MISCELLANY

Democracy as a constitutional principle

1 As any lawyer with a passing interest in British constitutional law knows, September 2019 saw the UK Supreme Court in the case of *R (Miller) v The Prime Minister*[1] place the due process of representative democracy at the heart of the common law constitutional theory. Leading the Supreme Court and giving the sole judgment, Baroness Hale could not have been clearer:

> "Let us remind ourselves of the foundations of our constitution. We live in a representative democracy. The House of Commons exists because the people have elected its members. The Government is not directly elected by the people (unlike the position in some other democracies). The Government exists because it has the confidence of the House of Commons. It has no democratic legitimacy other than that."[2]

2 The case itself considered what happens if a Prime Minister seeks to evade the House of Commons by advising (in effect, instructing) the Queen to prorogue Parliament. In any normal constitutional time, it would be a wholly theoretical question as Prime Ministers only hold office because they have a majority in the Commons. Also, until the Fixed-term Parliaments Act 2011, a Prime Minister could do what *Dicey* explained and appeal beyond the legal sovereignty of Parliament to the political sovereignty of the electorate, *i.e.* call a general election. As the problem had been purely theoretical and academic, unsurprisingly *Dicey* devoted an entire chapter to the dynamics which would prevent a Prime Minister taking this course. Essentially, even in the pre-welfare state days in which Dicey wrote, a government could not long govern without a Parliament to pass the legislation it needed, vote for the imposition of taxes and pass the Army Act.

3 The question could only realistically become live in a scenario where the House of Commons was unwilling to support the executive on the key issue of the day, yet also unable or unwilling to impose its own solution or (at the relevant time) agree to a general election. This, of course, is with the Parliamentary arithmetic following the 2017 general election.

---

[1] [2020] AC 373.
[2] *Ibid* at para 55.

4 The real question that fell to be answered by the UK Supreme Court was whether (a) it was sufficient to rely on constitutional conventions to police the accountability of the executive to the legislature; or (b) the common law should be developed so that legal principle policed the relationship between the executive and legislature in order to uphold the principles of democracy described by Baroness Hale in the passage cited at para 1 above. The answer given, emphatically, was that democracy was the guiding principle, and action destructive of the due process of democracy would be illegal. As the source of legally recognised democratic legitimacy on the "whole UK" level, the House of Commons could never be in the wrong; and in any dispute between Parliament and the executive, the latter would be very much cast as Charles I reborn.

What has this to do with the Channel Islands?

5 To any student of the relationship between the two Bailiwicks and the United Kingdom, there is a striking contrast with another unanimous decision of the UK Supreme Court, also with a sole judgment given by Baroness Hale, namely the *Barclay No. 2 Case*[3]. In that case, Baroness Hale appeared entirely untroubled by principles of democracy when holding (albeit *obiter*) that the UK Parliament must have the power to impose legislation on the Channel Islands. It is true that *Barclay No. 2* was a case brought in the British courts, and as a matter of British law any Act of Parliament imposing legislation on Jersey is valid.[4] But, as Ivor Jennings pointed out, the same is true as a matter of British law in respect of an Act of Parliament regulating what can or cannot be done in the streets of Paris. The real question being discussed towards the end of *Barclay No. 2* was whether Parliamentary Sovereignty should be part of the Channel Islands' jurisdictions' own constitutional theory as developed by their customary law?

6 On that point, the UK Supreme Court seemed unhesitatingly to accept that any defence of Jersey or Guernsey democracy must belong in the world of constitutional convention, and the judges of the UK Supreme Court would not consider developing constitutional principles in local customary law in order to protect against undemocratic abuses of power from across the Channel.

---

[3] *R (Barclay) v Secretary of State for Justice* 2014 GLR 201; [2015] 1 AC 276.

[4] See also the commentary in Jowell, Steele and Pobjoy, "The Barclay cases: beyond Kilbrandon" (2017) 21 *Jersey & Guernsey Law Review* 29.

