

2018.11.20

19 Deputy M.R. Higgins of H.M. Attorney General regarding the powers and limitations of the States Assembly in legislating and determining its procedures and composition: [OQ.189/2018]

Will Her Majesty's Attorney General outline the powers and limitations of the States of Jersey Assembly with regard to its ability to make law and determine its standing orders and composition?

Mr. R.J. MacRae, H.M. Attorney General:

This is a large question. In summary, the States Assembly has the power to adopt laws and make regulations for any regulations and Acts. The Assembly also has the power to regulate its own proceedings and the power to make Standing Orders for this purpose as set out in the States of Jersey Law 2005, which I will call the 2005 Law in this answer. I will briefly describe these powers. The Constitution of the States is set out in Article 2 of the 2005 Law. As for the making of laws, pursuant to the March 1771 Order in Council, which sanctioned the Code of 1771, which I will call the code, a law will become part of the law of Jersey if adopted by the States Assembly, given Royal Assent by Her Majesty in Council, and the resulting Order in Council in respect of the law is registered in the Royal Courts. Pursuant to the code, the only insular body entitled to enact a new law is the Assembly, abolishing the Royal Courts' power, which previously existed to make laws. There is no particular thematic limit on the competence of the Assembly to pass laws. After a law is adopted, in order to attain Royal Assent, a report is sent by my department through the official channel to the Privy Council responsible for the affairs of Jersey, presently the Secretary of State for Justice. In practice, a law that sought to depart from what is Jersey's constitutional relationship with the U.K. or pose a significant risk of breaching international obligations extended to Jersey will be the subject of further scrutiny and discussion between the U.K. Government and my department and the relevant departments that proposed the law. As to regulations, they are a form of delegated legislation. The power to make regulations can come from either a law that has been given Royal Assent or from an Order in Council where either have been registered in the Royal Courts and become effective in this Island. The power to make regulations may be wide but it is invariably expressly limited in a number of ways, including with respect to the subject matter of the original law pursuant to which the regulations are to be made.

The Deputy Bailiff:

Are you able to bring your answer to a close, Mr. Attorney, you are already well over the normal guidance for an answer?

The Attorney General:

I am sorry. I am probably two-thirds of the way through but I will try to summarise the last 2 sections if I may.

The Deputy Bailiff:

It is normally 90 seconds and you are at 2½ minutes.

The Attorney General:

I am sorry. So the last 2 matters are triennial regulations made for 3 years under the 1771 Code, which can be extended by a further 3 years by the 1884 Order in Council and, finally, Standing Orders made under Article 48 of the 2005 Law.

3.19.1 Deputy M.R. Higgins:

So, in other words, the Assembly, as a sovereign body, can pass the laws that it wishes, subject obviously to getting Privy Council consent, and therefore if the States chose to have its own Speaker rather than the Bailiff, it would be totally within its power to do so and therefore would the Attorney General confirm that, if the States has passed the law, then there would not be a constitutional issue because it is a matter for the States alone?

The Attorney General:

There are 2 questions there, in my submission. Firstly, yes, the States would be entitled to change its composition as currently provided for under Article 2 of the 2005 Law and that would include altering the nature of the speakership, the presidency of this Assembly. But that does not mean that would not give rise to a constitutional issue. A constitutional issue is an issue relating to an established set of principles governing a State, and I have already given a recent written answer to the effect that the removal of the Bailiff would amount to a constitutional issue. That does not take away from the power of the Assembly to determine its own constitutional arrangements.

3.19.2 Senator S.Y. Mézec:

Following on from the question from Deputy Higgins then, given that we have a President of the States Assembly and a Chief Justice of the Royal Court, which are arguably 2 different roles, could the Attorney General elaborate on why he thinks it is a constitutional issue that when we could simply have one different person do one of those 2 jobs and the roles, responsibilities and rights of this Assembly and its place in the wider world would remain completely unchanged?

The Deputy Bailiff:

I am not sure, Deputy, that the original question dealt with whether it was a constitutional issue or not, merely the powers of the Assembly, which the Attorney General has answered, and therefore I do not think this question is within the parameters of the original question. It could be posed at a different time.

3.19.3 Deputy M. Tadier:

Of course in the Jersey context we do not have a written constitution and it makes it difficult perhaps to nail down exactly in the abstract what one believes is an integral part of that constitution. With that in mind, could the Attorney General confirm how long a tradition needs to be in place for it to constitute being part of a constitution?

The Attorney General:

It would depend on the nature of the element that went to the core of the constitution of the state in question. So it is difficult to answer. I have given a written answer in relation to the Bailiff on 9th October and plainly, when one looks at the terms of the recital to the Code of 1771 in relation to the law-making process for Jersey, that is a constitutional issue as well. The Deputy is right, in the sense that it may be that a more recent innovation of less significance would not amount to something amounting to an established principle governing the way in which a State was administered or run.

