

To: Policy Development Team, Sark Chief Pleas

From: Dr Caroline Morris, Queen Mary, University of London

Date: 11 December 2018

Re: Constitutional Status of Sark

Introduction and background

1. I have been asked by the appointed Policy Development Team of the Chief Pleas of Sark for a legal opinion on the constitutional status of the island of Sark, on whose behalf the BSI, as National Standards Body, has made an application for a Country Code allocation from the ISO 3166 Maintenance Agency.
2. By way of background, I am a legal academic at Queen Mary University of London. My specialist field is constitutional law and history, in which I have researched and written for nearly twenty years. More recently, I have developed an interest in small states and jurisdictions.
3. I obtained my doctorate from King's College London, where I retain a position as Honorary Senior Research Fellow at the Centre for Constitutional and Political Studies. I have acted as the Academic Member of the Constitutional Law Reference Group of the Law Society of England and Wales and served on the Expert Advisory Group on Electoral Law Reform for the Law Commission of England and Wales.
4. I am the Founder and Director of the Centre for Small States at Queen Mary University of London. The Centre's aim is to provide a platform for inquiry and the dissemination of ideas addressing the particular challenges and opportunities faced by small states and jurisdictions from a legal perspective. I am a General Editor of the *World of Small States* book series, published by Springer.

5. I have advised various bodies on constitutional and/or small jurisdiction matters, including the Office of Tourism in European Islands, the Overseas Development Institute, the UK Electoral Commission, the UK Cabinet Office, the Commonwealth Secretariat, the Centre for Justice in Bermuda, the Seychelles Court of Appeal, the States (Legislature) of Alderney, the Delegation of the Catalonian Government to the UK, and the New Zealand House of Representatives.

6. I am a qualified Barrister and Solicitor (Attorney/Advocate equivalent) of the High Court of New Zealand.

Executive summary

7. With the caveat that the historical information presented below is a necessary simplification for the purposes of this opinion, my conclusions are as follows:

8. Since the earliest periods of organised settlement, the island of Sark has had its own individual link to the British Crown. In this respect, it is on a par with the other Channel Islands and the Isle of Man. Its rights and obligations in respect of the British Crown and the British government are no more and no less than the other Channel Islands and the Isle of Man. Size of jurisdiction is not a determinant of status. It thus follows that Sark is a dependency of the British Crown in its own right.

9. Sark's position with the Bailiwick of Guernsey is an administrative mechanism rather than an indication of legal status. Sark is a Crown Dependency in its own right, not a part of or dependency of Guernsey.

10. Furthermore, at no point in its history has Sark been subject to the rule of Guernsey or supported financially by Guernsey. Sark does share in the resources of Guernsey to some extent. For example, appeals from Sark's Court are to the Guernsey Royal Court but this is clearly for capacity reasons, and not uncommon in small jurisdictions, as the Eastern Caribbean Supreme Court (serving six independent states and

three British Overseas Territories) or the locating and staffing of the Pitcairn Court of Appeals in New Zealand demonstrates.

11. Present day practice of the British Government acknowledges and continues this approach to Sark. For example, Sark has been consulted individually for its views on the joining and the exiting of the European Union both by the British executive and the British legislature. Sark's distinct laws have been recognised by the United Kingdom's highest court within the last 12 months.
12. At international law, Sark has been recognised as a self-governing entity responsible for its own governance and development.

Definitions

13. The island of Sark lies with the English Channel within the Bailiwick of Guernsey. The Bailiwicks of Guernsey (including the islands of Guernsey, Alderney and Sark) and Jersey (the island of Jersey) together comprise the Channel Islands.
14. The Channel Islands, together with the Isle of Man in the Irish Sea, occupy a singular place in British constitutional law and practice. This sui generis status has been the cause of much confusion. A key source of confusion are the terms 'Crown Dependency' and 'Bailiwick'.

Crown Dependency

15. The Crown Dependencies are constitutionally unique. They are neither part of the United Kingdom of Great Britain and Northern Ireland nor are they British Overseas Territories (ie colonies).
16. The Crown Dependencies are island territories within the British Isles (this designation includes the island of Ireland), with their own political systems, legislatures, courts and legal and fiscal systems. They are effectively autonomous and self-governing although they do not enjoy full statehood as a matter of international law.

