

GUERNSEY BAR EXAMINATION

9.30AM, 25 APRIL 2016

COMPULSORY PAPER ONE

BAILIWICK LAWS, CONSTITUTION AND ADMINISTRATION

THREE HOURS

CANDIDATES ARE REQUIRED TO ANSWER ALL QUESTIONS

THE MARKS AVAILABLE FOR EACH QUESTION ARE SHOWN BELOW. NOT ALL QUESTIONS CARRY EQUAL MARKS.

- Question 1 – 25 MARKS
- Question 2 – 25 MARKS
- Question 3 – 20 MARKS
- Question 4 – 20 MARKS
- Question 5 – 10 MARKS

PLEASE WRITE LEGIBLY AND ENSURE THAT YOU ANSWER EACH QUESTION ON A SEPARATE SHEET OF PAPER. PLEASE WRITE ON ONE SIDE OF THE PAPER ONLY AND LABEL EACH SHEET CLEARLY WITH:

- NAME OF PAPER
- CANDIDATE LETTER
- QUESTION NUMBER
- PART NUMBER OF QUESTIONS (if applicable)

MATERIAL PROVIDED:

1. The Reform (Guernsey) Law, 1948, consolidated text
2. Rules of Procedure of the States of Deliberation, consolidated text
3. Human Rights (Bailiwick of Guernsey) Law, 2000, Order in Council and consolidated text
4. Succession to the Crown (Bailiwick of Guernsey) Law, 2016
5. Protocol No. 3 to the UK Treaty of Accession to the EEC

QUESTION 1

(25 marks)

It is 2017 and your client Mr Johnson approaches you with a problem concerning his butler's residential status in Guernsey. His (full time) butler has been resident for 5 years with Mr Johnson and lives in Mr Johnson's open market property. The butler wishes to undertake a course of independent study, which Mr Johnson supports, but which will mean he only works part-time for Mr Johnson. The Administrator for Population Management, who is responsible for administering Guernsey's new population/housing control regime, has decided that if Mr Johnson's butler works part-time he will no longer be entitled to live in Mr Johnsons' open market property in accordance with the relevant population management legislation and has written to him accordingly.

Mr Johnson wishes to challenge the decision of the Administrator.

- A. Advise Mr Johnson, in brief, how he might challenge the decision in Guernsey and explain what would be the proper forum for the dispute; and settle an appropriate Cause.

2 years pass. Mr Johnson has taken his case to the Guernsey Court of Appeal and lost. He is very angry and wishes you to take his case further. He says his butler has become an irreplaceable part of his family and indeed, is more akin to a brother to him than a butler. He feels his butler should be considered a part of his family and asks you if you could construct an argument based on human rights issues. In particular, he asks you whether he could appeal the decision of the Guernsey Court of Appeal and whether he might take his case to Strasbourg in order to challenge the compatibility of the Island population management legislation with the ECHR.

In answering this question, you should be aware that the UK government has now enacted the British Bill of Rights Act 2019. That Act has repealed the Human Rights Act 1998 in its entirety and made a number of important constitutional changes including the establishment of the Supreme Court as the Supreme Constitutional Court of the UK (including for the purposes of deciding Bill of Rights cases). There has been much criticism in the UK that the new Bill of Rights does not implement the ECHR as fully as the Human Rights Act 1998 did, but the UK has not withdrawn from the ECHR.

You should also note that the Human Rights (Bailiwick of Guernsey) Law 2000 still applies in Guernsey but was further amended in 2019. In particular, section 4 which relates to Declaration of Incompatibility was amended so that instead of the words –

- (5) In this section, "court" means –
- (a) The Judicial Committee of the Privy Council,

the relevant subsection now reads –

- (5) In this section, "court" means –
- (a) The Supreme Constitutional Court of the UK.

B. Advise Mr Johnson -

- (a) Whether there is any scope for further appeal;
- (b) Assuming an appeal can be pursued, what is the most appropriate law and forum for the dispute? (including in particular whether Mr Johnson might be able to take his case before the Court of Human Rights in Strasbourg); and
- (c) Generally; and, based on that advice
- (d) Settle any appropriate grounds of appeal.

