The idea that the major institutions of the state should be functionally independent and that no individual should have powers that span these offices, although conceived in the interests of good governance and constitutional tranquillity has been a potent force for tension within parliaments and legislatures ever since Montesquieu first crystallised its principles in *De L’Esprit des Lois*.

As far back as the American War of Independence, one of the chief complaints of the American revolutionaries was that the United Kingdom’s Act of Settlement of 1701 did not extend its attempts at the separation of powers to the colonies and that while in the United Kingdom a judge held office under the Crown during good behaviour and could only be removed by joint address to the Lords and Commons, judges in the thirteen colonies were appointed for limited terms by Colonial Governors acting on behalf of the Crown and could be dismissed if they made decisions of which the Governor disapproved.

The secession of the thirteen Colonies had a profound effect on how people since then have thought about constitutional arrangements not least because the American colonists, in attempting to explain the decision to rebel against British rule, were among the first to ask in a technical sense “What is a constitution for?”

If a time-travelling delegation from almost any of the Thirteen Colonies were to attend a modern Commonwealth Parliamentary Conference then it would be as sub-sovereign attendees of the Small Branches’ part of the conference. It is often a feature of Commonwealth and pre-Commonwealth constitutional development that important moments begin at the fringes and work their way towards the centre.

The Channel Islands, in particular the Crown Dependency of Guernsey, was sixteen years ago at the heart of one of these moments which had important consequences for the development of the separation of powers in the United Kingdom and beyond. The Channel Islands have a history of legislating for themselves and developing their own customary law that stretches back to the early middle ages. Until 2000, the Islands would, in legal terms, have been best known beyond their shores for their connection to the pre-revolutionary customary laws of Normandy and their development of Trust Law. Since that date Guernsey is, in legal and parliamentary terms, likely to be best known for the European Court of Human Rights Ruling in *McGonnell v the United Kingdom*.

Mr McGonnell had wanted to convert a flower packing shed into residential accommodation but was refused permission to do so under Guernsey’s development plans. In 1995 Mr McGonnell, who had taken up residence in the shed, appealed to the Guernsey courts where his appeal was dismissed. The presiding judge was the Bailiff of Guernsey who five years previously as Deputy Bailiff and Deputy Presiding Officer, had presided over the Island’s parliament when the development plans had been debated. In Guernsey, as in Jersey, the Chief Justice, called the Bailiff, is also the Presiding Officer of the Assembly.

Mr McGonnell took his case to Strasbourg. On 8 February 2000, the European Court of Human Rights gave judgment and found there to be a breach of Article 6 of the European Convention on Human Rights, the article that protects the right to a fair trial. Bias was not alleged but the Court felt that Mr McGonnell had been given legitimate grounds for fearing that the Chief Justice may have been influenced by his earlier participation as Presiding Officer in the Assembly’s adoption of the planning provisions. The Court did not point to anything wrong with the dual roles vested in the single office of Bailiff but did require that when sitting in a judicial capacity, the Bailiff should remind litigants where
appropriate of the dual role.

It would be too much to say that the case of McGonnell from the small jurisdiction of Guernsey was exclusively responsible for bringing to an end the 1400 year old great office of state that was the position of the United Kingdom’s Lord Chancellor but it was certainly powerfully influential and Lord Irvine of Lairg’s reply to a parliamentary question shortly after the decision that “The position of the Lord Chancellor is unaffected by this case” was somewhat wide of the mark. Lord Irvine’s subsequent clarification in the light of McGonnell that “the Lord Chancellor would never sit (as a judge) in any case concerning legislation in the passage of which he has been concerned” was more prophetic. It is certainly the case that McGonnell acted as one of the spurs to the Blair government’s reforms of the UK constitution in the early 2000s. Until 2005 the office of Lord Chancellor rose far above the principles of separation of powers. As head of the judiciary in England and Wales, Speaker of the House of Lords, Cabinet Minister and Law Lord, the Lord Chancellor’s responsibilities branched into functions of the executive, judiciary and parliament. After 2005 and the coming onto the statute books of the Constitutional Reform Act 2005, the Lord Chief Justice took on the role as Head of the Judiciary and the House of Lords elected its own Speaker.

