Terrorist asset freezing and the evolving constitutional relationship

1 One of the perennial vexed questions about the constitutional relationship between the United Kingdom and the Channel Islands is whether the UK Parliament at Westminster has power to legislate for the Islands without their consent. At the turn of the 20th century the celebrated constitutional lawyer Professor AV Dicey had no doubts—

> "… whatever doubt may arise in the Channel Islands, every English lawyer knows that any English court[1] will hold that an Act of Parliament clearly intended to apply in the Channel Islands is in force there *proprio vigore*, whether registered by the States or not."[2]

This view was given some support by a judgment of the Royal Court in 1960, which appeared to accept that the Bankruptcy Act 1914 of the United Kingdom, even though it had not been registered in the Court, was in force in the Island. The case was not argued but the Court observed in passing that the UK Parliament had power to legislate for the Island, and that there was no provision that required that an Act applying in express terms must be registered in the rolls of the Court before taking effect.[3]

2 Although acknowledging the convention that Parliament did not legislate for the Islands in domestic matters, the Kilbrandon Commission in 1973 echoed these views—

> "There appear, in any event, to be good grounds for accepting the more extreme view that if Parliament has power to legislate for the Islands at all, which we believe not to be in doubt, there are no circumstances in which it could be precluded from exercising this power."[4]

Kilbrandon justified the existence of the power not on raw force, but on "convenience".[5]

3 Although many constitutional lawyers in the Islands did not agree with these statements, another eminent English constitutional lawyer also doubted their accuracy

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[1] It is not clear whether Dicey intended to include the Judicial Committee of the Privy Council within the term "English court". Probably not. In any event, while English courts will usually be bound to apply English law to any issue before them, the Privy Council will generally apply the law of the jurisdiction from which the appeal is brought. The applicable law might be the first key issue.
[2] *The Law of the Constitution* (1902) 6th ed, p 52. A purist might remark that Dicey, distinguished English lawyer as he was, clearly did not know much about the constitutional law of Jersey. Acts of Parliament have never been registered in the States, but always before the Royal Court.
[3] *Ex p Bristow, PG intervenant* (1960), 35 PC 115.
[4] Part XI of Volume 1 of the *Report of the Royal Commission on the Constitution, 1969–73*, HMSO 1973, para 1472.
[5] *Ibid*, para 1469 *et seq*.

more recently. In a note in this *Review* in 2001,[6] Professor Jeffrey Jowell, QC suggested that the existence of this ultimate power had been justified by the notion of Parliamentary sovereignty or supremacy. That notion could no longer stand against the democratic principle that there could be no legislation without representation, a tenet effectively endorsed by Protocol 1 to the European Convention on Human Rights, now incorporated into the domestic law both of the UK and the Channel Islands. As Channel Islanders are not represented at Westminster, Professor Jowell expressed the view that these changes—

> "enliven the possibility that the courts would in future hold unconstitutional—in common law or under the European Convention—any imposition of the UK Parliament's will upon the Islands in domestic matters without their consent."[7]

4 When the Crown sanctioned the enactment of the States of Jersey Law 2005, the preamble of which stated "Whereas it is recognized that Jersey has autonomous capacity in domestic affairs", that seemed to lend force to Professor Jowell's view of the constitutional position. However, the phraseology in Orders in Council extending UK Acts to Jersey (usually subject to modifications) after 2005 did not change. They continued to record

> "it is accordingly ordered that the … Act shall be registered and published in the Island of Jersey, not as being essential to its operation therein but that the inhabitants of the said Island may have notice of the said provisions in the Act having passed and that they are bound thereby."

5 This anomaly recently came to the attention of the Royal Court in the context of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 ("the Terrorist Act"). This Act was sent down through the official channel with a covering letter from the Ministry of Justice stating, (curiously, but accurately) "I enclose the Act so that it may be registered in the Royal Court in Jersey as I understand that this is necessary in order for the Act to apply in Jersey …". The Attorney General presented the Act to the Court, but drew attention to the provisions of art 31 of the States of Jersey Law 2005. This article provides that—

> "(1) Where it is proposed—
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> (a) that any provision of a draft Act of Parliament of the United Kingdom should apply directly to Jersey; or

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[6] "The scope of Guernsey's autonomy—a rejoinder" (2001) 5 Jersey L Rev 271. Professor Jowell was until recently a professor of public law at University College, London. He is now a visiting professor, having been appointed as the inaugural director of the Bingham Centre on the Rule of Law.

[7] *Ibid* at p 275.

(b) that an Order-in-Council should be made extending to Jersey—(i) any provision of an Act of Parliament of the United Kingdom

…

the Chief Minister shall lodge the proposal in order that the States may signify their views on it."

Paragraph (2) provides in terms that, if an Act of Parliament is presented to the Royal Court and it appears that the States have not signified their agreement to the substance of the provision or Order in Council, the Royal Court shall refer it to the Chief Minister, and the Chief Minister shall refer it to the States.