The Deputy Bailiff:

Senator Mézec, on reflection I think I should have allowed your last question and therefore would you like to ask it?

3.19.4 Senator S.Y. Mézec:

Thank you. It is the same question but slightly rephrased given that the initial question refers to the powers and, key word, limitations of the States Assembly in its ability to make law. Therefore this is a question about the constitutional position of the Assembly and its own sovereignty. Would the Attorney General agree that, if a minor amendment was made to the States of Jersey Law 2005 to stipulate that the person who held the office of Presidency of the States Assembly to not be the person who also concurrently held the role of Chief Justice of the Royal Court that this would not impact on the ability, limitations, or the rights of this Assembly to conduct its business as the elected law-making body of Jersey?

The Attorney General:

We might be conflating 2 issues, which were conflated in the question I was asked some time ago. There is no doubt that this Assembly, as a sovereign body, subject to the consent of the Queen in Council, is entitled to change its own arrangements and that includes significant constitutional issues. But, nonetheless, as indicated for the reasons set out in my answer of 9th October 2018, the removal of the Bailiff, in my view, is clearly a constitutional issue. There are other issues of significance to the Jersey constitution, which would also amount to constitutional issues, there are others of less significance that would not do so. I do not propose to repeat the written answer I have given but, as I have said, the fact that a matter is a constitutional issue does not deprive this sovereign Assembly from dealing with it and addressing it in such way as it thinks fit.

3.19.5 Senator S.Y. Mézec:

Supplementary, if this is to be a constitutional issue then presumably there would be some sort of impact from the decision of the States to elect its own President. I would like to know from the Attorney General exactly what those implications are because, so far, in every answer he has given, I cannot seem to see any implications at all that would deprive this Assembly of its role as the supreme law-making body in Jersey, a sovereign body elected by the people in accordance with the Code of 1771 rather than the Royal Court where there was a clear split there. So could he please try to be a little bit clearer about what exactly these constitutional issues are, when, on the face of it, there does not really seem to be any?

[11:45]

The Attorney General:

If the question is directed to the role of the Bailiff, I can do no better than read one of the paragraphs from the written answer I gave to the Assembly on 9th October: "As I said during the debate, the role of the Bailiff goes to the heart of the Island's constitutional identity. The term 'Bailiwick' is inextricably bound up with the word 'Bailiff'. Jersey is called a Bailiwick because of the constitutional role of the Bailiff as civic head. It is not simply a matter of status but, as Lord Carswell put it, a reflection of his dominant position in public affairs in Jersey over the centuries. This derived from Jersey's constitutional identity as a *bailliage* within Normandy, headed by *un bailli*. To this day Jersey remains a *bailliage*, or bailiwick, under the English Crown in place of the Duke of Normandy, and still headed by a Bailiff. Sir Philip Bailhache in his submission to the Carswell Review, was therefore correct to state that, in constitutional terms, the head of the Bailiwick of Jersey is the Bailiff. Sir Michael Birt explained, when Bailiff, in his letter to the P.P.C. in 2011: 'The Bailiff has an important role to play in safeguarding the constitutional position of the Island'; and he went on to say 'it is hard to see how this role could continue if the Bailiff were simply Chief Justice. The underpinning of this role is that he is President of the States.'"

3.19.6 Deputy M.R. Higgins:

Just a comment first, and that is that they would say that, would they not, because the answers in the question, they were from 2 former Bailiffs.

The Deputy Bailiff:

I want to have a question, not comments, thank you.

Deputy M.R. Higgins:

Yes, I am going to do that. Could I ask the Attorney General, his statement on 9th October, I have read it through, in fact it is more of an opinion based on nothing. I cannot see any reference to the constitutional relationship within his answer. Will the Attorney General bring to this House a written document setting out the authorities for what he is trying to say so the House is better informed going forward?

The Deputy Bailiff:

Will you file a document?

The Attorney General:

I would be content to do so. It might be best, if the Deputy would be so kind, to formulate a written question to me saying precisely what he would like me to provide and of course I shall do so.

Deputy M.R. Higgins:

I will do that, thank you.

The Deputy Bailiff:

That brings the time allocated for questions under the Questions with notice to an end. We now move on to Questions ...

Deputy G.P. Southern:

Sir, I have a question unanswered from the head of the S.E.B. (States Employment Board). Could she or could someone assure me that they will circulate the answer as we could not get around to answering questions today?

The Connétable of St. Ouen:

Yes, someone, me, will undertake to circulate the answer to the Deputy as soon as possible, and the Assembly as well.

Deputy M.R. Higgins:

As we have run out of time, we have not obviously heard all the questions, could I ask that all those who were supposed to answer questions provide a written answer to them to the States as well because some of them are very interesting?

The Deputy Bailiff:

That would be a matter for the individuals concerned unless people wish to stand up and make confirmations at this point.

Information subsequently provided by Ministers and/or others: