

JERSEY'S RELATIONSHIP WITH THE UK PARLIAMENT REVISITED

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This article builds on the Jowell hypothesis of Jersey's relationship with the United Kingdom Parliament. It analyses the claims for Parliament's paramount power over Jersey in terms of the domestic British theories for Parliamentary Supremacy. The view that Parliamentary Supremacy derives from common law cannot apply to Jersey, and if it rests on the "political facts", this would suggest a colonial relationship requiring Jersey to be registered with the United Nations as a non-self-governing territory. This would trigger an international law decolonization duty. Following British principles of construction, clear words would be required for a statute to have effect regardless of Jersey's consent. Assuming Parliament does have paramount power in Jersey, any statute extended to Jersey would be presumed to take effect subject to local consent. The United Kingdom's practical power over Jersey rests on the fact that the royal prerogative in Jersey is exercised on the advice of British ministers. It is argued that there is no principled basis for judicially reviewing the grant of royal assent, but Ministerial advice to deny royal assent will be difficult to justify on principled constitutional grounds.

1 The purpose of this article is to explore Jersey's constitutional relationship with the United Kingdom, building on the iconoclastic work of Professor Sir Jeffrey Jowell.¹ At the heart of the article is the idea that there are now two competing orthodoxies. First, there is the orthodoxy as seen from the United Kingdom perspective, crystallised in the Kilbrandon Report,² which sees the power of the Westminster Parliament as paramount. Secondly, there is the Jowell hypothesis, which views the question through the prism of Jersey's constitutional history, which in turn reveals the Kilbrandon orthodoxy as an assertion of power with no legitimate source.

¹ Jowell, "The UK's Power over Jersey's Domestic Affairs" in Bailhache (ed), *A Celebration of Autonomy: 1204–2004. 800 Years of Channel Islands Law*, (2005); and Jowell, "The Scope of Guernsey's Autonomy—a Brief Rejoinder" (2001) 5 *Jersey Law Review* 271.

² Report of the Royal Commission on the Constitution 1969–73, Part XI of Vol I, London, HMSO, 1973 ("Kilbrandon Report").

2 What we shall argue is that, as a matter of modern British statutory construction, an Act of Parliament cannot purport to have effect in Jersey regardless of registration or consent unless it expressly states that intention. Beyond this, we shall argue that, viewed from the Jersey perspective, there is no reason why Jersey customary law should adopt the pure version of parliamentary sovereignty in respect of the United Kingdom Parliament applied domestically by the United Kingdom courts. It could be argued that Parliament can have legislative power consistent with the constitutional relationship between Jersey and the United Kingdom and its position as a Crown dependency. But this is limited to areas where, by way of British Ministers advising on the Royal Prerogative, the United Kingdom constitutionally exercises power with respect to Jersey—and this does not require Parliament being recognised by Jersey Customary Law as having a paramount power.

Preliminary comments on customary law

3 The argument presented here hinges on a particularly Jersey law point. The rule for recognising sources of law in Jersey is a matter of customary law, and customary law in this matter evolves.

4 As regards the flexibility of customary law, the point was made by the majority of the Privy Council in *Snell v Beadle*, that³—

“[Where] the customary law of Jersey has not been enshrined in a *coutume*, the proper approach is to regard it as being still in a state of development. It is capable of being refined or clarified by judicial decision as the customary law is applied to a new set of facts.”

5 The obvious application of this is to statutes which supersede custom. The Privy Council also comments at one point that “as soon as custom is changed into formal or positive law by *judicial decision* or by statute, it ceases to be custom” (emphasis added).⁴ That deserves clarification. The Privy Council can only have meant that once the courts have declared the customary law, that is how the law must be understood until changed by subsequent decisions or statute. Absent statute, it is “capable of being refined and clarified by judicial decision” particularly when “applied to a new set of facts”. Hence, it can be seen from the later Royal Court cases of *Connétable of St Helier v Gray* and *In re a Procureur de Bien Public of St Peter*, that

³ [2001] 2 AC 304; 2001 JLR 118, at para 21.

⁴ *Ibid*, at para 18.

judicial authorities may be overruled when they fail to represent modern practice.⁵

6 Such flexibility can be applied not just to substantive rules of law that regulate the conduct of citizens and government, but can be seen to apply to the customary law's approach to what it recognises as a source of Jersey law and its appropriate place within the hierarchy of sources. As Dr Kelleher has pointed out, Jersey did not continue to look at the *Très-Ancien Coutumier* as the sole legitimate source of Jersey customary law, as the 1847 Criminal Commissioners believed it to be in the absence of statutory intervention.⁶ Jersey customary law has taken on new sources of law—it cannot be attributed purely or even mainly to local usage.

7 Rules of recognition as regards sources of law may be absolute, such as the British rules of recognition for Acts of Parliament, subject to EU law issues. But such rules of recognition may be more flexible, for example the rules for non-binding precedent. Jersey's rule for recognising external sources has always shown itself to be flexible, and to adapt according to changing circumstances. The United Kingdom Parliament is one such external source of law but its recognition as such is a matter of Jersey, not English, law and its hierarchical status, as a matter of customary law, may evolve over time.

Assertion of Parliament's power in Jersey

8 It is not difficult to find highly authoritative assertions of Parliament's putative sovereignty in Jersey. However, the 1861 Civil Commissioners put the authority of Parliament, and the constitutionality of the use of its power, in more muted tones⁷—

“The competency of Parliament to legislate for Jersey is unquestionable; but the interference of the British Legislature, except in matters of a fundamental nature, *e.g.* for regulating the succession to the Crown, &c, or upon other subjects universally applicable to the whole empire, and perhaps some other special

⁵ 2004 JLR 360; 2008 JLR 163.

⁶ Kelleher, “The Sources of Jersey Contract Law” (1999) 3 *Jersey Law Review* 1; and *First Report of the Commissioners appointed to Inquire into the State of the Criminal Law in the Channel of Islands*, 1847, at vii (“*Report of the Law Criminal Commissioners*”).

⁷ *Report of the Commissioners appointed to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey*, 1861, at vii. See also *Report of the Criminal Commissioners*, *op cit*, at xi.

cases, is unusual, and would be viewed by the Islanders generally with dissatisfaction.”

9 The Code of 1771, an Order in Council registered in the Royal Court, assumes Parliament’s competence to legislate—

“Acts of Parliament in which reference is made to the Island, and in which it has an interest, such Acts must be exemplified in form, under the Great Seal, and sent to the said Island, there to be registered, and published, in order that the inhabitants may have knowledge thereof, and avoid the penalties of transgressing the same.”⁸

10 As early as 1668 we find a reference in passing in the case of *Bole v Horton* to an assumption that, whatever might be the jurisdiction of the English Courts⁹—

“So as though Wales became of the dominion of England from [the 13th century], yet the Courts of England had nothing to do with administration of justice there, in other manners than now they have with the Western Islands, Barbadoes, St. Christophers, Mevis (sic), New England, which are of the dominions of England, and so is Ireland, the isles of Garnsey and Jersey at present, all which may be bound by laws, made respectively for them by an English Parliament . . .”

11 In 1698 it is recorded that the English Attorney General advised that an Act of Parliament applying to Jersey—in that case, the Navigation Act 1660—did not need to be registered to apply in Jersey.¹⁰

12 In terms of the practical use of the power, students of Jersey law will be aware of the examples in the Jersey Law Course’s *Study Guide* of Acts of Charles II and William & Mary on the exportation of wool.¹¹ We can also find from the same period the extension of the Mutiny Act 1692 to Jersey.¹² An article by Richard Schuyler in the

⁸ Code of 1771, translation in Jersey Legal Information Board website (<https://www.jerseylaw.je/laws/translated/Pages/15.120.aspx>, last accessed 9 January 2017).

⁹ (1672) Vaughn 360, 400–401.

¹⁰ Schuyler, “Parliament and the Dominions: a Retrospect” (1928) 3 *Cambridge Law Journal* 209, at 219.

¹¹ 12 Car II, c 32 (<http://www.british-history.ac.uk/statutes-realm/vol5/pp293-296>); 1 W&M, c 32 (<http://www.british-history.ac.uk/statutes-realm/vol6/pp96-98>).