17. As their name suggests, these territories pay direct allegiance to the Crown in the form of the British Monarch who is ultimately responsible for their good governance. The Monarch is represented in each Bailiwick by a Lieutenant-Governor. The British government retains responsibility for the Crown dependencies in matters of defence and international relations.
18. The Crown Dependencies have no representation in the national Parliament of the United Kingdom at Westminster, although it is acknowledged that this Parliament may legislate for the Crown Dependencies (by convention, with their consent). No financial support or aid is provided by the British Government to the Crown dependencies.
19. The Channel Islands became dependencies of the Crown in 1204. Originally part of the Duchy of Brittany, the islands were annexed by William Longsword in 933 for the Duchy of Normandy. When in 1066, the Norman William the Conqueror became King of England, the Duchy owed loyalty to the English Crown in his capacity as Duke of Normandy. King John of England surrendered continental Normandy to France in 1204, but retained the Channel Islands. This position was formalised in the Treaty of Paris concluded between England and France in 1259. Although France continued to make claims to the Channel Islands (most recently in 1953), in simple terms the Channel Islands have been dependencies of the British Crown for approximately 800 years.

Bailiwick

20. As noted, the Channel Islands are usually described as being constituted as two Bailiwicks. The term “bailiwick” has not been defined in legislation, and its meaning in political science terms is not entirely settled. It should therefore not be considered as having any determinative legal or political meaning. Rather, it is primarily an historical descriptor. Sometimes it is used to designate an administrative grouping.
21. The term “Bailiwick” is of mixed French and English etymology. “Bailie” in old French refers both to a territorial entity and the senior public official

responsible for that entity. In the Channel Islands, the Bailie (which became the Bailiff) was ultimately responsible to the English (and then British monarch) for the administration of justice in the islands. “Wick” comes from the Middle English “wich”, itself derived from the Latin “villa”, town. Thus, Bailiwick can be understood to mean the area for which the Bailiff was responsible.

22. The history of the Channel Islands reveals that various administrative systems were used to govern the islands. In the early era of Channel Islands administration following the loss of continental Normandy, the islands were governed by a resident Warden appointed as the King’s agent. The Warden exercised judicial, administrative, and revenue-gathering powers (Le Patourel: 1937, 38-44). He was also responsible for the defence of the islands (Le Patourel: 1937, 40-41). The Warden had a number of subordinates to assist in these functions, who went by various terms, including sub-warden, bailiff, custodes and sub-custodes (Le Patourel: 1937, 47).
23. The administrative arrangements in this period were somewhat fluid. At some point between 1195 and 1198, Prince John of England became the first Lord of the Islands, although it is not clear whether this included Sark (Le Patourel: 1937, 121), which at this point was held either by the de Vernon family or directly by John’s brother, King Richard I. At times, Wardens were appointed for several of the Islands at the same time, and at other times, for individual islands. The first Warden charged with distinct responsibility for Sark was Philip D’Aubigny, who served from 1214-1219.
24. By the 14th century, the term Bailiff was being used to describe the public official who presided over the King’s Courts in Jersey and Guernsey. It survives in those islands to the present day. The Bailiff of Jersey is the Presiding Officer and non-voting Speaker of the States (Legislature) and President of the Royal Court. The Bailiff of Guernsey occupies a similar position. The Bailiff of Guernsey has very limited involvement in Sark’s affairs save that he may sit on a case involving Sark in the Guernsey Royal Court. He has no political influence or executive power over Sark. Neither Sark nor Alderney used the term Bailiff in such a way, instead employing the term *prévôt* to designate the presiding officer of their courts. This may

have reflected a division in the status and jurisdiction of the respective courts. The chief judicial officer on Sark is now known as the Seneschal.

The Constitutional Status of Sark

25. To understand the current constitutional position of Sark, it is necessary to go back over the centuries. The historical record reveals that Sark's status has been largely settled for hundreds of years. In the early Middle Ages (5-10th centuries), Sark functioned as a sparsely populated monastic centre.

