

## THE POWER OF THE UK TO LEGISLATE FOR THE CROWN DEPENDENCIES WITHOUT CONSENT—FACT OR FICTION?<sup>1</sup>

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*In this article, the author outlines the traditional view, as espoused by the Kilbrandon Commission, that the United Kingdom has a paramount power to legislate for the Dependencies even without their consent and then considers some of the arguments in support of the alternative view that there is no such power. Having reviewed the position from a Channel Islands perspective, consideration is then given to whether there are any differences in the position of the Isle of Man.*

1 My experience of over 20 years in public office in Jersey has been that, subject to the occasional bump along the way, the relationship between the UK and the Dependencies works well on a day-to-day basis. But a Dependency of the Crown cannot assume that the relationship with the UK will carry on as before; it has to be prepared for new challenges.

2 This is exemplified by the recent comment by Jeremy Corbyn, the leader of the Labour Party, following the release of the Panama Papers when, according to newspaper reports, he suggested that direct rule of the Crown Dependencies might be imposed if they did not behave as he thought they should in relation to taxation matters. He is not the first person to make such a suggestion. Back in 2009, Lord Wallace, a Liberal Democrat peer, visited Guernsey and said that the centuries-old understanding that the UK would always respect the Crown Dependencies' right to autonomy was no longer appropriate. He was quoted as saying "You cannot say that a promise given 800 years ago in totally different circumstances fits in any part today". It is clear that there are those who, from a political perspective, do not accept the Islands' right to their autonomy simply because of their history.

3 So how does our autonomy stand at present? One can of course look at it from two different aspects. The first is how it works in practice,

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<sup>1</sup> This article is extracted from the annual Caroline Weatherill Memorial Lecture delivered in the Isle of Man on 13 October 2016.

and the second is how strong its legal and constitutional underpinning is. It is this latter aspect which I wish to consider.

4 I hope I will be forgiven if I begin by dealing with the position from a Jersey or Channel Island perspective, as I am of course much more familiar with that, and our history differs from that of the Isle of Man. But having considered the position from a Channel Islands perspective, I shall offer a few thoughts on any differences in the Isle of Man's position.

5 One starts of course with history. The Channel Islands were part of the Duchy of Normandy from 933 onwards and were on the winning side in 1066 at the Battle of Hastings. In 1204, when King John lost Normandy to the French king, the Islands elected to remain loyal to the English Crown. In return the King confirmed that they could continue to be governed by their own laws and they would have a separate administration.<sup>2</sup> This was subsequently confirmed and enhanced in a succession of Royal Charters, all of which confirmed the separateness of the Islands from England.

6 Originally, the Royal Court, consisting of the Bailiff and 12 Jurats, was a law-making body as well as a judicial body. It gradually began to consult with the Constables and the Rectors of the 12 parishes in order to evaluate public opinion before petitioning the King for any change in the law, and out of this process gradually emerged the States of Jersey, comprising the three estates, namely the Jurats, the Rectors and the Constables. The States is first mentioned by name in 1497.<sup>3</sup> An important event took place in 1771. By Order in Council (known as the Code of 1771), it was confirmed that thereafter only the States could enact legislation. Finally, in 1948, the States became a fully democratically elected assembly when the Jurats and Rectors were replaced by Senators (elected on an Island-wide mandate) and a greater number of Deputies (elected on a parish basis).

7 Two points emerge from a review of the Islands' history:

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<sup>2</sup> The Constitutions of King John. See Everard & Holt, *Jersey 1204: The Forging of an Island Community* (2004) London, Thames & Hudson Ltd, ISBN 0-500-51163-2; Holt, "The Origins of Unity: a Note on the Constitutions of King John" in Bailhache (ed.) *A Celebration of Autonomy 1202–2004—800 Years of Channel Islands' Law* (2005) St Helier, Jersey Law Review Ltd ISBN 0-9535903-7-2, at 121.

<sup>3</sup> Bois, *A Constitutional History of Jersey* (1970) St Helier, States' Greffe, at sect 6/1.