¹² <http://www.british-history.ac.uk/statutes-realm/vol6/pp393-398>

1920s provides an interesting example of a tax extended to Jersey in 1727, namely the express extension of an earlier duty of six pence per month imposed on all seamen in ships of “any of the subjects of England, or any other his Majesty’s dominions” for the support of the Greenwich hospital for disabled sailors.¹³ Schuyler provides a review of Tudor legislation where various treason and religious legislation was extended to Jersey, albeit sometimes it appears to have been assumed that a reference to “the king’s dominions” included the Channel Islands.¹⁴ Much comes from the reign of Henry VIII, although we also find at the start of Edward VI’s reign an Act for dissolution of chantries applied to Jersey,¹⁵ and an Act against the export of horses.¹⁶

13 Richard Haldane, QC the future Lord Chancellor, strongly defended Jersey’s constitutional independence against the royal prerogative in the Jersey Prison Board case in 1894. Nonetheless, he proceeded on the basis that Parliament’s power was an accepted fact¹⁷—

“In Jersey it is conceived that the constitution contains two elements, the Legislative Assembly and the Crown as the executive power. Both are subject to the Imperial Parliament, that is to say, to the Crown acting by and with the consent of the Imperial Parliament. It must now be conceded, what was laid down by Lord Coke, *although for a time it was denied, that Jersey is subject to the legislative power of the Imperial Parliament so far as the question of legal power is concerned, although it might be grossly unconstitutional for the Imperial Parliament to exercise that power.* Conceivably the case might have stood otherwise. If the Channel Islands had formed part of the Dominions of the Crown only in the sense that Hanover once did—in other words, if they had belonged to the Crown, not in right of its existence as the British Crown, but in right of the Sovereign in a different capacity, it might well have been that Parliament would have had no such power. But it is not now contended that the Channel Islands present an analogy to the case

¹³ 2 Geo 2, c 7, see Schuyler, *op cit*, 220–221.

¹⁴ Schuyler, *op cit*, 228–229.

¹⁵ 1 Edw 6, c 14, s 7. See Schuyler, *op cit*, 218–219.

¹⁶ 1 Edw 6, c 5, s 1.

¹⁷ Haldane, “Jersey Prison Board Case—Notes of Proposed Arguments”, (2001) 5 *Jersey Law Review* 254–270. In the event the dispute was resolved by the Special Committee of the Privy Council without requiring their Lordships to resolve whether the Crown had the power to legislate for Jersey without the advice and consent of the States of Jersey.

of Hanover; and, subject to the reservation of all questions of constitutionality, it is not part of present argument that such power does not exist.” (Emphasis added.)

14 It is therefore unsurprising that the Kilbrandon Report was very clearly of the view that the British Parliament had paramount power to legislate for Jersey.¹⁸ Kilbrandon recognised that there had been a convention of long standing against Parliament legislating in domestic matters, but concluded that recent House of Lords authority supported “the extreme view” that none of this could limit Parliament’s legal authority—

“1469. All our official witnesses accepted that Parliament has power to legislate for the Islands and that, in some matters at least, the exercise of this power is not dependent upon the Islands’ consent being given. It has, however, been the practice not to legislate for the Islands without their consent on matters which are of purely domestic concern to them. There has been strict adherence to the practice over a long period, and it is in this sense that it can be said that a constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on domestic matters . . .

1472. The conclusion we draw is that despite the existence of the convention, Parliament does have power to legislate for the Islands without their consent on any matter in order to give effect to an international agreement. There appear, in any event, to be good grounds for accepting the more extreme view that if Parliament has power to legislate for the Island at all, which we believe not to be in doubt, there are no circumstances in which it could be precluded from exercising this power.”

15 In support of this, Kilbrandon quoted the *Lardner-Burke* case, to which we shall soon turn. This view of the position was recently supported by Baroness Hale giving the sole judgment in *Barclay*¹⁹—

“*The United Kingdom Parliament has power to legislate for the Islands, but Acts of Parliament do not extend to the Islands automatically, but only by express mention or necessary implication. The more common practice is for an Act of Parliament to give power to extend its application to the Islands by Order in Council. It is the practice to consult the Islands before any UK legislation is extended to them. The Kilbrandon*

¹⁸ *Kilbrandon Report, op cit.*

¹⁹ *R (Barclay) v Secy of State for Justice* [2014] 3 WLR 1142, at para 12 (“*Barclay*”).

Commission observed that 'it can be said that a constitutional convention has been established whereby Parliament does not legislate for the islands without their consent on domestic matters' (Cmnd 5460, para 1469). *Nevertheless, in the light of the view taken by the Judicial Committee of the Privy Council in Madzimbamuto v Lardner-Burke [1969] 1 AC 645, at 722–3, the Commission concluded that in the eyes of the courts the UK Parliament did have a paramount power to legislate for the Islands on any matter, domestic or international, without their consent, although it should be no more ready than in the past to interfere in their domestic affairs (para 1473).*" (Emphasis added.)

16 It can be said, and has been said, that *Lardner-Burke* has no relevance to Jersey.²⁰ That case concerned Southern Rhodesia and its unilateral declaration of independence. Southern Rhodesia had been a colony, and Parliament had never relinquished its power to legislate for the country. Doubtless it would have appeared from a 1950s perspective grossly unconstitutional for Parliament to enforce its legal rights over Southern Rhodesia, but then times had changed rapidly. But this is much as the great constitutional writer, Ivor Jennings, had written in the 1930s when he observed that, whatever the legal theory, it would be unconstitutional for Parliament to legislate for Northern Ireland without the consent of the Province's post-partition Parliament²¹—in retrospect the firm views on what was unconstitutional merely signified that Jennings could not at the time foresee circumstances when it would be proper not just to legislate over the head of Northern Ireland's Parliament, but to abolish it altogether. And so it was with *Lardner-Burke* and Southern Rhodesia, what was once unthinkable became perfectly understandable, and Parliament's legal power, once apparently a theoretical relic, was found to have remained intact to meet the eventuality. Jersey, however, was not and never had been a colony—there is no act of conquest or acquisition by the United Kingdom to account for Parliamentary authority.

17 Nevertheless, it can equally be said that Kilbrandon ostensibly had ample support for his proposition without a lazy application of what was then a recent and inappropriate precedent. The Royal Court itself had in 1960 explicitly recognised Parliament's paramount power over

²⁰ Jowell, "The UK's Power over Jersey's Domestic Affairs", *op cit*, at 265.

²¹ Jennings, *The Law and the Constitution* (2nd ed, London: University of London Press, 1938), at 153.

Jersey in *Bristow*.²² It has been noted that the decision of the Bailiff was given without hearing argument,²³ although that may serve to underline the apparent triteness of the proposition that British parliamentary sovereignty extends to making or unmaking any law whatsoever in Jersey.

The prerogative and British power in Jersey

18 It is worth setting out the other dynamic by which the United Kingdom Parliament—by way of the United Kingdom government—exercises power in Jersey. By this we mean through its having a monopoly on advising how the royal prerogative should be exercised in Jersey. It is the means through which the United Kingdom is involved in Jersey legislation, by advising on Royal Assent—and issue to which we shall turn later.

19 Whilst Haldane said of Jersey that “no less than in Great Britain, the Queen reigns without governing”,²⁴ on those matters where the monarch still reigns in Jersey as a matter of legal form (*i.e.* the use of the prerogative), power goes to the United Kingdom government. This is a flow of power in an entirely different direction from that enjoyed by the United Kingdom itself, where power flowed from the monarch into the representatives of the nation. In Jersey, whilst the abolition of the royal prerogative as matter of law will bring power to Jersey,²⁵ this is not the case where the prerogative remains but has ceased to be personal to the monarch. In such cases, the loss of monarchical power devolves to the United Kingdom government, who acts as the adviser to the monarch. In other words, a loss of personal royal prerogatives causes power to shift to a government entirely external and unaccountable to Jersey.

²² (1960) 35 PC 115.

²³ *In re Terrorist Asset Freezing (Temporary Provisions) Act 2010* [2011] JRC 047.

²⁴ Haldane, “Federal Constitutions within the Empire: an Address Delivered before the Society of Comparative Legislation”, Foreign and Commonwealth Office Collection, 1900, at 5 (<http://www.jstor.org/stable/60230556>, last accessed 21 September 2015).

²⁵ It should be noted that, as a matter of constitutional theory, any royal prerogative can be removed by statute, see Jennings, *The Law and the Constitution*, *op cit*, at 173–174; and *Att Gen v De Keyser’s Royal Hotel Co.* [1920] AC 508, at 526. Although beyond the scope of this article, there is no reason why a Jersey statute should not regulate or even abolish the prerogative.

20 Haldane wrote in 1900²⁶—

“If Jersey—and the same thing is true of the other islands referred to—had been larger and more important and at a greater distance from London, there is little doubt that under this form of constitution she could have obtained for herself a freedom as complete as she could have gained under those parliamentary forms where, theoretically and in the eyes of a court of law, the Imperial Parliament can do everything, while constitutionally in local matters it can do nothing.”

21 The reason for this distinction rests on the political fact we have set out: the prerogative in Jersey is exercised on the advice of British Ministers instead of Jersey's own political leaders. Haldane notes that very different dynamics applied in Jersey²⁷—

“Here the concession has by degrees been wrung from the Crown as the price of financial assistance. There it was by degrees obtained as the reward for assistance in the various wars with France.”

