Jersey and the Isle of Man) if it had been accompanied by a guarantee that the agreed competences were inviolable and, as has been outlined above, the United Kingdom was unable to make such a commitment.

In the absence of any definitive document setting out the powers of the insular authorities, the conclusion is that, strictly speaking, all legislative authority rests with the Crown and therefore, by extension, with the United Kingdom Government.

As a matter of long-standing practice, the Islands may make rules on any matters which do not transcend their own frontiers and somewhere within the scope of interpretation of this phrase lies the actual dividing line between metropolitan and insular authority.[58]

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VI. The Factors which led to the Present Informal Structure of Autonomy

The attitudes adopted by the British Government, which are described in the previous pages, give rise to a fundamental question. Why does the United Kingdom, on the one hand, tolerate the existence of quasi-independent entities which are constitutionally within their control, while on the other hand, refuse to formalise the relationship which has evolved, either by means of recognising that binding conventions exist, or by setting out the principles in statutory form and thereby facilitating legal certainty.

For an answer to this question one must look:
(i) to certain distinctive features which set the Islands apart both from the British overseas territories which they resemble in several respects and from mainland Britain into which they so easily could have been incorporated and
(ii) to the British constitutional doctrine of Parliamentary supremacy.

Looking firstly at the U.K.'s unwillingness to formalise the relationship, it is necessary to acknowledge the importance of geographical proximity. As part of the British Isles, they are liable to impinge more directly on the U.K.'s interests than its other territories. For instance, the tax policies pursued in the Islands are likely to have a greater impact on the behaviour of British investors than the policies adopted by Caribbean isalnds which are more distant and less stable politically.

The status of the Islands will also have an effect on the extent of the British continental shelf. If they were to become independent, the result would be to reduce the amount of sea

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area over which the U.K. could exercise sovereignty. By keeping the relationship informal, Britain may be seen to be preempting any moves towards independence in the sense that it has allowed considerable de facto autonomy, without having reduced the scope of its legal powers.

For strategic reasons, Britain is also bound to have an interest in the government of the Islands. They are sufficiently close to the British mainland for the U.K. to have an interest in the nature of the regime established and while hostile insular governments represent an unlikely scenario, the unfettered ability to take action in defence of the realm is obviously useful[59].

There is also an understandable desire to avoid taking any measures which might be interpreted as a renunciation of overall authority. As is discussed later, the United Nations Special Committee which considers the progress of colonial entities towards self-determination is assiduous in the pursuit of its objectives[60] and any action by Britain which might be construed (or misconstrued) as a loosening of ties, could lead to international pressure aimed at ending a newly-discovered 'colonial situation'.

Secondly, the relationship is characterised, in any event, by closer cultural links than is the case with most other remaining dependencies and this is reflected in the desire which exists on both sides, for the maintenance of special relations. This is manifested in a reluctance to treat the Islands in the same manner as overseas territories.

Thirdly, Britain will always want to maintain its ability to intervene, not necessarily because they expect to have to do so[61], but because the threat ensures that the Islands do not deviate

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too strongly from the chosen policy route of their metropolitan neighbour. The insular authorities are highly conscious of the need to maintain a low profile and, in many instances, that is best achieved by following the policies adopted in Britain[62]. Tax is a notable exception but, for various reasons, this is not entirely the thorn in the U.K.'s flesh which it might appear[63].

Perhaps the most important reason for the U.K.'s unwillingness to formalise the relationship is to be found in the central principle of Parliamentary Sovereignty under the British Constitution. As Sir Edward Coke has observed:

> "The power and jurisdiction of Parliament is so transcendant and absolute, that it cannot be confined, either for causes or persons, within any bounds"[64].

De Smith elaborates the principle in the following terms:

> "The Queen in Parliament is competent, according to United Kingdom law to make or unmake any law whatsoever; and no United Kingdom court is competent to question the validity of an Act of Parliament. Every other law-making body within the realm either derives its authority from Parliament, or exercises it at the sufferance of Parliament; it cannot be superior to or even coordinate with, but must be subordinate to Parliament"[65].

Although talking in a United Kingdom context, there can be little doubt, from the foregoing discussion, that the concept of Parliamentary Sovereignty applies, by extension, to the Islands under discussion and, to use de Smith's terminology, the insular governments exercise their authority 'at the sufferance of Parliament'.

Looking at the three topics discussed in the previous section,

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one sees that Parliamentary sovereignty would be undermined by a formalisation of the relationship. Clearly, a binding rule of non-interference imposes limitations upon the scope of Parliamentar activity. Similarly, a formal procedure for judicial review of governmental activity would result in the establishment of a form of constitutional court, capable of overruling Parliamentary decisions. The doctrine of Parliamentary sovereignty does not allow for the operation of such a higher judicial body and indeed, the concept would be anathema to British legislators.

With regard to the formal division of competences, it has already been noted that this could be achieved without constituting a legal attack on Parliamentary sovereignty. A political objection can, however, be raised. In conferring specific powers upon the Islands by legislation, the U.K would be creating obstacles to its future actions since the political consequences of encroachment, even where the possibility is envisaged by the express retention of residual power, may lead to both domestic and international repercussions.

On achieving a legislative division of competences, the Islands would naturally come to regard the Act concerned as a form of 'constitution' and subsequent interference would probably provoke insular hostility.

A related feature of the constitution which is relevant here, is its unitary nature. The concept of federalism will be discussed later but it may be noted for present purposes that the Islands presently have a considerable measure of capacity for independent action and, were this to be formalised, it would arguably undermine the unitary nature of the British system, which is epitomised in the principle of Parliamentary

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sovereignty.

The question which now arises is the historical rationale for Britain's failure to incorporate the Islands into the United Kingdom. The following reasons may, perhaps be postulated.

Firstly, whereas other self-governing dependencies derive their powers exclusively from Westminster legislation, the existence of the Isle of Man and the Channel Islands as autonomous units predates not only the intervention of the U.K. but also the emergence of its component countries[66], as cohesive political entities.

A second factor, from a historical perspective is, paradoxically enough, the geographical remoteness of the Islands from the centre of power. Taken in conjunction with the separate evolution of local institutions, a factor which distinguishes them from the Western and Northern Isles of Scotland, the effect was a certain immunity from the centralising forces which accompanied the emergence of a constitutional monarchy in Britain. One might speculate, in this connection, whether the preservation of separate institutions in both the Channel Islands and the Isle of Man reveals a more 'laissez-faire' philosophy in England than in Scotland, prior to the Union of 1707. Orkney, Shetland and the Western Isles all lost their Norse institutions under Scottish rule.

With particular regard to the Channel Islands, one must take into account their strategic position as 'British' territories lying in the Channel in the embrace of France. It was useful to Westminster to have an outpost situated 'on the doorstep' of their traditional enemy and English kings therefore treated them as a special case, in order to ensure their continued

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allegiance.

Finally, the importance of tradition in the United Kingdom should not be underestimated. Insular autonomy may never have been fully legitimised but it is now so thoroughly institutionalised that an Act of Incorporation is inconceivable.

The conclusion must be that the present relationship between Westminster and the Islands is characterised by a dichotomy between the legal norms and the situation in reality.

The central doctrine, is that of the supremacy of Parliament and this extends to the Islands by virtue of the Crown's responsibility for their good government. The main facets of the relationship, however, are based on extra-legal factors : long-standing traditions, historical autonomy, and a form of political equilibrium which has been arrived at without recourse to legal devices.

This last element, which is developed further in the following section of this chapter, is vital to the stability of the Islands.

In modern times, however, a number of external factors threaten to disrupt this equilibrium. International obligations have created for the United Kingdom, higher political priorities and the Islands are, accordingly, threatened by a gradual limitation of their capacity for independent action. How both sides have responded to this development will be considered in Chapters 3 and 4.

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VII. Characterisation of the Islands' Constitutional Status

As a conclusion to this discussion, one might return to the question of the Islands' constitutional status and, in particular, whether it is possible to characterise it in terms of any generally accepted category.

National constitutional systems abound with different types of entity ranging from local government units with only limited administrative functions to federal divisions capable of exercising substantial legislative and executive responsibilities independent of the federal government.

Several states have colonial possessions with varying degrees of internal self-government and so long as colonialism exists, it must be regarded as a form of constitutional category, although falling outside the continuum which could be constructed for units within a metropolitan territory.

Terminology poses a problem in that many of the terms used cover a variety of internal constitutional arrangements. For instance, 'local-government', 'federalism' and 'internal self-government' all encompass within their definitions, a broad range of governmental schemes, and such is the diversity that no one in particular can be held to constitute the norm. The terms, nevertheless, serve to offer a conceptual framework and by establishing the existence of certain general characteristics, it is usually possible to assign entities to one or other of the categories.

In this discussion, I propose to:

(i) Establish the general characteristics of the relationship as it has evolved between the United Kingdom and the three

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Islands under discussion.

(ii) Examine the three constitutional forms which are usually adopted as reflecting the general characterisation with a view to assessing which is the most appropriate for the Channel Islands and the Isle of Man.

(i) As a first step, a general statement may be made to the effect that the U.K./insular relationship is one between identifiable political and geographical entities of unequal size which, intending to maintain a constitutional link, have arrived at a situation which preserves the link while allowing legal diversity. The more specific characteristics may be enumerated as follows:

(a) The existence of a central government committed to retaining a constitutional relationship with the territory under consideration.

(b) The existence of a territory, smaller than the nation to which it is legally bound but with particular features which, individually, or in combination, justify a form of special treatment. These features may include:
- a national or cultural deviation from the metropolitan centre
- geographical distance from the metropolitan centre
- a political will to establish or continue legal links with the centre
- financial dependence upon the metropolitan country
- some other form of dependence upon the metropolitan country (e.g. for defence purposes)

(c) The tendency for a political equilibrium to be established somewhere between the extremes of unitary incorporation and complete independence. This concept of political/

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political equilibrium is fundamental to the discussion and is perhaps, best explained by reference to situations in which no equilibrium has been established.

At the 'unitary' end of the scale, one may give the example of the United Kingdom and Scotland. Here, it may be asserted that, due to a combination of strong centralist tendencies in London and an insufficient regional pressure to provide the necessary catalyst for a transfer of powers, one cannot talk in terms of 'equilibrium'. Accordingly, Westminster continues to exercise a legislative monopoly. Wales and Corsica (until recently) may be cited as similar cases.

At the other extreme, there is the case of the United Kingdom and the Republic of Ireland. Here, the force of Irish nationalism, in conjunction with an absence of political will in London to retain some form of constitutional control, resulted in the establishment of a new state enjoying complete legislative sovereignty.

One could say that political equilibrium is achieved when the relationship between the entities involves an actual division of powers, whether or not this is reflected in the legal forms. The concept may, therefore, encompass a wide range of existing constitutional relationships between central governments and identifiable sub-sections of their territory.

(ii) Following this characterisation, I propose to discuss the three terms which may be regarded as the basic models available under the above defined set of political and social circumstances. These terms are (a) Internal self-government, (b) Federalism and (c) Colonialism.

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(a) Internal self-government, which is not strictly speaking a legal term, may nevertheless be defined broadly as an arrangement whereby the central government delegates legislative and executive functions to a region within the country. The powers exercisable by the regional authority are derived from and susceptible to the central government and the latter may, without constitutional limitation, alter or abolish those powers. The region is considered part of the metropolitan area of the country and retains direct representation at the centre.

The term has been chosen in preference to 'devolution' despite the fact that the latter expression has been most commonly adopted in the U.K. in the recent consideration of schemes which fall within the above definition. The reason for this is that it is, in fact, erroneous to employ 'devolution' is such a restrictive way. Bogdanor states that "devolution...involves constitutional change of a wide ranging and fundamental kind"[67]. In the specific context of the U.K. debate of the late 1970s, this may have been the case but devolution may actually occur when any person or body passes power or authority to another[68]. The conferral of independence upon a former colony is devolution. So too is the granting of authority to local councils to pass bye-laws. Thus, although Bogdanor, Dalyell and other writers may be justified[69] in using the term according to its acquired meaning in the British political system, in their studies of a specific U.K. phenomenon, the concept of 'internal self-government' is preferred in this study as being legally more exact[70].

One of the clearest examples of internal self-government as it is defined above, is that of the old Stormont Government in Northern Ireland. It is not necessary to examine the specific

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powers exercised by this body prior to the reimposition of direct rule from Westminster. What is significant is the very fact that the London Government was legally able to take this step and thereby to illustrate in the most graphic way possible, that the initial transfer of powers did not limit the ultimate power of the metropolitan centre.

(b) The second category of constitutional arrangement which reflects the general characteristics set out above is 'federalism'. In attempting to define this term in the light of the different federal structures which exist in the modern world, authors have sought to identify common elements or arrive at generally applicable statements. For instance, it has been suggested that federalism represents "a political philosophy of diversity in unity"[71]. Similarly, Neumann, in identifying the common characteristic of various types of federal entity, states that:

> "...in each, the citizen of the federal state is subject to two jurisdictions - that of the federal government and that of the states"[72].

Clearly, neither of these statements is exclusive to those governmental structures which purport to be federations. Other forms, including the previously discussed concept of 'internal self-government' display characteristics of diversity in unity and involve dual jurisdiction. As Preston King pointed out:

> "Federations are not the only states which reconcile some local autonomy with some central direction"

or put more strongly:

> "...all states, including federations, marry some local autonomy with some central direction"[73].

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Federalism, therefore, requires to be more clearly defined and King suggested a more specific concept when he wrote:

> "Basically, we propose that federation be regarded as an institutional arrangement, taking the form of a sovereign state and distinguished from other such states solely by the fact that its central government incorporates regional units into its decision procedure on some constitutionally entrenched basis"[74].

The rationale for the establishment of a federal structure is often explained by reference to contract theory[75]. It has been described in terms of a contract or compromise between two political systems or, as Hicks puts it:

> "...a type of polity, operating a constitution which works on two levels of government: as a nation and as a collection of related but self-standing units"[76].

In assessing the suitability of contract theory, it is necessary to draw a distinction between the foundation of the system and the motives which permit its continued existence.

Whether there is a contractual foundation depends to a large extent on the nature of the pre-existing governmental system. Where a group of states agrees to come together under a federation, the agreement will normally be founded upon a treaty and this is in some ways, analogous to a contract. Where, on the other hand, a centralised state decides to adopt a federal structure, by dividing its territory into 'sub-states' or provinces, there is essentially a unilateral act. Whether there is also a 'contractual' element depends, not only upon the participation of authorities or individuals representing the sub-states[77], but upon their ability to exercise some leverage in the process. It is clearly untenable

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to talk in terms of a 'contract' where the central government, after consultation with interested parties, chooses to adopt a federal system and, thereby to divest itself of certain competences, where the decision is arrived at, not in response to pressure from below but simply in the pursuit of a policy of decentralisation for the purposes of administrative efficiency.

There may also be federation imposed by force[78] and such an action clearly exhibits very few contractual characteristics. It is submitted, therefore, that it is not possible to talk of contract at the a priori stage, as a general rule in the establishment of federations. Indeed, it is doubtful whether one is justified in importing this private law concept into the arena of public law.

Once a federation exists, however, it may be postulated that its continuation is founded upon 'contract' in the sense of a contract of government. In other words, the continuing relationship between federal governments and the individual states is based, as Preston King says on the "voluntary mutual exchange of a measure of independence against some matching and mutual advantage"[79].

It is not proposed, in this paper, to enter into the complexities of the debate as to the nature of federalism. From this brief discussion, however, two central aspects of the system may be asserted.

Firstly, there must exist an element of agreement between two political systems, to divide the powers available to them and accordingly, to abstain from exercising the authority which is acknowledged as within the domain of the other. Secondly, there must be an entrenchment of divided competences within the

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ese reasons, the federalism option is untenable.
st comfortable definition for the Channel Islands and
of Man is that they are 'quasi-colonies'. They fulfil
criterion in that they are not treated under the
onstitution as part of the metropolitan territory.
er of other factors may be cited to support this view.
rst place, they enjoy no democratic representation at
e, despite the legislative authority exercised by
er. The same is also true for Britain's remaining over-
endencies. Secondly, they display a number of similarities
other, more generally recognised 'colonial' possessions.
ple, the position of the Lieutenant-Governors, as has
ed, involves more than the mere formal representation
onarch. Indeed, until recently, the Lieutenant-Governor,
arly in the Isle of Man, was an official with considerable
ent authority, although this has been subject to gradual
over the years. In addition, the existence of the Judicial
e of the Privy Council as the final court of appeal may
as a 'colonial' feature. The Judicial Committee has no
tion over cases arising in the United Kingdom whereas it
tionally the court of last instance for proceedings
ing in Britain's colonies (and in ex-colonies which have
ished the procedure).
rriving at the conclusion that the relationship is a
olonial one, one must acknowledge the difficulty that
the United Kingdom, nor the Islands would favour such a
ion, in view of its emotive connotations. Nevertheless,
stitutional purposes, it is submitted that this character-
is, legally, the most appropriate.

constitutional system and therefore, by definition, the establishment of a distinction between 'ordinary' laws and laws which change the balance of powers previously arrived at, the latter being subject to an extraordinary procedure.

In practical terms, this implies a written constitution of some form[80] and an independent procedure for settling disputes between the two authorities.

Finally, it should be noted that where an entity is in a federal relationship with a central government, the territory of the former is treated as part of the metropolitan territory of the whole.

(c) The third legal form to be discussed is the colonial situation. D.K. Fieldhouse has written that:

> "Colonialism...now means the condition of a subject people and is used exclusively of non-European societies, when under the control of a European State or the U.S.A."[81].

If one were to accept this definition, then the Islands under discussion would clearly be excluded. It is necessary, however, to draw a distinction between the meaning of the term as it is used in the international sphere and what might, more suitably be described as the 'quasi-colonialism' which characterises certain internal constitutional structures. The former is clearly subject to distortion by international political influences. For legal purposes, however, I would define the latter as a relationship between a nation state and a territory, in which the former exercises legal sovereignty over the latter without recognising it, in law, as part of its metropolitan area. In other words, the fundamental criterion is that the smaller entity

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is treated separately from the metropolitan state.

The legal consequences of this are variable. If, however, the territory has no democratic representation at the centre or if its citizens do not enjoy equal citizenship rights with those in the 'parent' country, a colonial characterisation may be more easily established.

The question which must now be considered is which category most accurately reflects the situation of the Channel Islands and the Isle of Man.