(i) The Channel Islands have never elected a Member of the House of Commons, which therefore has no democratic mandate in respect of any of the Channel Islands.

(ii) The Channel Islands are not a colony or conquered or ceded territory.

8 The extent to which the Crown or Parliament may legislate for a colony is clear. However, the question of whether the Crown, through Order in Council or Parliament at Westminster, has the legal right to legislate for any of the Channel Islands without consent has never been settled and, because of their very different history, no analogy can be drawn with the situation of colonies. There have been various skirmishes over the years. In particular, during the 19th century there were three occasions when Jersey challenged the right of the Crown to legislate by prerogative Order in Council.

9 The first is *Re States of Jersey*<sup>4</sup> in 1853, the second is the *Victoria College* dispute in 1854 and the third is the *Prison Board* case in 1894.<sup>5</sup>

10 These cases did not resolve the question of whether the Crown has the right to legislate for the Island without its consent. However, the fact remains that, in all three cases, the offending Orders were withdrawn, albeit sometimes on the basis that the States had agreed to pass legislation to like effect. The *States of Jersey* case is of particular interest. In that case three Orders in Council were made for the purpose of setting up a new system of paid police and a court of summary jurisdiction. The States opposed the constitutionality of the Orders in Council and the Royal Court ordered that the registration of the Orders be suspended whilst the States petitioned Her Majesty in Council for the recall of the Orders, so that legislation on the subject could be passed by the States. The Committee of the Privy Council, although accepting that the Orders appeared well calculated to improve the administration of justice in Jersey, advised that they be revoked and said as follows—

“Yet as serious doubts exist whether the establishment of such provisions by Your Majesty’s prerogative without the assent of the States of Jersey is consistent with the constitutional rights of the Island of Jersey, their Lordships have agreed to report their opinion to your Majesty that it may be expedient for Your Majesty to revoke the said Orders.”

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<sup>4</sup> (1853) 9 Moo PCCC 185.

<sup>5</sup> All three cases are usefully summarised by Sir Godfray Le Quesne QC in *Jersey and Whitehall in the Mid-Nineteenth Century* (1992) Société Jersiaise

11 Despite the uncertainties surrounding the legal position, and despite the occasional disagreement, the relationship has by and large worked well. The United Kingdom has generally respected the Channel Islands' autonomy in domestic matters. In return, the Islands have been sensitive to their obligations as Crown Dependencies and have been happy to pass legislation to meet changing international standards. This is of course equally true for the Isle of Man.

12 But what would be the position if it became necessary to resolve whether the United Kingdom can, in one form or another, legislate for Jersey or one of the other Crown Dependencies even where the Island does not agree? I hope very much that this matter never arises for decision because I think that the present unwritten position has served both parties well. However, if it does, a court in the relevant Crown Dependency may well be called upon to adjudicate. As I continue to sit as a judge in all three Crown Dependencies, I do not propose therefore to offer any opinion of my own. I intend simply to summarise some of the competing arguments as they appear at present and hopefully to stimulate discussion and thought about the topic.

13 There are two methods by which the United Kingdom might seek to legislate. The first is by an Act of Parliament at Westminster stating expressly that it applies to the relevant Island. The second is by Order in Council issued under the Royal prerogative. I shall first take Acts of Parliament.

### **Acts of Parliament**

#### **(i) *The traditional view***

14 The traditional view is that, although there is a constitutional convention that Parliament will not legislate for the Channel Islands on matters of domestic concern without their consent, Parliament ultimately retains the legal right to legislate on any matter. Thus that leading constitutional lawyer Professor Dicey wrote in 1885—

“Whatever doubt may arise in the Channel Islands, every English lawyer knows that any English court will hold that an Act of Parliament clearly intended to apply to the Channel Islands is in force there *proprio vigore* [by virtue of its own force], whether registered in the States or not.”<sup>6</sup>

However he gave no authority in support of that assertion and is of course talking about the view of an English court.

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<sup>6</sup> AV Dicey, *The Law of the Constitution*, at 52.