Medieval period

26. We begin in the high Middle Ages around 1042 when the Channel Islands were part of the Duchy of Normandy. By that date, it was recorded that Sark had been granted to the Abbey of Mont St Michel. In 1057 Sark was re-granted to the Bishop of Coutances of Normandy. It then reverted to William, Duke of Normandy in 1066. In 1100, William of Normandy, now also King of England, granted Sark to the de Vernon family, Lords of Nehou in Normandy, near Cherbourg. Richard de Vernon passed various charters relating to Sark in 1174 and 1196 and had installed a public official there. The de Vernon family also endowed a parish church and provided a priest. Sark was at that time within the ecclesiastical jurisdiction of Coutances. Revenue is recorded as being collected from Sark by the de Vernons independently of revenues from the other Channel Islands (de Gruchy: 1919, 19).

27. The historical record differs as to whether Sark was re-seized for the English Crown by Richard I around 1195-6 following the de Vernons' transfer of Sark to the King of France or was forfeited to King John in 1204 for similarly treasonous reasons. The population around this time numbered approximately 400 people who practised farming and fishing. By the 1300s, a King's court had been established on Sark, staffed by six jurats, eminent local men who interpreted and declared the customary law of the island (Le Patourel: 1937, 88-91). There was also a "bedel", whose responsibilities roughly corresponded to the management of the court.

28. The Hundred Years' War saw Sark occupied by the French in 1338. They were expelled in 1340 and Sark reverted to the English Crown. Repeated waves of the plague in the 14th century decimated the settler population. France again occupied Sark in 1549 but the occupation came

to an end in 1553 when they were expelled by an opportunistic Flemish privateer, hoping for a reward from Queen Mary I of England. With the French gone, the monastery in ruins and the native population laid waste by disease, Sark became a wasteland, albeit one still in the possession of the English Crown.

Tudor period

29. Sark's modern existence is usually traced to back to the Tudor period. By the early years of Elizabeth I's reign (1558–1603), Sark was effectively deserted, and vulnerable to use as a base of piracy. The English were also worried that the French might try to re-occupy Sark. In 1565, Queen Elizabeth issued Letters Patent to Helier de Carteret of Jersey granting him the Seignory of Sark. In return for paying the Queen "one twentieth of a knight's fee", extensive rights to the fruits of the land and sea around Sark, as well as virtually complete legal and political power, de Carteret was charged with keeping the island "free of the Queen's enemies" and making it a place of "safety and tranquillity". In this he would be aided by 40 male tenants, who would keep and farm the land. The Letters Patent provided that should de Carteret fail to keep the terms of the grant or fall into arrears with the fee, Sark would revert to the Queen's possessions.

30. Political institutions were established not long after settlement of Sark. It is known that Chief Pleas had been constituted and was meeting infrequently to hear Islander's petitions before 1579.

31. In 1579 tensions arose with Guernsey when the inhabitants of Sark established their own court which would apply the law of Jersey. This was challenged by Guernsey, concerned about the introduction of Jersey law and Sark's expanding autonomy. The matter was settled by an Order in Council from the British Crown 1583 which finalised the 'Powers and Privileges of the Sark Court' and granted Sark the right to make its own laws, subject to appeals to the Royal Court in Guernsey and ecclesiastical jurisdiction lying with the Bishop of Winchester. Five jurats were to serve on this court.

32. Further developments occurred in 1675, necessitated by the refusal of the Sarkese to follow the established Church of England. The court was disestablished and replaced by the Court of the Seneschal, which continued in this form up to the present day.

33. The Seigneur, or Lord, of Sark, continues to hold Sark as a fief (in feudal terms, a grant of rights over land by the Crown to a subordinate, in return for a fee). In the present day, the annual fee for the fief of Sark is still rendered to the British Crown.

Modern era

Sark in the international arena

Sark and international relations

34. Along with the other Channel Islands, Sark is not a state as a matter of international law. However, it does enjoy some of the features of statehood such as a distinct UN country code (680).

35. Like the other Crown Dependencies, Sark therefore not a member of the European Union (EU). However, it is connected to it via Protocol 3 of the UK's Treaty of Accession 1973. In essence, this provides that the Crown dependencies form part of the EU external customs territory, and that for the purposes of trade in industrial, agricultural and horticultural products, they are treated as if they were a member state. In relation to capital and services (including financial services), the Crown dependencies are considered a third party. While the Crown dependencies are obliged not to discriminate between nationals of EU member states, there is no freedom of movement of persons. Other EU legislation does not generally apply to the Crown dependencies, although jurisdiction over the meaning of Protocol 3 ultimately lies with the European Court of Justice.