In 2009, as a development arising naturally out of the post McGonnell landscape the legal function of the House of Lords was separated from the legislative function and the Supreme Court was created but not before Lord McCluskey QC had commented “a good deal of nonsense is spoken about the separation of powers…for a 135 years or so serving judges have always played an important part in the deliberations of this House. They seldom vote.”

It is one of the interesting features of the McGonnell case that whilst the Channel Islands can have been said to be instrumental through it in reshaping the British Constitution, the Islands themselves were less affected. Parliamentarians from small jurisdictions will be familiar with the flexibility and degree of ‘multi-tasking’ that are required of officials in a mini state. In both Guernsey and Jersey, for the time being at least, the role of the Bailiff goes on much as before. The McGonnell ruling itself said that the European Convention did not require member states to comply “with any theoretical constitutional concepts.”

The Chief Justice and his Deputy in both Islands continue to preside in the assembly and to sit in court whilst at the same time taking care not to sit in cases in respect of which they had a role during the legislative process. (At the time of writing there is a proposition however pending before the Jersey States seeking the replacement of the Bailiff with a Speaker elected by the Assembly.)

The Latimer House Principles, which the CPA played such an important part in developing, are a yardstick against which assemblies and legislatures can measure themselves. These principles launched in 2004 are an attempt to establish basic rules for the interaction between parliament, the executive and the judiciary in democratic societies and set out in some detail the consensus arrived at by representatives of the three branches of government in the Commonwealth on how each of their national institutions should interrelate when exercising their institutional responsibilities. They are there to enable legislatures to ask themselves the questions; how well do we observe the separation of powers? Does our executive respect the freedom of the
“The separation of powers is an evolving, interlinked constitutional issue. Decisions in one small jurisdiction on the separation of powers can affect the entrenched constitutional arrangements of another much larger one.”

Above: The Royal Court in Guernsey.

The legislature and the judiciary to discharge their responsibilities? The great strength of the Latimer House Principles, however, lies in their ability to go beyond the pure doctrine of the separation of powers and in the words of the then Commonwealth Secretary-General Kamalesh Sharma to “recognise the complex and interlocking network of relations between the legislature, the executive and the judiciary.”

In ancient customary law, jurisdictions such as those found in the Channel Islands, the executive, judiciary and legislature are closely entwined, so closely entwined that in Guernsey the legislature is also the executive. In the United Kingdom ninety five salaried ministers sit in the House of Commons. It might appear at first glance that both these systems are a long way from the separation of powers envisioned by the principles of Latimer House but in both Guernsey and the UK the presence of the executive within the legislature can also allow for rigorous scrutiny of that executive. Integration of the executive and legislature in this way can provide stability and efficiency in the operation of government, balancing abstract concerns about an over mighty executive with a pragmatic desire to make the constitution work.

Similarly the advent of the Human Rights Act, which has changed the relationship between the judiciary and the legislature, has brought about a situation which at first glance does not sit comfortably with a pure interpretation of the separation of powers. Since the advent of the Act, judges can declare a statute to be incompatible with the Convention on Human Rights and the Government is required to rectify the situation. However the system works and it works in much the same way as the system of judges in the Channel Islands both sitting and presiding does, by the exercise of partnership and restraint on the part of the parties.

Does the Separation of Powers work in practice and are the Latimer House Principles still relevant today? The separation of powers is an evolving, interlinked constitutional issue. Decisions in one small jurisdiction on the separation of powers can affect the entrenched constitutional arrangements of another much larger one as McGonnell demonstrates. In fact, it demonstrates the assemblies of the Commonwealth, in spite of their diversity and different origins are constituent parts of a single living organism. Used properly the Latimer House Principles can operate as a framework accommodating that diversity, allowing for the flourishing of the separation of powers and at the same time enabling assemblies, both small sub sovereign ones and large national and federal ones, to develop in sometimes subtle and complex ways, the practical arrangements needed to keep judiciary, legislature and executive distinct but also fair, efficient and accountable.

References
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2 Lords Hansard; Written Answers 23rd February 2000: Column WA31.
4 HL Deb col 1030 8 March 2004
5 Commonwealth(Latimer House) Principles; Commonwealth Secretariat; Foreward, Kamalesh Sharma, July 2008.