QUESTION 2

(25 marks)

The Constitutional Investigation Committee reported to the States of Deliberation in January 2016 with proposals for changes in what the Policy Letter described as the making of Orders in Council, treaties, conventions and agreements in respect of Guernsey. The proposals, which are to form the basis of discussion with the United Kingdom Government, are set out in Annex 1, (attached).

- A. How do the proposals concerning primary legislation differ from the present arrangements; and what sort of issues do you think the UK Government will wish to explore in discussions about them?
- B. How do the proposals concerning international relations differ from the present arrangements; and what sort of issues do you think the UK Government will wish to explore in discussions about those?
- C. The Policy Letter concentrates on Guernsey, but what are the implications of both sets of proposals for Alderney and Sark?

QUESTION 3**(20 marks)**

The Conservative government is holding a referendum in June 2016 on the UK's continuing membership of the European Union. If the result of the referendum is in favour of the UK withdrawing from membership, it seems likely that the Conservative government would notify the EU authorities of the UK's intention to withdraw from the Union. In those circumstances, under Article 50 of the Treaty on European Union, the Union would be obliged to negotiate and conclude an agreement with the UK, setting out the arrangements for the withdrawal of the UK, taking account of the framework for its future relationship with the Union.

A. In the event of a UK withdrawal, in what way do you think that would change Guernsey's legal and constitutional relationships with the following –

- (a) the European Union,
- (b) the United Kingdom,
- (c) Alderney and Sark,
- (d) Jersey and the Isle of Man?

B. In the event of a UK withdrawal, what, based on the provisions of Protocol 3, would be the legal consequences for the Bailiwick?

QUESTION 4

(20 Marks)

The recitals to the Succession to the Crown (Bailiwick of Guernsey) Law, 2016 state as follows-

"WHEREAS representatives of the Commonwealth Realms of which Her Majesty is Sovereign agreed on the 28th October, 2011 to change the rules on succession to the throne and possession of it so as to make succession not depend on gender and to end the disqualification arising from marrying a Roman Catholic;

AND WHEREAS on the 25th April, 2013 Her Majesty assented to an Act of Parliament entitled the Succession to the Crown Act 2013 which amongst other things changes the rules on succession to the throne and possession of it so as to make succession not depend on gender and ends the disqualification arising from marrying a Roman Catholic;"

Explain -

- (a) Guernsey's constitutional position as a Crown Dependency, and
- (b) what effect the enactment of the Projet has in the Bailiwick as a matter of law.

QUESTION 5**(10 marks)**

Name six commentators on customary law whose works are relevant to practitioners of Bailiwick law.

In each case, name their principal works and explain the legal relevance of those works today. Only include works published in or before the 19th century.

ANNEX 1
CONSTITUTIONAL INVESTIGATION COMMITTEE
PROPOSAL TO ACHIEVE GREATER AUTONOMY IN THE LEGISLATIVE
PROCESS AND INTERNATIONAL AFFAIRS FOR GUERNSEY

1. Executive Summary

1.1. This Policy Letter sets out the background of the formation of the Constitutional Investigation Committee (CIC), summarises the results of the deliberations of the Committee, and sets out proposals for change which the States of Deliberation are asked to endorse in order to discuss with and propose to the UK Government.

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6. Proposal for change in the making of Orders in Council

6.1 A draft Projet should bear the certificate of one of the Law Officers, as is the practice now, to the effect that the Projet, if enacted into law, would not in that Law Officer's opinion conflict with any of Guernsey's treaty obligations or with any requirement of good government.

6.2 That certificate would be included in an Explanatory Memorandum sent to the MoJ with the Projet shortly after its approval by the States of Deliberation, as at present. If within a period of six weeks of the date of the Explanatory Memorandum the MoJ responded, demurring at the automatic passage of the Projet into law on the grounds ("the Projet Demurral Grounds") that it:

- i. conflicted with Guernsey's international treaty obligations, notwithstanding the certificate of the Law Officer;
- ii. placed the UK in conflict with one of its international treaty obligations;
- iii. could not be the subject of a recommendation to Her Majesty by the MoJ by reason of a potential breach of the Crown's responsibility for good government; or
- iv. was the subject of a petition to Her Majesty received within the 28 days prescribed by the Order in Council of 13th July 2011,

then and in any such case such Projet would be the subject of debate until either agreement were reached or the Projet were withdrawn. If no such demurrals were received, or if agreement were reached, the Projet could then be ratified on behalf of Her Majesty by the Lieutenant Governor of Guernsey and registered in the Royal Court of Guernsey.