15 A more recent statement of the traditional view is to be found in the Report of the Royal Commission on the Constitution (1973) (“Kilbrandon”) which accepted that there had been a strict adherence to the practice not to legislate for the Islands without their consent on matters of purely domestic concern over a very long period and in that sense there was therefore a constitutional convention that Parliament would not legislate for the Islands without their consent on domestic matters. However, Kilbrandon went on to refer to the Privy Council case concerning Southern Rhodesia at the time of UDI in 1968<sup>7</sup> and concluded that, notwithstanding the convention, Parliament ultimately had a paramount power to legislate for the Channel Islands in any circumstances.<sup>8</sup>

16 Those who would argue in favour of the traditional view can also point to certain *dicta* in the recent case before the Supreme Court of *R (Barclay) v Secy of State for Justice*.<sup>9</sup> The case was of course concerned with a very different matter, namely whether the English courts could judicially review an Order in Council giving Royal Assent to certain legislation passed by Sark on the ground that such legislation breached the European Convention on Human Rights. However, in passing, Lady Hale’s judgment referred with apparent approval to the view of the Kilbrandon Commission that the UK Parliament did have a paramount power to legislate on any matter, even without the Island’s consent.<sup>10</sup> However, these remarks were clearly *obiter*; they were not relevant to the issue before the court and there appears to have been no argument about the point.

17 There has only been one case in Jersey where this issue has arisen. That was the case of *Re Bristow* in 1960.<sup>11</sup> I should explain by way of background that the Code of 1771 laid down that Acts of Parliament expressed to apply to Jersey should be sent for registration by the Royal Court so the inhabitants would have knowledge of it. Nothing was said in the Code as to the effect of non-registration. Conversely, the Code provided that an Order in Council could only be executed in the Island after registration in the Royal Court and that if, upon the application for registration, it was considered that an Order in Council infringed the charters and privileges of the Island, the registration could

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<sup>7</sup> *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645.

<sup>8</sup> Royal Commission on the Constitution (1969–1973) Part 11, Ex 1, paras 1469–1473.

<sup>9</sup> [2014] UKSC 54; [2015] 1 All ER 429.

<sup>10</sup> At para 12.

<sup>11</sup> *Ex p Bristow* (1960), 35 PC 115.

be suspended by the Royal Court until representations were made to His Majesty and His pleasure had been signified.

18 Mr Bristow had been arrested in Jersey under a warrant for his arrest issued by the Registrar of the Bankruptcy Court in London pursuant to the Bankruptcy Act 1914. Section 124 of that Act ostensibly applied to the Island and provided that a warrant issued under that Act could be enforced in Jersey provided it was endorsed by the Bailiff. The warrant had not in fact been endorsed by the Bailiff before being executed. Mr Bristow contended that he had been unlawfully detained as the warrant had no effect in Jersey.

19 The court gave no reasons for its decision. Rather puzzlingly, it specifically declined to rule on whether Mr Bristow had been unlawfully arrested and detained. Be that as it may, the court in its Order observed that Parliament had the power to legislate for the Island and there was nothing which prescribed that an Act of Parliament which applied in express terms to the Island could not take effect unless it was registered by the Royal Court. As I say, no reasoned judgment was given and therefore it is not clear what was argued before the court and what its reasons were for making that assertion.

**(ii) *The alternative view***

20 The leading constitutional lawyer Professor Sir Jeffrey Jowell QC has been retained in recent years to advise Jersey on the constitutional relationship with the UK. He has expressed the view that much has changed since Kilbrandon in 1973. In particular, the courts are nowadays willing to apply constitutional principles and recognise constitutional rights to an extent which would have surprised their predecessors 30 years ago. Drawing on the advice of Professor Jowell, the Attorney General made a statement to the States in 2002 advising that, in his opinion, Parliament has no legal power to legislate for Jersey against its will in relation to domestic matters, including taxation.

