

When democracy came to the Isle of Man: a critical celebration of 1867.

The Isle of Man is situated roughly equidistant between England, Scotland, Northern Ireland, Ireland and Wales. At one time the centre of a significant Norse Kingdom, by 1399 at the latest it had entered the dominions of the English Crown, and has remained a possession – today a Crown Dependency – ever since.¹ It was not, however, absorbed into a neighbouring jurisdiction. Instead it retained a distinct legal identity, and its own national laws and organs of government. Initially this was as the possession of an English magnate, who ruled the Isle of Man as a feudatory monarch. But in 1765 the Crown purchased most of the rights of this monarch as the beginning of the process of Revestment - the taking of Crown powers into the hands of the Sovereign. Even this Revestment did not cause the assimilation of the Isle of Man with England – for instance “by joining the Isle of Man to Cumberlands black coast”² - although it was a close run thing.³ Instead, although government of the Island was by, and predominantly for the benefit of, London, this was done through existing Manx mechanisms. Central to these structures was the Manx Tynwald – a legislature consisting of the House of Keys and the Council (the latter consisting of officials of the Manx government appointed by the Crown), and led by the Lieutenant-Governor.

Ranking with 1765 in importance, the major constitutional reforms of 1866-1867, culminating in the first Manx democratic elections, seem more obviously something to celebrate.⁴ In particular, two elements of this phase of Manx constitutional history immediately attract attention: the increase of practical power exercised by insular authorities, as opposed to Imperial ones; and the change of the House of Keys from a self-sustained elite to a democratically elected chamber. In this note I will briefly suggest some important qualifications to these two elements, make a case for the importance of a neglected reform of 1866-1867, and suggest a complementary way of looking at the constitutional reform. In doing so I take a particular perspective – one which sees the Imperial authorities in London as important partners in the reforms, with their own way of looking at things. In particular, as the centre of a global empire, London had its own frame for understanding the Manx situation. As Belchem puts it, “driven by administrative convenience and ideological imperative, successive British governments displayed decreasing tolerance for anomalies, deviations and ‘inconsistencies’ from fiscal, constitutional, and other norms”.⁵

The increase of practical power exercised in the Isle of Man.

As part of the package of reforms in the mid-nineteenth century, the Isle of Man Customs, Harbours and Public Purposes Act 1866 “was a landmark reform separating Manx finances from those of the United Kingdom”.⁶ Authority over Manx finances undoubtedly increased the autonomy of Manx authorities. These reforms, however, were a long way from responsible government. Responsible government was based on the Imperial governor exercising less authority, and a ministry responsible to the elected colonial assembly exercising more. Responsible government was achieved by Nova Scotia, New Brunswick, and

¹ See further P.W. Edge, *Manx Public Law*, (1997).

² “A dialogue at the falls near Snaefield”, (c.1765) Quayle Bridge House Collection no.148 (1935-7) 3 JMM 118.

³ See P.W. Edge, “Man’s path to autonomy”, (2014) *History Today* 7.

⁴ S Rodan, “The World’s oldest Parliament and the World’s youngest voters”, (2015) *The Parliamentarian* 3, 156. For a detailed discussion of the context to the 1866 legislation, see R Fyson, *The struggle for Manx democracy*, (2016).

⁵ J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 30.

⁶ J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 78.

the Province of Canada in 1848, and by New Zealand and most of Australia in 1855-1859. ⁷ It was a model of Imperial governance in the air in 1866.

In 1866 cabinet government was not seen as suitable for a territory as small as the Isle of Man, and the Governor remained supreme head of government.⁸ Indeed, a consistent theme of Manx constitutional history until well into the 20th century was the dominance of the Lieutenant-Governor. Despite the fears of Lieutenant-Governor Hope that an elected Keys would “claim far greater and more arbitrary power ... at issue with the British government and any Council consisting of Members nominated by the Crown”,⁹ at the end of the 19 century, Walpole was able to write that “in the Legislature, in the Judicature, and in the Executive, power is largely concentrated in the Governor; and, strangely enough, the progress of ideas, instead of limiting, tends to extend his authority”.¹⁰ It was not until well into the twentieth century that an executive responsible to Tynwald became a key feature of the Manx constitution.¹¹

The democratisation of the Keys.