7 The contrast with the approach to prorogation in the United Kingdom is even greater when we see that, in *Barclay*, the power of the British executive is viewed in a far more favourable light in any clash it might have with the Channel Island legislatures than would be the case in *Miller*. Baroness Hale recorded a submission to this effect in *Barclay No. 2* (see para 17) by the intervening Channel Island Law Officers, *viz.* "The democratic decision of the Island legislature should not be supplanted by the executive's view of an executive-agreed treaty obligation".[5] The answer given by Baroness Hale is surprising bearing in mind the Court's uncompromising commitment to democracy as a principle of constitutional law shown just four years later. In the *Barclay* decision she stated:

> "However, it is the clear responsibility of the UK Government in international law to ensure that the Islands comply with such international obligations as apply to them. Just as the UK Parliament has the constitutional right to legislate for the Islands, even without their consent, on such matters, so must the UK executive have the constitutional power to ensure that proposed Island legislation is also compliant."[6]

8 The justification given for British institutions' unrepresentative control over Channel Island legislation flows back to a need to keep the Islands aligned to the choices of the British executive. The democratic objections to UK Parliamentary Supremacy over the Channel Islands are simply ignored when we reach the business-end of the *Barclay No.2* judgment.

9 It is not that a degree of Parliamentary power over Channel Islands' legislation is necessarily irreconcilable with democracy. It could be argued that a power to align the Channel Islands with decisions on foreign affairs is a necessary *quid pro quo* for the United Kingdom representing the Channel Islands on the world stage—and therefore the Channel Islands cannot expect to enjoy British representation without a degree of British oversight. However, for such a reconciliation between democracy and external power to work, it would presuppose that the United Kingdom's powers over Jersey and Guernsey are by a consent that could be withdrawn—much as Guernsey's legislative power in Alderney is by consent. The power could not be reconciled with democracy if it was instead a function of the UK Parliament having an inherent and unaccountable supremacy over the Islands. Such a reconciliation would be a radical re-analysis of the Channel

---

[5] *R (Barclay) v Secretary of State for Justice* 2014 GLR 201; [2015] 1 AC 276, at para 17.
[6] *Ibid.* at para 48.

Islands' relationship with the United Kingdom (as opposed to the Crown) into something more like "free association". It is difficult to think of an alternative.

10 It is quite possible that British judges—whether sitting in the UK Supreme Court or the Judicial Committee of the Privy Council—will at some point have to decide how far the principles of democracy expounded to such acclaim in 2019 extend to the Channel Islands. If the UK Parliament decides to impose unwelcome legislation on the Channel Islands, as it very nearly did with the Mitchell-Hodge amendments to the Financial Services Bill, the constitutional conventions that have upheld our autonomy for centuries will be no more.[7] The supporters of that Bill were adamant in their belief that the power of the British Parliament to impose legislation on the Crown Dependencies was crystal clear. If the UK Parliament commands, then, in the opinion of a large body of MPs, the function of the Channel Islands is to obey.

11 Such undemocratic sentiments were roundly condemned by Baroness Hale's predecessor as President of the Supreme Court, Lord Neuberger, but they were fuelled and ostensibly validated by the Baroness's own apparent carelessness towards democracy shown in the *Barclay No. 2 case.* Having decided in favour of enforceable law over constitutional convention in the context of upholding British representative government, the question is whether the same applies in the Channel Islands. Or will it be held that, in the Channel Islands, there is a principle of obedience to the United Kingdom that in the twenty-first century is more fundamental than democracy? The UK's senior judges were willing to make a radical development in the UK's jurisprudence in the name of democracy. It is difficult to see why such a step should be off limits where the Channel Islands are concerned. Baroness Hale herself in the area of damages in tort accepted that the customary law systems of the Channel Islands may show flexibility even in matters where the common law had not.[8]

.

[7] See Miscellany "A challenge to the legislative autonomy of the Channel Islands" (2018) 22 *Jersey & Guernsey Law Review* 116.

[8] See *Simon v Helmot* 2011–2012 GLR 517, [2012] UKPC 45 at [72].

12 Should Parliamentarians in the UK return to their idea of forcing legislation on the Channel Islands against their will, the British judiciary (whether in the UK Supreme Court or the Judicial Committee of the Privy Council) would have to decide whether or not they are going to colonise the relationship between the United Kingdom and the Channel Islands. It is a little late in world history to be acquiring new colonies.

Proportionality in the making of forfeiture orders

1 In 1988, a Scottish taxi operator named Ellis opened a bank account in Jersey and paid money into it. The money had been earned by lawful business but the purpose of the bank account was to evade tax in the United Kingdom. Ellis was later convicted of drugs offences and subjected to a confiscation order. During the investigation, the Jersey account ("the account") came to light. A suspicious activity report was made by the bank, and consent to operate the account was refused by the Jersey Financial Crimes Unit. Much later, notice was served upon Ellis to show cause why the money in the account should not be forfeited under the Forfeiture of Assets (Civil Proceedings) (Jersey) Law 2018 ("the Forfeiture Law").