21 A number of matters are relied upon in support of this alternative view—

(i) The first is that the traditional view is based entirely upon the doctrine of parliamentary sovereignty; *ie* that Parliament is supreme and the courts may not question an Act passed by Parliament. But that doctrine developed from an intention to prevent the King from raising taxation without the consent of Parliament. It is based upon where power *ought* in a democracy to lie, namely with the elected representatives of the people rather than the Monarch.

(ii) Support, if it is needed, for the proposition that the principle of parliamentary sovereignty rests upon democratic principle is to be

found in the observation of Lord Hoffmann in *R (Bancoult) v Secy of State for the Foreign and Commonwealth Office*<sup>12</sup> when he said—

“The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character.”

(iii) If democratic principle ultimately justifies the supremacy of the legislature over other branches of government within the United Kingdom, it can clearly be argued that democratic principle does *not* justify the supremacy of the UK Parliament over Jersey’s affairs. On the contrary, democratic principle would suggest that the will of the UK Parliament should not prevail. This is because Jersey residents have no representation in Parliament but do have full representation in the States of Jersey. The principle is clearly stated by Blackstone in his celebrated statement explaining why Parliament legislated for the town of Berwick upon Tweed but not for Ireland—

“The town of Berwick on Tweed, although subject to the Crown of England ever since the conquest of it in the reign of Edward IV, is not part of the Kingdom of England nor subject to the common law, although it is subject to all Acts of Parliament being represented by Burghers therein . . . But as Ireland was a distinct dominion, and had parliaments of its own . . . *our statutes do not bind them, because they do not send representatives to our Parliament*, but their persons are the King’s subjects, like as the inhabitants of Calais, Gasgoigny and Guienne, while they continued under the King’s subjection.”<sup>13</sup> [Emphasis added.]

(iv) The principle that there should be no legislation without representation is of course reflected in art 3 of Protocol 1 of the European Convention on Human Rights which reads—

“The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot under conditions that will ensure the free expression of the people in the choice of the legislature.”

In *Mathews v United Kingdom*,<sup>14</sup> the European Court of Human Rights upheld the complaint of a resident of Gibraltar and held that the lack of electoral representation of the population of Gibraltar in the European Parliament “would risk undermining one of the fundamental tools by

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<sup>12</sup> [2008] 4 All ER 1055, at para 35.

<sup>13</sup> Blackstone, *Commentaries* (1765) vol 1, at 98–100.

<sup>14</sup> [1999] 28 EHRR 361.

which ‘effective political democracy’ can be maintained”. By analogy, it is argued that for the United Kingdom to thwart the expression of a free and elected Jersey legislature, where no alternative means of political representation of Jersey residents in the United Kingdom Parliament is provided, would similarly undermine an essential feature of “effective political democracy”.

(v) Applying these principles, it is argued by supporters of the alternative view that the position in law is to be ascertained from custom and practice, just as in the development of the customary law in other areas. Thus, as Kilbrandon describes it, the strict adherence to the practice that Parliament will not legislate for the Islands without their consent on domestic matters, when combined with the democratic principle to which I have referred, suggests either that Parliament has never had such power or, alternatively, that the convention that it should not exercise that power has matured into law. It is of course unclear whether convention can crystallise into a law but Sir Ivor Jennings thought this was so,<sup>15</sup> and support is also to be found in a decision of the Canadian Supreme Court where Duff CJ said that “Constitutional law consists very largely of established constitutional usages recognised by the courts as embodying a rule of law” and that the process of crystallization was “a slow process extending over a long period of time”.<sup>16</sup> Indeed, Jennings pointed out that constitutional usages about the supremacy of Parliament in the UK were incorporated into the common law at the end of the 17th century. In this context one can refer also to the observation of Lord Hoffmann mentioned earlier concerning the development by the courts over a period of the principle of parliamentary supremacy.