It is possible, by analogy, to equate certain aspects of the relationship with the concept of internal self-government. Westminster may alter or abolish insular competences and, in the case of the Isle of Man, the U.K. has also been responsible for the granting of powers over a period of two centuries. Given the pre-existing autonomy, however, it would be stretching the point to talk of delegation. In any event, the Islands are not constitutionally part of the United Kingdom, nor do they have any representation in London.

Looking at federalism, it may be assumed that the relationship is founded upon an agreement or 'voluntary mutual exchange' between the Westminster and insular authorities. There is also considerable restraint exercised by the metropolitan government in the sense that they avoid intervening in matters recognised as falling within insular competence.

On the other hand, the United Kingdom does not recognise any binding constitutional conventions, limiting its own capacity to legislate for the Islands. As has been noted, they periodically emphasise their unrestricted right to intervene and, by definition, there can be no special procedure for altering the balance of

competences which exists.

While in principle, it may be possible to without a written constitution, such a system to be founded upon binding conventions which independent powers of the different authoriti need to be near unanimity between the parties scope and meaning of the fundamental doctrines which existed. Furthermore, a judicial procedu have had to emerge to deal with disputes. It m whether a system of such sophistication and co ever develop in customary form.

In any event, it has been shown that this h this instance and Parliamentary Sovereignty co basic legal principle.

A second factor which mitigates against the is highlighted by Friedrich who has observed a formation in modern federalism. He states:

"Where the emphasis used to be on formal des shifted to a stress on process...By this sh the role of the judiciary in federal integr disintegration) has become patent"[82].

Although we are not concerned with the integrati federalism here, the emphasis on the judicial ro The absence of judicial protection of insular au case of the Isle of Man and the Channel Islands, noted.

Finally, one should reiterate the point, in t federalism, that the Islands are not legally par Kingdom and that they fail the 'representation'

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A more difficult problem relates to the dichotomy which sometimes exists between this definition and the international perception of a territory. This divergence is particularly relevant to the Isle of Man and the Channel Islands and is considered in Chapter 4.

....

Chapter 2 - Footnotes

1. For instance, the procedure for petitioning Her Majesty in Council allows individual Islanders to voice grievances which are, in practice, considered by the British Government
2. The Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom, (The Stonham Report), HMSO London, 1969 and:
   The Report of the Royal Commission on the Constitution (The Kilbrandon Report) Cmnd 5460.
3. See Report of the Royal Commission on the Constitution, Vol.1, Ch.31, p.408, para.1347
4. This was stated several times by different insular officials during interviews conducted in the Islands, January and April, 1983.
5. In practice, it is the Home Secretary, as Minister of the Department responsible for dealings with the Islands.
6. This occurred in 1962, when the Royal Assent was withheld from the Wireless Telegraphy (Isle of Man) Act, See Ch.3.
7. The Oxford English Dictionary defines 'dependency' as "a dependent or subordinate place or territory - especially a country or province subject to the control of another of which it does not form an integral part".

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8. See Brierly, The Law of Nations, 6th ed. pp.129-130. pp.133-137
9. See Akehurst, A Modern Introduction to International Law, 4th ed. pp.250-255
10. See Brierly, supra. pp.173-181
11. ibid p.134

    See also Grieg, International Law, 2nd ed. pp.102-103
12. This is based upon the supreme authority of Parliament. Since it is constitutionally impossible to fetter Parliament in any way it has, by extension, the ultimate sovereignty over non-metropolitan territories for which it is responsible. See Harvey and Bather, The British Constitution, 2nd ed. at p.7 et seq. on Parliamentary Sovereignty.
13. See footnote 2 supra - Kilbrandon Report
14. Cmnd 5460 Vol.1
15. See footnote 2 supra - Stonham Report
16. ibid p.3 principles (i) and (ii)
17. ibid principle (iv)
18. ibid principle (iii)(b)
19. op cit p.413, para. 1374
20. See Stonham Report pp.3-4
21. See D.G. Kermode, Devolution at Work - A Case Study of the Isle of Man, p.106
22. ibid
23. MacDermott Report (Report of the Commission on the Isle of Man Constitution, 14th March, 1959)
24. ibid Vol. II p.138
25. Kermode, supra p.107
26. O. Hood Phillips, Constitutional and Administrative Law, 6th ed. p.29

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27. Stonham Report p.3

28. Vol. 6 Minutes of Evidence to the Royal Commission on the Constitution p.22, para.3

29. ibid p.103

30. ibid

31. ibid p.229

32. On the 25th October, 1967, Guernsey States passed a resolution requesting the Secretary of State to assure them that there was "no question of Her Majesty's Government seeking to legislate for the Island in any taxation matter which has long been accepted as the responsibility and concern of the insular authorities". Such an assurance was forthcoming from the Minister of State, Lord Stonham, at a meeting with a States' delegation on the 26th July, 1968.

33. Vol.6, Minutes of Evidence, p.10

34. Report of the Royal Commission Vol.1, p.445, para.1472

35. No Footnote

36. In 'Re the States of Jersey', it was a petition from a group of Islanders, who had formed a de facto police committee, which resulted in the original Order in Council to which the States objected in their own petition.

37. Re the States of Jersey (1853) 9 Moo. P.C.C. 187, the Victoria College Question and the Jersey Prison Board Case - see Report and Recommendations of the Special Committee of the States of Jersey appointed to consult with Her Majesty's Government in the United Kingdom on all Matters relating to the Government's application to join the European Economic Community. (The Jersey Report), Island of Jersey, 1967, pp. 30-34.

38. See for example, a summary of the arguments in the Jersey

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Prison Board Case, p.33 of the Jersey Report

39. The United Kingdom Marine (etc) Broadcasting Offences Act, 1967. (See Chapter 3 for a more detailed consideration)
40. See D.G. Kermode, Devolution at Work : A Case Study of the Isle of Man, p.105
41. Madzimbamuto v Lardner-Burke 1969, 1. A.C. 645
42. ibid p.722-3
43. Report of the Royal Commission, Vol.1, p.466, para.1539
44. ibid
45. Stonham Report, para.39
46. Minutes of Evidence, Vol.6, p.31 (Isle of Man), p.107 (Jersey)
47. ibid p.107, 1(b) of proposed changes
48. ibid
49. ibid 1(c) of proposed changes
50. The Associated States of the Caribbean were given full internal self-government with the United Kingdom retaining responsibility for defence and foreign affairs. In practice, they were able to engage in limited international activities. For instance, they had "the authority to apply for full or associate membership...in U.N. specialised agencies or similar international organisations of which the United Kingdom is itself a member and for membership of which the territory is eligible" (U.N. Doc. A/AC 109/L. 362, 10th February, 1967, pp.13,14 - Draft dispatch by the United Kingdom)
51. Vol.6, Minutes of Evidence, p.10, para.19
52. ibid para.18

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53. See Kermode, supra at p.108 for a description of the problems which arose in the nineteenth century, due to the failure to consult Tynwald over legislation applied to the Isle of Man.

54. Vol.1, Report of the Royal Commission on the Constitution, p.450, para.1489

55. Vol.6, Minutes of Evidence, p.230

56. See supra, footnote 54

57. See Kermode, supra, at p.110 on the preference in the Isle of Man for Tynwald legislation, even where the situation is effectively one of 'legislate or be legislated for'. Clearly, some form of prior consultation is necessary to allow this course of action.

58. This phrase was originally coined by the Home Secretary, R.A. Butler, in 1957. See 577 H.C. Debates, 27 Nov. 1957, Col.1185

59. In 1939, the U.K. made use of this ability, in assuming control over a wide range of functions in the Isle of Man, due to the war situation.

60. The U.N. General Assembly Special Committee on the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (U.N. General Assembly Resolution 1514)

61. In practice, British intervention is very rare although the extent of it may be concealed by a priori discussions in which the insular authorities choose to enact a particular measure as insular legislation rather than leaving it to the United Kingdom. (See footnote 57 supra)

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62. During interviews with Government officers in the Isle of Man (January 1983) and the Channel Islands (April 1983) it was repeatedly stressed that the insular authorities modelled most of their legislation, other than in the financial field, on the equivalent British law.

63. For instance, funds accumulated in the Islands remain within the Sterling Are instead of being deposited in more distant tax havens. The Islands also contribute to the U.K.'s foreign currency reserves.

64. See Harvey and Bather, the British Constitution, 2nd ed. pp.7,8, quoting from Blackstone's Commentaries.

65. S.A. de Smith, Constitutional and Administrative Law, 2nd ed. p.65

66. For historical accounts of the Islands' development, see: History of the Channel Islands (to 1979) by Raoul Lempriere and The Isle of Man, A Social, Cultural and Political History by R.H. Kinvig.

67. Vernon Bogdanor, Devolution, Oxford University Press 1979, p.1

68. The Oxford English Dictionary definition is "The passing of power or authority of one person or body to another".

69. Tam Dalyell, Devolution, The End of Britian?, Jonathan Cape, 1977.

70. The term may, nevertheless, encompass varying degrees of regional autonomy granted by a central government.

71. Preston King, Federalism and Federation, Croom Helm, London 1982, p.20

72. From 'Federalism, Mature and Emergent' ed. by Arthur W. MacMahon. Chapter 3, 'Federalism and Freedom : A Critique' by Franz L. Neumann, p.44

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73. King supra p.77

74. ibid

75. e.g. King supra, at pp.56-58,78-79 discusses authors who seek to explain federalism by reference to contract theory.

76. Ursula Hicks, Federalism 'Failure and Success' - A Comparative Study. London, Macmillan, 1978, p.4

77. This is clearly more likely where the proposed states of a federation reflect existing cultural or geographical communities, or administrative sub-divisions.

78. e.g. The Soviet acquisition of Latvia, Lithuania and Estonia or the forcible reunification of the United States of America following the secession of the Southern states.

79. King supra, p.41. The author is setting out his interpretation of Proudhon's philosophy.

80. See p.49 infra on the possibility of an unwritten constitution in a federal system.

81. D.K. Fieldhouse, Colonialism 1870-1945, p.6

82. See Carl J. Friedrich in 'Federalism and Supreme Courts and the Integration of Legal Systems', ed. E. McWhinney, P. Pescatore, at. Ch.3, p.17

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Chapter 3 - International Law and the Islands

I. The Erosion of Domestic Autonomy in the light of the Growth of International Regulation and the problems which arise out of the United Kingdom's Exclusive Treaty-making Power.

(i) Introduction

It is proposed in this section, to consider in more detail, the specific problems arising out of the growth of international regulation. In particular, three specific cases will be considered which have, in recent times, threatened to d rupt the equilibrium of the U.K./insular relationship.

As an introduction, however, it is useful to summarise the general circumstances which have brought about the problem.

Since the end of the Second World War, international treaty law has expanded rapidly and the list of subjects regulated internationally has also grown at a considerable pace. The effect of many of these treaty obligations has been to limit the scope of action available to sovereign states at the domestic level by imposing upon them the requirement, either to legislate in a particular fashion, or to abstain from actions which are in breach of international commitments.

What is the effect of this development on the notion of sovereignty?. As Grieg points out:

"The transfer of the concept of sovereignty in its internal application unaltered into the sphere of external relations involve(s) a denial of the existence of any rules of international law because a state could not

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bind itself, even by agreement"[1].

The political realities facing a state in the modern world are such that this 'absolute sovereignty' has no practical significance. One is forced to accept a more pragmatic concept which leaves room for the operation of international law. Thus, while remaining a fundamental basis of inter-state relations, the absolute freedom of action enjoyed by a state becomes limited "in so far as it has agreed to rules restricting that freedom"[2].

Agreements of this nature are clearly, in themselves, sovereign acts by state actors within the international legal system and, although the latter does not provide a mechanism for enforcement, it specifies norms of behaviour which states feel obliged to follow.

In the context of the Channel Islands and the Isle of Man, the absence of international legal capacity[3] poses a problem. At its most basic level, the requirement for the Islands to adhere to international obligations is founded, not on sovereign expression but on constitutional obligation. The latter allows for no prior consideration of consequences and affords no ability to negotiate more favourable terms.

Bearing in mind the threat which ever-increasing international regulation posed for insular autonomy, the British Government in 1950, made new arrangements to limit the application of treaties which it entered into on its own behalf. All foreign governments and international bodies were informed that treaties "relating to matters affecting the domestic legislation of the Islands"[4] would not extend to them unless they were expressly included[5](See Appendix III).

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On the face of it, this declaration has a very wide scope but there must be some doubt as to its exact legal effect. During the 1950s, the British Government had a policy of ensuring that an article was inserted into treaties:

"...providing either that the Treaty applies to territories 'for whose international relations the United Kingdom is responsible' if special notice to that effect is given (thus implying that, in the absence of any such notice, it extends to the metropolitan territory only) or, in the reverse form, under which the territories are included unless a declaration is made, or notice given, that the treaty shall not apply to specified territories in the absence of a special acceptance on their behalf"[6].

So long as the United Kingdom was able to negotiate one or other of the clauses mentioned, the actual effect of the 1950 Declaration was immaterial. During the 1960s, however, international opposition to the so called 'colonial' article, prompted by the anti-colonial sentiments of many newly independent states, led to a situation in which the United Kingdom was unable to secure their insertion. At this point, the legal and practical effects of the declaration assumed greater relevance, particularly for the insular authorities. It was questionable whether the terms of the declaration were in accordance with the international law governing the territorial application of 'non-specific'[7] treaties.

Sinclair observes that the doctrine on this point is divided[8] but that the predominant opinion is in favour of a broad interpretation. In other words, a treaty which makes no mention of territorial application must be held to apply

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to both the metropolitan and non-metropolitan areas of a state party.

The Vienna Convention on the Law of Treaties reflects the prevailing opinion in Article 29, which states:

> "Unless a different intention appears from the Treaty or is otnerwise established, a treaty is binding upon each party in respect of its entire territory".

The term 'entire territory' is widely accepted as including non-metropolitan entities[9].

A question of significance, however, is whether the 1950 Declaration may be construed as evidence that a 'different intention' has been 'otherwise established', with regard to the application of treaties to the Islands. The fundamental problem is in the circumstances which justify an exception to the residual rule on the grounds that a different intention has been established, outwith the framework of a particular treaty. In the absence of any express limitation in Article 29, the U.K.'s Declaration, vis a vis the Islands, might well be covered by it.

The decisive objection to this interpretation is that it undermines the basic intention of the article. If, by making an all-encompassing declaration, a state is able to establish a situation in which its non-metropolitan territories are excluded, other than where the opposite is indicated in the text, the residual rule of Article 29 is effectively reversed for the state which made the declaration.

Legal certainty requires that the phrase 'otherwise established' is limited and it is submitted that the line can be drawn between factors of a general nature*, which can

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be applied to all treaties (including the 1950 Declaration*) and circumstances which specifically pertain to the treaty under discussion. Only the latter may be considered as establishing a different intention.

Thus, where a multi-lateral treaty is negotiated within a regional international organisation, there may be a presumption that non-metropolitan territories outside the region are excluded. Similarly, and with particular relevance to the Islands under discussion, a bi-lateral double taxation agreement may by implication be held to extend only to the metropolitan area due to the different taxation systems in operation in the dependencies.

The U.K. Government would appear to concur with this proposition since, in 1966, they sent a letter of clarification to the Islands which substantially altered the apparent meaning of the 1950 Declaration (See Appendix III). The only circumstance in which the latter continues to apply is where a treaty contains an article allowing the state to apply the treaty to its dependent territories. In such cases, the presumption may be made that there was no intention otherwise to do so. The present position is, accordingly:

> "....that the United Kingdom's acceptance of agreements containing no indication of limited territorial application, binds all the United Kingdom's dependent territories, including the Channel Islands and the Isle of Man"[10].

As a result, Britain is from time to time, faced with the choice of non-adherence to treaties (which it seldom

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if ever contemplates) or imposing obligations on the Islands which spill over into the domestic sphere and are therefore, perceived as a threat to their long-standing independence.

The three cases discussed below highlight the problem in practice and raise a number of more specific aspects which will be discussed.

(ii) The Isle of Man Broadcasting Disputes

The issue of Manx broadcasting, which was the subject of an ongoing dispute in the 1960s provides one of the few opportunities to assess an actual conflict over the scope of insular competences[11]. In particular, there were two distinct episodes in the controversy and these reflect the two complementary aspects of continuing Westminster control.

On the first occasion, in 1962, the Home Secretary vetoed an item of Manx legislation, by use of the constitutional procedure of advising the Queen in Council not to confer the Royal Assent[12]. The Bill which had come from Tynwald, was aimed at permitting the Island to allow the operation of a powerful commercial radio station. In addition, a request was made for the revocation of two Orders in Council, made in 1949 and 1954. These had extended to the Island, U.K. legislation relating to wireless and television broadcasts and had been consented to by Tynwald at the time.

The justification given by the British Government for the refusal of all three requests was that they dealt with matters outside Tynwald's powers in that they were regulated

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by an international convention, acceded to by the United Kingdom on behalf of the Island. Furthermore, the legislation was in breach of the obligations set out in that convention[13]. In reality, the Manx plan, which was to set up a 'Radio Luxembourg' type of operation, fell foul of British public policy and the international obligations happened to be a convenient means for the U.K. to defend their failure to agree to the requests[14].

The second episode in the broadcasting dispute occurred in 1967 and related to the problem of the proliferation of 'pirate' radio stations. These were clearly in breach of the 1959 Convention and because of their concentration in Europe, the Council of Europe decided on a separate international agreement, imposing an obligation on those member states which ratified, to undertake stronger enforcement measures[15].

Meanwhile, the Isle of Man Government, having failed in its earlier bid for a commercial radio station, became aware of the publicity value of pirate radio in the light of transmissions made by the ship, Radio Caroline, from Manx waters. These were received in mainland Britain and in particular, by many potential tourists to the Island in Northern England. Furthermore, the broadcasters involved were very complimentary about the Island.

In order to conform to the European Agreements, the United Kingdom passed an act[16] which, in spite of the objections of Tynwald, was imposed by Order in Council upon the Isle of Man.

Having been overruled twice on these related issues,

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one of the Manx responses was to threaten to lodge a complaint with the United Nations. It is difficult to gauge how potent a threat this was. In strict law, it is doubtful whether the Island has any international standing[17] and the United Kingdom could probably have blocked the issue, had there been any inclination on the part of other states to pursue it in one of the United Nations' fora. In political terms, however, there might have been some alarm in London over the possible international reaction to a charge that the U.K. was interfering with the Island's right of self-determination.

