

SARK, THE SUPREME COURT AND THE STATUS OF THE CHANNEL ISLANDS: OR *BARCLAY* BITES BACK

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In R (Barclay) v Secy of State for Justice, the UK Supreme Court considered the constitutional relationship between Parliament, the UK courts and the Channel Islands. Many of the statements made by the Court appear to have profound significance for the Channel Islands. However, it is suggested that the importance of the decision in any wider constitutional debate should be limited and that it raises more questions than it answers.

Introduction

1 Sark is in the process of a revolution as it tries to make its laws compliant with the European Convention of Human Rights. This began with the Reform (Sark) Law 2008 which was challenged by the Barclay brothers before the English courts culminating in a hearing before the UK Supreme Court in *R (Barclay) v Secy of State for Justice*.¹ Along the way, the English Court of Appeal held that the dual role of the Seneschal as the Chief Judge on the Island and the President of the Chief Pleas was incompatible with the Convention (the point was not appealed to the Supreme Court). This led to the enactment of the Reform (Sark) (Amendment) (No 2) Law 2010 (“the 2010 Reform law”) and once more the Barclay brothers challenged it against human rights standards.

2 The Administrative Court² held that the 2010 Reform law was still incompatible with the Convention. The case was “leapfrog” appealed³ to the UK Supreme Court in *R (Barclay) v Secy of State for Justice (No 2)*⁴ where the substantive issue of compliance with the Convention was not considered; rather the court concentrated on whether the

¹ [2009] UKSC 9, [2010] AC 464; see also Pullum and Titterton “From Sark to the Supreme Court” (2015) 19 *Jersey and Guernsey Law Review* 33.

² *R (Barclay) v Secy of State for Justice* [2013] EWHC 1183 (Admin), [2014] 1 WLR 415.

³ Administration of Justice Act 1969, ss 12–15.

⁴ [2014] UKSC 54, [2015] 1 AC 276.

English courts had jurisdiction to quash an Order in Council granting Royal Assent to a Sark law enacted by the States of Deliberation; and if they did, whether it was appropriate to exercise it in this case.

3 This discussion will not consider the merits of the arguments regarding the 2010 Reform law's compatibility with human rights, but rather it will consider the implications of the UK Supreme Court decision in three respects:⁵ first, its opinion that Parliament has the power to legislate in the Channel Islands; secondly, the capacity in which the Secretary of State for Justice acts when he or she recommends legislation to the Privy Council; and thirdly, the implications of the UK Supreme Court's finding that UK courts had power to judicially review the granting of Royal Assent.

The power of Parliament

4 The UK Supreme Court stated that⁶—

“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.”

This was followed later with a potentially more troubling passage⁷—

“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 . . .”

5 While the first part is clearly true and Acts of Parliament do occasionally extend directly to the Islands, the issue of consent remains germane. Indeed, it is accepted by Insular legislation that Acts of Parliament can, on their face, apply to the Channel Islands with consent. This consent was traditionally signaled by way of the Act of Parliament being registered by the Royal Court of each Bailiwick. The legislation in question in *Barclay (No 2)*, the Human Rights (Bailiwick of Guernsey) Law 2000, states at s 17 that the primary legislation for

⁵ The Jersey courts at least are not bound by Supreme Court decisions: *State of Qatar* 1998 JLR 118; *Krohn GmbH v Varna Shipyard*, 1997 JLR 194. However they are very persuasive.

⁶ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [12].

⁷ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [48].

the Bailiwick includes that “Acts of Parliament Act which applies or extends directly to Guernsey”.⁸ Accordingly, the application of United Kingdom legislation to Jersey or Guernsey with their consent is not contentious.

