

MISCELLANY

A challenge to the legislative autonomy of the Channel Islands

1 The hectic passage through the House of Commons on 1 May 2018 of amendments to the Sanctions and Anti-Money Laundering Bill brought the constitutional positions of the Crown Dependencies and the Overseas Territories into sharp relief. Two of those amendments related to the proposed imposition on those territories of UK Government policy on registers of beneficial ownership of companies. UK Government policy is, in brief, that such registers should be accessible in general by members of the public, including NGOs and the media.

2 Amendment NC 14 would have required the Secretary of State, *inter alia*, to—

“prepare a draft Order in Council requiring the government of any Crown Dependency that has not introduced a publicly accessible register of beneficial ownership of companies within their jurisdiction to do so.”

A “publicly accessible register of beneficial ownership of companies” was defined by reference to information broadly equivalent to that available pursuant to Part 21A of the Companies Act 2006 of the United Kingdom. The deadline was fixed by reference to the coming into force of the EU’s 5th Anti-Money Laundering Directive. How the Secretary of State would have “required” the governments of the Crown Dependencies so to act was unclear.

3 Amendment NC 6 was drafted in similar terms for the Overseas Territories, except that the deadline was specified to be 31 December 2020, and that the form of the register was to be specified in the Order in Council.

4 Neither of those amendments accorded with the constitutional position of the Crown Dependencies or the Overseas Territories. The question of whether a register of beneficial ownership should be public or private (and open only to law enforcement and fiscal authorities) is a domestic matter within the jurisdiction of each of the territories. Indeed in the case of the Cayman Islands, a specific undertaking had

been given at the time when their new constitution¹ was enacted in 2009 that the UK Government would not legislate for them without consent on a domestic matter.² Indeed the BVI has a very similar constitution,³ although it is not known whether such an undertaking was given. Other MPs, however, drew attention to the specific power reserved to Her Majesty in the constitution of the Cayman Islands, for example, at s 125, “to make laws for the peace, order and good government of the Cayman Islands”. So far as the Channel Islands are concerned, there are of course no written constitutions. And even the Kilbrandon Report⁴ acknowledged the existence of a constitutional convention that Parliament did not legislate for the Islands without their consent on a domestic matter.⁵

5 After much lobbying by the governments of all the territories, the UK Government eventually arrived at the conclusion that it should not oppose NC 6 on the basis that it would not have a majority in the House of Commons to do so, and it was accordingly adopted. NC 14 was not, however, pressed to a vote by Her Majesty’s Opposition.

6 What conclusions can be drawn? First, and regrettably, it is the case that Parliament, and the UK Government, are prepared to act unconstitutionally for political reasons. If that were not so, the UK Government would have opposed, and Parliament would not have adopted, NC 6 which undoubtedly interfered in the domestic affairs of the Overseas Territories. But secondly, and this is more interesting from the perspective of the Channel Islands, it seems that the views of Professor Sir Jeffrey Jowell QC are beginning to gain traction. Jowell has contended that the Kilbrandon Report—

“is woefully short on authority, devoid of analytical rigour, packed with speculation, and imbued with colonial assumptions which have always been irrelevant to Jersey’s status and are out of tune with the present times.”⁶

¹ www.legislation.gov.uk/uksi/2009/1379/pdfs/uksi_20091379_en.pdf

² See the speech of Geoffrey Cox MP; [https://hansard.parliament.uk/commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill\(Lords\)](https://hansard.parliament.uk/commons/2018-05-01/debates/9BE03BAC-2539-4951-88A2-9A8A20D7A1A3/SanctionsAndAnti-MoneyLaunderingBill(Lords))

³ <http://www.bvi.gov.vg/sites/default/files/constitution.pdf>

⁴ Report of the Royal Commission on the Constitution 1969–73, Part XI of Vol 1, London, HMSO, 1973 (“the Kilbrandon Report”).

⁵ *Op cit*, para 1469.

⁶ Jowell, “The UK’s Powers over Jersey’s Domestic Affairs” in Bailhache (ed), *A Celebration of Autonomy: 800 Years of Channel Islands Law*, Jersey, 2005, at 249.

7 He has argued against Parliament's claims to have a paramount power to legislate for Jersey—

“Being a power of ‘last resort’ . . . it does not permit intervention in Jersey's domestic affairs except in extreme circumstances and on a restricted range of matters consistent with the exercise of prerogative powers within the UK.

If I am wrong about that[,] I ask . . . whether the constitutional convention (that the UK does not exercise its powers over Jersey's domestic affairs) has now crystallized into a legal rule to that effect.

. . . If there is ambiguity about either of the first two questions, such constitutional ambiguity these days should be resolved not by unsubstantiated albeit repetitious claims, but on the basis of modern constitutional principle . . .”⁷

8 If only constitutional conventions are in question, why differentiate between the Overseas Territories and the Crown Dependencies? It seems that Parliament may have recognised that it no longer has the power to legislate for the Channel Islands on a domestic matter, not as a matter of convention but as a matter of law.⁸

⁷ Johnson, *Jersey Law Course 2015–16: Jersey Legal System and Constitution* (Institute of Law, Jersey, 2016, para 7.64).

⁸ See, generally, Dixon, “Jersey's Relationship with the UK Parliament Revisited” (2018) 22 *Jersey and Guernsey Law Review* 43; and Dawes, “The Constitutional Limits of Assisted Death” (2018) 22 *Jersey and Guernsey Law Review* 200.