22 Hence, the control of finance and legislation and Parliament has led to the prerogative powers flowing from the Crown to Ministers who command a majority in Parliament. Jersey could exercise no such power over the British Crown. In respect of Jersey, the scope for using the theoretical power of the monarchy has been greatly diminished through the recognition of the constitutional rights and independence of the Island. However, where the prerogative remained, any political role in advising on its use went to the monarch's British ministers by way of the Privy Council. If the monarch's prerogative in foreign policy was carried out in respect of Jersey on the advice of Jersey ministers, then Jersey would be as independent as any Caribbean state that retains the Queen as head of state. On this, rather than any theoretical power of the British Parliament, hangs Jersey's constitutional relationship with the United Kingdom. And, we shall argue, Parliament's power in Jersey should be confined by what is justified for as long as nothing is done to sever this relationship.

²⁶ Haldane, “Federal Constitutions within the Empire”, *op cit*, at 8.

²⁷ Haldane, “Federal Constitutions within the Empire”, *op cit*, at 8.

Professor Jowell's new constitutional hypothesis for Jersey

23 It might be thought that the position of anyone seeking to deny Parliament's power over Jersey was somewhat hopeless. It is not just that there are so many examples of the power being used, but that the most authoritative sources affirm the existence of such a power. Any disinterested party researching the subject must surely come to the conclusion that was made in passing in the *International Comparative Law Quarterly* in the 1960s: "The United Kingdom Parliament has the constitutional right to legislate for Jersey, and indeed has done so from time to time".²⁸

24 If this were right, then we could settle down to a discussion of how Parliament has the power, but then debate when the exercise of that power would be unconstitutional. This could be discussed secure in the knowledge (*per Lardner-Burke*) that unconstitutionality would be a legally meaningless accusation.²⁹ Indeed, it might be thought that it was more a matter for political theory or historical analysis than anything to do with lawyers.

25 Against this weight of authority, Professor Jowell has powerfully argued that there is no principled explanation or justification for the extension of parliamentary sovereignty to cover Jersey. As regards Kilbrandon, he argued³⁰—

"[It] is woefully short on legal 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."

26 The essential arguments are at the start of his original attack on Parliament's claims to have a paramount power in Jersey³¹—

"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 the prerogative powers within the UK.

²⁸ Graveson, "The Unification of Law in the British Isles", (1968) 17 *International Comparative Law Quarterly* 117, at 126.

²⁹ As opposed to arguments around constitutionality and the use of Orders in Council, see *In re the States of Jersey*, 9 Moore P NS, 184, at 262. See also Dicey, *Introduction*, *op cit*, at 13 (note 20), and recently art 31 of the States of Jersey Law 2005.

³⁰ Jowell, "The UK's Power over Jersey's Domestic Affairs", *op cit*, at 249.

³¹ Johnson, *Jersey Law Course 2015–16: Jersey Legal System and Constitution* (Institute of Law: Jersey, 2016), para 7.64.

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 crystallised 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 . . .”

27 The arguments are (a) a power cannot exist beyond the limits of its justification; (b) the power has always been used within conventional limits, which has crystallised into law, and (c) as the power has always been used within such limits, it cannot be taken as established that it exists beyond those limits merely because this has from time-to-time been asserted as possible.

28 It is not the first time that a leading jurist has raised a doubt as to Parliament's power in the Channel Islands. In the 19th century, Henry John Stephen tentatively recognised a historical flaw in Parliament's claim over Jersey³²—

“The Channel Islands indeed claim to have conquered England, and are the sole fragments of the dukedom of Normandy which still continue attached to the British Crown. For this reason, in these islands alone of all British possessions does any doubt arise as to whether an Act of the imperial Parliament is of its own force binding law.”

Jowell, however, went beyond this historically obvious argument, to mount an attack on a broader principled basis which joined the historical lack of a clear origin for Parliament's power, to the reality of the exercise of the putative power, and from there to modern constitutional principle.

29 Unfortunately, the Government of Jersey was never called upon to address these points in detail before the Supreme Court in *Barclay*. The simplistic orthodoxy expounded by Baroness Hale was never subject to having to defend itself against Jeffrey Jowell QC's advocacy, as would otherwise have been the case.

Article 31 of the States of Jersey Law

30 It is useful here to set out the argument that the use of parliamentary sovereignty in Jersey is already regulated by art 31 of

³² Stephen, *Commentaries* (8th ed), at 100–102, quoted in Dicey, *Introduction, op cit*, at 13 (note 20).

the States of Jersey Law 2005. This is a useful issue to deal with in the context of this article, and we move to it immediately as it will help to frame certain key issues around the use of Parliamentary power in Jersey.

31 Article 31 of the States of Jersey Law 2005 provides as follows—

“(1) Where it is proposed—

- (a) that any provision of a draft Act of the Parliament^[33] of the United Kingdom should apply directly to Jersey; or
- (b) that an Order in Council should be made extending to Jersey—
 - (i) any provision of an Act of the Parliament of the United Kingdom, or
 - (ii) any Measure, pursuant to the Channel Islands (Church Legislation) Measures 1931 and 1957^[64],

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.”

32 The question of what this meant was considered in the *Asset Freezing* case. The following argument was put forward by the then Attorney General and recorded (without approval or disapproval by the then Bailiff)³⁴—

“With the approval of Her Majesty in Council, the States has passed Article 31 of the 2005 Law. The effect of this is that the

³³ A “draft Act of Parliament” may be thought by some to be an oxymoron, but it seems clear that in context it means any provision of a Bill before the UK Parliament.

³⁴ *In re Terrorist Asset Freezing (Temporary Provisions) Act 2010* [2011] JRC 047 at [16].

Court may not register a UK Act purporting to have direct effect unless the States 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.”

33 The force of this argument is obvious. Article 31 aims to place all Acts of Parliament and Orders in Council before the States of Jersey for approval. It was well established in the 19th century that Orders in Council should not be imposed on Jersey, and it would be unconstitutional for the (non-judicial) Privy Council to do so³⁵—art 31 creates a systematic mechanism to achieve this result. What point would there be for the provision to mention Acts of Parliament alongside Orders in Council if an Act of Parliament had to be registered regardless of the States’ approval or disapproval? There are, however, several points on which this argument needs to be refined.

34 First, art 31 conspicuously fails to say what happens if the States of Jersey rejects the registration of any of the measures listed there. The precedents that establish the unconstitutionality of Orders in Council imposing legislation on Jersey ended with those Orders being withdrawn not being quashed or declared void.³⁶ There was a process

³⁵ *Re States of Jersey* (1853) Moo PC 185, 262, where it was held that there were “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”; and Haldane, “The Work for the Empire of the Judicial Committee of the Privy Council”, (1922) 1 *Cambridge Law Journal* 143, at 151, said that the Judicial Committee of the Privy Council believed the Prison Board Case to be moot as the Order in Council broke constitutional convention. Compare *The Commissioners appointed to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey*, 1861, at v–vi, who argued that the power still existed.

³⁶ Lord Haldane would in 1922 relate why the Prison Board Case did not come to a positive decision, which demonstrates the difficulty in drawing clear principled precedent from the messy reality of law in practice. Haldane, “The Work for the Empire of the Judicial Committee of the Privy Council “, *op cit*, at 151—

of discussion, followed by a reference to the Judicial Committee of the Privy Council. It is not obvious why art 31 would be ineffective if it led not directly to the invalidity of the Act of Parliament in Jersey, but to that dynamic. Constitutional statutes can work by way of setting in motion political processes rather than strict legal consequences. Declarations of incompatibility under the Human Rights Act 1998 and the Human Rights (Jersey) Law 2000 are obvious examples.

35 Secondly, statutes that overturn fundamental constitutional principles should be explicit. This principle is well known in the area of fundamental constitutional rights, where it has been expounded in *R v Secy of State for the Home Department, ex p Simms*,³⁷ a case which has been applied by the Jersey courts.³⁸ The same principle has been held to apply outside the field of constitutional rights, and in the field of constitutional principles generally. This is found in *Thoburn v Sunderland City Council*.³⁹ By parity of reasoning, art 31 of the States of Jersey Law could not resolve fundamental constitutional issues in the relationship between Jersey and the United Kingdom by implication. General words do not traverse fundamental constitutional principles, even if their natural meaning would appear to do so.⁴⁰ If Parliament does have paramount power in Jersey, art 31 was insufficiently clear to create a fundamental constitutional change therein.

36 Thirdly, and crucially, art 31 does not purport to alter the position where Parliament purports to legislate for Jersey without the need for

“When I had modestly opened the case, and was asked how long I thought I should take, I replied that I could compress my remarks into eight days. Presently Lord Watson rose to the occasion, and said that, in his opinion, it was highly inexpedient that the Council should decide this abstract question without its being essential. He was of opinion that the Home Office were going back on their own convention. They ousted their own Order in Council on that ground, and Lord Watson said that, if anybody raised a constitutional question and demanded that it should be disposed of, the only thing he was quite clear about was that he would do all he could to make that party pay the costs.”