The early Keys might be understood as chosen by the people of the Island, as opposed to appointed by the Lord. A.W. Moore notes that In 1580, for instance, the Keys refused to pass a law because they had not been chosen by the people.¹² It seems likely that from 1610, and certainly from 1659, the Keys had a role in the election of their own members. In 1639, however, calling for election of the Keys by the people formed part of the basis for a conviction against Edward Christian of “most seditious and tumultuous behaviour”.¹³ The Keys founded their self-elected status on a judgment of the Deemsters that the Keys gave names to the Governor for approval.¹⁴ The practice arose of the Keys choosing two candidates, of full age and landowners to £3 per annum, of which the Governor would choose one (almost invariably the first named).¹⁵ Their tenure of office remained precarious however, with the Lord dismissing members as late as 1731,¹⁶ despite Wilson’s 1722 suggestion that vacancies were created “when a member dies, or is discharged, either on account of age, or for any great crime, which, upon a trial by his brethren, he is found guilty of”.¹⁷ Nonetheless, “the Keys became more and more a closed corporation and membership

⁷ A.B. Keith, *Responsible government in the dominions*, (1912).

⁸ R.H. Kinvig, *The Isle of Man: A social, cultural and political history*, (1975) 156-162.

⁹ Hope to Fitzroy, 16 August 1853 (MNHL: Letterbook vi, f, 578-95).

¹⁰ S Walpole, *The Land of Home Rule*, (1893), Ch. XVII.

¹¹ D.G. Kermode, *Offshore Island Politics: The constitutional and political development of the Isle of Man in the Twentieth Century*, (2001).

¹² A.W. Moore, *A History of the Isle of Man*, (1900) 766-767. This abstinence was echoed in the 19th century, when Colonel Campbell refused to be sworn in as a member of the self-elected chamber. See J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 50; R Fyson, *The struggle for Manx democracy*, (2016) at 44.

¹³ *Christian* (1661), discussed in A.W. Moore, *Manx worthies*, (1901) 59-82. .

¹⁴ Lib Scacc, 1659.

¹⁵ By the early 17th century the Keys had begun to gain in status, with a number of special legal privileges, perhaps most notably the power to consent to customs duties set by the Lord.

¹⁶ A.W. Moore, *A History of the Isle of Man*, (1900) 737-794.

¹⁷ T Wilson, “The History of the Isle of Man”, (1722) Manx Society v.18, 90. One of the oldest surviving Manx cases gave MHKs charged with felony the right to be tried by the Keys, rather than a different jury – see *Key’s Case* (1418) Liber P..

was largely confined to a few leading families”.¹⁸ Just before the introduction of elections, they were described to the Lieutenant Governor as “the Gentry of the Island both in talent and property”.¹⁹

This was a strikingly idiosyncratic lower chamber for a national legislature within the British Empire. It is not the case that the Empire always insisted on elections to national legislatures: we can see unelected national assemblies in Hong Kong in 1843,²⁰ and India in 1861,²¹ for instance. In 1865, as the democratisation of the Keys was under way, the elected assembly of Dominica was replaced with a hybrid assembly consisting of one-half elected members and one-half appointed.²² One does not have to reflect very long on nineteenth century Imperial racism to see what these unelected chambers have in common. For territories which were more ethnically European, however, an elected lower house and an unelected Legislative Council was commonplace – for instance in Canada from 1841,²³ and New Zealand from 1853.²⁴

What we do not find is a lower chamber which is appointed by itself, with the government choosing only from a shortlist nominated, overwhelmingly, from within a particular caste.²⁵ In 1837, Robert Peel was quoted as describing the Keys as “So anomalous a body as could not exist within the British Empire”.²⁶ Although the Imperial government was willing enough to leave the peculiar practices of the Manx alone when the Keys were comparatively unimportant, once attention was focussed on the Keys, it was an idiosyncrasy which could not be accepted.

Although the principle of an elected Keys was implemented in 1867, the conception of the electorate was very narrow, with a franchise limited to adult males able to meet a high property qualification. Kermode has suggested that around 20% of the adult population were eligible to vote, and “only a tiny proportion of the adult male population were qualified to contest elections”.²⁷ The first elections led to “a thoroughly conservative house, 13 of the 24 members elected having sat in the old self-elected House, and a majority of the 11 new men being pledged to conservative views”.²⁸

The unpicking of the Keys official functions.

The separation of powers, imperfectly observed in the 19th century British constitution, was not a major feature of the Manx constitution. What is striking from an Imperial perspective, however, is not entanglement between legislature and executive – one of the key features of the 19th century British constitution – but the entanglement between legislature and judiciary. A 24 member lower house in some

¹⁸ R.B. Moore, “The Roll of the Keys”, (1956) IOMNHAS (P) V(2), 47.