As soon as an entity is perceived as a 'colony', the international community tends to take an interest. In reality, Tynwald was probably less enthusiastic about this kind of international attention, however, because full independence is ultimately the most likely outcome[18] and even the broadcasting dispute had not engendered much insular support for the complete severing of ties with Britain.

What the Manx did do, was to attempt to appeal to the Commonwealth Secretariat, requesting arbitration. Unfortunately for Tynwald, the request had to be transmitted through the Home Office[19] and the British Government refused to forward it.

The one practical outcome was the setting up of the Stonham Working Party to study the Manx/U.K. relationship.

These events illustrate graphically the constitutional and political weakness of the Islands when faced with an unyielding British Government. In retrospect, however, many Manx officials[20] concede that the objective they were pursuing, in seeking to permit broadcasts which could be

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heard in the United Kingdom would, had it been achieved, have 'transcended the frontiers of the Island'.

(iii) Membership of the Council of Europe and the European Convention on Human Rights.

The second situation in which an international treaty has placed a question mark over insular autonomy, arose from the United Kingdom's accession to the European Convention on Human Rights.

Once again, it is the Isle of Man which has provided the most notable case. In the Tyrer Judgement[21], the British Government found itself condemned before the Court of Human Rights, when the Manx system of judicial corporal punishment was held to amount to 'degrading treatment' within the meaning of Article 3 of the Convention[22].

Both the U.K.'s ratification of the Convention and the subsequent declaration recognising the compulsory jurisdiction of the Court had expressly included the Isle of Man (and the Channel Islands), as had the important declaration allowing the right of individual petition. The inclusion of the Island was in accordance with Article 63(1) of the Convention which provided for the possibility of bringing dependent territories within its scope.

It is clear that a majority of people and politicians in the Island disapproved of this external 'interference' and the corporal punishment rules have not yet been removed from the statute book. In practice, however, no birching sentences have been carried out since the judgement. The policy is

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explained in the case of Teare v O' Callaghan[23], in which an appeal was lodged against a birching sentence imposed by a lower court. The Manx Court of Appeal held that, while the sentence was perfectly lawful, Manx judges should, in exercising their discretion on sentence, put into effect "a sentencing policy which is as much in conformity with the Isle of Man's treaty obligations as is consistent with the operation of Isle of Man law". Since various sentencing options were open to the judges, it was possible, therefore, to avoid ordering the use of the birch. This policy was suggested by the Manx Attorney-General, in his submission.

The European Convention has also caused some concern in the Channel Islands, which, like the Isle of Man, have 'birching' laws which are no longer applied in practice.
The most recent occurrence which highlights the dilemma faced by the insular authorities is the liberalisation of the homosexuality laws in Guernsey, in order to bring them in line with the European Convention. In this case, there was widespread hostility in the Guernsey States, to the new provisions and they were only approved for a period of three years, thus allowing the Island to "keep to the letter of the law...without having to yield to the spirit of it"[24]. It was pointed out in the debate that failure to comply with the convention "would almost certainly result in the matter being referred to the European Commission of Human Rights"[25] and that there was no possibility of winning the case which would ensue. It was this prospect which induced many States' members to cast their votes against their 'better judgement'.

The Convention sets out at Article 63(3)[26] that, where it is applied to the non-metropolitan territories of member States, this should be done with due regard to local requirements. A question

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which arises is when the Islands can make use of this provision.

In the Tyrer Case, the Manx Attorney-General submitted that the popular support for birching in the Island constituted a requirement which had to be taken into consideration but this argument was firmly rejected by the Court. According to their judgement, there was no reason to believe that law and order could not be maintained in the Island without corporal punishment. As Graham Zellick explains:

"Article 63 was designed for certain colonial territories whose state of civilisation when the Convention was drafted was thought not to permit the full application of its provisions. Not only was the Isle of Man not such a territory, but the prohibition contained in Article 3 was absolute and no local requirement - even if law and order could not be maintained without corporal punishment - would entitle a state to make use of a punishment contrary to Article 3"[27]

The conclusion to be drawn is that, in relation to other articles of the treaty, overseas territories may be able to invoke the 'local requirement' rule but for the Isle of Man, no such option is available. One might reasonably expect the Channel Islands to be similarly affected by this non-application of Article 63(3).

Perhaps the main significance of the European Convention on Human Rights is the extent to which it seeks to regulate aspects of the criminal law. Penal provisions, in particular, have no external effects except in the sense that outsiders are subject to them while in the Islands[28] and their imposition or abolition was traditionally recognised as a matter solely for the insular authorities. International obligations have,

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therefore threatened to upset the constitutional balance and should the Islands decide at any stage to reassert their historical rights in this area, the U.K. will be faced with the prospect of having to impose legislation in another field which has hitherto fallen within the scope of insular competence.

(iv) Membership of the European Communities.

The third issue which threatened to create a rupture between the Islands and Britain was the impending accession to the European Communities at the beginning of the 1970s. At this time, it was assumed in the Islands that the EEC would shortly be moving towards the harmonisation of direct taxes in addition to harmonising the rates which applied to indirect taxation (VAT).

The Isle of Man had only just succeeded in arresting the decline of its population and in reviving its depressed economy, achievements brought about primarily by the abolition of a number of taxes[29] and the maintenance of a low basic income tax. Thus, EEC Membership brought the prospect of a speedy return to the depressed area status of the 1950s.

The prosperity of the Channel Islands was based on a similar favourable tax structure which seemed to be under threat. In addition, there was the likelihood of fierce competition from continental Europe, for the Islands' agricultural and horticultural exports to the United Kingdom.

The EEC Treaty offered little hope for the Islands in that Article 227(4) provided for the full inclusion of

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European Territories whose external relations were controlled by a Member States. Nor was there any prospect that the Islands' special difficulties would be allowed to impede the whole process of U.K. accession.

The possibility of Community membership was, therefore, taken very seriously by the insular authorities and this concern was reflected both in the Royal Commission[30] and Stonham[31] investigations and in separate studies carried out in the Islands[32].

Having assessed the consequences, the Islands reached broadly the same conclusions, namely that full inclusion would have serious consequences on the insular economy in general and in certain sectors in particular. Accordingly, they asked the British Government whether it would be possible to negotiate a special status for them which reserved their traditional right of access to the U.K. markets. In all other areas, they sought to be excluded from the provisions of the EEC Treaty.

Initially, the chances for a specially negotiated arrangement did not look very promising. What was significant, however, was the British Government's assurance that they would not impose Community membership upon the Islands. In effect, it would appear that they were offered independence as the only other option, with the likelihood of a customs barrier between them and the enlarged Community. One suspects that the motive for offering them this stark alternative was to pressurise them into accepting the EEC, but it nevertheless indicates that where the subject matter of a convention is so all-encompassing as to affect wide areas of domestic competence, the U.K. has recognised a moral obligation to

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offer the opportunity for opting out. This is not to say that the British Government neglected the views of its European Islands in the negotiations, and the final agreement is a testament to their efforts. Having obtained agreement on all the main issues affecting the U.K., Mr. Geoffrey Rippon, the Government's chief negotiator was able to obtain a special status for the Islands, largely along the lines of what they had originally requested[34]. This was very much an 'eleventh hour' success which was achieved in the 'tidying-up' discussions and in the event, the existing members of the Community, proved quite willing to allow these special provisions.

Even at this stage, the United Kingdom Government indicated that the Islands could reject the arrangements and choose to be outside the Communities. No-one was surprised, however, when all three chose to 'enter' and in doing so, to sustain their special relationship with the U.K.

It is interesting to speculate what would have happened had Britain been unable to obtain the special arrangements. The indications are that Jersey and Guernsey might have taken opposing stances. Guernsey made it clear that, in the final outcome, it would have followed the United Kingdom into the Communities, "partly for reasons of loyalty and partly for reasons of expediency"[35]. Jersey, on the other hand, seriously contemplated the possibility of remaining outside. It is likely that the Isle of Man, which was bound more closely to Britain by its 'Common Purse' arrangement[36], would have opted for inclusion.

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(v) Conclusions

One might conjecture that the additional tensions which have prompted constitutional difficulties in the field of treaty application, are due to outside influences which have disrupted the 'political equilibrium' of the U.K./insular relationship.

In order to test this, I propose to (a) classify the actors operating in the sphere of international treaty law as it affects the Islands and (b) to assess the influence capable of being exercised by the additional actors in the system.

(a) In constitutional terms, it is possible to speak of only two 'primary' actors in the system, namely the insular authorities and the British Government. As has been shown, these are the dominant institutions in the insular legal process and while 'secondary' actors may be capable of influencing the formulation of legal rules[37], their adoption and application is ultimately controlled by the Westminster or Island Governments.

It was therefore, possible to define the nature of insular autonomy in terms of an 'equilibrium' which although having no basis in legal theory, was arrived at in practice through a process of political compromise.

In the context of treaty obligations, it is postulated that a third category of actor exists, external to the relationship, but capable of influencing more directly, the adoption and application of rules in the Islands through the medium of international conventions. Two types of 'external' actor can be identified: 'third states'[38] who are parties to an agreement and 'supranational organs', set

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up under specific treaties.

The establishment of the latter allows us, in turn, to introduce a fourth actor who is the 'legal person' under domestic law, whether an individual or an association. Under certain treaties, they may be classifed as actors in the sense that they are able to invoke the rights provided in the agreement, before a specially constituted judicial body.

A distinction requires to be drawn here between the types of situation in which the additional actors are involved. On the one hand, there is the 'a priori' situation which is essentially the process of concluding a treaty which will apply to the Islands. On the other, one may talk of 'a posteriori' situations which arise once the commitment has been made to the international obligation.

This distinction will be utilised in conjunction with the terms 'adoption' and 'application' which are used to describe the nature of the influence exerted by the additional actors.

In 'a priori' situations, one can only speak of the adoption of legal rules and in this case, third states will be the only additional actors whose influence need be assessed. At the 'a posteriori' stage, there may be adoption or application, the former occurring where the treaty provides a mechanism for supplementary legislation and the latter, either because a judicial system has been set up or because contracting states invoke the established international legal procedures when another state party has failed to apply the rules. It is clear that a more complex inter-relationship of additional actors is involved

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here. The third state and the supranational organ may, under the provisions of a treaty, have a role to play in supplementary rule-making. In addition, these may be joined by individuals, in having locus standi before the judicial process which has been constructed. Finally, third states alone are able to make use of international legal mechanisms against a state which breaches its treaty obligations.

It is hoped, by the construction of this model, to highlight the various avenues open to 'additional' actors in influencing the legal development of the Islands.

(b) Looking firstly at 'a priori' problems, a prerequisite for the elevation of third states to actors is to be found in the United Kingdom's scale of priorities. There must be a political will to proceed with the treaty concerned, notwithstanding any difficulties raised by insular objections. As has been noted, Britain is very reluctant to allow the Islands to influence their freedom of movement in the international sphere and accordingly, this prerequisite is almost invariably fulfilled.

At the negotiating stage, third states may insist upon a territorial application clause, extending the treaty to the non-metropolitan territories of the parties. Alternatively, they may ensure the exclusion of a territorial limitation clause, thus allowing the residual rule of the Vienna Convention to take effect.

In the substantive area, other states may quite simply seek provisions which will have major repercussions in the

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Islands.

In the international legal instruments which gave rise to the Man broadcasting disputes[39], it may be assumed that third states were instrumental in the formulation of the provisions and, by virtue of the U.K.'s accession, obtained an indirect role in regulating the Islands.

Where the United Kingdom is seeking to become a party to an already existing treaty, this external role is likely to be greater since the basis of the negotiations will be an existing set of rules arrived at entirely by third countries, and the large scale amendment of these rules may be difficult to secure.

The EEC situation highlights this phenomenon, notwithstanding the ability of the U.K. to negotiate the amendment of Article 227 and thereby limit the scope of application of the Treaty to the Islands. In substantive terms, the Islands are still required to apply the Community rules relating to free movement of goods and agriculture[40]. Many of these rules were enacted by the original 'Six' and their effects on the Islands are quite significant[41]. The external influence, although indirect, is clearly established.

In addition to exercising this influence at the 'a priori' stage, third states may also contribute 'a posteriori' where the treaty allows for supplementary rule-making, in which the state parties play an active part. The European Communities' structure is an example of this with the Council involvement in Community law, which is then translated into insular law. The development of law-making international organisations will be considered in more detail below.

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The second aspect of 'a posteriori' third state influence is in the field of application. There is little evidence that insular action is actually scrutinised by third states to ensure compliance with international obligations but the prospect of such scrutiny may induce the United Kingdom to secure the Islands' adherence, in order to pre-empt criticism and diplomatic pressure from other contracting parties.

The most interesting development of international law, in terms of assessing the insular relationship with other actors through the medium of treaty rules, is the already mentioned tendency towards the setting up of organisations with supranational powers. This is done, either by establishing bodies capable of interpreting and applying treaty rules in a judicial manner (The European Court of Human Rights and the European Court of Justice) or by going a stage further and conferring upon treaty institutions, an independent or semi-independent legislative capability (The European Communities' Commission).

Where this occurs, it is no longer possible to consider the treaty simply as a static instrument reflecting in its provisions, the intention of the drafters at the time of conclusion. It is, instead, the constitutive document in an evolving system and, as such, it is likely to produce unexpected results in terms of obligations subsequently imposed. This is true of both the European Convention on Human Rights and the European Community Treaties. Admittedly, the former has no legislative mechanism and the rules are established in principle, from the outset. The system, however, in providing a Court of Human Rights, allows for the judicial interpretation of the provisions in the Convention

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and, by extension, permits a degree of creativity on the part of the judges. (This applies also to the E.C.J.) Judicial creativity is bound to impose unforeseen restrictions on a government which is legally committed to upholding the Court's decisions. In the same way, it will restrict the freedom of action of the unsuspecting insular authorities. The Tyrer Case is a clear example of this.

Where a treaty provides for supplementary rule-making, the Islands will be subject to the same effect, although Member State governments are able to avoid it, assuming they retain some control over the decision-making process.

Thus, we find that third states assume a more direct role in 'a posteriori' law-making (in the legislative sense). In addition, another form of external actor now operates at this level, namely the 'supranational' organ (Commission of the European Communities, Commission of Human Rights, E.C.J., Court of Human Rights). These bodies may be involved in both the adoption and the application of legal rules.

Finally, we see the introduction of the fourth actor in the legal process. The individual is now capable of utilising his access to the international courts in order to secure his rights and, in so doing, to contribute to the application of internationally agreed rules. As will be illustrated later, this last actor may be significant because his motives in seeking the enforcement of legal rules will differ from those of the other actors and in many instances, he is the only actor who is likely to have a sufficient interest in the outcome.

As a result of this development, it is submitted that the following conclusions can be drawn:

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(1) Where the Islands request it, the United Kingdom is still able to negotiate, in certain treaties either their exclusion or a special arrangement. Due to modern trends, however, this can no longer be guaranteed in every case.

(2) Accordingly, the U.K.'s relationship with the Islands must not be regarded in isolation. One must take into account the broader context of Britain's commitment to participate in an evolving world legal order.

(3) By transferring legislative competences and judicial control to supranational institutions, the United Kingdom has ceased to be the sole entity which is capable of impinging upon the Islands' autonomy, by its legislative actions.

(4) In the 'a priori' situation, the U.K. has conceded the right of the Islands to end the relationship should the latter decide that a particular set of international rules to which Britain is committed, ought not to be applied to them.

(5) In 'a posteriori' situations, the United Kingdom may have to face the dichotomy of international obligation and insular autonomy due to an unexpected evolution in the system established under a particular treaty.

(6) Preservation of the relationship is an insular priority; accordingly, the tendency is for the Islands ultimately to accept international obligations imposed upon them, albeit unwillingly. Emphasis is therefore shifted to the symbolic aspects of their autonomy (prior consultation, local enactment of international rules.)

(7) Although growing international regulation and the increasing influence of external actors creates a potential for destabilising

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the U.K./insular relationship, the strength of that relationship has so far been sufficient to withstand the pressures.

This last point leads us to consider two further aspects which will be discussed in the remaining sections of this paper.

Firstly, there is the question of the Islands' present and potential status under international law. An examination of this may help to throw some light, both on the legal uncertainty of the insular position, which is illustrated in the foregoing discussion, and on their continuing stability in practice.

Secondly, one should assess how the various actors deal with international regulation in fields where no controversy has occurred. The three situations discussed previously represent in fact, the only major problems which have arisen out of the U.K.'s exclusive treaty-making power. In this connection, I propose to examine the practice with regard to the most prolific source of external rules; the European Community and this in turn may allow one to explain, in the context of international regulation as a whole, the continuing substantial autonomy exercised by the Islands, in the face of growing international legal constraints.

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II. The International Legal Status of the Islands

(i) Aspects of International Personality.

In this discussion, the traditional view that only states are subjects of international law, is clearly no longer tenable. The list of types of entity possessing some form of international personality has grown since the end of the Second World War, the most often quoted 'new' actor in this field being the international organisation[42].

In addition, it is widely accepted that other territorial units, which do not have the attributes of full statehood, now may be said to possess some degree of international personality[43].

I propose to assess whether this is the case with the Channel Islands and the Isle of Man, adopting the simple definition of Grieg, who states that:

> "(A)n international person is an entity having the power of independent action on the international plane"[44]

From this definition, it is evident that the proof of international personality lies in the establishment of certain factual circumstances and it is postulated that only two aspects need be considered in order to test this.

Firstly, one should ask whether the Islands are legally capable of concluding international agreements independent of the U.K. and whether in fact they have done so.

Secondly, one needs to establish whether they are members or potential members of any international organisation, and if so, whether the circumstances of that membership justify the conclusion that they are 'international persons'.

On the first question, it has become clear that certain

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territories which are not fully sovereign are capable of enjoying some international personality. Broadly speaking, these may fall into two categories. Firstly, there are units of some federal states which have been endowed with a degree of independent capacity in the international arena. One may cite in this category, the province of Quebec which has been able to enter into treaties on cultural questions[45], under powers conferred with some reluctance, by the Canadian Government[46]. Secondly, there are examples of non-metropolitan or colonial entities being given the power to negotiate and conclude international treaties. This was the case with the British dominions which, under a process of evolving independence, obtained limited international legal capacity, prior to the date when they could be regarded as sovereign nations in their own right[47].

For the Channel Islands and the Isle of Man, however, it is not possible to point to any capacity of this kind and the investigations (and conclusions) of the Royal Commission make it clear that the U.K. possesses exclusive treaty-making competence on behalf of the Islands. This is borne out by the practice and the only instruments which are in any way analogous to treaties, are a number of double taxation agreements[48]. Since none of these involve third countries, however, they may more appropriately be decribed as a form of internal legal instrument.