6 However, Parliament legislating without Insular consent is far from accepted within the Channel Islands and its basis lacks clarity.⁹ The Supreme Court, however, appears to have accepted without demur the Kilbrandon Commission¹⁰ view of the matter. To summarise, the Commission reported that “all the witnesses” accepted that Parliament has the power to legislate for the Islands and in some instances without the Island’s consent, but did not do so by reasons of a constitutional convention.¹¹ The Commission went on to find, based on an extract in *Madzimbamuto v Larder-Burke*,¹² that adherence to a Convention does not negate the power to legislate. So Parliament’s power to legislate remains.

7 From this basic principle, the Supreme Court went on to say that as the United Kingdom has responsibility for the Channel Islands in international law, it must be able to put that responsibility into effect by Parliament legislating for the Islands¹³ and accordingly the United Kingdom executive must have power to decide whether Insular legislation is compliant.¹⁴ Here the court adopted Kilbrandon’s reasoning that unless Parliament could legislate, the UK would have

⁸ And Jersey Law says the same, Human Rights (Jersey) Law 2000, art 1.

⁹ J Jowell, “The UK’s Power over Jersey’s Domestic Affairs”, in P Bailhache (ed), *A Celebration of Autonomy 1204–2004*, at 265

¹⁰ Report of the Royal Commission on the Constitution 1969–1973 (1973) (Cmnd 5460) (“Kilbrandon”), at [1469].

¹¹ Kilbrandon, at [1469].

¹² [1969] 1 AC 645, at 722–723; the finding that the UK Parliament originally had power to legislate in relation to Southern Rhodesia does not apply to the Channel Islands as its origins were annexation and a view that when territory is annexed by the United Kingdom the authority of the UK Parliament extends to it as to the United Kingdom itself (see 722). The Channel Islands were never annexed (although they have been liberated from the French and the Germans in their history this is clearly not the same thing). So it does not follow.

¹³ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [48]; adopting Kilbrandon at [48].

¹⁴ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [48].

the responsibility in international law, but no power to put it into effect.¹⁵

8 However, this proposition ignores a fundamental principle. It is possible for Parliament to legislate in contravention of international law and so put the United Kingdom in breach of its international obligations. While this is unlikely and it is presumed that legislation does not have this intended purpose, the Crown can enter an international obligation on behalf of the United Kingdom which Parliament subsequently undermines.¹⁶ If the Crown¹⁷ cannot command a majority in Parliament (in both Houses) then the legislature is putting the United Kingdom in breach of its international obligations, and ultimately the UK should renounce that obligation or face the consequences of non-compliance. This is accepted as it is the necessary outcome of Parliamentary sovereignty. And it does happen—the current refusal to lift the blanket ban on prisoners voting is a prime example of Parliament exercising this power.¹⁸

9 If Parliament can legislate for the Channel Islands (against the relevant Island’s wishes) so as to make the United Kingdom compliant with international law, conversely there is no reason why it cannot legislate for the Islands so as to put the United Kingdom in breach of international law. For example, Parliament could legislate to put the Islands in breach of international human rights obligations—arbitrary detention of “undesirable” persons say—and the Islands could not nothing to prevent it or, according to the Supreme Court, disregard it.

10 However, in principle there is no reason why the same approach could not be adopted for the Channel Islands as it is for the United Kingdom in respect of most (maybe not all) international obligations. If the Insular authorities do not remedy their non-compliance with international law then the UK could renounce the extension of the obligation to the relevant island or require the Island to compensate it for any financial loss.

11 Furthermore, the Supreme Court did not consider the implications under art 3 of the First Protocol to the European Convention of Human

¹⁵ Kilbrandon, at [1433].

¹⁶ It can change its mind as it were: see *Post Office v Estuary Radio* [1968] 2 QB 740, at 757, *per* Diplock LJ (albeit the citation refers to the Crown and not Parliament changing its mind).

¹⁷ Assuming the Crown, that is the British Government, are seeking compliance with the international obligation.

¹⁸ For a discussion of the background, see House of Commons Library Paper (SN/PC/01764) “Prisoners’ voting rights” (2005 to May 2015).