¹⁹ Drinkwater to Loch, 2 Feb 1863, (SRO: Loch Papers, GD 268/116).

²⁰ Letters Patent, 5 April 1843.

²¹ Indian Councils Act 1861.

²² See *Africana: The Encyclopedia of the African and African America Experience*, (2005) at 420.

²³ Following the Act of Union 1840.

²⁴ Following the New Zealand Constitution Act 1852.

²⁵ Lest this be thought too strong a phrase, consider J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 24.

²⁶ Reported in *Mona's Herald*, 25 April 1837.

²⁷ D.G. Kermode, *Offshore Island Politics: The constitutional and political development of the Isle of Man in the Twentieth Century*, (2001) at 23.

²⁸ Brown's Directory, 61-2.

sense “representative” of the local population was unexceptional compared with the same lower house’s involvement in judicial matters.

Looking back to the earliest records of the Manx constitution, there is substantial evidence that the Keys, or at least a precursor of the Keys, had a role combining something of the fact finding function of a jury with an advisory role on the content of Manx law.²⁹ As the Manx legislative process and legislature solidified in the 16th and 17th centuries, their advisory role largely merged with their legislative one, although there is some evidence of the Keys being asked to advise on Manx law even after Revestment.³⁰ The Keys, however, remained the supreme Manx jury.

From 1601³¹, the Keys sat in the Court of General Gaol Delivery, the Manx court responsible for felony trials, not as the trial jury, but in order to assist the Deemster on difficult points of law,³² and to “observ[e] whether the jury digress from the evidence by giving a false and partial verdict in which case they are liable to be severely fined and punished”.³³ The Keys were seen as an essential part of the Court, with failure to attend a dereliction of duty which could be punished,³⁴ and resulted in MHKs being fined for failure to attend as late as 1814.³⁵ Their role in the Court of General Gaol Delivery became problematic, however, with the Lieutenant-Governor complaining in 1823 that they were trying cases, rather than simply regulating the jury, and so delaying procedure in the Court. As a result, Secretary of State Peel ordered him to arrange a test-case.³⁶ In *R v Kelly* (1824)³⁷ a 14 year old had been sentenced to death for burglary. He argued that he should not have to answer the indictment, as the Keys were not present as his trial in General Gaol Delivery. In particular, he argued that the two presiding judges had split on whether the indictment was flawed, and that the presence of the Keys would have resolved this. The Keys also complained that the failure to include them in the trial was an invasion of the liberties of the Keys and of the Manx, and was null and void. The Privy Council found that the Keys did not “form an integral and constituent part of the said Court”, and reaffirmed the validity of the conviction and death sentence. Kelly was, however, reprieved and transported instead.

While the Keys retained a role in the most serious criminal trials until the 1820s, its role in other proceedings survived until the 1860s. As Lord MacNaghten put it in a 1910 appeal to the Privy Council, “From the earliest days, as long as the House of Keys exercised both judicial and legislative function, it was the Court of Appeal from all verdicts of juries except during the period between 1777 and 1793”.³⁸

²⁹ See P.W. Caine, *The story of the House of Keys*, (1939) IOMNHAS (P) IV, 430.

³⁰ A function which to at least some extent survived Revestment – see A.W. Moore, *Extracts from the Journals of the Self-Elected House of Keys*, (1905) at p.90.

³¹ See *Grand Jury Case* (1601) *Liber P*. Twenty four jurors assisted the Deemsters in *Wm Craine (Cleric)* (1517) *Liber P*., but it is unlikely they were a permanent body. See further the distinction between the Keys and the Commons in J Kewley, “Manx local government in the Eighteenth and Nineteenth Centuries”, (2014-5) 12 *Isle of Man Studies* 88 at 101.

³² A.W. Moore, *A History of the Isle of Man*, (1900) 737-794.

³³ J Clarke, *A view of the principal courts of the Isle of Man*, (1817) at 44. In early cases, this could also result in prosecutors being punished – see *Caines Case* (1645) *Liber P*..

³⁴ See *Huddleston and Others* (1668) *Liber Scacc*..

³⁵ For instance in 1814. See A.W. Moore, *Extracts from the Journals of the Self-Elected House of Keys*, (1905) p.12

³⁶ Secretary of State Peel to Governor Athol, 30 January 1825, Governor’s Letterbook for 1817-1832 MML 9845/1/3 p.230.