³⁷ [2000] 2 AC 115, at 131.

³⁸ *Larsen v Comptroller of Taxes* [2016] JCA 137, at paras 22–23.

³⁹ [2002] EWHC 195 (Admin), [2003] QB 151, at paras 60–67.

⁴⁰ *R v Special Commr, ex p Morgan Grenfell & Co Ltd* [2002] UKHL 21, [2003] 1 AC 563—legal professional privilege had to be expressly excluded in a statute to show that Parliament understood this to be the case, even though for over a decade everyone had understood the statute to be plainly intended to do that.

registration of the Act in the Royal Court. To effect constitutional change, it is not about what any parties to the legislation believed or ought to have believed would be the effect,⁴¹ it is a question of what the words say. On the subject of the application of statutes purporting to apply without registration, art 31 says nothing.

Construing an Act of Parliament's application to Jersey

37 It must be remembered that an Act of Parliament is first and foremost a British statute. If its provisions are to mean the same in the United Kingdom as in Jersey, they must be construed in the same way. The same principle applies to the provisions that purport to give effect to the substance of the statute in Jersey—it would be decidedly odd if a statute on its true application did not apply to Jersey as a matter of United Kingdom law, but did as a matter of Jersey law.

38 There are numerous presumptions as a matter of British law as to how an Act of Parliament should be construed. We have already noted the cases of *Simms* and *Thoburn* on the construction of statutes which purport to have constitutional effect: they apply equally to any British statute that purports to have application to Jersey. The point in *Simms* was one of the rule of law⁴²—

“The principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words.”

39 The imposition of an Act of Parliament without registration as a law in Jersey would be a failure of the rule of law. This is admitted in the Code of 1771, as we have seen, and should be taken as a very uncontroversial proposition. The Attorney General in the *Asset Freezing Case* framed this objection in terms of European Convention

⁴¹ *Thoburn*, at para 63—

“The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes. I should add that in my judgment general words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute, by reference to what was said in Parliament by the minister promoting the Bill pursuant to *Pepper v Hart* [1993] AC 593. A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute.”

⁴² At 131.

rights of those affected by statutes,⁴³ but this is another way of saying essentially the same thing. The rights of individuals (particularly in criminal law matters) cannot be determined by unpublished law.

40 To this we might add a further reason for applying the *Simms* presumptions to Acts of Parliament extending to Jersey: the principles of democracy and non-colonialism. It cannot be thought that Parliament would seek to override a responsible legislature. This must apply particularly because Jersey is not and never has been a colony. Jersey is not and never has been on the United Nations list of non-self-governing territories.⁴⁴ Even accepting the constitutional legality of Parliament unilaterally legislating for Jersey, for it to do so is not to act within the present constitutional forms of internal independence but to overthrow them in favour of a form which subjects the island to the direction and invigilation of a superior sovereign power—much as occurred when Parliament asserted its paramount power over the previously *de facto* independent Rhodesia. It cannot be thought that Parliament would readily assert a colonial relationship in respect of its power over Jersey. A failure to respect Jersey's self-government would lead to the Jersey being entered on the list of non-self-governing territories and thus initiate an international law duty of decolonisation.⁴⁵ Whatever might have been the case with 17th century statutes, a 21st statute would be assumed not to have a colonising intent.

41 None of this of itself answers the question of whether the British Parliament has paramount power over Jersey. The point is rather, even assuming parliamentary sovereignty in its absolute "make or unmake

⁴³ *In re Terrorist Asset Freezing (Temporary Provisions) Act 2010* [2011] JRC 047 at para 16:

"The effect of a rule that an Act of the UK Parliament can take effect in Jersey without registration could, for example, lead to Jersey residents unknowingly committing criminal offences because they had acted in breach of legislation passed by a legislature in which they were unrepresented and when they were not aware of the fact that the legislation had been passed because it had not been registered in Jersey. One can see an argument that this too would not be consistent with rights under the Convention."

⁴⁴ See <http://www.un.org/en/decolonization/nonselfgovterritories.shtml>, for the current list; and <http://www.un.org/en/decolonization/nonselfgov.shtml>, for historical data (both last accessed on 7 October 2016).

⁴⁵ Essentially, any assertion of parliamentary sovereignty that materially diminished Jersey's independence would create a duty to work towards Jersey's independence.

in any whatsoever sense” applies to Jersey, an Act will only apply to Jersey regardless of consent and registration (applying the principles in *Simms*, *Thoburn* and many recent British cases) if the Act expressly states this should be the case. Otherwise, even if the Act were extended to Jersey, the Act would be construed as respecting fundamental principles such as the rule of law, democracy and non-colonisation, and its legal effect would wait on registration and consent.

42 It follows that we are very much interested in the doctrine of parliamentary sovereignty in its absolute sense. It is not simply the constitutional relationship between Jersey and the United Kingdom, but the question of why parliamentary sovereignty in this absolute sense of a power to “make and unmake any law whatsoever” should apply to Jersey.⁴⁶ Once we see that the assertion of parliamentary power without consent would be an extreme use of legislative power, we need to see the source of that power before it can be agreed that parliamentary sovereignty is part of the local rule of recognition for the law in Jersey.

Parliamentary sovereignty—and the English law rule of recognition

43 There is a fairly simple point to be made as regards all the most important sources set out above. They come from an English law perspective. From that English perspective: parliamentary sovereignty gives rise to the ultimate “rule of recognition” for law before the English courts.⁴⁷

44 As regards applying this *English* rule of recognition before *English* courts to Acts of Parliament extending to Jersey, it is as Dicey said⁴⁸—

“[W]hatever doubt may arise in the Channel Islands, every English lawyer knows that any English court will hold that an Act of Parliament dearly intended to apply to the Channel Islands is in force there *proprio vigore*, whether registered by the States or not.”

⁴⁶ Dicey, *Introduction, op cit*, at 3–4; and Jennings, *The Law and the Constitution, op cit*, at 148–149.

⁴⁷ We slip a little between talking of Britain or England due to the confusion that, whilst the statutes are British, there is some theoretical ambiguity as to whether parliamentary sovereignty is limited in Scotland to any degree by the Act of Union.

⁴⁸ Dicey, *Introduction, op cit*, at 13 (note 20).

45 Under the doctrine of parliamentary sovereignty, the English courts in theory are bound to enforce a statute that bans smoking in Paris,⁴⁹ so that from an English perspective the legal position is perfectly clear. From a Jersey perspective, it might be an entirely different matter, but that is a matter of whether Jersey law accepts British supremacy or whether Jersey otherwise submits to Parliament's power, neither of which is a matter for English courts. Indeed, the quote from Dicey was concluded with the quote from Henry John Stephen that we set out earlier arguing that Parliament was not necessarily sovereign when it came to creating law in the Channel Islands.⁵⁰

46 The claim to apply British parliamentary sovereignty to Jersey needs to be viewed from the perspectives of the justifications for parliamentary sovereignty in terms of British constitutional theory, and whether and how far such justifications can apply in Jersey, such that there is a rule of recognition in Jersey law that a British statute is the highest form of law in Jersey.

47 There are essentially three approaches worth noting—

- (1) Parliamentary sovereignty as the creation of common law;
- (2) Parliamentary sovereignty as a creation of the political facts;
- (3) Parliamentary sovereignty as an aspect of popular sovereignty.

It is not necessary to express a view on which is right: the concepts overlap to a significant degree, and many articles can be expended on that subject without reaching any wholly satisfactory conclusion. The point is rather that all throw up interesting implications for Jersey's constitutional relationship with the United Kingdom.

⁴⁹ Jennings, *The Law of the Constitution*, *op cit*, at 149.

⁵⁰ See note 31, above.

1. *The common law theory*

48 While Dicey expounded the modern theory of parliamentary sovereignty,⁵¹ he did not theorise as to the source of the principle. The idea that parliamentary sovereignty is a principle of common law is stated clearly by Ivor Jennings, the next great constitutional theorist to turn his mind to the concept.⁵²

49 Jennings did not doubt the existence of parliamentary sovereignty, even if he doubted the importance given to it by Dicey. However, today the common law explanation is commonly associated with challenges to parliamentary sovereignty. Lord Steyn in *Jackson v Att Gen*⁵³—

“[T]he supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.”

This view has also been stated extra-judicially by Lord Hope.⁵⁴

50 The difficulty for this theory of Parliamentary power is that the Common Law does not and has never applied to Jersey. It is made clear in a judgment of the Court of Exchequer in 1519⁵⁵—

“An office was found that the Earl of Derby was seised in fee of the Isle of Man, and died thereof seised, his heir within age; the office is void. This island is not part of the kingdom; it is governed by its own laws, and not by the laws of this land. Garnsey and Jersey are also governed by their own laws: a writ of error does not lie upon an erroneous judgment given there; and so of Garnsey and Jersey, &c.”