36. This arrangement was negotiated at a late stage of the UK's accession to the European Economic Community (Johnson: 2013) when it became apparent that the terms of the accession would apply to the Channel Islands by virtue of their being territories for whose international relations the UK

government was responsible (Royal Commission on the Constitution, 1973: para. 1381). In the course of the negotiations for the UK's entry to the EEC, each Channel Island legislature (Jersey, Guernsey, Alderney and Sark) voted individually on the terms of the proposed protocol to the Treaty of Accession (Johnson: 2013: fn 208). The majority decision of Sark Chief Pleas was to approve the draft protocol. This differed from Guernsey which approved the protocol unanimously.

Sark at international law

37. Sark has received some attention at international law, most notably and recently in litigation brought by the Barclay brothers challenging aspects of Sark's law and governance for lacking compliance with the European Convention on Human Rights. In these challenges, some of which came before the European Court of Human Rights, there is no suggestion that Sark's governance arrangements were the past or future responsibility of Guernsey. Rather, they were for Sark to decide, subject to the determinations of the Court. Reforms did come to Sark in the form of the Reform (Sark) Law 2008 passed by Chief Pleas and given the Royal Assent by the Privy Council. Further reforms were made in 2010.

38. In litigation before the International Court of Justice in the 1950s, the UK and France were in dispute over the ownership of two sets of islands off the coast of Jersey. In the *Minquiers and Ecrehos case*, the ICJ set out the constitutional and other documents relevant to the sovereignty question. Although the case did not touch on Sark's status per se, in the course of judgment the Court made the significant observation that "[e]ven some of the more important Islands, such as Sark and Herm, were only occasionally mentioned in documents of that period, though they were held by the English King just as were the three largest Islands [ie Jersey, Guernsey and Alderney]" (ICJ: 1954, 55). This statement affirms, at the very highest level of international law, the historical evidence outlined above, that Sark has its own individual relationship with the British Crown, rather than being subsumed into one of the larger Crown dependencies.

Sark and the British Government

39. The Kilbrandon Commission, which was primarily established to consider the UK's constitutional position prior to its accession to the then European Economic Community, devoted a chapter of its report to the Crown Dependencies. Most of its focus was on the larger islands of Jersey, Guernsey and the Isle of Man. Nonetheless, it considered each island individually and on its own terms.
40. The Commissioners visited Sark (Kilbrandon: 1973, para 1343), and noted that "it has an independent relationship with the government of the United Kingdom" (Kilbrandon: 1973, para 1355). Significantly, the Report observed that "Chief Pleas of Sark stated that the constitutional relationships between the Islands and the United Kingdom were, broadly speaking, the same as those between Guernsey and the United Kingdom, as set out in the evidence of the States of Guernsey; and this was accepted by the States of Guernsey and by the Home Office." (Kilbrandon: 1973 para 1448). The Commissioners concluded the section on Sark by saying "Sark had managed its own affairs for over 400 years and had always remained solvent. It had at no time received grants from any outside source, not even by way of compensation for war damage." (Kilbrandon: 1973 para 1454).
41. The approach taken by the Kilbrandon Commission has strongly influenced the practices of the British government in dealing with the Channel Islands. As noted above, each of the Channel Islands was consulted separately and voted individually on the implications of the UK joining the then EEC. In the negotiations to withdraw from the now EU, it was agreed that each of the Islands would have a 'seat at the table' with the British government, and be able to put forward its own individual concerns (HC 423: 2017, para 19). Guernsey does not speak for Sark or Alderney unless this has been mutually agreed.
42. In addition, there is clear evidence that those government departments which liaise with the Channel Islands engage with each island on its own terms. For example, the governance arrangements of Sark came in for

particular comment in the 2014 Report of the Justice Committee: *Crown Dependencies: developments since 2010*. There it was noted that the UK Ministry of Justice has been providing support and encouragement to the Sark Chief Pleas on these issues (HC 726: 2014, para 62-63). The Ministry of Justice also organised workshops on economic development for Sark (MOJ: 2014, para 65). The British government has noted that in these endeavours the Ministry of Justice “have received welcome assistance from other Crown Dependencies”, as well as commenting that “the conseillers in the Chief Pleas who have worked hard to strengthen governance on the Island, without administrative support” thus indicating that Sark itself is seen as a Crown Dependency in its own right, rather than a dependency of Guernsey which would have been expected to provide administrative support in these circumstances (HC 726: 2014, para 67).

