

The Crown Dependency of Jersey: Constitutional Insights

Insights - 08/10/2019

Introduction:

There is much discussion in the private client community about what a future Labour Government might seek to introduce by way of fresh taxes. Alongside that, the concern of clients seems to be the possibility of capital controls being imposed to prevent capital leaving the sterling area. The question we are asked is "*Could such legislation be imposed on Jersey?*". This briefing seeks to provide some constitutional insights into that question.

The Present Day:

In recent times the question of whether Jersey and the other Crown Dependencies have autonomous capacity to govern their own domestic affairs has come to the fore. This is a substantive academic issue in its own right but the purpose of this note is to clarify the key facts and issues surrounding this topic.

For a more detailed analysis we would recommend a review of Sir Michael Birt's article for the Jersey and Guernsey Law Review – "*The power of the UK to legislate for the Crown Dependencies without consent - fact or fiction*". See link at the end of this note.

The Crown Dependencies (the Bailiwick of Jersey, the Bailiwick of Guernsey and the Isle of Man) are not part of the UK but are self-governing dependencies of the Crown.

This means they have their own directly elected legislative assemblies, their own administrative, fiscal and legal systems and their own courts of law.

The Crown Dependencies are not represented in the UK Parliament and have never been colonies of the UK. They are distinct from the Overseas Territories, like Gibraltar and Bermuda, which have a different relationship with the UK, and which remain under the jurisdiction and sovereignty of the UK.

By way of example Jersey residents have no representation in UK Parliament but do have full representation in the States Assembly otherwise known as the States of Jersey (the **States**) which is Jersey's fully democratically elected parliament.

The constitutional relationship of the Islands with the UK is maintained through the Crown which, acting through the Privy Council, is ultimately responsible for ensuring the good government of the Island. The relationship is not enshrined in a formal constitutional document, and while Jersey does not receive subsidies from or pay contributions to the UK, it does make annual voluntary contributions towards the costs of defence and international representation, and the Crown, via Her Majesty's Government is responsible for the defence and international relations of the Islands.

| The History:

The ability for Jersey to determine its own laws, raise taxation, and hold elections is based on long-standing constitutional precedent, dating from 1204 when King John lost the Battle of Rouen, signalling the loss of continental Normandy, which had been united with The Crown since the invasion of England by William the Conqueror in 1066. As a consequence, the Channel Islands, part of the Duchy of Normandy for more than a hundred years at that point, were persuaded to side with King John, and in return King John confirmed the Islands could continue to be governed by their own laws with a separate administration, whilst a "warden" (later to become Governor) was appointed by the King to organise the defence of the Island. The right to be governed by their own laws with a separate administration was thereafter enshrined in convention by a series of Royal Charters, all of which embedded the separateness of the Channel Islands from England.

The Crown has a representative in Jersey, namely the Lieutenant Governor, who ensures the good governance of the Island and works alongside:

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| Legislative Changes:

UK legislation rarely extends to Jersey and should not be extended without first consulting Jersey's

authorities and obtaining their consent. On occasion where it does extend, this may be by an Act of Parliament or by Order in Council (**OIC**) of the UK. For an Act to extend otherwise than by an OIC is now very unusual.

Where the UK seeks to legislate for Jersey, it is clear under Jersey law that Jersey's authorities must be consulted and the States should signify their approval. The position is enshrined under Article 31 of the States of Jersey Law 2005 which provides that where it is proposed that any draft Act of the Parliament of the United Kingdom should apply directly to Jersey or that an OIC should be made extending to Jersey the Chief Minister of Jersey shall lodge the proposal in order that the States may signify their views on it. Fundamentally, the Royal Court of Jersey, which is responsible for registering the Island's legislation in order that it can come into force, is also vested with the obligation and authority to refer any overreaching provision to the Chief Minister, who in turn, shall refer it to the States before any legislation is registered.

Interestingly the Royal Court considered the ambit of Article 31 of the States of Jersey Law 2005 in the matter of *Re the Terrorist Asset-Freezing (Temporary Provisions) Act 2010*. The Act was expressed to apply to the Channel Islands and was accordingly sent down for registration by the Royal Court albeit that there had not been time to bring the matter before the States. Therefore the Royal Court did not register the Act and consistent with Article 31 referred the matter to the Chief Minister who in turn referred the matter to the States for debate and approval. The effect of Article 31 was that the Royal Court could not register a UK Act unless the States had signified their approval. We highlight Sir Michael Birt's conclusion in his article referred to above:

"It would be very strange if, despite the enactment of Article 31 with Royal Assent, an Act of Parliament still had legal effect even though the States had not signified approval and the Royal Court had not registered the Act. Such an outcome would render Article 31 completely pointless despite its clear intent that the democratic process in Jersey be respected."

Another key issue to clarify and noted by the Royal Court when it considered the ambit of Article 31 is that Jersey residents have no representation in the UK Parliament but do have full representation in the States of Jersey. It is a fundamental principle that there should be no legislation without representation. This principle is recognised by English constitutional law and is further reflected in Article 3 of Protocol 1 of the European Convention on Human Rights. The point here is that for the United Kingdom to thwart the expression of a free and elected Jersey legislature, where no alternative means of political representation of Jersey residents in the United Kingdom Parliament is provided, would seemingly undermine an essential feature of "effective political democracy".

Notwithstanding the above the UK Government has consistently adopted a non-interventionist policy regarding Jersey's affairs. The Kilbrandon Report of 1973 stated that The Crown has ultimate responsibility for the good government of all the Crown Dependencies (including Jersey) and that good government would only be called into question in the most serious of circumstances, such as the fundamental breakdown of public order or endemic corruption in the government, legislature or judiciary.

More recently the UK Supreme Court's ruling that the proroguing of the UK Parliament was unlawful has been considered to add credence to Jersey's ability to challenge potential legislative over-reach by British politicians. The judgment from the Supreme Court justices stated that *"Since a prerogative power is not constituted by any document, determining its limits is less straightforward. Nevertheless, every prerogative power has its limits, and it is the function of the court to determine, when necessary, where they lie"*.

The significance for the Crown Dependencies is that the UK courts would be the ultimate arbiter of whether the use of so-called prerogative powers was lawful. The parallel to be drawn is that in the event the UK Parliament sought to legislate for Jersey without the consent of the island, and in circumstances where there was no question as to the good government of the island, then this would be a matter which could be challenged in the courts and may be seen as a precedent whereby the Crown Dependencies may challenge the exercise of the Crown's authority over the islands.

Conclusion:

The constitutional relationship of the Crown Dependencies with the UK is not straight forward. It is founded on centuries of convention and indeed continues to evolve. In accordance with the preamble to the States of Jersey Law 2005 in our view there are strong grounds to submit that Jersey has autonomous capacity to govern its own affairs. Accordingly we conclude there are several reasons for saying that any future UK government could not successfully legislate for Jersey against its will.

For further reading on this subject please see the following articles:

[The power of the UK to legislate for the crown dependencies without consent – fact of fiction? Michael Birt](#)

[Jersey's Constitution – Jersey Finance](#)

[Fact sheet on the UK's relationship with the Crown Dependencies - Ministry of Justice](#)

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