Looking now at the membership of international organisations, the federal/colonial distinction may once more be drawn. In practice, there are very few instances where units of a federal state have separate membership of international organisations,

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but one notable example is to be found, perhaps surprisingly, in the United Nations. Byelorussia and the Ukraine, which are federal divisions of the U.S.S.R., are full members of the organisation and their 'personality' is thus assured.

Among dependent territories and colonies, a more widespread involvement in international organisations may be cited as evidence of some degree of personality. Several organisations, including offshoots of the U.N. allow participation of territories which are not fully sovereign and this may range from full membership to observer status. An example of the former is the Caribbean Community and Common Market which has, since its inception, consisted of a mixture of states and dependencies[49].

It is necessary, when talking of international organisations, to draw a distinction between governmental and non-governmental bodies. The involvement of associations from non-sovereign entities, in the latter category, cannot be invoked as evidence that they have international personality. Thus, for instance, the participation of a local Red Cross organisation in the International Red Cross Federation, does not allow this presumption.

There is nothing in principal to prevent the Isle of Man and the Channel Islands obtaining some form of membership, in organisations whose statutes allow for the admission of dependent territories. In practice, however the Islands are not members of any governmental organs operating in the international sphere and it is doubtful whether Britain would sanction any insular attempt to become involved in this area. It may be noted that the Islands have a status, distinct

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from the United Kingdom, in the British Commonwealth. Only sovereign states are full members, however, and the place of the dependent territories in the Commonwealth, is solely by virtue of the membership of the metropolitan state to which they are attached. As was noted in the Isle of Man broadcasting disputes, the Manx could not gain access to the Secretariat of the Organisation, in order to voice their complaints, because the U.K. Government refused to transmit the request[50].

The conclusion may be drawn, therefore, that from the point of view of involvement in international treaties and organisations, that the 'British' Islands have no legal capacity and, in accordance with Grieg's definition, one cannot describe them as 'international persons'.

(ii) The International Legal Definition of the Islands' Status

Bearing in mind the Islands' lack of international personality, it is possible to limit a study of international definitions to those forms of status which may involve the absence of legal capacity. I propose, therefore, to look at only the two broad categories which, although not consisting wholly of entities without international personality, fulfil this requirement: (1) Non self-governing territories[51] and (2) territories which are perceived in a unitary sense[52], as part of a larger sovereign entity.

The adoption of the former as a category in international law requires further elaboration. The existing terminology which is employed to describe different forms of dependent relationship is highly confused, reflecting the broad spectrum

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of dependency forms which exist in practice[53]. In addition, the choice of a particular term may be influenced by non-legal considerations. Thus, a particular territory may be classified as having a 'colonial' structure for political reasons. Crawford goes as far as to state as a 'cardinal principle', that:

> "...the legal incidents of a given relation are to be determined, not by any inference from the label attached to it...but from an examination of the constituent documents and the circumstances of the case"[54].

In order to overcome the definitional problems which arise in this area, I have chosen 'non-self-governing territory' as a generic term.

The first stage is to assess whether the international status of the Islands can be ascertained from any of the sources of international law, namely treaty provisions (the primary source)[55], state practice (custom?) or doctrine.

The most important treaty provisions, which might have some relevance for the Channel Islands and the Isle of Man are to be found in Chapter XI of the Charter of the United Nations. This is entitled 'Declaration Regarding Non-Self-Governing Territories' and imposes a number of obligations on U.N. Members'which have or assume responsibilities for the administration of territories whose peoples have not yet attained a full measure of self-government'[56]. In subsequent resolutions, the U.N. General Assembly has taken the process a stage further in complementing the above-mentioned duties of metropolitan states with rights for the dependencies involved. The most important of these is Resolution 1514[57] which is

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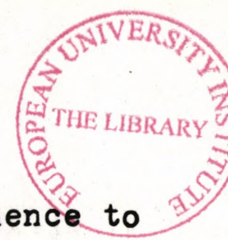

known as the 'Declaration on the Granting of Independence to Colonial Countries and Peoples', and which established the fundamental right of all peoples, to self-determination[58].

The central question here is whether the Islands may be said to fall within the scope of these provisions. In other words, are they to be classified as 'non-self-governing territories'. In spite of the existing legal limitations on their autonomy, the answer to this question would appear to be negative. The U.N. General Assembly, in Resolution 1514 and other statements[59] has made it clear that they are only dealing with colonial territories, and in spite of the conclusion reached in Chapter 2, the Islands under consideration are not perceived internationally as such. Accordingly, the U.N. General Assembly 'Committee of Twenty-Four', set up in pursuit of Resolution 1514 to monitor the progress towards self-determination of certain entities, has never paid any attention to the position of Britain's offshore islands.

A consequence of this conclusion is that, despite the prevailing opinion in the Islands that they are entitled to self-determination, such a right, if it exists, does not derive from the principles of international law as enumerated by the United Nations.

Another source which might have helped one to obtain an internationally authoritative definition of the Islands' status, was the judgement of the international arbitration court, set up to resolve conflicting British and French claims on the extent of their respective continental shelves in the English Channel[60].

With regard to the area of sea around the Channel Islands,

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the United Kingdom claim was based on the submission that the former had their own continental shelf which joined that of the 'mainland' in the middle of the Channel. In support of this, they stated that the Islands were;

> "...in effect'island States enjoying an important degree of political, legislative, administrative and economic independence of ancient foundation'"[61].

This is the only occasion on which the U.K. has sought to attribute 'statehood', albeit of a limited nature, to the Channel Islands and it should be appreciated that their aim was to maximise the amount of sea area in the Channel over which they could exercise jurisdiction. It is doubtful whether they would be prepared to concede this definition, in any other circumstances.

What was more significant in this case, was the view taken by the Court of Arbitration as to the status of the Islands. In their decision, they stated that they:

> "...must treat the Channel Islands only as islands of the United Kingdom, not as semi-independent states, entitled in their own right, to their own continental shelf vis-a-vis the French Republic"[62].

This decision is clearly not legally decisive in determining the Islands' international status but it may nevertheless be viewed as persuasive, in any attempt to define that status. In the absence of any clear statement emanating from the traditional sources of international law, it is worth considering two practical criteria which might be postulated as determinants. These are (1) the internal constitutional classification and (2) international recognition.

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(1) On the face of it, the first provides a simple test of the status of an entity in international law by assimilating it with the constitutional structure in existence. Thus, the two concepts are, in effect, merged. While such an approach would contribute to legal clarity, there are two overriding objections, one of principle and the other of practice.

The first is that the metropolitan state would control the international status of an entity, by its choice of constitutional form and it must be doubtful whether an international legal definition can be construed in this way, from the unilateral actions of a single state.

The second more practical objection, relates to the already mentioned activities of the United Nations in this area, and the complete exclusion of the 'British' Islands from the international process which has been developed regarding non-self-governing territories. Thus, we have a situation in which the U.K. categorises the Islands as dependencies, outside the metropolitan area while the international community places the Islands within the United Kingdom for international purposes. The adoption of this criterion, serves therefore to confuse rather than to clarify the position.

(2) This leads us to consider the merits of the second criterion - international recognition. It is possible, by drawing an analogy with the constitutive theory of recognition[63], to argue that the Islands' status may be deduced from the attitudes adopted by members of the world community, either expressly or by implication. This clearly intrduces an element of subjectivity and a further disadvantage is that it renders

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a legal definition susceptible to the overt political influences which characterise recognition in international law[64]. Despite this, it is arguably a more realistic criterion in that it links the definition to the realities of international perception.

In adopting the recognition requirement, the question now arises as to whether there has been sufficient express or implied recognition of the Islands as 'non-self-governing territories', or whether, in the absence of such recognition, they must be viewed merely as part of the territory of the United Kingdom for international purposes.

In certain respects, the special status of the Islands may be said to have been recognised by the state actors in the world community. The absence of objections to the terms of the 1950 Declaration[65] may be cited as evidence of recognition that the Islands were not part of the U.K. albeit that this can only be construed from the silence of the other states. Similarly, every time a state has accepted a territorial exclusion clause in a treaty (or indeed a clause which extended the agreement under consideration to the Islands), it might be said to have explicitly recognised the Islands' dependent status. The same conclusion could perhaps be drawn from the Member States' acceptance of a special arrangement under the European Communities.

It is submitted, however, that in these cases, the recognition was not of a particular international status but simply of a different internal constitutional system which third states were prepared not to disrupt, if it could be avoided. It must be borne in mind that states have been

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increasingly inclined to reject the 'colonial article' in other treaties. The fact that in some cases, the territorial application has been limited cannot, therefore, be invoked for the general purpose of ascertaining international status.

What is far more persuasive in this discussion is the absence of recognition for the Islands in international fora, and in particular in the United Nations.

In conclusion, it may be stated that, by adopting the recognition criterion, in conjunction with what little is to be found of a legal or quasi-legal nature, the most appropriate definition is that the Islands are, under international law, part of the territory of the United Kingdom. Their peculiar constitutional situation must, in this sense, be regarded merely as another form of internal arrangement, adopted by a sovereign nation, for the administration of its territory.

In practice, this dichotomy between the constitutional and international positions means that the Islands cannot look to the norms of international law for the legal guarantees which they lack in their relationship with the United Kingdom. On the other hand, as has been shown, the legal position contrasts sharply with the situation in reality and the insular authorities presently have no interest in obtaining a separate identity in the international order. This is in keeping with the low profile which they are anxious to maintain. In addition, where there is no international interest in the Islands, there is no external pressure being exerted on Britain. Whether this attitude will change depends ultimately on the actions of the United Kingdom, particularly

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where insular autonomy is at stake. Treaty obligations would again, seem the most likely source of future problems.

In the following chapter, dealing with the particular aspects of the insular relationship with the European Communities, I propose to analyse the way in which the Channel Islands and the Isle of Man have been able to minimise the difficulties which have arisen from one particular treaty. The conclusions to be drawn from this may help one to explain the continuing stability of the relationship in the face of external pressures.

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Chapter 3 - Footnotes

1. Grieg, International Law, 2nd. ed., p.4
2. ibid
3. For an assessment of the extent of the international legal capacity of the Islands, see Section II of this chapter. In the context of treaty powers, it is sufficient to note that the U.K. has exclusive competence.
4. From Home Office Letter no.929,451 of March 8, 1951 regarding the position of the Channel Islands and the Isle of Man in relation to treaties and international agreements affecting the domestic legislation of the Islands.
5. Foreign Office Circular No. 0118 (T.F. 11/5), October 16, 1950 - 'Position of the Channel Islands and the Isle of Man in Relation to Treaties and International Agreements', (Reprodueed in Annex III).

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6. Law and Practices concerning the Conclusion of Treaties; U.N. Legislative Series, 1953 (ST/LEG/Ser.B/3) pp22-23. Quotation taken from I.M. Sinclair - The Vienna Convention on the Law of Treaties, p.57
7. In other words, treaties whose territorial scope is not specified in the text.
8. Sinclair supra, pp.57-58
9. ibid p.59
10. See Home Office Letter dated Dec.30, 1966 on the Position of the Channel Islands in relation to international agreements. (Taken from K.R. Simmonds, the British Islands and the Community, III - Guernsey,)
11. D.G. Kermode supra (Ch.2, footnote 24) gives a more detailed account of the broadcasting disputes at pp.60-62 and p.145
12. The Wireless Telegraphy (Isle of Man) Bill, 1962.
13. The International Telecommunications Convention, 1959.
14. It should be recalled that, in 1962, the U.K. had no commercial broadcasting itself and has, until recently, resisted the proliferation of the Broadcasting media.
15. The 1965 European Agreements for the Prevention of Broadcasts from Stations outside National Territory. ETS No. 53, E.Y. XIII, p. 349, Cmnd 2616.
16. The Marine etc. Broadcasting (Offences) Act, 1967.
17. See Section II of this Chapter for a more detailed discussion of the international standing of the Islands.
18. ibid.
19. See Kermode, supra, p.61.
20. From interviews conducted in the Isle of Man, January, 1983.
21. Judgement of 25 April, 1978.

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22. Article 3 states: 'No-one shall be subject to torture or to inhuman or degrading treatment or punishment'.

23. Reported in European Human Rights Reports, Part 14, April 1982, Vol. 4 at p.232.

24. Guernsey Weekly Press, 8th April 1983, quoting from the speech of Deputy John Langlois.

25. ibid - from the speech of Conseiller Roydon Falla,

26. Article 63(3) states: 'The provisions of this Convention shall be applied in such territories, with due regard, however, to local requirements'.

27. Graham Zellick - Corporal Punishment in the Isle of Man, I.C.L.Q. 1978, Vol. 27, p.665 at p.671.

28. Ironically, the Tyrer Case did not even feature this since the complainant who had been birched was Manx and lived on the Island.

29. Capital Transfer Tax, Capital Gains Tax, Death and Estate Duties, Surtax.

30. See Vol. 1, Report of the Royal Commission, pp.462-3

31. See Stonham Report, p.18, para.46.

32. See for example:
   - 'The Jersey Report' (Ch.2, footnote 21)
   - Island of Jersey - Report of the Common Market Committee on the Constitutional question.
   - States of Guernsey, Billet d'Etat, Wed. 15 December, 1971, States Advisory and Finance Committee - Membership of the EEC
   - Tynwald, Report on the Possible effects on the Isle of Man of U.K. entry into the Common Market - Dr. H. Thurston.

33. The accession to the ECSC and Euratom Treaties were viewed with very little concern in the Islands because of their marginal concern.

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34. An initial attempt to negotiate associated status for the Islands under Articles 131-136 of the EEC Treaty was rejected by the existing members.
35. Vol. 6, Minutes of Evidence, Royal Commission on the Constitution, p.237. Guernsey came to the conclusion that, on balance, complete exclusion would be more harmful than full 'membership'.
36. Under this arrangement, Customs and Excise Duties and V.A.T. are collected jointly and the Isle of Man is remitted a portion of the total revenue. (See Ch.4)
37. For instance, several constitutional developments in Jersey were prompted initially by petitions from individuals or groups to the Crown (See Ch.2, footnote 21)
38. Since the Islands are not, in fact, state, the term 'third states' is not wholly accurate but it is used in this context in order to convey the idea of external state actors.
39. supra footnotes 13 and 15.
40. See Protocol 3 to the Act of Accession 1972
41. For further details, see Chapter 4 of this paper.
42. See Brownlie, Principles of Public International Law, 3rd ed. at p.65 who categorises international organisations as 'established legal persons' where they fulfil certain criteria.
43. For a full discussion of international personality, see Grieg, International Law, 2nd ed. pp.92-119
44. ibid p.92
45. These are with France and other French-speaking countries.
46. There are 3 federal states whose component units are accepted as having some international capacity under the constitution - Switzerland, the German Federal Republic and the U.S.S.R.

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47. There is some debate as to when the Dominions achieved full statehood. Their admission to the League of Nations, however, is generally agreed to have occurred before Britain relinquished sovereignty. See Crawford, The Creation of States in International Law, Chapter 8.5 pp.238-246

48. These are:

- U.K. - Isle of Man 'Arrangement for the Avoidance of Double Taxation etc', 29 July 1955
- U.K. - Guernsey Agreement of 24 June 1952
- U.K. - Jersey Agreement of 24 June 1952
- Guernsey - Jersey Agreement of 11 July 1956

49. The Caribbean Community and Common Market (CARICOM). The British Dependency of Montserrat belongs to this organisation and Belize became a member prior to its independence.

50. The Isle of Man and the Channel Islands are listed separately in the Europa Yearbook, 1982, p.154 under 'Dependencies and Associated States of the Commonwealth'.

51. This phrase appears in the title of Chapter XI of the Charter of the United Nations.

52. 'Unitary', in this sense, meaning part of the metropolitan territory of a state.

53. See Crawford, supra p. 186

54. ibid

55. See I.M. Sinclair supra pp.2-3

56. supra, footnote 51

57. U.N. General Assembly Resolution 1514 (XV) of 14 Dec., 1960

58. U.N. General Assembly Resolutions are not legally binding in the international arena but where there is consensus,

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they may be declaratory of the law.

59. See also U.N. General Assembly Resolution 1541(XV) of 15 Dec., 1960

60. France/U.K. Arbitration on the Continental Shelf, International Legal Materials 18, 1979.

61. ibid p.85

62. ibid p.90

63. See Grieg supra, Chapter 4.

64. ibid p.122

65. supra, footnotes 4 and 5.

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Chapter 4 - The Islands and the European Communities

I. The Background to the Membership question and the Islands' Fears.

Some mention has already been made of the problems which arose when the U.K. sought to join the European Communities, and of the satisfactory outcome which was negotiated.

As an introduction to the discussion of the specific EEC issues, however, it is worth considering the background to the membership question and, in particular, the expected economic effects of both full 'membership' and full exclusion.

A fundamental general observation is that small, insular economies are likely to be more vulnerable to external factors because of the limited scope of the economic activities which they undertake[1]. In essence, the reliance on one or a few products for export income renders an island's economy susceptible, not only to a general recession, as is the case with diversified larger economies, but to particular occurrences which might disrupt the market in their principal product or products.

In comparison with other island dependencies, the Channel Islands and the Isle of Man have, in fact, succeeded in achieving greater economic diversity. Their economies remain, however, sufficiently limited in order for them to experience severe difficulties, when one particular sector is disrupted.

This is probably the most important underlying feature to be borne in mind, in assessing insular fears about the prospect of EEC membership.

I propose to touch briefly on the various principal sectors

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of the insular economies and to describe the expected impact of the EEC in each case.

(i) Finance Industry[2]

The finance industry now represents the most important sector in the economies of all three Islands. Their attractiveness in this area may be attributed to the following main reasons:

(i) Low tax rates and the absence of certain forms of tax.

(ii) Confidentiality - guaranteed to clients

(iii) Political stability

(iv) The existence of a legal infrastructure[3].

Clearly, the loss or erosion of one or all of these attractions would place the Islands in a less favourable position vis-a-vis potential investors and financial institutions wishing to establish themselves. One might have expected the first two, in particular, to be susceptible to Community regulation. It is, therefore, perhaps surprising that the experts who were commissioned to examine the effects of Community Membership on the Islands, should have concentrated only on the taxation aspects of the EEC, in their assessment of how the finance industry would be influenced.