Rights (right to free elections). In *Matthews v UK*¹⁹ the European Court of Human Rights considered whether it was compatible with the Convention to exclude Gibraltar residents from voting in European Parliament elections. The court stated—

“The Court must ensure that ‘effective political democracy’ is properly served in the territories to which the Convention applies, and in this context, it must have regard not solely to the strictly legislative powers which a body has, but also to that body’s role in the overall legislative process.”

The court continued—

“Even when due allowance is made for the fact that Gibraltar is excluded from certain areas of Community activity, there remain significant areas where Community activity has a direct impact in Gibraltar . . . such as road safety, unfair contract terms and air pollution by emissions from motor vehicles and to all measures in relation to the completion of the internal market. The Court thus finds that the European Parliament is sufficiently involved in the specific legislative processes leading to the passage of legislation . . . and is sufficiently involved in the general democratic supervision of the activities of the European Community, to constitute part of the ‘legislature’ of Gibraltar for the purposes of art 3 of Protocol No 1.”

12 As Sir Jeffrey Jowell has stated,²⁰ Parliament (a legislature for which Islanders have no right to elect members) legislating for the Islands—even in a limited capacity—could breach art 3 of the First Protocol.²¹ Thus, there is an interesting paradox introduced by the Supreme Court. If the UK Parliament legislates to make Insular law compliant with the UK’s international obligations it is itself (potentially) breaching another of the UK’s international obligations (art 3 of the First Protocol). It is damned if it does and damned if it doesn’t. The margin of appreciation granted to Contracting Parties to the European Convention of Human Rights may permit a limited legislative power for the UK Parliament in respect of the Channel Islands—for example where the Islands’ Governments refuse to give effect to fundamental rights. But it is difficult to see it retaining a full power whilst remaining compliant with art 3 of the First Protocol.

¹⁹ (1999) 28 EHRR 361 (App 24833/94).

²⁰ J Jowell, “The UK’s Power over Jersey’s Domestic Affairs”, in P Bailhache (ed), *A Celebration of Autonomy 1204–2004*, at 268–269.

²¹ Also Universal Declaration of Human Rights, art 21.

Registration

13 An additional issue arises over the act of registration of legislation by the respective Royal Courts. Does an Act of Parliament need to be registered by the Royal Court before it has effect (and if not registered does it then have no legal effect in the respective Bailiwick). If registration is required, then a way of displaying consent exists. In other words is registration a final legislative act or merely an administrative act? If registration is a legislative act then an enactment is not valid without registration occurring.²² Just as an Act of Parliament would not be valid without Royal Assent as it is a legislative act (even if now a constitutional formality) so an unregistered law would not be valid without registration. Conversely, if it were merely an administrative act then the legislation is “complete” before registration and so fully valid.

14 Historically,²³ the status of registration has been far from clear.²⁴ It is a requirement which applies to all legislation and not just that coming from the United Kingdom. Thus, at least as a starting point, if either of the Royal Courts can refuse to register an Act of Parliament they can also refuse to register a law, Ordinance, regulation or order. In Jersey, at least, the States of Jersey Law 2005, art 31²⁵ complicates matters as it requires the States of Jersey to give assent before an Act

²² In the same way, an Act of Parliament (or an Insular Law) requires Royal Assent as a necessary step.

²³ In Jersey, *Ex p Bristow* (1960) 35 PC 115 stated that registration was not required for validity; as did Dicey: AV Dicey, *Introduction to the Study of The Law of The Constitution* (8th ed, Liberty Press, 1982), at 13, fn 20; *Ex p Bristow* was expressly disapproved in the *Terrorist Asset Freezing Case* [2011] JRC 47, 2011 JLR 117.

²⁴ In Guernsey, the Royal Court could legislate until 1948 (see Reform (Guernsey) Law 1948) and so the act of registration could have been a legislative or administrative act before that date; the Jersey Royal Court’s legislative powers ended much earlier (with the Code of 1771), but even then the Jurats and Bailiff were part of the legislature and so the division was not usually problematic.