51 If the Common Law is the reason for parliamentary sovereignty and thus the reason why “any English court will hold that an Act of Parliament dearly intended to apply to the Channel Islands is in force

⁵¹ He did not create the concept that the courts could strike down Acts of Parliament, *e.g. Logan v Burslem* (1842) 4 Moo at C 284.

⁵² Jennings, *The Law and the Constitution*, *op cit*, at 105.

⁵³ [2006] UKHL 56, [2006] 1 AC 262 at [102].

⁵⁴ Hope, “Sovereignty in Question”, Paper presented at the W.G. Hart Workshop, 28 June 2011, at 11–12. Available at http://www.supremecourt.gov.uk/docs/speech_110628.pdf.

⁵⁵ *Anonymous* (1519) Jenkins 199.

there *proprio vigore*”,⁵⁶ that will not assist to explain why a court in the Channel Islands would take the same approach.

52 If we ask why an English court would apply “*proprio vigore*” in the Channel Islands an Act of Parliament that purported to break the rule of law (by not being registered in Jersey) and/or acted contrary to the principles of democracy and established constitutional propriety, the answer would be that Parliament is sovereign, and effect must be given to its laws. However, to a court in the Channel Islands it would be entirely proper to state that Parliament may be sovereign in the United Kingdom, but that has not mean that a court in the Channel Islands must treat such a statute as applying *proprio vigore* in the Islands.

2. Parliamentary sovereignty as a matter of the political facts

53 The alternative approach is that most famously associated with Professor Sir William Wade: that parliamentary sovereignty rests on the political facts, a view expounded in his 1955 article, “The legal basis of sovereignty”.⁵⁷ Having explained that all rules of law have ultimately historical sources, which may be unknown, Wade continues⁵⁸—

“The rule of judicial obedience [to Parliament] is in one sense a rule of the common law, but in another sense—which applies to no other rule of common law—it is the ultimate political fact upon which the whole system of legislation hangs.”

54 Parliament is sovereign, therefore, because it established itself as sovereign in the Glorious Revolution of 1688. Had the political facts changed and the Jacobites succeeded, the political facts might have swung back in favour of monarchical power.

55 This approach has been criticised. For example, Philip Allott wrote in 1979 that the courts applied rules as opposed to recognising political facts.⁵⁹

⁵⁶ Dicey, *Introduction*, *op cit*, at 13 (note 20).

⁵⁷ Wade, “The Legal Basis of Sovereignty”, (1955) 13 *Cambridge Law Journal* 172.

⁵⁸ Wade, “The Legal Basis of Sovereignty”, *op cit*, at 188.

⁵⁹ Allott, “The Courts and Parliament: Who Whom?”, (1979) 38 *Cambridge Law Journal* 79, at 115: “In the celebrated passage from the judgment of Willes J., in *Lee v. Bude & Torrington Ry. Co.* quoted above, there are words which are clearly stated as a legal rule: “as long as [an Act of Parliament] exists as law, the Courts are bound to obey it” (emphasis added by the judge). Such a formula implies that there are not only rules about how courts

56 However, the political facts approach accords with a considerable amount of constitutional common sense—the history of how Parliament came to be sovereign is one of a struggle between the powers of the monarchy and of Parliament, just as the history of how the House of Commons became the supreme power within Parliament is one of a contest between the relative powers of the House of Commons and the House of Lords.⁶⁰ Similarly, LS Amery said that the limits of the personal prerogative would become clear in the case of the conflict arising from any controversial use.⁶¹

57 However, political facts can change, as Wade himself recognised. He argued that the disapplication of certain provisions of the Merchant Shipping Act 1988 by reason of incompatibility with European law was a change in parliamentary sovereignty in recognition of new political facts⁶²—

“In Factortame the House of Lords elected to allow the Parliament of 1972 to fetter the Parliament of 1988 in order that Community law might be given the primacy which practical politics obviously required. This in no way implies that the judges in either case decided otherwise than for what appeared to them to be good legal reasons. The point is simply that the rule of recognition is itself a political fact which the judges themselves are able to change when they are confronted with a new situation

recognise Acts of Parliament as existing and in force, but also rules about their duty to give effect to them. The task of the courts is to declare and apply the law, not to recognise facts. Mr. Justice Willes was stating a rule, not recollecting that his predecessors had recognised political facts.

⁶⁰ Low, *The Governance of England*, (New York, GP Puttnam & Sons: 1920), at x. Sideny Low, the celebrated commentator on the British constitution, argued in the first edition of *The Governance of England* published in Edwardian days that the Lords did not have a genuine veto power against the Commons, as its formal power would be removed in the conflict resulting from its actual use. Come the second edition, Low could report that this had in fact happened following the dispute over Lloyd George's budget. Writing in 1900, Haldane stated that this was a general position of impotence for upper houses of legislatures based on the British model: Haldane, “Federal Constitutions within the Empire”, *op cit*, at 8.

⁶¹ Amery, *Thoughts on the Constitution*, (London: Oxford University Press: 1964), at 6–7; and “The Nature of British Parliamentary Government”, in Henderson (ed.), *Parliament: a Survey*, (London, George Allen & Unwin Ltd: 1952), at 59.

⁶² Wade, “Sovereignty—Revolution or Evolution?” (1996) 112 *Law Quarterly Review* 568.

which so demands . . . In *Factortame* it arose from the creation of new ties with Europe.”

58 Professor Jowell took up this point more fully in a noted article challenging the nature of parliamentary sovereignty in the United Kingdom. If “political facts” created parliamentary sovereignty, then political facts can alter parliamentary sovereignty. Following the decision in *Jackson* where three of the nine Law Lords cast doubts on the absolute nature of parliamentary sovereignty, Jowell argued⁶³—

“Is there any altered ‘political fact’ which justifies a new-found judicial authority to review the validity of legislation so as to ensure conformity with the rule of law? The dicta in *Jackson* provide compelling evidence that there are changed understandings and expectations nowadays which, unlike in the past, reject the notion of the unfettered authority of a legislature, however representative of popular opinion it may be.”

59 In other words, parliamentary sovereignty was created by a certain set of “political facts”, and may be altered if new facts allowed. Although, it might be added, as parliamentary sovereignty arose from the institution establishing a supreme political power in the United Kingdom, then any ability of the courts to alter parliamentary sovereignty would depend on whether supporters of the old position would be strong enough (and motivated enough) successfully to fight back. As LS Amery made clear in respect of the remaining personal royal prerogatives, the reality of power can be made clear in struggle.⁶⁴

60 What must, of course, be noted is that it is not the political facts in the United Kingdom that are in point for the purposes of this article. If the political facts are to explain parliamentary sovereignty in Jersey, those facts must relate to Jersey and to its relationship with the United Kingdom as seen from the Jersey perspective. Just as the courts of England and then the United Kingdom recognised Parliament as the superior power in that land, so the customary law of Jersey must have come to recognise Parliament’s power. And, which is more, there should be no change in that custom—remembering what we said at the start as to the willingness of Jersey customary law to promote and demote external sources of law in terms of significance.

3. *Parliamentary sovereignty as an aspect of popular sovereignty*

⁶³ Jowell (2006). “Parliamentary Sovereignty under the New Constitutional Hypothesis”, *Public Law* 562, at 563–564.

⁶⁴ Amery, *Thoughts on the Constitution*, *op cit*, at 6–7; Amery, “The Nature of British Parliamentary Government”, *op cit*, at 59.

61 Dicey described parliamentary sovereignty as being the legal embodiment of the political sovereignty of the people.⁶⁵ Although Jowell's own thoughts on parliamentary sovereignty in a British context would appear to dispute that this is something that can still be asserted today, in his original argument in respect of Jersey's constitutional relationship with the United Kingdom Parliament, he proposed something strikingly similar⁶⁶—

“[Parliamentary sovereignty] is a principle based not upon a notion of where power actually lies but upon where power ought in a democracy to lie—namely, with the elected representatives of the people rather than the monarch.”

62 The argument is that Parliament's power in the British Constitution cannot be seen as lying simply on the brute fact of power, but in its representativeness, *i.e.* that there is no power within a country's constitution greater than the people of the country themselves.

63 Such a dynamic obviously cannot apply as between Jersey and the British Parliament. Parliament's power can, of course, be supported by the consent of the Jersey people. Such consent might be explicit, or implicit in consensually maintaining a consensual relationship where the power of the British Parliament is explicable. Alternatively, the power of the British Parliament might be seen as deriving from an altogether cruder dynamic, *i.e.* submission to a larger and more powerful neighbour.

64 Talking of parliamentary sovereignty, the jurist William Anson, a contemporary of Dicey, noted that sovereignty in a democracy is constrained by the loss votes, but in a despotism it is constrained by estimating a threat of rebellion.⁶⁷ Parliamentary sovereignty has arisen in the context where the nature of Parliament's relationship with the people of the country creates a restraint. Such a dynamic does not apply as regards Jersey, nor does any threat of rebellion given that Parliament can hardly be overthrown by revolution in Jersey. The natural restraints on parliamentary sovereignty that come through its members' accountability to the British people,⁶⁸ which is a strong

⁶⁵ Dicey, *op cit*, at 26–29, 285.