³⁷ *R v Kelly* (1824) *Privy Council*. The text is based on *Liber Plitor* 1824.

³⁸ *Gill v Westlake* [1910] AC 197, PC construing Isle of Man Appellate Jurisdiction Act 1867.

Numerous examples could be given of the Keys reversing the verdict of a jury in a civil case. In 1830, for instance, the Keys reversed the dismissal of an assault suit by the jury, and awarded £100 damages plus costs to the plaintiff.³⁹

As well as being distinctive, this function was controversial. An obvious objection is that the Keys could be involved in the passing of a law and then, as the appeal jury, in applying it to the facts of a particular case. As cogently, the Members of the House of Keys may have had, or be seen to have had, their own interests in a particular case. This is perhaps best illustrated by the Keys increase of damages in a libel case against the *Manx Sun*. G.W. Dumbell had been counsel for the appellant in the initial trial, which had resulted in an award of 40 shillings. He then sat as one of the Keys, which raised the award to his client to £100.⁴⁰

The role of the Keys in civil appeals was put forward by the unelected Keys themselves as an obstacle to the introduction of elections.⁴¹ It could, however, be addressed by combining election with the removal of the judicial function. The Keys role in civil appeals was abolished in 1866. When an appellate structure excluding the Keys was created in 1867, delayed by scrutiny in London,⁴² the Privy Council found that it was a new procedure, rather than a continuation of the former process with its particular limitations.⁴³

Conclusions.

So, is there less to celebrate in 1867 than the Isle of Man envisages?⁴⁴ To answer this, we need to recognise that Manx constitutional change has long been a process of gradual change – sometimes acknowledged, sometimes not – rather than revolution. The potentially revolutionary moment for the Isle of Man was in 1765, and it failed to materialise. Instead, to quote Walpole, “the constitution of the Isle of Man, like the constitution of the United Kingdom, is no rigid law. It has never been embodied in any document or regulated in any statute. It has changed, it is changing, it is susceptible of future change”.⁴⁵

Viewed in that light, 1866 and 1867 were tremendously important. The Keys were disentangled from the judicial process, paving the way for a judicial process with sufficient integrity to retain international credibility; without which the financial services of the late twentieth century are hard to imagine. A key part of the Manx constitution was taken from the control of a narrow elite, and instead put into the hands of an initially narrow, but gradually widening, electorate. The Isle of Man is justly proud of the early inclusion of some women in its electoral process,⁴⁶ and of the participation of 16 year olds in national elections. Elections came late to the Isle of Man, but the Island soon made up for lost time. The legitimacy

³⁹ *Moore v Stowell* (1830), reported in J.C. Bluett, *The Advocate's Notebook*, (1847) at 73.

⁴⁰ See J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 55.

⁴¹ See J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 49-50.

⁴² J Belchem, “The onset of modernity, 1830-1880” in J. Belchem (ed.), *A New History of the Isle of Man: Volume V*, (2000) at 84.

⁴³ For a useful discussion of the limits of appeals to the Keys, see *Shimmin v Fargher* (1697) reported in J.C. Bluett, *The Advocate's Notebook*, (1847) at 16; and *Ronald v Scott* (1824) reported in J.C. Bluett, *The Advocate's Notebook*, (1847) at 52; *Haining v Stowell* (184) reported in J.C. Bluett, *The Advocate's Notebook*, (1847) at 196.

⁴⁴ For instance through commemorative stamps (<http://www.tynwald.org.im/about/news/Pages/1711.aspx>, accessed 8 March 2017), and a special celebratory event (<http://www.tynwald.org.im/education/history/1867/Pages/default.aspx>, accessed 8 March 2017).

⁴⁵ S Walpole, *The Land of Home Rule*, (1893), Ch. XVII.

⁴⁶ On which see R Fyson, *The struggle for Manx democracy*, (2016) 217-248.

which a democratic chamber gave to the exercise of political power – a legitimacy still a matter for debate as the composition and powers of the Legislative Council remain hotly contested – paved the way for the twentieth century shift of powers from the Lieutenant-Governor and his Council to responsible government.

These are all important changes, worthy of celebration. It is, however, worth recalling that by 1867 the Manx constitution fitted much more neatly into a model of governance to be found elsewhere in the British Empire. The Manx constitution of say 1800 was much more distinctively Manx than the Manx constitution of 1867. The reforms suited the Manx. They also suited a London responsible for governance of a global empire.