²⁵ The provision is somewhat confusing in relation to Acts of Parliament. It refers to consent to a “draft Act of the Parliament” (art 31(1)(a)). No such thing exists. It is either a Bill or an Act of Parliament. If the rule is to apply to a Bill, which one? The one passed by both Houses (in which case, the motion in the States may need to be quick, as Royal Assent can be given the same day); or an early Bill (in which case, the text might change and so the State’s vote might be considered meaningless).

of Parliament can be registered. As it was explained in *In re Terrorist Assets Freezing Case*:²⁶

“The effect of art 31 of the 2005 Law is that, as a matter of Jersey law, the approval of the States is necessary before an Act of the Westminster Parliament can be registered by the Royal Court.”²⁷

15 Even if registration was merely an administrative act before the enactment of art 31,²⁸ the enactment of art 31 suggests strongly that it has become a legislative act—even though this issue was expressly left open by the court.²⁹ In Jersey, at least, this suggests that registration is a final stage of the legislative process. This is not the end of the matter however. While it could be argued that the Monarch and the Privy Council³⁰ gave Assent to the 2005 Law and so have consented to limiting (any) direct legislative power Parliament had over Jersey, this ignores Parliamentary sovereignty. In a purely UK context, the executive could not limit Parliament’s legislative power—so why can it do so in Jersey? Only if Parliament’s power were not supreme (over the Privy Council) before the 2005 law could it be limited by that law; but if it were supreme it could only be limited by itself.³¹

16 Further, it is important to emphasise one of the Bailiff’s phrases: “as a matter of Jersey law”. Thus, it may well be that as a matter of UK law an Act of Parliament extends to Jersey without registration, and an UK court may be obliged to find that it does so extend. But this does not mean a Jersey court has to follow suit. This does not resolve the question of whether Parliament can legislate without the Island’s consent, but it is sufficient to cast doubt on the Kilbrandon Commission’s view of the matter³² and, accordingly, the Supreme Court’s acceptance of that position.

Two hats

²⁶ [2011] JRC 47, 2011 JLR 117.

²⁷ *In re Terrorist Assets Freezing Case* [2011] JRC 47, 2011 JLR 117, at [12].

²⁸ Although, when enacted it was art 30 it was renumbered subsequently.

²⁹ *In re Terrorist Assets Freezing Case* [2011] JRC 47, 2011 JLR 117, at [17].

³⁰ Including UK Ministers.

³¹ As happened with the Parliament Acts 1911–1949: see *R (Countrywide Alliance and others) v HM Attorney General* [2007] UKHL 52, [2008] AC 719.

³² While it might be possible to say it was wrong at the time the Kilbrandon Commission reported, the Commission could hardly have found differently when all the witnesses said otherwise.

17 The Supreme Court also considered whether the Crown could be acting “in right of” Guernsey, rather “in right of” the United Kingdom.³³ Put simply, when the Secretary of State for Justice advises Her Majesty to give Royal Assent is he or she advising on behalf of Guernsey, the United Kingdom or both? The advocates to the Court, including the Hon Michael Beloff QC (a former judge of the Guernsey Court of Appeal) argued—

“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.”³⁴

The issue was therefore not fully considered and the court concluded—

“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.”³⁵

18 As the parties did not contest that the Crown was acting in right of the United Kingdom, the question was considered almost in a conclusionary way. While a full exploration of this question is not within the scope of this discussion, a few points can be made.

19 In *Barclay (No 2)*³⁶ and in the earlier *Bancoult (No 2)*³⁷ reference was made to a John Finnis paper “Common Law Constraints: Whose Common Good Counts?”³⁸ where he criticised the earlier House of Lords decision in *Quark Fishing*³⁹ and in particular the view of Lord Bingham—

³³ *R (Barclay) v Sec of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [51]–[57].

³⁴ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [57].

³⁵ *R (Barclay) v Sec of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [57].

³⁶ *R (Barclay) v Sec of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, at [52].