With regard to direct taxation, there was some fear of a Community-wide harmonisation of rates but it was recognised that this was "sufficiently remote to fall well outside the time-scale of effective forward planning"[4]. A number of more indirect potential effects were also identified, particularly with regard to the attraction of the Islands for wealthy residents[5] but given that the Communities had not adopted any definitive rules in this area, in the late 1960s, the whole exercise was based

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on conjecture as to the speed of harmonisation.

With regard to confidentiality, it seems likely that the Islands were aware of a possible future 'threat' from the EEC but the sensitivity of this subject may have resulted in an unwillingness to commit views to paper.

The EEC commitment to the transparency of the market necessarily involves rules about disclosure. This itself, should present no particular fear for the Islands, since they are anxious in any case to emphasise the quality of their finance industry , but there must have been some alarm at the prospect of Community rules which, for instance, provided for central bank supervision, involving access to files. It is difficult to persuade investors that, once legal access is established in this way, the information which becomes available will not be passed on to the Inland Revenue[6].

The general conclusion, however, seems to have been that, in the medium term, the finance industry would not be significantly undermined. On the other hand, as Colin Powell pointed out:

> "The existence of a haven for funds from Member States within the EEC, is in direct conflict with the principles of the Treaty...For this reason, the long-term finance centre prospects would not be encouraging, if Jersey was included in the EEC"[7].

By staying outside the Communities, the Islands could have maintained their low tax structure. In addition, they could have avoided the main threat to confidentiality, outlined above. Clearly, in this area, certain Community rules with extra-territorial effect would have had some consequence, given that the Island would still have been involved in the European Capital Markets.[8]

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The main problem here, however, would have been stability. Politically, one might have expected the Islands to remain stable but, as has been shown, the relationship with the U.K. would have been dramatically altered. In particular, it is difficult to imagine that the Islands could have had a future within the Sterling Area, especially given the Community's long term aim of monetary union.

(ii) Agriculture[9]

With regard to agriculture, entry into the EEC was anticipated as having a major impact upon the Islands, in two specific respects.

Firstly, concerning prices, the important new consideration was the level of the European target price for insular agricultural produce. In respect of milk, the high cost of production in the Channel Islands cast a shadow over the future of their dairy industry. It was pointed out that:

> "For supplies to be maintained, returns must be adequate to keep farmers' incomes at an acceptable level, and these returns can only be secured through a price level above the EEC target price, or through additional assistance from public funds"[10].

On the other hand, the EEC prices for cereals were higher than those in the Isle of Man (the only Island with significant cereal production). Although increased prices would, therefore, benefit cereal producers a knock-on effect could be anticipated since cereal foodstuffs represented a significant proportion of the costs in the dairy sector.

The second effect of membership which caused concern, was

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the removal of trade barriers, which was likely to affect the Islands in two ways. Firstly, by allowing the access of European produce to the insular markets, there was a danger that certain sectors of home production would become uncompetitive and again, it was the dairy industry which was expected to suffer. In addition, the Channel Islands might be required to allow the import of live cattle, something which had hitherto been forbidden, in the interests of preserving the purity of local breeds. Secondly, with regard to exports, the removal of tariff barriers between Britain and the rest of Europe meant that the traditional preferential treatment afforded to the Islands by the U.K., would cease. This was very serious for the horticultural industry of the Channel Islands and, in particular, for tomato exports from Guernsey, which would now have to face stiff Dutch competition.

It is clear from this brief outline of the effect of Community membership in the agricultural/horticultural sector, that the Islands could expect a major restructuring and, in all probability, a diminution of their industries, if faced with the strict application of Community law. Guernsey, in particular, whose tomato production represented its single most important source of export earnings, offers a clear illustration of the vulnerability of entities with a limited economic base.

Had the Islands stayed outside the Community, they would have been able to protect their internal production insofar as it was oriented towards internal consumption. The export market, however, in certain products, would probably have disappeared. For the Guernsey tomato growers, this step would

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have resulted in a complete reversal of their competitive position, vis-a-vis the Netherlands.

(iii) Tourism[11]

The third major economic activity which the Islands have in common is tourism and, once again, Community Membership offered the prospect of changes which potentially could harm the industry.

A distinction must be drawn here between the Channel Islands and the Isle of Man on account of the fact that only the latter is in full customs union with the U.K.[12] The effect of this 'Common Purse' arrangement is that, in most respects, the Island is subject to the same indirect taxes in operation in Britain (i.e. consumption taxes). Thus, the introduction of a Value Added Tax, although having some effect on Manx prices, would not necessarily have been serious and in any case, would have not altered their competitive position with regard to United Kingdom resorts.

For the Channel Islands, the situation was, and still is, very different. They had no general indirect taxes and excise duties were considerably lower than in the U.K. Thus, they were able to offer potential tourists, highly competitive prices for accomodation, consumer goods, food,alcoholic drinks and tobacco.

On the assumption that V.A.T. would have to be introduced at a rate of between 10% and 15%, and that excise duties would be harmonised, it was calculated that prices would rise between 3% and 5% for a period of four to five years[13]. This would clearly have eroded any competitive advantage which the Islands previously had in the tourist market.

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By remaining outside the Community, the Islands could have avoided the above mentioned effects on their tourist industry.

From this brief and selective summary of the conclusions reached by the insular authorities with regard to the effects of Community membership on their industries, the reasons for seeking a special arrangement are manifest. The Islands understandably had to assess the future effects of membership on the assumption that the process of integration would occur more speedily than has turned out to be the case. In the event, many of the fears which they expressed related to developments which have not yet occurred. Nevertheless, some of their predictions have proved correct, despite the limited nature of the relationship finally agreed.

In the following section, I propose to examine the basic legal documents governing the special relationship between the Islands and the European Communities.

II. The Scope of Application of Community Rules in the Islands

(i) The EEC Treaty provision, which establishes a legal relationship between the Islands and the Community is Article 227.5(c)[14] which states:

> "This Treaty shall apply to the Channel Islands and the Isle of Man only to the extent necessary to ensure the implementation of the arrangements for those Islands set out in the Treaty concerning the accession of new Member States to the European Economic Community and the European Atomic Energy Community signed on 22 January 1972"

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The arrangements referred to in this clause are to be found in Protocol 3 to the Act of Accession (see appendix IV) and this is, in practice, the constitutive legal document of the special relationship which was negotiated. The Protocol has only six articles and it would seem, in some respects, that the drafters chose to sacrifice clarity in favour of brevity.

Article 1.1. begins by stating that "(t)he Community rules on customs matters and quantitative restrictions...shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom". It then goes on to specify, in particular, the applicability of the rules which govern the progressive abolition of customs duties and charges having equivalent effect.

This is the fundamental provision of the Protocol, which places the Islands inside the Common External Tariff and under an obligation to allow the free movement of goods.

Article 1.2 deals with the application of the agricultural regime to the Islands. The rules regarding levies and import measures, which are clearly assimilable with the provisions of Article 1.1, are applied in the first paragraph. The second paragraph states that "Such provisions of Community rules...as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable". Finally, paragraph three of Article 1.2 places an obligation on the Council to "determine the conditions under which the provisions referred to in the preceding sub-paragraphs shall be applicable to these territories".

Although the specific articles of the EEC Treaty with which the Islands are bound to comply are not indicated, it is apparent that Article 12 et seq. on the Customs Union and

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Articles 30-36 on the elimination of quantitative restrictions are included.

The extent of the operation of the Agricultural Policy is clarified in Council Regulation 706/73[15] (See Appendix V), which was subsequently issued in accordance with Article 1.2 sub-paragraph three of the Protocol. This Regulation is discussed further below.

Article 2 of the Protocol guarantees the existing rights enjoyed by the Channel Islanders and Manx in the United Kingdom but excludes them from Community provisions relating to the free movement of persons and services. Thus, it is implicitly indicated that the Islands are excluded from these areas of the Treaty.

Article 3 ensures that, if at any stage in the future, 'persons' or 'undertakings' as defined in Article 196 of the Euratom Treaty, embark upon activities governed by the Atomic Energy Community, the Euratom rules will apply to them in full.

Article 4 is the clause which imposes upon the insular authorities the obligation to apply 'equal treatment' to all natural and legal persons of the Community.

Article 5 allows for the adoption of 'safeguard measures' by the Council "(i)f, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Communities and these territories".

Finally, Article 6 limits the definition of a 'Channel Islander' and a 'Manxman', for the purpose of the rights excluded under Article 2. Accordingly, all residents of the Islands, born, adopted, naturalised or registered in the U.K., or with one parent or grandparent fulfilling the same criteria,

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are expressly omitted from the definition. So too, are Islanders who have "at any time been ordinarily resident in the United Kingdom for five years".

Regulation 706/73, which sets out the applicable agricultural rules contains four substantive articles of which the first three are of specific interest.

Article 1 renders applicable, most of the provisions of the agricultural trade regime, the main exceptions being the rules on refunds and monetary compensation amounts. Article 1.2 establishes that the Islands and the U.K. are to be treated as a 'single member state' for the purpose of applying the agricultural rules while Articles 1.4 and 1.5 prohibit the Islands from granting aid in excess of the amounts of refunds, compensatory amounts and export credits established by the EEC.

Article 2 imposes upon the insular authorities, the requirement to submit aid schemes to the Commission for approval and reserves the right of the Council to apply other state aid provisions (Articles 92-94 EEC) 'insofar as this proves necessary.

Article 3 lists the specific agricultural areas in which Community rules are applicable to the Islands.

(ii) A number of questions arise from these provisions. In particular, Article 1 of the Protocol, in conjunction with Regulation 706/73, and Article 4 of the Protocol are open to interpretation.

With regard to Reg.706/73, it is submitted that certain provisions could be in conflict with the aims of Protocol, Article 1. Firstly, the non-application of the rules on refunds,

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compensatory amounts and export credits, although consistent with the non-involvement of the Islands in Community funding[16], could in fact, lead to a disruption of the market conditions. With respect to aids and export credits, the Islands are expressly forbidden from exceeding the amounts granted within the Community[17]. There is no obligation requiring them to equal these amounts, however, and accordingly, while the Communities are protected from unfair competition from the Islands, the reverse is not the case.

It may justly be argued that this is a matter for the insular authorities since it is within their capabilities to remove this disequilibrium by matching the Community aid granted.

In any event, the situation has arisen because of the Islands' desire to avoid European taxation and this could only be achieved by their complete exclusion from the system of Community funding.

Monetary Compensation Amounts present particular problems which will be considered in a later case study. It is sufficient to note at the moment that, since they are intended to remove market distortions caused by fluctuating currencies, their non-application in trade between European Member States (except Britain) and the Islands may lead to such distortions occurring.

A further problem relates to the legal scope of Article 2 of Regulation 706/73 which deals with aid schemes. The question which arises is whether this provision covers all aids or only those in the agricultural/horticultural field. Regulation 706 was enacted in pursuance of Article 1.2 of the Protocol which gave the Council legal authority to determine the conditions 'referred to in the preceding sub-paragraphs'. A strict reading of this would appear to limit

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their scope of action to matters covered in Article 1.2 - in other words, only agricultural matters. Article 2 of Regulation 706/73 refers, however, to aids other than those covered in the preceding article (refunds, compensatory amounts, export aids.) By adopting a broad view, Article 2 may be held to encompass aids to industry, including the sensitive area of tax exemptions and in a recent document, the Commission has taken this view[18]. It must be doubtful, however, whether the Council was empowered to deal with non-agricultural matters under the Protocol, when it adopted Regulation 706/73.

The lesser interpretation is that the provisions mentioned only deal with specific aids such as fuel subsidies or capital grants for the agricultural industry.

Turning now to Article 4 of the Protocol, the question is, once again, one of scope. On the face of it, Article 4 must be interpreted in a broad sense, to cover all aspects of Community involvement. Accordingly, any discrimination which is precluded under the Treaty would be covered. Within the Islands, however, the tendency has been to regard this rule only in terms of discrimination as it affects the movement of workers[19]. Thus, having altered their laws to provide for the equal treatment of all Community nationals in this area, the insular authorities have adopted the view that their obligations have been fulfilled[20], in this respect. Curiously enough, the Commission seems to take the same view[21]. If the intention was so limited, it is certainly not reflected in the wording of Article 4 and this would appear to be a clear example of undue brevity in the drafting. Adopting a strict interpretation, I propose to

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discuss below, a number of situations which could be held to be in breach of Article 4 of the Protocol.

From the basic texts, the application of two further provisions will be considered. Firstly, Article 5 of the Protocol is of interest because, on the one hand, it appears to allow the European Community the opportunity of 'policing' the Islands, while on the other, it affords the insular authorities a possibility to avoid applicable European rules where special problems arise. It is clear that these two possibilities could, in practice, come into conflict. The outcome of the one case in which safeguard measures have been adopted, will be assessed.

Secondly, Article 1.2 of Regulation 706/73 sets out the 'single member state' concept and the effect of the application of this will be dealt with briefly.

(iii) Finally in this section, it is worth making mention of the European Communities' legislation of the Islands. Jersey, Guernsey and the Isle of Man each have a separate European Communities law which puts into effect the applicable provisions of the Community Treaties[22].

The main point of interest is in the implementation of the treaty arrangements and in the legal status of the Treaties and of community instruments.

In both these respects, the insular legislation mirrors the basic provisions set out in Articles 2 and 3 of the U.K. European Communities Act 1972[23].

Thus, in principle, the insular authorities must (1) facilitate the application of Community regulations (which are

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directly applicable) and (2) take the necessary legislative steps to implement directives. Similarly, Island judges must apply European law where it is relevant, and where there is a question as to the'validity, meaning or effect'[24] of a Community instrument, the Court may refer the matter to the E.C.J. for a preliminary ruling.

The extent to which the insular authorities fulfil the obligations set out in their respective European Communities' laws will be assessed further below.

With regard to judicial application, it may be noted that there are very few cases involving Community law and, thus far, there has been no request for a preliminary ruling from any insular court. In the Isle of Man, however, there has been judicial acknowledgement, both of the requirement to apply European rules and of the possibility of referring the matter, where there is some doubt.

It is perhaps not surprising that Community law has such a marginal effect on the Islands. In addition to the limitations brought about by the partial nature of the relationship, there are also many rules which, although applicable in principle, are not likely to be utilised in practice. A number of issues have been identified, however, and these will now be considered.

III. Issues Arising from the Protocol Provisions

(i) Free Movement of Goods and Distortion of the Market

The extent to which free movement of goods exists, even between the Member State participants in the Community legal order, is a matter of some debate. Despite the abolition of

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customs barriers and quantitative restrictions inside the Community, and the efforts at eradicating charges and measures having equivalent effect, there are still ways in which states can manifest protectionist tendencies. This should always be borne in mind when considering the potential and actual market distortions which characterise the trading relationship between the European Communities and the Islands.

(a) Monetary Compensation Amounts

The question of Monetary Compensation Amounts (MCAs) has already been touched upon briefly. In this section, I propose to consider why a divergence has occurred between the Channel Islands on the one hand and the Isle of Man on the other, with respect to this issue.

MCAs were initially introduced to compensate for the difference between representative or 'green' rates used for converting agricultural prices into national currencies, and the market rate for currencies. A simple explanation of the operation of MCAs is to be found in the Interim Report of the Tynwald Select Committee on the Common Market:

> "...each Member State applies its own rate of MCAs, based on the strength of its currency so that the goods are put into a neutral position by the exporting country by means of either an export levy or refund. Where necessary, the price is again adjusted by the receiving country according to its own currency position, by means of either an import refund or levy. For countries with revalued currencies, MCAs are levied on imports and granted on exports, and for countries with devalued currencies, they are levied on exports and granted on imports"[25].

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For the Islands, this poses an interesting problem. Since they are excluded from Community funding, they are not entitled to benefit from refunds under the European Agricultural Guidance and Guarantee Fund (although the insular authorities are at liberty to match this amount from their own funds). The result is that insular agricultural produce, in certain circumstances, may become uncompetitive.

The question is therefore, whether the Islands are required to impose MCA levies upon agricultural goods imported or exported, according to the currency situation.

The Isle of Man was faced with this issue when a Manx farmer received a bill for £20,000 from Her Majesty's Customs and Excise in respect of Monetary Compensation Amounts payable on live cattle which he had exported. Tynwald subsequently sought an opinion from their constitutional adviser, who came to the view that MCAs, whether they could be construed as import measures within the meaning of Article 1.2 of the Protocol, or simply as an economic measure concerned with currency fluctuations, remained, nevertheless part of the Community financing of the Common Agricultural Policy. Since Regulation 706/73 excludes the Islands from Community financing, the Isle of Man was not bound to apply MCAs[26].

In this particular instance, it was not a question of importing in any case and with regard to MCAs on exports, Article 1.1 of Reg. 706/73 was cited as a further legal basis. ("Community rules...for trade in agricultural products...shall apply to the Islands, with the exception of rules on refunds and on compensatory amounts granted on exports by the United Kingdom")[27].

The Isle of Man has accepted this advice and does not apply

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Monetary Compensation Amounts. The Channel Islands, on the other hand, continues to do so without enjoying 'reciprocal' access to the European Agricultural Guidance and Guarantee Fund, when refunds would be applicable.

The different approaches may, perhaps be explained by the fact that the Channel Islands have a separate system of customs under which all duties and levies collected in the Islands go to the local exchequers. The Isle of Man, although it now has an independent customs service, is still bound to the U.K. by a customs agreement under which the revenue is pooled and a proportion is transferred to the Manx Government annually by the U.K. Treasury. This removes the necessity for customs procedures but it also means that any sums collected as MCA levies go into the 'common purse'. The Manx will receive their alloted share, in accordance with the criteria set out in their agreement with the U.K.[28] but the remainder of the levy, which is the bulk of it, will be paid into Community funds.

It may be concluded that, by remaining outside the Community funding system, the extent of integration into the 'Common Market' of the Islands, depends on the support policies adopted by the insular authorities. From the MCA question, however, the Manx would seem to have distanced themselves even further from the integrative process by ensuring the continuance of market distortions, so long as Sterling is able to fluctuate from the representative rates.

(b) The Agricultural Marketing Boards

The second situation involving the operation of the market, relates to the existence of 'state' agricultural monopolies in the Islands[29]. When the United Kingdom joined the European

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Communities, it was generally accepted that the British Marketing Boards, with their sales monopolies, were in breach of Community law. Following a strong campaign for the retention of the Milk Marketing Boards, the British Government succeeded in 1978, in persuading the Council to issue two regulations (1421/78 and 1422/78) authorising the continued operation of the boards under certain conditions[30] which both the Isle of Man and the Channel Islands were capable of meeting.