43. The Westminster Parliament also engages with each of the Channel Islands separately. For example, in the 2014 report the Justice Committee took evidence from Sark Chief Pleas generally and on matters of particular relevance to Sark (HC 726: 2014, para 26). Particular attention was also paid to Sark’s special concerns by the Justice Committee in the 2017 report on Brexit and the Crown Dependencies, with Committee members heard the views of Chief Pleas. It was noted that Sark’s interests differ from that of Guernsey in some respects (HC 423: 2017, Annex).

Sark and the Bailiwick of Guernsey: political and legal relationships

44. As noted, Sark maintains its own legislative and executive body (Sark Chief Pleas) and operates its own fiscal system. For example, there is no income tax on Sark, unlike Guernsey which taxes personal income at 20%. In terms of Crown administration, the Lieutenant-Governor of Guernsey, who is the Monarch’s representative, acts in that capacity for Sark and Alderney as well. Sark has a Senior Administrator, who performs various civil service functions.
45. From Victorian times, the three jurisdictions of the Bailiwick have shared a common criminal law. Civil law jurisprudence is within their own hands. Sark’s distinct customary (Norman-rooted) law (which has been traced

as a distinct body of law to the 12th century (Le Patourel: 1937, 109)) as well as its enjoyment of unlimited civil jurisdiction was recognised by the UK Judicial Committee of the Privy Council as recently as March 2018 (*A v R* [2018] UKPC 4, para 24 – noting that this had been enjoyed by Sark since Tudor times). It is also worth noting that when Guernsey undertook extensive reforms to its constitution in the early 2000s, the considerations and the subsequent constitutional changes did not involve or affect Sark. Sark's own constitutional change was undertaken separately with a quite different catalyst and was completed later in the decade.

46. Alderney, the middle-sized island of the Bailiwick, has close ties to Guernsey, much more so than Sark. As a consequence of Alderney's devastation following the German occupation in WWII, arrangements were made in 1948 for Guernsey to assume responsibility for major services in Alderney in return for an annual remittance from Alderney. Two Members of the Alderney States are also entitled to sit and vote in the Guernsey States of Deliberation. No such political arrangement exists between Guernsey and Sark.

47. Guernsey may also legislate for Alderney without its consent. This arrangement persists to this day. While Guernsey may legislate for Sark, it can only do so with Sark's consent, granting Sark more extensive control over its statutory law than Alderney. All three jurisdictions are legislatively subordinate to the Westminster Parliament.

48. Notably, the Kilbrandon Commission considered that this arrangement between Guernsey and Alderney was:

not considered to have affected Alderney's general constitutional position as a largely autonomous dependency of the Crown. They are regarded in Alderney as temporary ones, made for the convenience of the Island, with the intention that Alderney should one day regain a measure of independence similar to that which existed before the War. (Royal Commission on the Constitution, 1973: para 1451).

49. It must follow that this conclusion applies a fortiori to Sark.

Conclusion

50. There is a clear line that can be traced from the settlement of Sark in the high Middle Ages through to the present day. Sark, for all intents and purposes, is a self-governing autonomous jurisdiction, responsible for its own fiscal system, administration, political governance and legal system. It receives no financial assistance from the other Channel Islands nor the British government.

51. Its relationship with Guernsey has been frequently misunderstood. But the Bailiwick of Guernsey is not a constitutional or legal construct, and it does not consist of one dominant jurisdiction (Guernsey) and two lesser, dependent jurisdictions (Alderney and Sark). Indeed, this conclusion was explicitly rejected by the Kilbrandon Commission, still regarded as the foremost authority on Britain's constitution and its relationships with the Channel Islands.

52. In terms of its status, Sark, like the other Channel Islands, is a Crown Dependency, with a direct relationship to the British Crown in the person of the Monarch. In Sark's case, this is no better illustrated by the fee paid each year by the Seigneur or Lord of Sark to the Queen of England for the continued possession and enjoyment of Sark.

Selected References

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