³⁷ *R (Bancoult) v Secy of State for Foreign Affairs* [2008] UKHL 61, [2009] 1 AC 453, at [39], [40] and [48].

³⁸ University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008

³⁹ *R (Quark Fishing) v Secy of State for Foreign Affairs* [2005] UKHL 57, [2006] 1 AC 529, at [12].

“Any constitution, whether of a state, a trade union, a college, a club or other institution seeks to lay down and define, in greater or lesser detail, the main offices in which authority is vested and the powers which may be exercised (and not exercised) by the holders of those offices. Thus if a question arises on what authority or pursuant to what power an act is done, it is to the constitution that one would turn to find the answer. Here, it is plain that the Secretary of State for Foreign and Commonwealth Affairs of the United Kingdom has no power or authority under the constitution of SGSSI (the 1985 Order, as amended) to instruct the Commissioner. Such power and authority can be exercised only by the Queen, who in this context is (and is only) the Queen of SGSSI. It is in my view correct in constitutional theory to regard the Secretary of State as her mouthpiece and medium . . .”

20 The suggestion that a Minister of the Crown acting as the mouthpiece and medium of the Sovereign was as the Supreme Court put it in *Barclay (No 2)* “to stand the constitutional theory of responsible government on its head”, as Her Majesty acts only on the advice of a government minister who is responsible to a legislature.

21 While Finnis is clearly right, a Minister cannot act as the mouthpiece of the Sovereign herself. He does not address whether that Minister can advise as a Privy Counsellor alone (and not as both a Privy Counsellor and UK Minister). Therefore, can a Privy Counsellor have a dual mandate and so put aside UK interests and purely act as a Privy Counsellor for the Channel Islands? The answer to this is difficult, but as a starting point it is noteworthy that not all Privy Council Committees are required to include UK Ministers;⁴⁰ and so in some instances it must be possible for Her Majesty to be advised by Privy Counsellors who are not Ministers.

22 Both Finnis⁴¹ and the Supreme Court⁴² refer to *Halsbury’s Laws*⁴³—

⁴⁰ The Universities Committee which deals with matters relating to Oxford and Cambridge (Universities of Oxford and Cambridge Act 1877) has a quorum of three and must contain either the Lord Chancellor (a Minister) or a member of the Judicial Committee (not a Minister).

⁴¹ J Finnis, *Common Law Constraints: Whose Common Good Counts?* University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008, at [17] (Finnis refers to the same passage in the earlier edition).

⁴² *R (Barclay) v Sec of State for Justice* [2014] UKSC 54, at [52].

⁴³ (5th ed, Lexisnexis, 2009), *Commonwealth*, vol 13, at [717].

“The United Kingdom and its dependent territories within Her Majesty’s dominions form one realm having one undivided Crown. This general principle is not inconsistent with the further principle that on the grant of a representative legislature, and perhaps even as from the setting up of courts, a legislative council and other such structures of government, Her Majesty’s government in a colony is to be regarded as distinct from Her Majesty’s government in the United Kingdom. To the extent that a dependency has responsible government, the Crown’s representative in the dependency acts on the advice of local ministers responsible to the local legislature, but in respect of any British overseas territory or other dependency of the United Kingdom, acts of Her Majesty herself are performed only on the advice of the United Kingdom government.”

23 Taken at face value, the determination of whose advice is given to the Privy Council is based on having responsible government.⁴⁴ In Jersey there is now a Council of Ministers which is drawn from members of the elected States of Jersey and is responsible to it. It therefore has a responsible government in classic Bagehot terms.⁴⁵ Similarly, while Guernsey rejected ministerial government, the adoption of Policy Councils is more or less the same in practice so it too has a responsible government. The other legislatures in the Channel Islands are less developed, but still have elected governments. Indeed, this has been recognised by the House of Commons as it now suggests that UK government departments should not routinely check Channel Island laws for compatibility with international law, but accept the views of the relevant Island’s Law Officers.⁴⁶ If eventually the Ministry of Justice automatically follows Insular advice and becomes little more than a post box for the Privy Council, could it still be said that it is the United Kingdom government, rather than the Insular government, which is responsible for the Islands? However, we are not yet at a stage where the UK government acts merely as a post box—the reliance on Insular authority is too recent—but if this practice continues it will become much easier to argue that the Secretary of State for Justice is more or less a post box for the

⁴⁴ It may be that responsible government should be read as a responsible government within a Sovereign state.