⁶⁶ Jowell, “The UK's Power over Jersey's Domestic Affairs” in Bailhache (ed), *A Celebration of Autonomy: 1204–2004. 800 Years of Channel Islands Law* (2005), at 250.

⁶⁷ Anson, (*The Law and Custom of the Constitution, Vol. 1: Parliament*, (Oxford: Clarendon Press, 1909), at 240–241.

⁶⁸ Jennings, *The Law and the Constitution, op cit*, at 139.

argument as to why the principle cannot be swallowed whole by an external jurisdiction—at least not if it has any choice in the matter.

The political facts and Jersey's relationship with the United Kingdom

65 What we shall suggest is that, historically, Parliament's power over Jersey has derived from the facts of political power. This is no place to write a constitutional history of Jersey's relationship with the United Kingdom, but some points should be obvious.

66 First, the historic starting position was the somewhat despotic power of the Dukes of Normandy. It could not have suited either the people of Jersey nor Parliament for the British monarch to retain Jersey as a private kingdom. We have noted earlier that in 1697, the then English Attorney General advised that Parliament's power over Jersey was not contingent on registration of Acts in the Royal Court. It would be interesting if historical study could show if the concern here was as to British power over Jersey or Parliamentary power over the Crown. That must be for another day, but it may be useful to consider whether various incidents in Jersey's constitutional history were really extensions of domestic English/British concerns.⁶⁹ For example, the Code of 1771 was passed at a time when the British Parliament was purporting to legislate unilaterally for the American Colonies, and it is

⁶⁹ For example, it is easy to attribute the Charter of Edward III to Jersey in 1341 to securing local loyalty against France, particularly as that year saw the start of the phase known as the War of Breton succession. However, 1341 was a year of domestic political turmoil which addressed the rights granted by previous monarchs. The Statute of 1341 said,

“And the franchises granted by our sovereign lord the king or by his predecessors, to the holy church, to the peers of the land, or to the city of London and other cities and boroughs and to the Cinq Ports, or to the commons of the land, and all the franchises and free customs shall be maintained in all points: and nothing shall be done to the contrary.”

See Wilkinson, *Constitutional History of Medieval England: Vol II, Politics and the Constitution, 1307–1399*, (London, Longmans: 1952), at 200–201. If Bertie Wilkinson (*ibid*, at 185) was correct to talk of “Edward [III]’s incurable levity in constitutional affairs”, it may be that the renewal derived from nothing more than an instruction to renew all charters. This is not the place for such considerations—which would require considerable research—the point is rather the difficulty of establishing a settled and principled relationship when the side with the greatest power gives the issues almost no attention.

unlikely that there would have been any time for fine distinctions between the power of Parliament in Jersey as opposed to New Jersey.

67 Secondly, the establishment in common constitutional commentary of Parliament's power over Jersey was achieved in a decidedly non-democratic age, and even then it was frequently disputed. Parliament's power arose in an age where the alternative source of ultimate power was the monarch. Nothing can be more obvious than that the political facts have changed in a way very relevant to Jersey. The existence of a legislative power over a non-metropolitan territory is a very exceptional thing in the modern world. This can be seen in the United Nations Decolonization Committee website⁷⁰—

“The [United Nations] Charter binds administering Powers to recognize that the interests of dependent Territories are paramount, to agree to promote social, economic, political and educational progress in the Territories, to assist in developing appropriate forms of self-government and to take into account the political aspirations and stages of development and advancement of each Territory. Administering Powers are also obliged under the Charter to convey to the United Nations information on conditions in the Territories. The United Nations monitors progress towards self-determination in the Territories.”

68 As we have noted, Jersey has never been on the United Nations list of non-self-governing territories. This provides significant evidence that the United Kingdom has no administrative role in Jersey except that which Jersey, as a small community, accepts from time to time for its own benefit. This is the consensual rationale for British legislative rights in Jersey—in distinction to the “submission to a superior” argument, which whilst supporting a claim for paramount power would also be a claim for colonial mastery. (Of course, it may be that the United Kingdom has never properly thought through the relationship between its views of the United Kingdom's constitutional role in Jersey and whether Jersey should be on the list of non-self-governing territories. Were it to do so, it seems unlikely that the United Kingdom would want to adopt a position that obliged it to place Jersey on the list and thus trigger a decolonisation duty.)

69 Thirdly, assuming that the relationship is consensual and non-colonial, the nature of that relationship is not wholly within Jersey's gift, *i.e.* it is something that must be agreed (and occasionally glossed) explicitly or tacitly. The benefits of United Kingdom citizenship and

⁷⁰ <http://www.un.org/en/decolonization/history.shtml> (last accessed, 31 October 2016).

representation will come with a *quid pro quo*. Historically, we find many examples of British legislation in Jersey arising out of this relationship. For example, the ban on exporting wool from Jersey was a function of permitting exports of wool to Jersey from England in the first place.⁷¹ The Militia Act was extended to Jersey, but that was for the purpose of regulating the King's soldiers whose function was to defend the Island. The exercise of power by the English Parliament in these cases flowed from the nature of Jersey's dependency on England or how it benefited from a close relationship—it was never a pure exercise of superior power over a subordinate territory.

70 The question that would face a Jersey court is one of customary Jersey law—and the customary law changes. It is impossible to deny the very significant evidence of Parliament legislating for Jersey, but with the exception of one unreasoned *ex parte* decision, *Bristow*,⁷² there is nothing vaguely modern in terms of judicial evidence of Jersey customary law as regards the extent of the recognition of United Kingdom statutes. The consistent observance of the convention of non-interference by Parliament in Jersey means that the customary law on this subject has never been declared definitively by Jersey courts, whatever persuasive authority there might be in terms of *obiter dicta* from British courts and arguments by British constitutional commentators. The question would be how in the 21st century a Jersey court should declare Jersey's rule of recognition in respect of Acts of Parliament, not how it might have done in previous centuries had the putative paramount power ever been put to a judicial test in Jersey.

71 As long as Acts of Parliament are duly registered after consent is given under art 31 of the States of Jersey Law 2005, there is no problem. Jersey courts would only be called upon to expound customary law if force of law were sought to be given to an Act of Parliament in Jersey outside that process, *i.e.* if the Act required registration regardless of art 31 or purported to have force regardless of registration.

72 A Jersey Court in the 21st century would be entitled to take note, in determining the limits of Parliament's sovereignty over Jersey, that—

- (a) none of the common explanations for parliamentary sovereignty (*i.e.* common law, political facts, and popular sovereignty) as a matter of British law is applicable to Jersey;

⁷¹ See note 10, above.

⁷² (1960) 35 PC 115.

- (b) the political facts have moved on from the assumptions of previous centuries, and ought not to be bound by Kilbrandon and Hale's assumption that the facts of *Lardner-Burke* were relevant to Jersey;
- (c) assertions of Parliament's paramount power were never wholly accepted in Jersey, and that the United Kingdom had never chosen to put them to the test;
- (d) the British Empire had risen and fallen, and Jersey had never been colonised. The power of Parliament over Jersey's domestic affairs has never been put to the test, not even when Westminster governed a quarter of world's population;
- (e) the convention of non-interference that Kilbrandon largely accepted may not have force of law before British courts, but it is a political fact relevant to the question whether Jersey law recognises a foreign legislature as having force of law in Jersey.

73 The United Kingdom has never entered Jersey on the United Nations list of non-self-governing territories—which underlines the fact that, were Parliament's power to move from being a legal fiction to a practical reality, the result would be a significant change in Jersey's constitutional status in the world: it would be a colony. Why, if the question were asked in the 2010s, should the answer be that the United Kingdom holds sovereignty over Jersey as a matter of Jersey law?

74 In short, why would Jersey's courts expound the customary law to create a rule of recognition giving the United Kingdom power to make any law it wished for Jersey? Furthermore, the political facts might, however, support lesser alternatives coherent with the actual relationship between Jersey and the United Kingdom. There are intervening stops between full independence and colonialism.

The political facts, foreign policy and the prerogative

75 It should now be clear that it is open to the Jersey courts to hold that customary law does not include a rule of recognition that Parliament has paramount power over Jersey. The question must arise as to whether there is a principled basis for a more limited rule of recognition in line with established constitutional conventions.

76 A key justification for Parliament having sovereign power over Jersey given by Baroness Hale in *Barclay* was this⁷³—

⁷³ At para 48.

“However, it is the clear responsibility of the United Kingdom government in international law to ensure that the Islands comply with such international obligations as apply to them. Just as the United Kingdom Parliament has the constitutional right to legislate for the Islands, even without their consent, on such matters, so must the United Kingdom executive have the constitutional power to ensure that proposed Island legislation is also compliant.⁷⁴ As was pointed out in evidence to the Kilbrandon Commission, to hold otherwise would be to assign responsibility to the United Kingdom without the power to put that responsibility into effect (Cmnd 5460, para 1433).”