(vi) A significant development occurred when, with Royal Assent, the States enacted art 31 of the States of Jersey Law 2005. The preamble to that Law specifically recognised Jersey’s autonomy by stating “whereas it is recognised that Jersey has autonomous capacity in domestic affairs”. Consistently with that statement, art 31 is in the following terms—

“Duty to refer certain matters to the States

31(1) Where it is proposed:—

(a) that any provision of a draft Act of the Parliament of the United Kingdom should apply directly to Jersey; or

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<sup>15</sup> *The Law and the Constitution* (5th ed, 1959), at 126.

<sup>16</sup> *In re Weekly Rest in Industrial Undertakings Act etc* [1936] SCR 461, at 466-467.



- (b) that an Order in Council should be made extending to Jersey:—
  - (i) any provision of an Act of a Parliament of the United Kingdom, or;
  - (ii) any Measure, pursuant to the Channel Islands (Church Legislation) Measures 1931 and 1957,
 the Chief Minister shall lodge the proposal in order that the States may signify their views on it.
- (2) Where, upon transmission of an Act of the Parliament of the United Kingdom containing a provision described in paragraph 1(a) or of an Order in Council described in paragraph 1(b) to the Royal Court for registration, it appears to the Royal Court that the States have not signified their agreement to the substance of the provision or Order in Council—
  - (a) the Royal Court shall refer the provision or Order in Council to the Chief Minister; and
  - (b) the Chief Minister shall, in accordance with paragraph (1), refer it to the States.”

The Royal Court considered this provision in the case of *Re the Terrorist Asset-Freezing (Temporary Provisions) Act 2010*.<sup>17</sup> That was a case where the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 of the Westminster Parliament was expressed to apply to the Channel Islands and was accordingly sent down for registration by the Royal Court. Although the Island authorities had been consulted on the Act, there had not been time for the Chief Minister to bring the matter before the States. Accordingly, when the matter came before the Royal Court, it did not register the Act but instead referred the matter to the Chief Minister in accordance with art 31(2)(a). The States subsequently approved a proposition of the Chief Minister that the Act should have effect in Jersey. The matter therefore came back before the Royal Court which duly registered the Act as it was satisfied that the requirements of art 31 had been complied with. However, in passing, the court took the opportunity to say that, in the light of developments since 1960, it was questionable whether the decision in *Bristow* was correct and it was arguable that an Act of Parliament could not have effect in the Island unless registered. The effect of art 31 was that the Royal Court could not register a UK Act unless the States had signified

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<sup>17</sup> 2011 JLR 117. See also “Terrorist asset freezing and the evolving constitutional relationship” in Miscellany (2011) 15 Jersey and Guernsey Law Review 125.

their approval. It would be very strange if, despite the enactment of art 31 with Royal Assent, an Act of the UK Parliament still had legal effect even though the States had not signified approval and the court had not registered the Act; indeed the States might have voted against registration of the Act. Such an outcome would render art 31 completely pointless despite its clear intent that the democratic process in Jersey should be respected. The court also referred to some of the other matters I have mentioned in support of the alternative view, such as the significance of art 3 of Protocol 1 of the ECHR.

### **Prerogative Order in Council**

22 The Royal prerogative for the Crown to legislate by Order in Council for the Islands is presumed to have derived from the supreme legislative power possessed by the Dukes of Normandy. In practice, as in the UK, this method of legislation has fallen into disuse. It has been superseded by the extension to Jersey of Acts of Parliament with the consent of the Island. Nevertheless, the question still arises as to whether an Order in Council under the prerogative power could be made in respect of domestic matters. There is certainly doubt over the extent of the power. As was said by Lord Diplock in *BBC v Johns*—“It is 350 years and a civil war too late for the Queen’s Court to broaden the prerogative”.<sup>18</sup> Furthermore, as I have already indicated, in the *States of Jersey* case in 1853, the Privy Council advised that serious doubts existed as to whether the making of a prerogative Order in Council concerning the administration of justice in Jersey without the assent of the States was consistent with the constitutional rights of the Island.