In this discussion, what is significant is that Article 1.1 of Regulation 1422 lists the organisations to which the U.K. Government may grant the rights set out in Regulation 804/68 (as amended by Reg.1421/78). Neither the Manx, nor the Channel Islands' Milk Marketing Boards are included in the list although, in accordance with the single member state concept, the possibility for inclusion exists.

Once again, it was Tynwald which enquired into this problem and obtained a legal opinion[31]. They were advised that, in order to comply with Community law, they would have to seek an addendum to Regulation 1422/78 to cover the Isle of Man Milk Marketing Board.

One constitutional difficulty was identified, however, arising from the fact that it was the U.K. Government which had the right of authorisation under the amended Article 25 of Regulation 804/68[32]. Similarly, it was the United Kingdom which would organise producer referendums and exercise general supervision. It was recommended by the constitutional adviser that the Government of the Isle of Man should undertake these functions. It is difficult, however, to envisage how this could have been arranged without a breach of the single member state concept in agriculture.

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The Channel Islands have, in this regard, maintained a low profile and their milk marketing boards have hitherto avoided the strict application of European law. What is not clear, however, is whether the lack of Community action, to bring them into line is due to acquiescence or ignorance.

(c) Subsidies

The question of subsidies, is one which has arisen with regard to the Guernsey tomato industry. Following a difficult year for the tomato sector in 1979[33] the Guernsey States introduced a financial support contingency scheme for its horticultural industry[34], the central feature of which was the establishment of price support payments to tomato growers[35]. The plan was not submitted, however, to the EEC Commission for approval. It is important to appreciate the spill-over effects of an aid scheme directed at a product produced primarily for export. Clearly, European competitors are likely to suffer as a result and following a question in the European Parliament[36], the Commission investigated the matter. As a result, the scheme was retrospectively submitted for consideration and, in the event, the Commission's approval was granted, on the basis that the aid offered did not exceed Community aid in the same sector. Guernsey has consistently pointed to the subsidies granted to Dutch growers as an example of unfair competition and they regarded their scheme as a means of restoring competitiveness.

From the previous discussion of Article 1 of Reg.706/73, there is little doubt that Guernsey was under an obligation to submit the aid scheme for approval. Article 1.1 of the Protocol, which applies Community agricultural rules to the Islands, must clearly be held to encompass the State Aid

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provisions of the Treaty insofar as they regulate aid given in the agricultural sector.

(d) Import Controls

Finally, in this subsection, it is worth considering what must be regarded as the central feature of the relationship between the Islands and the Communities, namely the 'free movement of goods'.

The fundamental rules to be applied in this respect, are those on customs duties, charges having equivalent effect, quantitative restrictions and measures having equivalent effect. Nor can there be any doubt of the Islands' obligation to apply the relevant Community law.

Despite the strict legal requirements, however, a number of situations have occurred which would suggest that even these most basic rules are not fully adhered to. The following three cases are mentioned by way of example.

(i) The Manx Case of Ball v Nicholson.

This case is of particular interest because it involves one of the few situations in which Community law has been invoked in an insular court. It involved a defendant company which was charged with having imported ice-cream into the Isle of Man without a licence, contrary to the Ice-Cream (Import Regulation) Order, 1968[37].

Before considering the case itself, it is important to summarise its background. Locally produced Manx ice-cream, which is more expensive than ice-cream in the U.K., is considered locally to be a far superior product and the Manx Government has traditionally employed protectionist measures to ensure the exclusion of competitively priced (but allegedly lower quality)

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ice-cream, from outside the Island. This policy was implemented by means of a 'closed-licensing' system: in other words, an import licence was required in principle but never granted in practice. Following complaints from U.K.-based ice-cream manufacturers, the Island, apparently in recognition of its European obligations, adopted an 'open-licensing' system, under which all applications would be granted.

The Nicholson case[38] arose out of a situation in which ice-cream was imported without a licence and the defence argument was that, despite the open licensing system in operation, manufacturers had to fulfil impossible conditions in order to obtain one. In particular, attention was drawn to condition 5 of the licence which would have been issued. This stated:

"The consignment shall be accompanied by a certificate issued by an official veterinarian of the competent central authority of the country of origin certifying that:-

(a) it has been manufactured from milk and milk products coming from :-

(i) healthy animals free from mastitis

(ii) stock officially recognised as being free from tuberculosis

(iii) establishments situated in the centre of zones at least ninety kilometres in radius, which have been free from foot and mouth disease for a period of at least sixty days.

(b) it has been prepared from milk and cream which have undergone heat treatment of a kind to destroy pathogenic germs.

(c) it does not contain antibiotic substance or preservatives"

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As the Deputy High Bailiff[39] noted:

"It is...clear to me that the items (a)(i) and (a)(ii) of condition 5 of the Specimen Licence are of such a nature that no importer of ice-cream could have complied with them; and to that extent, the condition defeats the very object for which it appears that a licence would have been given"[40]

The Board of Agriculture and Fisheries justified the requirements on the grounds of public health but this was dismissed by the judge, who had accepted expert evidence highlighting the greater health risk associated with other products on which less exacting requirements had been imposed. The Deputy High Bailiff went on to state:

"Indeed, the only inference that I can draw is that the real purpose of this particular provision is to protect the agricultural industry of the Island and an important consumer of its produce, the Island's ice-cream industry; which of course....was the purpose of the closed licensing system"[41].

Having reached this conclusion, he proceeded to consider the validity of the licensing system and by reference to English case law[42], he declared condition 5 of the licence void because it was unreasonable.

This did not, however, render the whole licensing system void and, according to the law prior to the 1st of September, 1973, the defendant company would still have been guilty of an offence. Since that date, the European Communities (Isle of Man) Act had been in operation, and the judge then felt obliged to consider what effect, if any, Community law had, on the case before him. Having looked

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at Article 1.2 of Regulation 706/73, the Deputy High Bailiff came to the following conclusion:

"...the provisions of the EEC Treaty relating to the free movement of goods between the Island and the United Kingdom do not apply to the products mentioned; albeit that they apply in respect of trade between the Island and other Member countries (a somewhat anomalous situation). In these circumstances, and having regard to Section 2 of the European Communities (Isle of Man) Act, the law that I must apply in this case is that of the Act of 1934[43], unaffected by Community law"[44].

It is clear that the judge did not take into account, Article 4 of the Protocol (the equal treatment provision). Although this was probably formulated to avoid discrimination against nationals of Community Member States other than Britain, it should have been possible to invoke it, in conjunction with the basic free movement provisions, to reach the opposite conclusion to that adopted by the Deputy High Bailiff.

The case is interesting in another respect because, having handed down a conviction against the defendant company, the Manx judge proceeded to consider the operation of the licensing system vis a vis member countries of the Community other than the United Kingdom.

At the outset, he stated that:

"In so far as it is an impediment to trade between Members of the Community this licensing system is clearly contrary to Article 30 of the EEC Treaty in that it has equivalent effect to a restriction on imports; and no contrary argument was directed to me on that point. It was argued

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however, that it could be justified under Article 36 of the EEC Treaty on grounds of 'the protection of health' or of 'public policy"[45].

The former ground was dismissed because local icecream was not subject to the same requirements. As regards public policy, the judge considered whether there was a need to protect local icecream manufacturers from unfair competition and whether this could be construed as a 'public policy' requirement. In this respect, he quoted the Advocate-General in the Van Duyn Case, who stated:

"Nevertheless, the particular circumstances justifying recourse to the concept of public policy may vary from one country to another and from one period to another, and it is therefore necessary in this matter to allow the competent national authorities an area of discretion within the limits imposed by the EEC Treaty"[46].

The Deputy High Bailiff regarded the establishment of two elements as vital: (i) What were the fundamental national interests at stake and (ii) were the measures taken disproportionate to the harm caused. His conclusion in this respect was that it was not possible to identify any fundamental national interests and implicit in this statement is the establishment of disproportionality. As he pointed out:

"It may well be that the local ice-cream industry does need to be protected from competition offered by producers who by virtue of the very rules of the Community, are in a position to buy cheap butter from the Intervention Board, whereas they are not. But here I am in considerable difficulty. The evidence indicates that the industry does not

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need such protection - hence the apparent change in policy of the Board in early 1979. Where then is the 'public policy'. Then again if it does need protection are the measures taken reasonable. It may be that an absolute prohibition is called for; maybe something less. But in that a licence may be issued which, whilst it purports to be a licence permitting the entry of this particular product, contains a condition which effectively prohibits its importation, I can only come to the conclusion that the system is a disguised restriction on trade and is therefore, in the context of inter-community trade, (i.e. trade other than trade between the United Kingdom and the Island), unlawful"[47].

(ii) The Import and Export (Control)(Jersey) Order, 1982[48]

This order states at Article 1 that:

"Subject to the provisions of this Order, all goods are prohibited to be imported into the Island or to be exported from the Island or shipped as ships' stores".

Articles 2 and 3 proceed to deal with licensing arrangements, the main feature of which is the discretionary power vested in Jersey's finance and Economics Committee. Article 4 states:

"Nothing in Article 1 of this Order shall be taken to prohibit the importation of any goods (other than the goods mentioned in the Schedule to this Order) which are proved to the satisfaction of the Agent of the Impots to have been brought into the Island from the United Kingdom, the Bailiwick of Guernsey or the Isle of Man"

From these provisions, it is clear that, in principle, there

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of the States of Jersey, sets out at Article 1:

"Il est défendu d'importer dans l'Ile des oeufs de poules ou de canes en coque, ou de vendre, d'exposer ou d'offrir en vente dans l'Ile des oeufs de poules ou de canes en coque qui y auront été importés, sans qu'il ne soit inscrit sur la coque, le nom de son pays d'origine en lettres indélébiles, ayant une hauteur d'au moins 2 millimètres"[51].

It is very likely that this requirement to mark the shell of every egg imported would be construed as a measure having equivalent effect to a quantitative restriction. There is no such stipulation for locally produced eggs and there can be little doubt that it constitutes a barrier to trade. What is important in this case is whether the provision will provoke a complaint from prospective importers of eggs. If this occurs, and the EEC Commission becomes interested, there is a possibility that the regulation will be repealed[52].

It should be noted that regulations of this kind (Triennial Regulations) and the equivalent instrument in Guernsey (Ordinances) are in force for a limited duration and do not require to be submitted to the Queen in Council for the Royal Assent. Thus, the U.K. Government is unable to prevent their enactment, or even to point out at an early stage, any inconsistencies with European law.

(ii) The Equal Treatment Clause

As was mentioned earlier, Article 4 of Protocol 3, which states that 'the authorities of these territories shall apply the same treatment to all natural and legal persons of the Community', has been interpreted restrictively, both in the

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is no free movement of any goods from non-U.K. sources to Jersey (other than the other British Islands). Whether there is in practice depends on the licensing policy of the Finance and Economics Committee and this is not easy to ascertain, but the indications are that, with regard to certain agricultural products, a 'no-licence' policy is in operation (e.g. milk). A justification which has been given for this Order is that it is based on health grounds[49]. On the face of it, such a sweeping law goes far beyond what is required for protection of health upon the Island, covering as it does all goods, including many which are unlikely to present significant health risks. What must be borne in mind is the size of the administration operated by the Jersey States. As a matter of practicality, a general exclusion coupled with a licensing policy is far less complicated than a series of laws, setting out acceptable standards for the importation of all potential products. Indeed, it is doubtful whether any of the insular authorities could raise a sufficient bureaucracy to produce the volume of legislation required for complete coverage under the latter system.

Taking this into account, the 'public health' justification becomes somewhat more tenable. It might, however, be more appropriate to invoke the more general exception of 'public policy' on the basis of the above-mentioned limited resources. Notwithstanding this, it is difficult to imagine the law not being used in a protectionist way and this raises doubts whether it accords with Community law.

(iii) The Jersey Egg-Marking Law

The recent 'Reglement (1983) sur le marquage d'oeufs'[50]

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Islands and by the Commission, as encompassing only the issue of the movement of workers.

It is submitted that, from the text of the article, this is an undue limitation and the provision should in fact be viewed more broadly.

By adopting this view, it is possible to identify several existing situations which may be in breach of article 4. Again, the following case studies are put forward as examples.

(a) The Import and Export (Control)(Jersey) Order, 1982 (See p.103)

In addition to the already discussed effects of this instrument on the free movement of goods, it may be cited in the context of the 'equal treatment clause'. Article 4 of the Order sets out a general exemption from the licensing provisions, for goods imported from the United Kingdom, Guernsey and the Isle of Man. Thus, notwithstanding the licensing policy adopted, it is clear that U.K. importers have unrestricted rights of access for goods, other than those listed in the schedule, whereas importers from other Community Member-States are obliged to obtain authorisation. This would appear, prima facie, to be a discrimination in breach of Article 4 of the Protocol.

(b) The Customs Agreement between the Isle of Man and the United Kingdom[53].

Reference has already been made to the Customs Agreement which exists between the Isle of Man and the U.K. Prior to a recent renegotiation, it was known as the 'Common Purse' Agreement and although the latter title is now erroneously used in referring to the arrangement, it remains an appropriate descriptive term, in that the Manx continue to receive a proportion of the total amount collected in excise duties

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and indirect taxes[54].

The issue of the 'Common Purse' is one which presently divides the Island and there is a strong movement in favour of abrogation[55] particularly among the tourist trade. They take the view that tourism could be revitalised in the Island, if they were able to offer duty-reduced and duty-free items, and cheaper accomodation costs through a reduction or abolition of V.A.T.[56] Opponents of abrogation are primarily businessmen and industrialists who fear that the introduction of customs procedures would affect business costs and drive away both existing and potential industries. The Manx Government has conducted studies into the effects of abrogation[57] and, despite the recent renegotiation, which resulted in the establishment of an independent Manx Customs service, it continues to be a live issue.

It is not the purpose of this paper to examine the abrogation question in any depth but, with regard to th equal treatment provision of Protocol 3, it is possible to put forward a legal problem which has not hitherto entered the debate[58].

The effect of the Customs Agreement, in terms of the movement of goods, is that all items entering the Island from the United Kingdom, do so without any customs procedures. This has been made possible by the fact that duties[59] and V.A.T. are maintained at the same rate. Thus the Isle of Man and Britain are not only in customs union but have a largely unified system of indirect taxation.

On the other hand, goods entering the Island from another Community Member State (e.g. Ireland), are subject to the normal procedures which continue to operate for intra-community

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trade. Accordingly, in practice, there is no equal treatment between U.K. importers and those from other Community Member States.

There are two views which might be adopted as to the scope of Article 4 in this situation.

Firstly, applying the provision as it stands, it clearly has very serious effects on the operation of the Customs Agreement. Assuming that the Island were to extend to all Community nationals, the treatment it affords to U.K. importers under the agreement, there would be no means of preventing low duty items entering the Island untaxed. By definition, such goods would then have free access to the U.K. and such a situation would undoubtedly be unacceptable to the U.K. Government. Given this anomalous situation, the whole foundation of the Customs Agreement would be put in question since, in practice, the Isle of Man would be required to institute standard procedures for the importation of goods, albeit that they were unnecessary in the case of items arriving from the United Kingdom (which is the majority). Since the removal of customs procedures is one of the fundamental purposes of the agreement in the first place, there would be little point in having it.

The second possibility is that an implicit limitation might be read into Article 4, allowing a degree of unequal treatment, to the extent necessary to ensure the enforcement of internal taxation arrangements. This is manifestly a more rational approach.

The problems outlined, however, illustrate the possible outcome of rule-making which is not concise.

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In any event, the Isle of Man would appear to be under an obligation to make the procedures as simple as possible, in order to adhere to the spirit of Article 4.

Since the Channel Islands have no 'Common Purse' arrangement with the U.K., and consequently charge lower excise duties and no V.A.T., one might expect there to be no question of their breaching Article 4 in the area of customs procedures. It would appear, however, that they operate a simplified procedure with respect to goods arriving from the U.K.[60], thereby introducing an element of discrimination based on the origin of the imports.

(c) General

In addition to the two cases discussed above, there are many other situations which, according to the wording of Article 4, may be held to constitute breaches of the equal treatment requirement. Indeed, it is entirely to be expected, given the special relationship which exists between the Islands and Britain, that the former will have laws which favour the citizens of the U.K. and accordingly, discriminate against other Community nationals. The following examples further serve to illustrate this:

(i) The requirement that doctors practising on the Islands be registered in the U.K.

(ii) The different treatment afforded to British Clearing Banks in the Isle of Man Banking Act.

(iii) The exclusive rights of British Telecom under the Telecommunications Act, 1980.

It is clear from this discussion that Article 4 in principle imposes a very high standard upon the Islands in respect of non-discrimination. For reasons of practicality, it would seem

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unreasonable to expect them to adhere to the letter of the law in this respect and, as a matter of practice, it has been noted that they have adopted a minimalist stance, without unfavourable reaction from the European Community. The result is that once again, the legal text bears little relation to the actual situation.

(iii) The Single Member State Concept and Safeguard Measures

The judicial application of the single-member state concept in the Nicholson Case has already been outlined in the previous discussion. This is the one situation where 'equal treatment' has not been applied to the detriment of U.K. nationals. In this section, however, I propose to examine what the exact meaning of the 'single member state' concept is and in particular to assess whether there is any justification in applying it, as the Manx Deputy High Bailiff did, to exclude the Community free movement provisions, in respect of trade in agricultural products, between the U.K. and the Islands.

For reasons already stated, it is submitted that the judgement in the Nicholson Case was based on an incomplete examination of the European rules which are applicable to the Islands. It is worth also considering another situation in which the single member state concept was invoked, again involving the Isle of Man. This occurred in 1982, when the Manx Government banned the import of meat from Northern Ireland, because of the threat which was posed to their domestic production. They based this action on the argument that, since Northern Ireland and the Isle of Man were part of a single member state for Community purposes, the free movement of goods did not

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apply. In effect, they believed that their action should be construed as an internal measure outwith the scope of competence of the European Communities.

As might have been expected, this caused a reaction among Northern Irish meat exporters and the matter was then placed before the Council of the European Communities which issued, for the first time, a Decision founded upon the safeguard measures article of Protocol 3 (Art. 5)[61]. This authorised the United Kingdom to permit the Isle of Man to apply a system of special import licences for sheepmeat, beef and veal. The decision applies until 1 April, 1984.