2 In 2019, the Royal Court[1] delivered a judgment[2] making several findings. First, it held that Ellis had failed to discharge the burden of showing that the account was not "tainted property". Secondly, it held that the Forfeiture Law must be given effect compatibly with the ECHR and with the principle of proportionality.[3] Thirdly, it held that it would be "disproportionate for the entire Account, comprising, as it does, the respondent's legitimately earned moneys, to be forfeited".[4] Fourthly, it held that the evidential burden was on the Attorney General to satisfy the court that the forfeiture order being sought was proportionate.[5]

3 On appeal by the Attorney General, the Court of Appeal[6] agreed with the first two findings of the Royal Court but not with the third and

[1] Clyde-Smith, Commr and Jurats Olsen and Dulake.
[2] *AG v Ellis* [2019] JRC 141.
[3] *Ibid*, at para 22.
[4] *Ibid*, at para 23.
[5] *Ibid*, at para 28.
[6] Crow, Perry and Bailhache, JJA.

fourth.[7] In relation to the first two findings the Court of Appeal stated—

> ". . . the fact that the court is a public authority under Article 7 of the [Human Rights] Law means that it cannot do otherwise than make a forfeiture order which is compatible with the Convention rights, including A1.P1.[8] in the first place. It does that by, (among other things) applying the test of proportionality."

4 The Royal Court had been persuaded by the reasoning in *Ahmed v HMRC*[9] that it would be disproportionate for the entire account to be forfeited. In *Ahmed*, the respondent had hidden substantial quantities of cash in his home with a view to evading tax but the source of the cash was a legitimate business. The English court held that the cash was "recoverable property" (the equivalent concept under English legislation) only to the extent of the unpaid tax, and that it would be disproportionate to make a forfeiture order other than in relation to the unpaid tax.

5 The Court of Appeal first distinguished the Forfeiture Law from the English legislation, the stated purpose of which was to enable cash "which is, or represents property obtained through unlawful conduct" to be forfeited. That definition led the English court to hold that only that part of the money obtained by Ahmed that represented evaded tax was property obtained through unlawful conduct. By contrast, the preamble to the Forfeiture Law described its purpose as including "the seizure and forfeiture . . . of cash and other assets suspected to be property . . . intended to be *used in* unlawful conduct." [Emphasis added.] The Forfeiture Law extended to the instrumentalities of crime. It was broader in effect than the English legislation.

6 The Court of Appeal went on to emphasise the importance of not eliding the two stages of the relevant test. The first stage (which the Royal Court had correctly applied) was to identify the tainted property. In this case the account had been set up to evade tax. The whole of the contents of the account had been used in unlawful conduct. It was all liable to forfeiture. The second stage was to decide what forfeiture order to make. Here there was a discretion. Article 11(4) provided that, unless a respondent satisfies the court that the property is not tainted, the court shall "make a forfeiture order in relation to the property specified in the notice *or any part of it*." [Emphasis added.] That

---

[7] [2020] JCA 098.

[8] Article 1 of Protocol 1 to the Convention which confers the right to peaceful enjoyment of possessions.

[9] [2013] EWHC 2241 (Admin).

discretion was to be exercised rationally and fairly, and proportionately. That was where the Royal Court had erred. The decision in *Ahmed* was not relevant to the assessment of proportionality. It should be assessed by reference to the purpose of the Forfeiture Law. The matter was remitted to the Royal Court for reconsideration.

7 In the application of the two stages of the relevant test, it was clear from the express terms of art 11(4) that the evidential burden of showing that the property was not tainted lay on the respondent. The Court of Appeal concluded that the correct interpretation of the Forfeiture Law was that the evidential burden in relation to proportionality also lay on the respondent.

8 The judgment of the Court of Appeal is interesting for several reasons. It is now clear that the decisions of English courts under the equivalent (but not identical) English legislation will not necessarily be helpful. It is the purpose of the Forfeiture Law which should govern its interpretation. It is at least arguable that the purpose of the legislation is draconian. The preamble provides that it is a—

> "Law to provide for the seizure and forfeiture, by way of civil proceedings, of cash and other assets suspected to be property originating, or intended to be used, in unlawful conduct . . ."