⁴⁵ See generally, W Bagehot, *The English Constitution* (Chapman and Hall, 1867).

⁴⁶ See House of Commons Justice Committee, *Crown Dependencies: Developments since 2010* (Tenth Report of Session 2013–2014) (HC Papers 726), at 7–14.

Islanders and Her Majesty is acting on the advice of her responsible governments in the Channel Islands and not the UK government.

A side wind: judicial review

24 The Supreme Court mentioned⁴⁷ the House of Lords findings in *Bancoult (No 2)*,⁴⁸ where Lord Hoffmann stated—

“The principle of the sovereignty of Parliament, as it has been developed by the courts over the past 350 years, is founded upon the unique authority Parliament derives from its representative character. An exercise of the prerogative lacks this quality; although it may be legislative in character, it is still an exercise of power by the executive alone . . . I see no reason why prerogative legislation should not be subject to review on ordinary principles of legality, rationality and procedural impropriety in the same way as any other executive action.”

25 As mentioned above in relation to art 3 of the First Protocol, extended Acts of Parliament are made by an unrepresentative body (in respect of the Island). So does this mean that Acts of Parliament may be opened up to challenge by judicial review in relation to their application within the Crown Dependencies⁴⁹ (although clearly not in the United Kingdom)? Acts, in so far as they relate to Jersey, lack the “unique authority” derived from Parliament’s representative character and so following Lord Hoffmann’s logic they could be reviewed. Conversely, notwithstanding their undemocratic nature, they are not an executive action and so may not be seen as reviewable on principle. This is a complicated issue and not one which can be fully resolved here but it does provide food for thought.

Jurisdiction

26 The UK Supreme Court concluded that the UK in its right over a colony or dependency is accountable to the UK courts.⁵⁰ Before considering the implications of this in practice, it is worth considering the significance of a UK court determining whether it has jurisdiction

⁴⁷ *R (Barclay) v Secy of State for Justice* [2014] UKSC 54, at [45].

⁴⁸ *R (Bancoult) v Secy of State for Foreign Affairs* [2008] UKHL 61, [2009] 1 AC 453, at [35], with Lord Rodger at [105] and Lord Carswell at [122] expressly agreeing, and Lord Mance at [141] and Lord Bingham at [69] doing so by implication.

⁴⁹ Where they are extended by Order in Council, those Orders should be subject to judicial review.

⁵⁰ *R (Barclay) v Sec of State for Justice* [2014] UKSC 54, at [37].

over the matter. There was originally a belief amongst scholars that the jurisdiction of a court was a matter of public international law. This is typified by Beale, who stated that “the sovereign cannot confer legal jurisdiction on his courts or his legislature when he has no such jurisdiction according to the principles of international law”.⁵¹ It was put similarly by FA Mann—“the international jurisdiction to adjudicate is . . . not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate”.⁵² This strict view of how a court determines its jurisdiction is ancient⁵³ and Justice Story stated in 1824—

“the laws of no nation can justly extend beyond its own territories, except so far as regards its own citizens. They can have no force to control the sovereignty or rights of any other nation, within its own jurisdiction.”⁵⁴

27 Thus, in 1964, FA Mann proclaimed that it would be bad law to suggest that a state could proclaim its own jurisdictional extent, because to do so would impact on another state’s sovereignty;⁵⁵ however, when he reviewed the question twenty years later, he was not so sure.⁵⁶ By the 1980s, courts regularly exercised jurisdiction over disputes taking place abroad where the activity and the person were not linked with the jurisdiction.⁵⁷ Indeed, in *Re Barcelona Traction*,

⁵¹ J Beale “Jurisdiction of a Sovereign State” (1922) 36 *Harvard Law Review* 241, at 243; although he later retracted his view suggesting that jurisdiction was purely domestic.