From the point of view of this discussion , paragraph 7 of the preamble to the decision is of particular relevance. This states:

> "Whereas in the context of the trade arrangements with certain third countries pursuant to the common organisation of the market which apply to the Isle of Man, subject to the Community provisions which govern the relationship between the Island and the Community, it is desirable to permit the Island authorities to apply certain measures in order to protect its own production and the working of its own agricultural support system".

The presumption to be made is that, in the absence of a special exemption, which here is justified with reference to similar exemptions in agreements with third countries, the free movement provisions of Community law would apply. This paragraph is also indicative of the willingness of other Member States to allow the Island to deviate from the norm, because of their special circumstances.

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From this, one might draw the conclusion that the single member state concept cannot be held to undermine the application of Community rules pertaining to agriculture where the trading relationship is between the Islands and the United Kingdom. The phrase should, therefore, be understood simply as extending to the Islands, all Community regulations and directives in the agricultural field, to which the United Kingdom is bound, without the need for a specific reference to the Islands in the instrument.

It is interesting that, in this one respect, the Islands appear to have chosen the wide interpretation of the law, in order, paradoxically, to minimise its application.

(iv) Enactment of Community Law

Finally, a brief mention must be made of the attitude in the Islands to the enactment of European Community legislation. As has been noted, they are required, in principle, to implement all Community Regulations and enact all Community Directives encompassed by the provisions of Protocol 3 and Regulation 706/73. In practice, it is quite impossible for the insular authorities to undertake such a huge administrative and legislative programme. It has been pointed out that in Jersey, and presumably this is the case in the other Islands, Community rules fill over a yard of shelfspace on the Greffe bookshelves[62]. The Greffier is quoted as saying, however that "99.99 per cent of it does not affect us". Clearly, a far higher percentage should, in law, be implemented but this statement is indicative of the pragmatic approach which has been adopted and the Islands tend only to implement Community instruments which are directly relevant to them. This requires them, in addition to be responsive to new situations which

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might necessitate putting into practice, rules which previously were not thought to be relevant.

The U.K. Government provides some assistance by drawing important legislation to the attention of the Islands.

The Isle of Man employs a Common Market Officer whose task it is to examine and forward items of Community legislation to the various departments. They are perhaps more assiduous in this respect and the monthly bulletin lists the Community law which is applicable to the Island. It is interesting that no distinction appears to have been made between regulations and directives. The latter are regarded as effective without subsequent enactment by Tynwald[63].

Scrutiny of Community legislation by the elected representatives is piecemeal. The Manx Common Market Committee has been disbanded and in all three Islands, European rules are examined, if at all, by the various sectoral committees.

Finally, returning to the Nicholson Case, we have the one known example of a judge considering referral under Article 177 of the EEC Treaty. The Deputy High Bailiff appreciated that this possibility was available to him but decided, in the event;

> "...not to follow this course as this is a criminal matter.. and I consider the inevitable long delay unacceptable"[64].

It is clearly misplaced to refuse a 177 reference on the grounds that the case is a criminal one. The ECJ has given many preliminary rulings in the past on references from criminal proceedings. In any case, given that the defendant company was found guilty, it may be that it would have been prepared to suffer the delay, in the hope of a different outcome.

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(v) Conclusions

In seeking to draw conclusions from the foregoing discussion, it is important to emphasise that evaluation based on a single or small number of situations must, by definition, be tentative. Notwithstanding this, one might postulate from the cases discussed, a number of general factors which govern, and to an extent, undermine the relationship in strict law which was established in 1973.

(1) Lack of legal clarity

The vagueness of certain provisions of Protocol 3 and Regulation 706/73 has been noted. This has allowed the insular authorities, both administrative and judicial, a greater capacity for interpretation. On a more specific level, there is a tension between the central applicable norm relating to the free movement of goods and the express exclusion of the Islands from the Community funding provisions.

(2) The 'Minimalist' Attitude of the Islands

Bearing in mind the preceding point, the Islands have opted for a 'minimalist' approach with respect to European Community obligations. This is manifested in a number of ways:
(a) The interpretation placed on the single member state concept which, given that insular trade is largely with the U.K., minimises the application of the free movement of goods provisions. (b) The limited application of the equal treatment clause, allowing the continuation of 'discrimination' in many areas. (c) The policy of enacting only relevant Community legislation with the assessment as to relevance being made by the Islands' authorities. (d) The continued operation of import measures and the adoption of new measures which breach

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Community obligations. (e) The Manx decision not to apply Monetary Compensation Amounts. (Although the Channel Islands do apply MCAs the motive is probably to increase insular revenue, and not specifically to ensure the removal of distortions in the market caused by fluctuations in currencies)

It is of interest to question why the Islands have adopted this 'minimalist' stance. The simple answer is perhaps that there is no real commitment to the free movement principle as it applies to goods. The economic structure of the Islands is such that trade is now, relatively speaking, less important than other sectors of the economies. In addition, trade other than with the U.K. is insignificant. Having retained their traditional free access to the United Kingdom markets, the Islands clearly have very little interest in the principles of free trade which characterise the internal Community market. On the other hand, with local consumption geared to local production in several areas, one might expect certain protectionist tendencies. As economic diversification continues, this attitude may change since new export possibilities, particularly in light engineering are becoming available. Given the situation hitherto, however, the insular approach to Community law is perhaps understandable.

(3) Community Acquiescence

One might have expected the Islands' attitudes to lead to conflict in certain situations. A number of factors, however, have prevented this occurring, the principal one being the acquiescence of the Communities in general and of the Commission in particular. The latter has only very rarely interceded where Community law appears to have been breached by the Islands, and

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then only at the behest of a third party.

There are two possible explanations for this. Firstly, although the Commission is aware of insular actions, it does not regard them as significant in terms of the Community as a whole and therefore does not intervene. Secondly, the Commission may, in fact, be unaware of insular activities until a particular aspect is drawn to their attention. This latter explanation is, in a sense, a manifestation of 'acquiescence' in that the Commission, by its failure to monitor the Islands, clearly accords them a low priority.

The result in either case, is the absence of pressure on the Islands forcing them to conform with their obligations.

(4) The Influence of Individual Actors

The Islands are clearly not cut off entirely from the outside world and occasions will arise when individuals, on whom some 'personality' has been conferred in the European Communities, are adversely affected by certain insular activities. The result in such cases is that the European Commission is forced to act, albeit reluctantly.

(5) Conflict Avoidance

Where the Community is prevailed upon to act, conflict has nevertheless, been avoided, to date. This can be done either by the use of safeguard measures, allowing an exception for the Islands or alternatively, by the Islands choosing to repeal the offending measures, in recognition of their obligations[65].

Thus, in terms of the classification of actors employed in Chapter 3, it may be seen that, in the situation created by the European Communities Treaties, the additional strains

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which might have been imposed by the extra actors have been avoided. The relationship is, in fact, characterised by a surprising tranquility.

This leads one to consider the effectiveness of law as an instrument governing the relationship between the Islands and the European Community. It would seem that, as with the constitutional situation vis a vis the United Kingdom, the law and the practice diverge and the Islands exercise greater autonomy than the legal texts allow them in principle. In this sense, the law may be seen to be restricted to a 'back-up facility', should the insular authorities overstep the discretionary capacity which they presently exercise with the implicit approbation of the other interested parties.

Finally, in connection with the European Communities, there emerges from the previous discussion, one point which was not raised by the Islands in their campaign to obtain a special relationship.

Even within the limited arrangement finally reached, it has become clear that the Islands are not able to implement all those rules which are applicable in theory. This has necessitated the adoption of a 'responsive' approach based on the perceived relevance of Community instruments.

Had the Islands been fully included, it would have been impossible for their Governments to cope with the flood of Community rules emanating from Brussels. It would also have been difficult to justify a selective 'responsive' approach when all instruments of a general nature applied to them.

The most likely outcome would have been a huge increase in 'interference' from London with the wide-scale extension of

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U.K. implementation measures to the Islands.

In the light of this and the foregoing discussion, it would appear that European unity, as it is presently evolving, and insular autonomy are mutually inconsistent concepts. Since the prosperity of many peripheral (and in particular insular) areas is often dependent upon local autonomy[66], one might postulate that the process of unification at the centre is likely to lead to 'disintegration' at the peripheries.

In this regard, the special relationship negotiated for the Channel Islands and the Isle of Man may turn out to be one of two things; either an aspect of the Islands' transition to independence or the foundation of a new European 'dependency' model which could serve as the basis for those entities which presently enjoy a special relationship with a European Member State. In order to examine these alternatives further, it is necessary to look at the approach adopted both with existing territories linked to the Communities through their metropolitan power and and with future 'special status' areas which are part of applicant states[67].

....

Chapter 4 - Footnotes

1. See 'Report on the Possible Effects on the Isle of Man of United Kingdom Entry into the Common Market' by Dr. Hugh Thurston, at page 8.
2. For more detailed studies of the expected effects of European Community Membership on Jersey and Guernsey, see - 'The Jersey Report' (Ch.2, footnote 21) pp.119-124 on direct taxation

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- Economic Survey of Jersey by G.C. Powell, p.256 et seq.
- States of Guernsey Report (Ch.3 footnote 32)

5. See the Thurston Report (Isle of Man) supra p.35-36
6. Until the establishment of a separate Manx Customs and Excise Department, this was a factor to be considered by by companies registered in the Isle of Man. The access to VAT records by U.K. Customs officers led to fears that the Inland Revenue could obtain information indirectly.
7. Powell supra p.256
8. For example, European Community rules on consolidation of accounts might require Member State 'parent' companies to disclose the financial position of their insular subsidiaries.
9. For a more detailed study see:
   - Thurston Report (Isle of Man) supra p.51-61
   - Jersey Report p.7-9, Appendix G (Agriculture) p.125-178, Appendix H (Trade and the Common External Tariff) P.179-188 (Prepared by Dr. Thurston)
   - Guernsey States Report supra, p.713 et seq.
10. Powell supra, p.121
11. For a more detailed study, see
   - Thurston Report (Isle of Man) supra p.40-50
   - Jersey Report p.6-7 (VAT), Appendix E (Economic Structure) Appendix F (Taxation) p.112-119 on VAT.
   - Powell supra p.81-83
12. In other words, a union which embraces not only customs duties but also excise duties and VAT rates.
13. Powell supra p.82, para.262
14. The corresponding articles of the ECSC Treaty and the Euratom Treaty are Articles 79(1) and 198 respectively

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15. Regulation (EEC) No. 706/73 of the Council of 12 March, 1973, L.68/73

16. See the preamble to Reg.706/73, at the sixth paragraph, which sets out the exclusion of the Islands from Community financing.

17. The difficulty, which became clear during interviews conducted in the Islands, was in quantifying the amount of aid provided in Community Countries.

18. See European Communities Commission, information sheet BN/2/1979 entitled 'Territories with Special Relationships with Britain and the European Community'. In this, it is stated that:

"...to ensure the maintenance of free trade, the European Commission, under Article 93 of the Rome Treaty, has power to vet local aid schemes to industry as with full members of the Community" (my underlining).

19. See Colin Powell, The Channel Islands and the Common Market, the Three Banks Review, No. 95, 1972, p.49 at p.59. Powell states:

"the Protocol to the Treaty of Accession...requires the Islands not to discriminate between nationals of the United Kingdom and those of other member countries of the EEC in the local job market" (my underlining)

20. See Edward Owen, The Battle for Special Terms - Jersey and the Common Market in 'The Islander', June 1980, p33, first paragraph of p.34

21. supra, footnote 18. The Commission document states:

"...although Treaty provisions relating to Free Movement of Workers and Freedom of Establishment do not apply to

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the islanders, nationals of all countries of the Community including the United Kingdom, must receive identical treatment within the territories..."

22. European Communities (Jersey) Law, 1973
European Communities (Bailiwick of Guernsey) Law, 1973.
European Communities (Isle of Man) Act, 1973.

23. The basic provision at Article 2 is:
"2(1) All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties as...in accordance with the Trea-ties are without further enactment to be given legal effect or used in (the Island) shall, in (the Island) be recognised and available in law, and be enforced, allowed and followed accordingly and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies"

24. Article 3(1) in both the insular laws and the U.K. Act.

25. Interim Report of the Tynwald Select Committee on the Common Market, para 5.4 pages 4,5.

26. ibid p.21, para.32 of the Advice tendered by MR. M.E. Bathurst, Constitutional Advisor to Tynwald.

27. ibid para.34

28. The criteria for the allocation of monies collected under the Common Purse were described in the Review of the Isle of Man - U.K. Common Purse Arrangement by P.A. Management Consultants Ltd at p.71 et seq. Briefly, the Manx share is calculated according to three factors (i) the actual

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duty paid in the Isle of Man (ii) The Manx resident population as a percentage of the total United Kingdom and Isle of Man population (iii) The Manx 'fiscal' population as a percentage of the total United Kingdom and Isle of Man population.This last criterion is 'in effect, the number of extra full time residents who would be required on the Island to provide the same amount of duty as that contributed by visitors'.

29. For example, the Islands' Milk Marketing Boards and the Isle of Man Fatstock Marketing Association.

30. For a Milk Marketing Board or similar organisation to be authorised, the basic requirements are:

(a) it is supported by at least 80% of the milk producers established in the area covered by the Board.

(b) These producers represent at least 50% of the milk production in that area.

(c) The percentage of milk used for direct human consumption must be at least 1½ times greater than the corresponding average for the Community as a whole.

31. See Second Interim Report of the Tynwald Select Committee on the Common Market - opinion by Mr. Bathurst annexed, at p.1 paras.3 & 4.

32. Official Journal L.171, 28th June 1978, containing Council Regulation (EEC) No.1421/78 of 20th June 1978 amending Regulation (EEC) No.804/68 on the Common Organisation of the Market in Milk and Milk Products.

33. See Billet d'Etat, Wednesday 30 July, 1980 p.511. States Committee for Horticulture 'Financial Support Contingency Scheme for the Horticultural Industry'.

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34. ibid p.519 Summary of Recommendations

35. ibid p.513 Support Measures - contingency plan.

36. European Parliament - written question 1250/80 by Mr. Welsh to the Commission on the proposed export subsidy for Guernsey tomatoes. 6 Oct. 1980 OJ C.335/14

37. The Order was made under the provisions of Section 25 of the Agricultural Marketing Act, 1934.

38. Michael John Ball, an officer of the Isle of Man Board of Agriculture and Fisheries and Nicholson (Isle of Man) Ltd, at the Petty Sessions, District of Douglas, Isle of Man, 9th July 1980.

39. The Deputy High Bailiff was the judge in the case.

40. ibid p.5 of judgement

41. ibid

42. Padfield v Minister of Agriculture, Fisheries and Food, (1968), 1 All E.R. p.694
Chertsey UDC v Mixnam's Properties Ltd, (1964) 2 All E.R. p.629

43. See footnote 37 supra

44. p.8 of judgement

45. p.9 of judgement

46. p.10 of judgement

47. p.12 of judgement

48. Made under the Import and Export (Control)(Jersey) Law, 1946. Recuiel des Lois, Tome VII p.338, Jersey States Greffe, 1982, 7074.

49. This justification was put forward during interviews in Jersey with States Officials, April, 1983.

50. Made under powers conferred by the Order in Council of 14 April 1884. Recuiel des Lois, Tomes IV-VI page 46, Jersey

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States Greffe, 1983, 7166

51. This Order is in French since this was the language of the enabling Order in Council

52. The possibility that this line of action would be adopted was suggested during interviews in Jersey with States' officials.

53. See P.A. Management Report on the Common Purse, supra.

54. ibid and footnote 28.

55. The right of the Isle of Man to abrogate from the agreement unilaterally has been recognised. See ibid, p.1 summary of findings, no.7.

56. See Report and Recommendations concerning Abrogation of the Common Purse Agreement, December 1982, by the Isle of Man Tourist Industry Liason Committee.

57. supra footnote 53.
Also Report of the Finance Board on Customs and the Common Purse Arrangement, Finance Department, October 1966 and various Reports of the Tynwald Select Committee on the Common Purse.

58. I am grateful to Mr. G. Sanders from the Isle of Man who pointed out to me the possible applications of Article 4 of Protocol 3.

59. One 'side-effect' of this parity is that the Isle of Man does not enjoy complete tax sovereignty or control over its own revenue. U.K. budgetary decisions on excise and VAT rates have a direct impact on the Island.

60. This was indicated during interviews in Guernsey and Jersey with officials, April 1983.

61. Council decision of 19 July, 1982 authorising the U.K. to

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permit the Isle of Man authorities to apply a system of special import licences to sheepmeat and beef and veal. 82/530/EEC, O.J. L.234/7, 9.8.82

62. See Edward Owen supra, footnote 20.
63. On the face of it, this is possible under Article 2(1) of the European Communities (Isle of Man) Act, 1973.
64. page 13 of judgement.
65. See footnote 60.
66. This thesis is advanced by Kermode in Devolution at Work a Case Study of the Isle of Man, in which the development of the Isle of Man is contrasted with the decline of the Scottish islands.
67. This is a subject for wider study. In this connection, however, it is noteworthy that the Faroe Islands chose to remain outside the European Communities and Greenland is soon to leave. To date, very little is known about the arrangements which will be made for the Azores, Madeira and the Canary Islands, on the admission of Portugal and Spain but the indications are that a special arrangement will be negotiated for them.

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Appendix I

The Isle of Man and the Channel Islands - Basic Facts

	I.of Man	Jersey	Guernsey
Population[1]	64,679	77,000	56,000
Area	572 km^2	116 km^2	78 km^2
Government[2] Revenue	£97.2m	£118.5m	£61.4m
Government[2] Expenditure	£97.2m	£94.3m	£70.1m
Imports[3]	not available	£230.9m	not available
Exports[3]	not available	£89.9m	not avaiable
Principal Economic Activities[4]	Finance, Manufacturing Industry, Tourism, Agriculture	Finance, Tourism, Agriculture, Lt. industry	Finance, Tourism, Horticulture, Lt. industry.
Companies Registered[5]	not available	16643	7295
Bank[6] Deposits	£1,200m	£13,000m	£3,000m
Standard Rate of Income Tax	20%	20%	20%
Value Added Tax	15%	no VAT	no VAT.