If, therefore, a bank robber borrows from a friend a valuable new Range Rover with a view to using it to make good his escape, that Range Rover is tainted property and liable to forfeiture even if the friend knew nothing of the unlawful purpose. It is only the principle of proportionality, and the discretion vested in the court, which may save the vehicle from forfeiture. The inclusion of the instrumentalities of crime in the definition of tainted property liable to forfeiture was no doubt intended to have a deterrent effect.

9 The position is similar in Guernsey. By s 13 (2) of the Forfeiture of Money etc in Civil Proceedings (Bailiwick of Guernsey) Law 2007, as amended, in relation to money which has been detained under s 7 or frozen under s 10—

"The Royal Court may order the forfeiture of the money or any part of the money if satisfied on a balance of probabilities that the money or the part—

(a) is any person's proceeds of unlawful conduct, or

(b) is intended by any person for use in unlawful conduct."

There is, however, no reversal of the burden of proof.

10 The Forfeiture Law in Jersey develops a process which began with the Drug Trafficking Offences (Jersey) Law 1988, enacted to meet the perceived need for an effective confiscation regime to deter criminal activity in relation to drug trafficking and to ensure that criminals did not profit from their crimes. The 1988 Law was followed by the Proceeds of Crime (Jersey) Law 1999 which extended the power to make confiscation orders to offences other than drug tracking offences. A confiscation order can only be made post-conviction for a relevant criminal offence. The new Forfeiture Law enables tainted assets (as defined in the Law) to be forfeited even where no criminal proceedings have taken place. The Court of Appeal's judgment in *Att Gen v Ellis* is a useful exposition of the process of forfeiture of assets which have been used in unlawful conduct.

Plus ça change, plus c'est la même chose

1 The Editorial in the *Nouvelle Chronique de Jersey* for Saturday 26 October 1901 contained a familiar lament about the elected members of Jersey's States Assembly.

> "*Au mois de Décembre auront lieu les élections pour Députés. Il devient de plus en plus de la plus grande importance que les Electeurs fassent un bon choix et que le bien-être public seul influence leurs votes . . .*
>
> *Nous ne sommes point satisfait de la composition de la Chambre comme nous l'avons vue depuis longtemps . . .*
>
> *Il existe actuellement une grande inégalité dans la composition de la Chambre. Prenons, pour example, la ville de St-Hélier. M. le Connétable est un Avocat; M. le Deputé E.T. Nicolle est un Avocat aussi; M. le Deputé E.B. Renouf est un Ecrivain et M. le Deputé Bailhache représente, lui seul, le commerce. La paroisse importante de St.-Sauveur est représentée par M. Théodore Le Gallais, Avocat, et St.-Martin et la Trinité par M. Binet et M. Le Gros, tous les deux Ecrivains; M. le Connétable de St.-Laurent est un Ecrivain et M. Seale de St.-Brelade, un Ecrivain aussi, et M. Crill de St.-Clément également. L'agriculture est représentée et les sans-occupation aussi; mais le commerce proprement dit cherche en vain pour un représentant, et évidemment la vie politique n'offre aucune incitation aux commerçants de la ville.*"
>
> [Elections for deputies take place during the month of December. It has become of even greater importance that electors make the right choice and that the public interest alone guides their votes . . .

> We are dissatisfied with the composition of the Chamber as we have stated for some time . . .
>
> A great imbalance exists at present in the composition of the Chamber. Take, for example, the parish of St Helier. The Constable is an advocate; Deputy ET Nicolle is also an advocate; Deputy EB Renouf is a solicitor and Deputy Bailhache alone represents business. The important parish of St Saviour is represented by Mr Theodore Le Gallais, advocate, and St Martin and Trinity by Mr Binet and Mr Le Gros, both solicitors; the Constable of St Lawrence is a solicitor and both Mr Seale of St Brelade and Mr Crill of St Clement are solicitors too. Agriculture is well represented and those with no occupation also; but business properly so called seeks in vain for a representative; clearly political life offers no incentive to the traders of the town.]

2 Although the editor of the *Nouvelle Chronique de Jersey* was obviously unimpressed, it is remarkable, by the standards of our time, how many Jersey lawyers were to be found in the Island's Legislative Assembly—a total of nine. In 2020 we can muster only one advocate and one English solicitor. Bear in mind too, that the legal profession in 1901 was miniscule compared with the legal profession of today. But the complaint about the dearth of commercial representatives is very apposite. The editor was concerned about the lack of members representative of the business community. What would he write today of an Assembly almost totally devoid of men and women with experience of the finance industry which generates the bulk of the Island's revenues?