77 Essentially, as the United Kingdom has powers and responsibilities in some respects (*e.g.* foreign affairs), it needs the power to discharge both. This then implicitly links with Kilbrandon’s view that if Parliament had the power to legislate for Jersey, then it must have total power, notwithstanding that this was admitted to be an “extreme view”.⁷⁵

78 The argument is somewhat simplistic. First, it could equally be said that, given Jersey’s position as a self-governing territory, that the United Kingdom should not take on obligations in respect of Jersey except those to which Jersey has consented. Alternatively, as with many tax matters, Jersey should where possible be entrusted to settle its own international relations where they concern domestic issues. Secondly, it might well be supposed that something less than paramount legislative authority would be required to ensure that Jersey complied with customary international law (where consent is implied), or complied with international obligations to which it had consented. Thirdly, if we hypothesise that the United Kingdom’s responsibility for Jersey’s external relations exists for the benefit of Jersey rather than the United Kingdom, Jersey’s compliance may to a large extent be ensured as being necessary to continue to enjoy that benefit. If Jersey legislates internally so as to place the United Kingdom in default of international obligations that exist either at customary international law or have been entered into with Jersey’s consent, then Jersey may forfeit the benefits of the relationship. This aspect of Jersey’s relationship with the United Kingdom is, in principle, no different from the position of Monaco in respect of France; Monaco can only

⁷⁴ The United Kingdom government does not have any formal power by way of the prerogative or otherwise to ensure compliance with the Human Rights Act of devolved legislation—although Parliament retains the power to impose a solution.

⁷⁵ *Kilbrandon Report, op cit.* para 1473

enjoy the benefits of its relationship with France if it avoids exercising its independence in a way that causes problems for its neighbour, a principle that is enshrined in treaty.⁷⁶

79 What Baroness Hale was wrestling with goes to the heart of the power exercised by the United Kingdom over Jersey. As we saw earlier, the royal prerogative, in Jersey, is exercised on matters of legislation and external relations on the advice of United Kingdom ministers. This includes the prerogative to sign legislation into law, a position where no ministerial advice is required as regards United Kingdom legislation.⁷⁷ It is this to which we now turn.

UK's role in Jersey legislation

80 What we shall seek to do in this section is to set out how the UK Supreme Court itself concluded that a legislative decision (namely to advise the giving or withholding of the royal consent to Channel Island legislation) could be subject to judicial review. The purpose of this section is to identify principled grounds on which that can be done, and then to argue that those same grounds could be used to identify where Parliamentary legislation itself is constitutional or

⁷⁶ See art 2 of the Treaty Aiming at Adapting and Confirming Friendship and Cooperation Relations between the Principality of Monaco and the French Republic, dated 24 October 2002. This does not deal with Monaco's internal legislation, but requires Monaco to curtail its external independence—

“The Principality of Monaco ensures through appropriate and regular consultations that its international relations are conducted in convergence with those of the French Republic on fundamental matters. The French Republic consults with the Principality of Monaco so as to take into account the latter's fundamental interests.”

⁷⁷ Baroness Hale believed it was “interesting that the interveners reserve their position in relation to jurisdiction judicially to review the *refusal* of Royal assent, while arguing that there is no jurisdiction to review a decision that Royal Assent should be granted” (at para 49). However, whilst she plainly meant that there was some sort of inconsistency, the positions taken by Jersey and Guernsey were obvious and principled. To advise the Crown to give assent to legislation passed by the legislature is to advise the unelected monarch not to interfere with democracy. In the British Constitution, the monarch is not advised at all to consent to legislation. Should any British government intervene to advise the Queen to refuse consent to legislation (*e.g.* an unwanted backbench bill which somehow made it through despite government opposition), then that would surely be a matter where judicial review might be appropriate—but any advice (assuming any were ever given) to sign a Bill into law would not be reviewable.

unconstitutional. Baroness Hale, sitting in a British court, may have held that there was no analogy between Royal Assent to Channel Island laws and the making of Acts of Parliament, but we are not here concerned with the fact that “the courts of England and Wales have no more power to interfere in that process than they have to interfere with the process of giving Royal Assent to the Acts of the UK Parliament.”⁷⁸ We are concerned with the rule of recognition applied by Channel Island courts when Acts of Parliament purport to create law within their own jurisdiction.

81 There are several reasons why it is important that we consider the extent of the United Kingdom’s role in Jersey legislation, namely the monarch’s role in giving Royal Assent. First, it would be foolish to consider the role of the British Parliament in Jersey legislation without considering the most practical way in which the United Kingdom may interfere with Jersey’s legislative choices. Secondly, consideration of the rights and wrongs of how the United Kingdom can operate a negative voice in the Jersey legislative process will provide useful context for the rights and wrongs of how the United Kingdom acting through Parliament may be able to directly impose choices. Thirdly, as will be seen, the United Kingdom in the *Barclay* case moved swiftly between the issues of ministerial advice and Royal Assent (*i.e.* the subject matter of the case), and the issues of Parliamentary power. The two issues are conceptually related.

82 The *Barclay* decision is characteristically confused as to the capacity in which the Crown is advised by ministers in the Channel Islands’ legislative processes⁷⁹—

“The reality, as the Advocates to the Court argue, is that the appellants were advising Her Majesty both in right of the Bailiwick of Guernsey and of Sark and in right of the United Kingdom. They were advising her upon the final stage of the Island’s legislative process. But they were doing so because of the United Kingdom’s continuing responsibility for the international relations of the Bailiwick. They were politically accountable to the United Kingdom Parliament for that advice. I see no reason to doubt that they were legally accountable to the courts of the United Kingdom, although only in an appropriate case, which this is not.”

83 The problem with this is that Her Majesty was acting in right of the Bailiwick of Guernsey and of Sark and of nowhere else—the consent

⁷⁸ *Barclay*, at para 48.

⁷⁹ *Barclay*, at para 57.

was to be given to a law in Sark and not in the United Kingdom. Setting aside the intermediate step that the Ministers acted as Privy Councillors, the Ministers were not acting “in the right of anyone”; they were in the position to advise *Her Majesty in the right of Sark*, but gave that advice solely from the perspective of United Kingdom interests.⁸⁰ In doing so, their advice was solely in the negative, *i.e.* as to whether a legitimate United Kingdom interest such as accountability in international law is a reason to withhold consent.

84 The ability to give that advice exists as a matter of power more than principle, that is to say, it is a function of the political facts. British ministers do not give such advice to the monarch in respect of domestic legislation, as we noted earlier. Indeed, it is only the insertion of the Minister as a practical step in the process that provided a basis for a challenge to the Sark statute—on the basis that it was contrary to the scheme of the Human Rights (Bailiwick of Guernsey) Law 2000. The role of the courts under the 2000 Law in respect of primary legislation is to enforce that legislation—even when a declaration of incompatibility is issued, it is not for the courts to say anything further on the rights and wrongs of the legislation.⁸¹ The Minister's role in

⁸⁰ It is noted that this would present a difficulty to any argument that advice from a British minister on refusing consent cannot be judicially reviewed in the Channel Islands in respect of making any mandatory order that consent should be recommended. However, it would not be an obstacle to a declaratory order from a Jersey court as to a violation of legislative due process. The issue of whether Channel Islands courts can judicially review such ministerial advice was left open by Baroness Hale, see *Barclay* at para 57.

⁸¹ The scheme of the 2000 Law, as with its United Kingdom and Jersey equivalents, is that primary legislation is valid until repealed. The courts cannot strike down legislation which is held to be incompatible, but give a declaration of incompatibility, which opens the door to a fast track amendment or repeal system. It is perfectly possible for the British Parliament to enact legislation without a declaration of incompatibility in the hope that it would be upheld, and with the intention of repealing it should it not be upheld. This occurred with the Communications Act 2003, see HL Deb, 25 March 2003, vol 646, cols 658–659 *Political Advertising: Explanatory Note by DCMS*, 10 December 2002 (<http://www.publications.parliament.uk/pa/jt200203/jtselect/jtrights/24/2413.htm>, last accessed 25 May 2015), at para 12, *R (Animal Defenders International) v Secy of State for Culture Media and Sport* [2008] UKHL 1, [2008] 1 AC 1312; and *Animal Defenders International v UK* (2013) 57 EHRR 21. It is difficult to see why the same would not apply to Sark legislation, or that of Jersey. It is difficult to see the

granting consent was used as a way to side-step this prohibition, bringing the courts into the issue of whether the Law should be allowed to exist on the statute book.