1. Isle of Man, 1981 Census; Channel Islands, 1981 estimate.
2. Isle of Man, 1983-4 projection; Jersey, 1981 figure, Guernsey, 1983 projection including expenditure on the capital account. Guernsey is drawing on its accumulated reserves for capital projects in 1983. In previous years there has been a surplus of revenue over expenditure.
3. No separate figures are available for the Isle of Man because of the Customs Union with the U.K. which allows completely unrestricted movement of goods, without Customs procedures; Jersey, 1980 figures
4. Isle of Man - In 1979/80 income generated in basic sectors of the Manx economy was as follows: Finance 22%, Manufacturing industry 14%, Tourism 12%, Agriculture 2½%. Public administration and other services accounted for 39½%

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The three principal manufacturing sectors are (i) Engineering, (ii) Textiles, Clothing and Footwear and (iii) Food and Drink. Exports are generally directed through the United Kingdom.
Tourist arrivals from May 1st to September 31st fluctuate between 450,000 and 650,000.
The agriculture industry caters mainly for home consumption although sheep carcases are exported in some quantity. (13,700 in 1978) There is also a sizeable export market for herring and other fish products (8,700 tonnes in 1976)
Jersey - The finance and banking centres account for approximately ¼ of the national income while wealthy immigrants contribute a further 23 - 24%.
Tourism remains a vital contributor to Jersey's wealth and, in 1980, passenger arrivals by sea and air amounted to 1,340,000.
The main agricultural/horticultural products are potatoes, tomatoes and livestock, the first two being exported in large quantities. Some 40,000 tonnes of potatoes are -exported to the U.K., mainly during the early season before local new potatoes become available.
There is a policy to attract more light industry to the island as a means of further diversifying the economy. Present industrial activity includes electronics and the manufacture of traditional knitwear.
Guernsey - Although lagging behind Jersey in terms of overall financial activity, Guernsey's finance 'industry' contributes a proportionately larger amount to national income (approximately 40%). Guernsey also differs from Jersey in being the major offshore centre for Captive Insurance Companies, outside Bermuda. There are now some 120 captives established in Guernsey.
The importance of the tourist industry is reflected in the passenger arrival figures for Guernsey (357,000 in 1980)
The main horticultural activity continues to be tomatoes although this has been in decline for the last ten years. Tomatoes to the value of £22.8m were exported in 1980.

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Cut flowers and plants have been expanded to take up some of the spare growing capacity and exports in this field were worth £12.3m in 1980.

In light industry, the biggest sector is electronics. Other manufacturing activities include packaging, knitwear, pharmaceuticals, boat building and food processing.

5. Channel Islands, 1982 figures.
6. Most recent estimates.

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Appendix II

The Report of the Joint Working Party on the Constitutional Relationship between the Isle of Man and the United Kingdom, (HMSO 1969).

The main principles of the constitutional relationship, set out on page 3, are as follows:

"(i) Parliament at Westminster has ultimate legislative supremacy, not only in respect of the United Kingdom, but also in respect of a number of territories including the Isle of Man as a dependency of the Crown.

(ii) The Crown has ultimate responsibility for the good government of the Isle of Man.

(iii) The Crown, in its widest sense, acting through the United Kingdom Government, is responsible for (a) the defence and (b) the international relations of the Isle of Man.

(iv) The government and legislature of the Isle of Man are autonomous in respect of matters which do not transcend the frontiers of the Isle of Man (which include the land mass, territorial waters, ground beneath territorial waters and air space above the land mass and territorial waters); including (but not limited to) the levying, the collection and the control of insular revenues; finance; agriculture and fisheries; criminal law; harbours; mineral rights; police; social services, trade and professions.

(v) Legislation passed by the legislature of the Isle of Man, after being signed by the Lieutenant-Governor and members of the legislature, requires the Royal Assent in order to complete its enactment.

(vi) When insular legislation is submitted to Her Majesty for Assent, advice is tendered by the Privy Council. At present, under the general Order made at the beginning of the reign, legislation stands referred to the Committee of the Privy Council charged with Manx affairs."

These principles are also applicable to the relationship between the United Kingdom and the Channel Islands. See the Report of the Royal Commission on the Constitution, Chapter 31, paragraphs 1348 and 1360-1363 (pp.408-411). Also, Minutes of Evidence, Volume 6, the Memorandum of the States of Jersey at pages 103-104 and the Memorandum of the States of Guernsey at pages 228-230. A separate Committee of the Privy Council deals with the Channel Islands.

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Appendix III

(1) Foreign Office Circular No.0118 (TF. 11/5) - October 16, 1950

Position of the Channel Islands and the Isle of Man in Relation to Treaties and International Agreements.

I have to inform you that His Majesty's Government in the United Kingdom of Great Britain and Northern Ireland have recently had under consideration the position of the Channel Islands and the Isle of Man in relation to treaties and international agreements applicable to the United Kingdom.

2. Although in municipal law, the Channel Islands and the Isle of Man do not form part of the United Kingdom, His Majesty's Government have hotherto regarded such treaties and international agreements as applying to those Islands unless, in the case of any particular treaty or agreement, the contrary has been expressly stated in the instrument itself.

3. His Majesty's Government have come to the conclusion that it would be more consistent with the constitutional position of these Islands to regard them for international purposes as not forming part of the United Kingdom of Great Britain and Northern Ireland.

4. Accordingly, any treaty or international agreement to which His Majesty's Government in the United Kingdom may become a party after the date of the present dispatch will not be considered as applying to the Channel Islands or the Isle of Man by reason only of the fact that it applies to the United Kingdom of Great Britain and Northern Ireland, and any signature, ratification, acceptance or accession on behalf of the United Kingdom will not extend to the Islands unless they are expressly included. For the purpose of any treaty or international agreement to which his Majesty's Government may become a party hereafter, the Channel Islands and the Isle of Man will, unless the contrary is expressly stated, in each case be included among the territories for whose international relations His Majesty's Government are responsible.

5. I have to request that you will notify the Government of the country in which you reside of this decision, conveying to them the information contained in the preceding paragraphs of this dispatch. You should also inform them that a note in

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similar terms, bearing this day's date has been addressed to their diplomatic representative in London and that all foreign Governments with whom His Majesty's Government are in diplomatic relationship, the United Nations, the International Labour Office and other international organisations concerned have been similarly informed.

6. I have to add that you should explain, if the question is asked as to the position of the Channel Islands and the Isle of Man under existing treaties, that the step now being taken does not affect the application of existing treaties to those Islands.

Ernest Bevin.

The principles of this declaration were set out in a letter to the insular authorities dated March 8, 1951 which is not reproduced here.

(2) The Position of the Channel Islands in Relation to International Agreements

Home Office,
Whitehall, London SW1
December 30, 1966

Sir,

I am directed by the Secretary of State to refer to the Home Office letter of March 8, 1951, conveying the decision, which had been communicated in a declaration to foreign governments and international organisations, that the Channel Islands and the Isle of Man should no longer be regarded for international purposes as forming part of the United Kingdom of Great Britain and Northern Ireland. The letter further pointed out that, following the declaration, the Channel Islands and the Isle of Man would normally be included, for treaty purposes, among the (non-metropolitan) 'territories for whose international relations Her Majesty's Government in the United Kingdom are responsible". Many international agreements contain an article enabling States which become parties to the agreement to extend its application to dependent territories 'for whose international relations' the States 'are responsible'. The effect of the

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decision conveyed in the letter of March 8, 1951, was, therefore (a) to ensure that the Islands would be regarded for treaty purposes not as part of the metropolitan territory of the United Kingdom but as 'countries for whose international relations Her Majesty's Government are responsible'; and (b) to make it possible for the United Kingdom to extend agreements containing such an article to the Channel Islands, and the Isle of Man, at a convenient time, after the United Kingdom had become a party. The Secretary of State understands, however, that some difficulty had arisen over the application of certain types of international agreement, and he thinks that the following statement amplifying the letter of March 8, 1951, would be useful.

The extent of territorial application of an international agreement is a matter to be determined by the agreement itself in accordance with the decisions at the negotiations; it may be shown expressly or by specifying the territories in relation to which a contracting party is to be bound, or by implication. The decision conveyed in the letter of March 8. 1951 did not change and could not have changed the rule of international law, under which the signature, ratification or accession of any State to an international agreement is presumed to be in respect not only of the State itself but of all the territories for whose international relations it is responsible, unless this presumption is displaced by the wording of the agreement itself or by necessary implication. Such a presumption would be displaced, for example, by the inclusion of an article enabling contracting parties to apply the agreement to dependent territories, which would show that, in the absence of such application, the initial acceptance was confined to the metropolitan territory of contracting parties. In the absence of any express or implied limitation of territorial extent, however, a States's acceptance of obligations in an agreement would be held to include acceptance on behalf of all its dependent territories. The position then is that the United Kingdom's acceptance of agreements containing no indication of limited territorial application binds all the United Kingdom's

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dependent territories including the Channel Islands and the Isle of Man. Before concluding such agreements, however, Her Majesty's Government will always endeavour to discuss the implications as fully as possible with the Insular Authorities.

I am Sir,

Your Obedient Servant

The Lieutenant-Governor R.M. North

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Appendix IV

Act of Accession : Protocol No. 3 on the Channel Islands and the Isle of Man

Article 1

1. The Community rules on customs matters and quantitative restrictions, in particular, those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom. In particular, customs duties and charges having equivalent effect between those territories and the Community as originally constituted and between those territories and the new Member States shall be progressively reduced in accordance with the timetable laid down in Articles 32 and 36 of the Act of Accession. The Common Customs Tariff and the ECSC unified tariff shall be progressively applied in accordance with the timetable laid down in Articles 39 and 59 of the Act of Accession, and account being taken of Articles 109,110 and 119 of the Act.
2. In respect of agricultural products, and products processed therefrom which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom, shall be applicable to third countries.

Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable.

The Council, acting by a qualified majority on a proposal from the Commission shall determine the conditions under which the provisions referred to in the preceding paragraphs shall be applicable to these territories.

Article 2

The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from Community provisions relating to the free movement of persons and services

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Article 3

The provisions of the Euratom Treaty applicable to persons or undertakings within the meaning of Article 196 of that Treaty shall apply to those persons or undertakings when they are established in the aforementioned territories.

Article 4

The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community.

Article 5

If, during the application of the arrangments defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall, without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application.

The Council shall act by a qualified majority within one month.

Article 6

In this Protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or a grandparent was born, adopted naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.

The administrative arrangements necessary to identify these persons will be notified to the Commission.

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Appendix V

Regulation (EEC) No. 706/73 of the Council of 12 March, 1973 concerning the Community arrangements applicable to the Channel Islands and the Isle of Man for trade in agricultural products. (operative provisions only)

Article 1

1. Community rules applicable to the United Kingdom for trade in agricultural products covered by Annex II to the Treaty establishing the European Economic Community and in goods covered by Regulation No. 170/67/EEC and Regulation (EEC) No. 1059/69, shall apply to the Island with the exception of rules on refunds and on compensatory amounts granted on exports by the United Kingdom.

2. For the purpose of applying the rules referred to in paragraph 1, the United Kingdom and the Islands shall be treated as a single Member State.

3. No refund or compensatory amount shall be granted in respect of the products referred to in paragraph 1, originating in or coming from these islands, in respect of which customs formalities are completed in a Member State.

4. Where the products referred to in paragraph 1 are exported to third countries, the Islands may not grant aid in excess of the refunds or compensatory amounts which may be granted by the United Kingdom, in accordance with Community rules, on exports to third countries.

5. Where the products referred to in Paragraph 1 are exported to Member States, the Islands may not grant aid in excess of any amounts which may be granted by the United Kingdom, in accordance with Community rules, on exports to other Member States.

Article 2

As far as aids other than those referred to in Article 1 are

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concerned, the provisions of Article 93(1) and the first sentence of Article 93(3) of the treaty establishing the European Economic Community shall apply.
The Council acting by a qualified majority on a proposal from the Commission shall make the other provisions of Articles 92,93 and 94 of the Treaty applicable insofar as this proves necessary.

Article 3

As from 1 September 1973, the Community rules applicable in the matter of:
- veterinary legislation
- animal health legislation
- plant health legislation
- marketing of seeds and seedlings
- food legislation
- feeding stuffs legislation
- quality and marketing standards

shall apply under the same conditions as in the United Kingdom to the products referred to in Article 1 imported into the islands or exported from the Islands to the Community, the veterinary legislation being applicable under the same conditions as in the United Kingdom in respect of Northern Ireland.

Article 4

Detailed rules for the application of Article 1, in particular rules to prevent def—lections of trade shall be adopted in accordance with the procedure laid down in Article 26 of Council Regulation No. 120/67/EEC of 13 June 1967 on the common organisation of the market in cereals as law amended by the Act of Accession or in the corresponding Article of other Regulations on the common organisation of the markets as the case may be.

Article 5

This Regulation shall enter into force on the day of its publication in the Official Journal.....

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Appendix VI - The Internal Constitutional Structures of the Islands

Taken from the Europa Yearbook, 1982

The Isle of Man (Europa Yearbook p.1400)

"The Constitution

The Isle of Man is governed by its own laws. Tynwald is the legislative body, and consists of both branches of the legislature, that is, the Legislative Council and the House of Keys, sitting together as one body, but voting separately on all questions except, in certain eventualities, the appointment of Boards of Tynwald. The House of Keys has 24 members chosen by adult suffrage for five years. The Legislative Council is composed of a President, the Lieutenant-Governor, the Lord Bishop of Sodor and Man and eight members elected by the House of Keys. Customs duties, some indirect taxation and income-tax come within the province of Tynwald. The Isle of Man Act, 1958, gave the Tynwald greater control of fiscal matters. An Executive Council of five members of the House of Keys and two of the Legislative Council was set up in 1961, to act with the Governor.

Judicial System

The Isle of Man is, for legal purposes, an independent sovereign country under the British Crown with its own Legislature and its own Judiciary administering its own common or customary and statute law. The law of the Isle of Man is, in most essential matters, the same as the law of England and general principles of equity, administered by the English Courts are followed by the Courts of

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the Isle of Man unless they conflict with established local precedents. Her Majesty's High Court of Justice of the Isle of Man is based upon the English system but modified and simplified to meet local conditions. Justices of the Peace are appointed by the Lord Chancellor of England usually on the nomination of the Lieutenant-Governor. Members of the Legislative Council, the High Bailiff, Deputy High Bailiff and the Mayor of Douglas and the Chairman of Town and Village Commissioners are ex officio J.P.s"

For a fuller account of the internal constitution of the Isle of Man see 'Report of the Commission on the Isle of Man Constitution' (The MacDermott Report), 14th March, 1959. Norris Modern Press Ltd., Douglas.

Jersey (Europa Yearbook p.1404)

"The Constitution

The Lieutenant-Governor and the Commander in Chief of Jersey is the personal representative of the Sovereign, the Commander of the Armed forces of the Crown and the channel of communication between Her Majesty's Government in the United Kingdom and the Insular Government. He is appointed by the Crown and is entitled to sit and speak in the Assembly of the States, but not to vote. He has a veto on certain forms of legislation.

The Bailiff is appointed by the Crown, and is President both of the Assembly of the States (the Insular Legislature) and the Royal Court of Jersey. He has, in the States, a right of dissent and a casting vote.

The Deputy Bailiff is appointed by the Crown and, when

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authorised by the Bailiff to do so, may discharge any function appertaining to the office of Bailiff.

The Government of the Island is conducted by Committees appointed by the States. The States consist of 12 Senators (elected for six years, six retiring every third year), 12 Constables (Triennial), and 28 Deputies (Triennial), all elected under universal suffrage, by the people. The Dean of Jersey, the Attorney-General and the Solicitor-General are appointed by the Crown and are entitled to sit and speak in the States, bot not to vote. Permanent laws passed by the States require the sanction of Her Majesty in Council but Triennial Regulations do not.

The official language is French but English is the language in daily use.

Judicial System

Justice is administered in Jersey by the Royal Court, which consists of the Bailiff or Deputy Bailiff and twelve Jurats elected by an Electoral College. There is a Court of Appeal which consists of the Bailiff (or Deputy Bailiff) and two Judges, selected from a panel appointed by the Crown. A final appeal lies to the Privy Council in certain cases.

A Stipendiary Magistrate deals with minor civil and criminal cases. He also acts as Examining Magistrate in criminal matters".

For a fuller account of the internal constitution of Jersey, see 'The Law of the Channel Islands, II. The Constitution of the Bailiwick of Jersey' by Raoul Lempriere in The Solicitor Quarterly, 1962 (1) 289.

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Guernsey (Europa Yearbook p.1407)

"The Constitution

The Lieutenant-Governor and Commander in Chief of Guernsey is the Personal Representative of the Sovereign and the channel of communication between Her Majesty's Government in the United Kingdom and the Insular Government. He is appointed by the Crown. He is entitled to sit and speak in the Assembly of the States, bit not to vote.

The Bailiff is appointed by the Crown and is President, both of the Assembly of the States (the insular legislature) and of the Royal Court of Guernsey and has a casting vote.

The Government of the island is conducted by committees appointed by the States.

The States of Deliberation is composed of the following members:

(a) The Bailiff, who is President ex-officio

(b) Twelve Conseillers elected by the States of Election (elected for six years, six retiring every three years)

(c) H.M. Attorney-General and H.M. Solicitor-General (Law Officers of the Crown), who have a voice but not a vote.

(d) Thirty-three People's Deputies elected by popular franchise

(e) Ten Douzaine Representatives elected by their respective Parochial Douzaines

(f) Two Alderney Representatives elected by the States of Alderney

The Attorney-General and the Solicitor-General are appointed by the Crown, and are entitled to sit and speak in the States, but not to vote.

Projets de Loi (Permanent Laws) require the sanction of Her Majesty in Council.

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The functions of the States of Election is to elect persons to the offices of Jurat and Conseiller. It is composed of the following members:

(a) The Bailiff (President ex-officio)

(b) The 12 Jurats or "Jures-Justiciers"

(c) The 12 Conseillers

(d) H.M. Attorney-General and H.M. Solicitor-General

(e) The 33 People's Deputies

(f) Thirty-four Douzaine Representatives

(g) Four Alderney representatives for the election of Conseillers only.

Meetings of the States and of the Royal Court formerly conducted in French, are now conducted in English but the proceedings in both are begun and ended in French. English is the language in common use but the Norman patois is often heard in the country parishes.

Judicial System

Justice is administered in Guernsey by the Royal Court which consists of the Bailiff and the twelve Jurats. The Royal Court also deals with a wide variety of non-contentious matters.

An acting Magistrate deals with minor civil and criminal cases.

The Guernsey Court of Appeal deals with Appeals from the Royal Court".

For a fuller account of the internal constitution of Guernsey, see 'The Constitution of Guernsey', D. Ehmann and M. Marshall, Toucan Press, St. Peter Port, 1976

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