⁵² F Mann “The Doctrine of Jurisdiction in International Law Revisited after Twenty Years” (1984–III) 186 *Recueil de Cours* 9, at 67.

⁵³ U Huber “De Conflictu Legum diversarum in diveris imperiis” 2 *Praaelectriones Juris Civilis* (3rd ed, Utrecht, 1711); trans by E Lorenzen “Huber’s de Conflictu Legum” (1919) 13 *Illinois Law Review* 375, at 403.

⁵⁴ *The Apollon* (1824) 9 US (Wheat) 362, at 370; similar views expressed by R Waizenegger, *Der Gerichtsstand des §23 ZPO und Seine Gestzliche Entwicklung* (Göttingen, 1915), at 43–44 (cited in A Von Mehren “Theory and Practice of Adjudicatory Authority in Private International Law: A Comparative Study of the Doctrine and Practices of Common and Civil-Law Systems” (2002) 295 *Recueil de Cours* 9, at 145).

⁵⁵ F Mann “The Doctrine of Jurisdiction in International Law” (1964–I) 111 *Recueil de Cours* 1, at 35.

⁵⁶ F Mann “The Doctrine of Jurisdiction in International Law Revisited after Twenty Years” (1984–III) 186 *Recueil de Cours* 9, at 30.

⁵⁷ This began with the US Supreme Court decision in *International Shoe v Washington*, 326 US 310 (1945).

*Light and Power Company (Belgium v Spain)*⁵⁸ before the International Court of Justice, Sir Gerald Fitzmaurice observed—

“It is true that, under present conditions, international law does not impose hard and fast rules on States delimiting spheres of national jurisdiction . . . but leaves to States a wide discretion in the matter. It does however (a) postulate the existence of limits—though in any given case it may be for the tribunal to indicate what these are for the purposes of that case; and (b) involve for every State an obligation to exercise moderation and restraint as to the extent of the jurisdiction assumed by its courts in cases having a foreign element, and to avoid undue encroachment on a jurisdiction more properly appertaining to, or more appropriately exercisable by, another State.”

28 Put simply, it is a matter for a domestic court, such as the UK Supreme Court, to determine its own jurisdiction,⁵⁹ albeit with limits it sets itself, mindful of the need to exercise moderation. Thus, as a matter of UK law, the UK Supreme Court could (in theory at least) determine that it had jurisdiction over a claim where a British citizen, who has lived in New York most of her life, is involved in a road traffic accident with her next door neighbour.⁶⁰ The restrictions that exist, if any, of this determination are only found in public international law—and the scope of these are more flexible as reasonableness becomes the touchstone.⁶¹

29 The relationship between Jersey and the United Kingdom—and the unified legal status in public international law—means that the situation is even less restrained than it might be between the UK and another sovereign state. It can be said, therefore, that it is a matter of UK law⁶² whether the UK courts can judicially review the activities of a Privy Counsellor in relation to decisions in relation to the Channel Islands. In the same way, it is for the US Supreme Court to determine whether the United States courts have jurisdiction to review decisions of, say, the Jersey Chief Minister. Likewise, it is the Judicial

⁵⁸ *Barcelona Traction, Light and Power Company* (1970) ICJ Reports 3, 105 (at [70]).

⁵⁹ Subject to EU law, where there has been substantial harmonisation: see for example Brussels I (Recast) Regulation No 1215/2015. The EU regime does not, however, apply to public law matters.

⁶⁰ Article 15 of the French Civil Code would actually grant jurisdiction to the French courts if the person were French.

⁶¹ F Mann “The Doctrine of Jurisdiction in International Law Revisited after Twenty Years” (1984–III) 186 *Recueil de Cours* 9, at 32.