23 Kilbrandon accepted the UK submission that the Crown had ultimate responsibility for the good government of the Islands. He did not consider specifically the question of the Crown as opposed to Parliament but in relation to the power of intervention in pursuance of its ultimate responsibility for good government, the report said—

“There is room for difference of opinion on the circumstances in which it would be proper to exercise that power. Intervention would certainly be justifiable to preserve law and order in the event of grave internal disruption. Whether there are other circumstances in which it would be justified is a question which is so hypothetical as an argument not to be worth pursuing.”<sup>19</sup>

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<sup>18</sup> [1965] Ch 32, at 79.

<sup>19</sup> Para 1502.

24 The views of Her Majesty's Government were expressed by Lord Bach in the House of Lords in May 2002 when he said—

“The Crown is ultimately responsible for the good government of the Crown Dependencies. This means that in the circumstances of the grave breakdown or failure in the administration of justice or civil order, the residual prerogative power of the Crown could be used to intervene in the internal affairs of the Channel Islands and the Isle of Man. It is unhelpful to the relationship between Her Majesty's Government and the Islands to speculate about the hypothetical and highly unlikely circumstances in which such intervention might take place.”<sup>20</sup>

25 What has changed since Kilbrandon is that it has now been clearly established by the House of Lords in the *Bancoult* case<sup>21</sup> that Orders in Council made under the Royal prerogative are subject to judicial review on conventional grounds. So, such an Order in Council could be quashed on the grounds that it was *Wednesbury* unreasonable. It would no doubt certainly be argued by Jersey that, when the Island has a democratically elected legislature, the exercise of a prerogative power by the Sovereign contrary to the wishes of that legislature, other than in circumstances where there had been a grave breakdown in law and order, would indeed be unreasonable and liable to be set aside by the courts.

### **Application to the Isle of Man**

26 So, can these various arguments be transposed to the Isle of Man? I have read with interest the material which the First Deemster has kindly sent me, including relevant cases and interesting articles by Peter Edge<sup>22</sup> and by Augur Pearce.<sup>23</sup>

27 The Isle of Man's history is of course very different from that of the Channel Islands but no less colourful. It is an ancient kingdom whose King (later Lord) was originally subject to the King of Norway, then to the King of Scotland and, after some disputes between England and Scotland, since 1399 to the English sovereign. Tynwald has existed for at least 1,000 years and until the Revestment in 1765, laws

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<sup>20</sup> Written answer 3 May 2002.

<sup>21</sup> *R (Bancoult) v Secy of State for Foreign and Commonwealth Affairs* [2008] 4 All ER 1055.

<sup>22</sup> “David, Goliath and Supremacy: the Isle of Man and the Sovereignty of the United Kingdom Parliament”, (1995) 24 *Anglo-American Law Review* 1.

<sup>23</sup> “When is a Colony not a Colony? England and the Isle of Man”, (2003) 32(4) *Common Law World Review* at 368.

were enacted by the Lord of Man with the assistance of Tynwald. Since 1765, the Lordship of Man has been vested in the person of the British sovereign. One possible difference in its history as compared with the Channel Islands is that it is argued by some that the Isle of Man is a conquered territory because of the events of 1399 and the terms of the grant by Henry IV. However it is clear that that view is the subject of dispute.

28 Taking first the traditional view, there would appear at first sight to be greater support for it in local jurisprudence here than is the case in the Channel Islands where, as I have said, the only relevant decision is that of *Bristow*. The cases which I have read are *Re Robinson*,<sup>24</sup> *Crookall v Isle of Man Harbour Board*,<sup>25</sup> *Re CB Radio Distributors Ltd*<sup>26</sup> and *Re Tucker*.<sup>27</sup> The most detailed is that of the Staff of the Government Division in the *CB Radio* case, which in turn exhibited the fascinating opinion of Sir James Gell, Attorney General in 1876. Having reviewed the position in some detail, Hytner JA said this at 396—

“Since 1876 the United Kingdom Parliament and Tynwald have both continued to legislate for the Island but the course of dealings between the successive governments of the United Kingdom and the Isle of Man has resulted broadly in Tynwald legislating for the internal affairs of the Island and Parliament legislating for defence and foreign affairs, including all matters affecting the relations of the Island with others.