6 The Court duly referred the Terrorist Act to the Chief Minister who in turn sought and obtained the agreement of the States to the registration of the relevant provisions of the Act. The Ministry of Justice procured the issuance of another Order in Council in the following terms—

"*At the Court at Buckingham Palace*

THE 13TH DAY OF OCTOBER 2010

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

It is this day ordered by Her Majesty, by and with the advice of Her Privy Council, that printed copies of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010 be transmitted to the Royal Court of the Island of Jersey.

AND, having noted that the States of Jersey have signified pursuant to Article 31 of the States of Jersey Law, 2005 that they agree that sections 1 and 3 of the said Act so far as they relate to the Terrorism (United Nations Measures) (Channel Islands) Order 2001 (SI 2001/3363) should extend to Jersey so as to be law in Jersey, it is hereby accordingly ordered that the said provisions of the Act shall be registered and published in the Island of Jersey, *not as being essential to its operation herein* but that the inhabitants of the said Island may have notice of the said provisions in the Act having passed and that they are bound thereby." [Emphasis added]

7 When the Order in Council was registered, the Court took the opportunity to give a short judgment on the question whether the italicised words above were any longer appropriate. As the Court stated, it had heard no adversarial argument on the issue of whether an Act of the UK Parliament can have legal effect in Jersey without registration in the Royal

Court, and its observations were therefore *obiter*. Nonetheless, given that opportunities for clarification of the law in this area arise only infrequently, the Court's provisional views are important.

8 The Court took the opportunity first of all to cast strong doubt on the continuing validity of the decision in *Ex parte Bristow*.[8] The Court endorsed the observations of the Attorney General that

> "[w]ith the approval of Her Majesty in Council, the States [Assembly] has passed Article 31 of the 2005 Law. The effect of this is that the Court may not register a UK Act purporting to have direct effect unless the States [Assembly] has signified its approval. It could be argued that it would be strange if, notwithstanding the enactment of Article 31, 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. It would render Article 31 ineffective despite its clear intent to ensure that the democratic process in Jersey is respected. It might be argued that, when making an Order in Council of the kind the Court is now asked to register, the Crown in Council must be assumed to have intended that such Order would be construed consistently with insular legislation which already has the approval of the Crown in Council."[9]

9 The Court added that there were three other reasons to question the validity of the observation in *Ex parte Bristow*.

(1) The European Convention on Human Rights brought with it the right to free and fair elections protected by art 3 of Protocol 1. To accept that an Act of the UK Parliament, in which the people of Jersey have no representation, could have direct effect in Jersey would be likely to involve a breach of art 3. Now that the ECHR has been incorporated into domestic law, the Court has an obligation to interpret legislation in accordance with it.[10]

(2) The effect of allowing that a UK Act could apply in Jersey without registration could lead to the commission of criminal offences by Jersey residents without their knowledge, which would again breach Convention rights.[11]

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[8] (1960) 35 PC 115.
[9] [2011] JRC 047, at para 16, *per* Birt, Bailiff.
[10] It is true of course that the ECHR has been in force in the Islands since 1960, even though not part of domestic law until more recently, but a British court now has an obligation to "read down" any statute (including, it is submitted, an Order in Council) so as to be convention compliant.
[11] Jersey residents are presumed to know the law of Jersey, but cannot be presumed to know the law of another country. If, therefore, a UK Act can become part of the law of Jersey without registration in the Royal Court, and publication in Jersey, they are unfairly at risk.

(3) The approval by the Crown of the preamble to the 2005 Law, cited above, arguably signals an assumption that an Act of the UK Parliament cannot of itself have legal effect in Jersey prior to registration.[12]

10 These arguments seem very compelling, even if the Court was careful to state that the matter remained open for decision on a future occasion. The preamble does of course refer only to autonomous capacity in domestic affairs, but the remaining arguments in para 8 above go to matters of principle under generally accepted human rights norms.

11 So far as art 31 of the 2005 Law is concerned, it would seem absurd to contemplate a state of affairs where an Act of the UK Parliament had effect in Jersey even where the democratically elected legislature had, pursuant to a duty imposed by a Law sanctioned by the Crown in Council, declined to approve the extension of the relevant provision. No court would give effect to such an absurdity. It would now seem to be the case that registration in the Royal Court is a prerequisite before an Act of the UK Parliament (or any statutory instrument) can take effect in Jersey. The retention of the words "not as being essential to its operation herein" was probably an administrative oversight in the drafting of the new Order in Council. It is to be hoped that officials in the Privy Council Office will see fit to remove the words from the standard form of future Orders in Council directing the registration of statutory provisions emanating from the United Kingdom Parliament.

[12] The preamble is not of course part of the Law, but it is an aid to construction.