7. Proposals for change in the making of treaties, conventions and agreements in respect of Guernsey

- 7.1 The UK is responsible for the international representation of the British CDs and OTs since they are not fully independent sovereign states, and as such lack full international legal personality, and therefore have no capacity to enter into international agreements of their own volition. The long-standing practice of the UK when it ratifies, accedes to, or accepts a treaty, convention or agreement is to do so on behalf of the United Kingdom of Great Britain and Northern Ireland and any of the CDs or OTs which wish the treaty to apply to them. In relation to Guernsey, distinction should be made between (a) the extension of treaties and (b) entrustment.

Extension of treaties ratified by the UK

- 7.2 The extension of treaties ratified by the UK does not engage the international legal capacity of Guernsey directly since it is the sovereign State, the UK, which undertakes the act of ratification, accession or acceptance of a treaty. Extension is a sovereign expression of will relating to Guernsey, however it is effectively a decision for the Crown, exercised by the UK Government, with the acquiescence of the Guernsey authorities. In other words, through the act of extension, Guernsey submits to and accepts the expression of the sovereign will of the UK.
- 7.3 For the future, it is proposed that as with draft Projets, notification of the desire to have a treaty extended would be given to the MoJ through official channels. A Law Officer would provide a certificate to the effect that in the opinion of that Law Officer the insular authorities complied with the treaty obligations through the relevant legislation, administrative procedures and policies and, further, that in extending such treaty to Guernsey the latter would not be in breach of any existing other treaty to which it is subject. As at present, a compliance matrix would be sent with the

certificate to demonstrate compliance unless it is agreed by the MoJ and Law Officers that such is not necessary.

7.4 If, within a period of six weeks of the date of the notification, the MoJ responded demurring at the support for extension of the international instrument on the grounds (“the Treaty Extension Demurral Grounds”) that:

- i. Guernsey does not meet the treaty’s obligations, notwithstanding the certificate of the Law Officer and compliance matrix;
- ii. Guernsey’s legislation, administrative procedures and/or policies conflict with how the UK meets the treaty’s obligations;
- iii. The notification contains a request for reservations or declarations that it would be necessary to agree with the UK and the relevant treaty body;
- iv. Extension would involve a potential breach of the Crown’s responsibility for good government;

then and in any such case extension of the treaty would be the subject of debate until either agreement were reached or the notification were withdrawn.

7.5 If extension is granted without demurral or with agreement, the Crown would agree to make a declaration to the relevant body that the treaty extends to Guernsey and would provide a copy of the exchange of notes containing this declaration through official channels for registration in the Royal Court of Guernsey.

Agreements entered under entrustment

7.6 Whilst Guernsey does not have full international legal personality as an independent State, over the past decades it has nevertheless developed some international identity as recognised by the MoJ and the Justice Select Committee. Guernsey has been entrusted to conclude its own international agreements such as bilateral treaties relating to taxation and asset sharing, and discussions have been held on entrustments relating to other agreements such as bilateral investment treaties and social security agreements. It is therefore now accepted as a matter of practice by both the States of Guernsey and the UK Government that Guernsey may be authorised to conclude its own international agreements.

7.7 Further, the MoJ has stated that it supports the use of entrustments as a way to enable the CDs to represent their own interests on the international stage. With a view to the widening of the scope of entrustment, it is suggested that a general entrustment should be given which states that entrustment is valid, save where the agreements concluded under it:

- i. affect defence and security matters;
- ii. restrict Human Rights;
- iii. also apply to the UK;
- iv. require the participant to be a sovereign state;
- v. are to be negotiated within an international organisation of which the UK is a member.

7.8 In addition the general entrustment could also describe other principles to be followed when using entrustment to enter into agreements with the support of the UK. The general entrustment would not preclude entrustment being granted by the UK in respect of the reserved list outlined in paragraph 7.7.

7.9 Similar demurred grounds to those set out in sub-paragraphs (i) to (iii) of paragraph 6.2 and the six week time scale would be embodied in the agreement (suitably adjusted in respect of the matters described in sub-paragraphs (i) to (v) of paragraph 7.7).

7.10 Upon granting of any entrustment, a signed copy would be sent through official channels to the insular authorities.