Whilst the right of the United Kingdom Parliament to legislate may thus be a subject for interesting discussion among constitutional historians and lawyers, the issue in our view must now be regarded as academic, because since the inception of the appeal court in the Isle of Man the validity of such legislation has never been questioned but on the contrary has always been recognised and applied. It is now too late to question the right of Parliament to legislate *in this manner* for the Island, at any rate in this court.” [Emphasis added.]

29 At first sight, these cases could be said to give considerable support to the traditional view. However the following points can be made:

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<sup>24</sup> *In re the Estate of James and Elizabeth Robinson Dec'd* (CP 1935/68, Chancery Division, 30 January 1936, unreported).

<sup>25</sup> 1981–83 MLR 266.

<sup>26</sup> 1981–83 MLR 381.

<sup>27</sup> 1987–89 MLR 220.

(i) The court in *CB Radio* was careful to limit its acceptance of Parliament's right to legislate to where Parliament was legislating "in this manner". In context, that must be reference back to the preceding paragraph where it is stated that Parliament legislates for defence and foreign affairs *etc* whereas Tynwald legislates for internal affairs. That point is made more specifically in the case of *Tucker* where at 228–229 the Appeal Division said this—

"There has been for many years a convention that whilst Parliament legislates for the Island in matters relating to defence and foreign affairs and until recently customs and excise, it leaves to Tynwald control over all domestic matters . . . Whilst I can envisage an interesting argument relating to ultra vires by an astute Manx constitutional lawyer in, say, 1780, it is now far too late—at any rate in this court—to deny the right of Parliament to legislate *in accordance with accepted convention*." [Emphasis added.]

It can be argued therefore that the Appeal Division was not accepting Parliament's right to legislate contrary to the convention.

(ii) The reason for accepting a power of Parliament to legislate is interesting. In both *Crookall* (at 276) and *CB Radios* (at 396), it is indicated that the legislation was in effect being passed by the Sovereign in his capacity of Lord of Man but with the assistance of Parliament (where it was Westminster legislation) or Tynwald (for local legislation). It followed that if Acts of Westminster and Tynwald were to conflict, it would simply be the later Act which would prevail.

(iii) None of the cases was concerned with the situation where Parliament was legislating contrary to the wishes of the Isle of Man as expressed through Tynwald. It is arguable therefore that the position in that event remains open.

30 Turning to the alternative view, it would seem that the arguments in support of that view concerning the Channel Islands are equally applicable to the Isle of Man. Thus there have been great changes in the application of constitutional principles and rights since Kilbrandon and indeed since the Isle of Man cases referred to earlier. The argument runs that it is very hard to see any democratic principle which justifies a Parliament where Isle of Man residents are *unrepresented* overriding the wishes of a local legislature where its citizens *are* represented. The one area where the arguments in respect of Jersey are not equally applicable to the Isle of Man is art 31 of the States of Jersey Law 2005. It is of course a matter for the Isle of Man but it might be worth considering the enactment of something along the lines of art 31 so as to support the principle that UK legislation should only be extended to the Island if Tynwald agrees.

31 As to legislation by prerogative Order in Council, it seems that the position in the Isle of Man would be identical to that in the Channel Islands. It would be arguable that any Order in Council passed contrary to the wishes of Tynwald, other than where there had been a grave breakdown in law and order, could be attacked on the grounds that it was *Wednesbury* unreasonable and should be quashed.

### **Conclusion**

32 I began this lecture by pointing out that one can never tell what will happen in the future. Uncertainties as to the extent of the Crown Dependencies' autonomy have not generally caused difficulties and the Islands have developed successfully since the Second World War in exercise of that autonomy. However, the Crown Dependencies need to keep the position under review. What can be said with confidence is that constitutional law has moved on since the Kilbrandon Report and that, in the event of a dispute arising over the constitutional relationship which ends up before the courts, the Crown Dependencies will have a number of legal arguments in support of their autonomy which would not have been available in 1973.

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