85 The only meaningful reason why a British minister should be involved in advising the monarch to deny Royal Assent is that the law might damage a legitimately relevant interest of the United Kingdom. For otherwise the decision by the Queen to sign a law from Jersey, Guernsey, Sark or Alderney into law would be no different in character to her signing domestic United Kingdom legislation, *i.e.* no decision at all, as the signature would be automatic. So, we must ask what can be “legitimately relevant” to enable a minister to take the extraordinarily undemocratic step of advising an hereditary monarch to reject a democratically approved law? The answers can only be “anything” or “not a lot”.

86 First, it could be argued that, as the Queen acts on the advice of a British minister, the power lies with that minister. The minister is politically accountable to Parliament for giving that advice. The Minister advises from a United Kingdom perspective and so can consult the general interests of the United Kingdom, as it is in respect of those issues that the Minister is accountable and for which he is elected to the British Parliament to represent his (British) constituents.

87 Secondly, and alternatively, it could be argued that the advice that Ministers give in those contexts is limited to what is constitutionally coherent. If the royal prerogative (as advised by United Kingdom ministers) is used to enter into a treaty, it is incoherent if the royal prerogative is the next day to be used to approve a Channel Island law breaching that treaty.

basis on which a court could pre-empt such litigation by directing a refusal of royal consent. Even in the scenario where legislation was deliberately non-compatible, it is difficult to see the basis for judicially reviewing a grant of royal consent. As Lord Irvine has commented, the wisdom of engaging in disputes with the Council of Europe is a “state matter” (Irvine, “A British Interpretation of Convention Rights”, [2012] *Public Law* 237), an argument which justifies intervention by Ministers to deny consent, but shows the impossibility of court intervention. Similarly, Lord Neuberger noted in the context of the Human Rights Act that a decision of the United Kingdom to breach its treaty obligations under the European Convention on Human Rights “would be a political decision, with which the courts could not interfere”, see Neuberger, “Who are the Masters Now?” 2nd Lord Alexander of Weedon lecture, 6 April 2011. It is hard to see why this is any less so when United Kingdom ministers advise on giving royal consent to contentious Crown dependency legislation.

88 Beyond these issues, there is no principled reason for British involvement.

89 Baroness Hale said in *Barclay* that the use of the ministerial power to advise giving or refusing consent is one where ministers are “accountable to the courts of the United Kingdom”, albeit only in “appropriate cases”.⁸² If there is to be genuine legal accountability, then it needs to be on the basis of principles that can form recognisable and constituent principles of law. Just as the principles by which the limits of a statutory power will be abstracted from the statute itself, so any limits to the ministerial power to advise withholding Royal Assent must be abstracted from the relevant legal materials and established political facts. There are three obvious options—

- (a) First, the nature of the constitutional relationship demonstrates severe limitations on the power. The United Kingdom controls the use of the royal prerogative in matters of defence and foreign policy, for example. It does not exercise any such role in respect of domestic affairs. It would follow that ministers may consider in advising on Royal Assent any matter on which ministers might otherwise speak on the use of the prerogative in respect of Jersey. Similarly, they might advise on the basis of ministers having roles with other existing aspects of Jersey's relationship with the United Kingdom, such as the Common Travel Area. But outside such areas where sovereignty in Jersey or other legal power is in the hands of United Kingdom ministers, there can be no role.
- (b) Secondly, we move to an “anything” scenario, which is one of paternalism. In this case, United Kingdom ministers might argue that there is a general duty to ensure good governance. In such a case there is nothing that is strictly off limits, but to be proper such an intervention must be supported by evidence that a reasonable minister could have feared for Jersey were the law passed.
- (c) Thirdly, and finally, ministers may, in giving advice on Royal Assent, do so wholly by reference to the United Kingdom interests. Were this the case, it is difficult to see how such decisions could be “legally accountable” to the courts on the basis of violating any constitutional propriety.

90 Despite its complexities, it should be clear that only the first option represents the reality of how the relationship between Jersey and the United Kingdom has been operated, as well as being coherent with principles of democracy and non-colonisation.

⁸² At para 57.

Conclusion

91 In respect of the claims of Parliament to be able to legislate freely and without consent, we have sought to build on Jowell's analysis to provide further jurisprudential reasons why such claims can and should be rejected.

92 First, as Jowell has demonstrated, it would be unconstitutional for the United Kingdom to exercise such a power for reasons of established practice and modern democracy. Jowell has argued that such a constitutional convention is capable of crystallising into positive law.⁸³ What can be added is that the factors identified by Jowell are also of such constitutional importance that Acts of Parliament (as a matter of modern statutory construction) can only traverse them by express words. In other words, even if we accept that as a matter of Jersey law a British statute can be recognised as law in Jersey without registration, the Act would need to be explicit that this was the intention. The same would be true if an Act required registration regardless of consent under art 31 of the States of Jersey Law. As with the case of *Simms* and *Thoburn*,⁸⁴ it is necessary for Parliament when traversing fundamental constitutional principles to be clearly confronted in the wording of the Act with what it is doing.

93 Secondly, this being so, Parliament may only assert the power to impose laws on Jersey if we accept that Jersey applies a rule of recognition to Westminster statutes equivalent to the absolute form of parliamentary sovereignty that exists in the United Kingdom. This can only be the case if the reasons for the existence of parliamentary sovereignty in the United Kingdom have been replicated in Jersey. In respect of the common law argument for the existence of parliamentary sovereignty, the common law is no part of the law of Jersey. In respect of the "political facts" argument, the present political facts (including international political morality such as decolonisation and self-determination) do not support a declaration of the customary law of Jersey that the United Kingdom continues to have (assuming it ever had) an absolute power in Jersey. In respect of the argument that parliamentary sovereignty flows from "popular sovereignty", this cannot apply to territories outside the United Kingdom which are not party to that area of popular sovereignty. The customary law in the 21st century should look at the reality of the established constitutional

⁸³ Jowell, "The UK's Power over Jersey's Domestic Affairs, *op cit*, at 262–264.

⁸⁴ [2000] 2 AC 115, at 131; [2002] EWHC 195 (Admin), [2003] QB 151, at paras 60–67.

relationships, as opposed to adopting untested assertions of absolute power.

94 Thirdly, any power of Parliament to legislate without consent should be limited to matters where the present constitutional arrangements give primacy to the United Kingdom. As long as, for example, matters of foreign policy and defence remain with the royal prerogative as advised by British ministers, there is a cogent argument that Britain should have the power to ensure that Jersey does place Britain in default of its international obligations. However, that argument is plainly limited to those matters which are Britain's responsibility under present constitutional arrangements (*e.g.* foreign policy and defence), and cannot be a basis for a broad uncontrolled power in Parliament. If Jersey is to have the benefits of United Kingdom representation and protection it must accept burdens—and if on any issue it does not accept the burden it is better for the United Kingdom to have the option of imposing necessary legislation than for the only sanction to be the dissolution of the relationship. Outside such issues, Baroness Hale's and Lord Kilbrandon's fear of the United Kingdom having "responsibility . . . without the power to put that responsibility into effect" does not really apply.⁸⁵

95 Fourthly, the principles by which legitimate Parliamentary legislation can be recognised should be equivalent to those by which it would be legitimate for United Kingdom ministers to interfere by advising a refusal of Royal Assent. Baroness Hale held that it is possible for a United Kingdom court to recognise where a minister has overstepped the mark.⁸⁶ It should be likewise possible for a Jersey Court to recognise the legitimacy of an Act of Parliament in its application to Jersey. As we have argued, the absolute view of parliamentary sovereignty is a derivation of either the common law or the political facts of the British constitution or as the embodiment of British popular sovereignty. There is no need for the courts of Jersey to declare that the current position of the Island's customary law in this regard must follow Dicey's view of British law.

96 Fifthly, none of this brings into doubt Jersey's position as a Crown dependency. It does not, for example, involve any legislation to remove the royal prerogative on defence or on foreign policy, nor would it require that prerogative to be used on the advice of Jersey ministers. Such changes would indeed be tantamount to a declaration of independence, and thus are political not legal matters. What it would mean is that the power of Parliament in Jersey would be limited

⁸⁵ *Barclay*, at para 48.

⁸⁶ *Barclay*, at para 57.

to the matters on which the Crown dependency is in fact dependent on the United Kingdom. Changes to that relationship, very much of itself an established political fact, cannot be properly changed by courts purporting to declare the customary law. It would be quite a different matter if the customary law were declared so that centuries of constitutional convention and modern democratic and non-colonial principles were given force of law in Jersey's rules of recognition.

97 In saying all this I differ from Professor Jowell on perhaps one small point alone. He wrote in 2005, that Parliament's powers must be, *inter alia*, "consistent with the exercise of the prerogative powers within the UK".⁸⁷ It is perhaps more appropriate to ask that Parliament's powers should be consistent with the remaining prerogative powers that are in constitutional reality exercised by the United Kingdom government.

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⁸⁷ Jowell, "The UK's Power over Jersey's Domestic Affairs", *op cit*, at 249.