⁶² Or respectively the law of England, Scotland and Northern Ireland.

Committee of the Privy Council to determine whether the Jersey courts have jurisdiction over matters in the United Kingdom or the United States.

30 The more important question, therefore, is not whether a court states that it has jurisdiction to hear cases involving activities involving a different jurisdiction but rather whether those rulings can be enforced: the court's so-called enforcement jurisdiction. This is the ability of a court to give effect to a judgment.⁶³ Accordingly, had the Administrative Court's order⁶⁴ to quash the recommendation to give Royal Assent to the 2010 Reform Law been upheld by the Supreme Court, what would the courts of the Channel Islands have done?

31 Would the (upheld) decision of the Administrative Court be recognised in Sark and Guernsey? If the Court of the Seneschal and the Royal Court recognise the authority of the Administrative Court to quash the 2010 Reform Law then the local authorities are giving consent to the enforcement of the judgment—and this is enough to create enforcement jurisdiction.⁶⁵ In other words, the local law is recognising the authority of foreign courts (the English courts in this case) to determine a matter.

32 Conversely, if the Administrative Court's decision were not recognised by the courts in the Bailiwick of Guernsey then—as a matter of local law—the validity of the Royal Assent would stand and the 2010 Reform Law would still be in force. The enforcement jurisdiction of any court depends on an ability to enforce it; there are no means by which a UK court could enforce its quashing order in the Bailiwick if it were not so recognised.

33 This extreme position, however, requires some consideration of the practicalities of the matter. Should the Court of the Seneschal not recognise the Administrative Court's order (declaring that the 2010 Reform Law were in force) and the matter was appealed it would ultimately reach the Judicial Committee of the Privy Council. The Privy Council would have to consider whether the order had effect. While the route and parties to any such case may determine the answer the Privy Council provides, it must be remembered that the constitution of the Judicial Committee is the same as that of the UK Supreme Court (albeit it may be a different panel of judges) and so the

⁶³ F Mann “The Doctrine of Jurisdiction in International Law Revisited after Twenty Years” (1984–III) 186 *Recueil de Cours* 9, at 34.

⁶⁴ See *R (Barclay) v Secy of State for Justice* [2013] EWHC 1183 (Admin).

⁶⁵ F Mann “The Doctrine of Jurisdiction in International Law Revisited after Twenty Years” (1984–III) 186 *Recueil de Cours* 9, at 37.

broken circle might be completed. The highest judicial authority in the Channel Islands might confirm that the Administrative Court has jurisdiction. It then would become local law that the English courts had enforcement jurisdiction in this respect.

34 The position would be different if the recommendation were ordered to be quashed by the Administrative Court before Royal Assent was given. The Secretary of State for Justice would be situated in England⁶⁶ when the Privy Council meeting was held. Thus, he would clearly be subject to the enforcement jurisdiction of the English courts and he would be acting improperly should he put forward a law for Royal Assent when it was ruled unlawful to do so. In such a case, the matter would be one purely of English law. No court in the Bailiwick of Guernsey could make something a law when it has not received Royal Assent. This is the case even if—as a matter of local law—the English courts acting in excess of their jurisdiction.

Conclusion

35 In *Barclay (No 2)* the Supreme Court made a number of significant statements about the relationship between the United Kingdom and its Parliament and the law in the Channel Islands. While it might be possible to say that those statements are strictly *obiter* or are not good precedent in relation to the various strands of Jersey or Guernsey law, this is simply dodging the important issues raised by the case. The purpose of this short discussion is to point out that the Supreme Court's reasoning leaves a number of live issues and difficulties and therefore *Barclay (No 2)* should not be seen as ending the debate on the relationship between the UK courts and Parliament and the Channel Islands, but rather providing another interesting chapter.

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⁶⁶ The Privy Council can meet in other parts of the United Kingdom as well—such as Balmoral—where a slightly different question might arise but this will be ignored as it does not affect the principle.