Sark, the Supreme Court and the Status of the Channel Islands: Or Barclay Bites Back

Phillip Johnson

Introduction

Sark is in the process of a revolution as it tries to make it 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 *Barclay, R (On the Application of) v Secretary 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.

The Administrative Court[2] held that the 2010 Reform law was still incompatible with the Convention. The case was 'leapfrog' appealed[3] to the UK Supreme Court in *Barclay, R (On the Application of) v Secretary of State for Justice*[4] where the substantive issue of compliance with the Convention was not considered, rather the court concentrated on whether the English courts had jurisdiction to quash an Order in Council granting Royal Assent to a Guernsey Law enacted by the States of Deliberation; and if they did, whether it was appropriate to exercise it in this case.

[1] [2009] UKSC 9, [2010] AC 464.
[2] *Barclay, R (on the application of) v Secretary of State for Justice* [2013] EWHC 1183 (Admin), [2014] 1 WLR 415.
[3] Administration of Justice Act 1969, s 12 to 15.
[4] [2014] UKSC 54, [2015] 1 AC 276.

This discussion will not consider the merits of the arguments regarding the 2010 Reform laws 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 Justice acts when he or she recommends legislation to the Privy Council; and thirdly, the implications of the UK Supreme Court finding that UK courts had power to judicially review the granting of Royal Assent.

The role of Parliament

The UK Supreme Court stated that:[6]

> *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 passage:[7]

> *it is the clear responsibility of the United Kingdom government in international law to ensure that the Islands company 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…*

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

[5] The Jersey Courts at least at 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] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, [12].
[7] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, [48].

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*, the Human Rights (Bailiwick of Guernsey) Law 2000, states at section 17 that the primary legislation for 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.

However, Parliament legislating without Insular consent is far from accepted within the Channel Islands. The Supreme Court, however, appears to have accepted without demur the Kilbrandon Commission[9] 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.[10] The Commission went on to find, based on an extract in *Madzimbamuto v Larder-Burke,*[11] that adherence to a Convention does not negate the power to legislate. So Parliament's power to legislate remains.

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 Islands[12] and accordingly the United Kingdom executive must have power to decide whether Insular legislation is compliant.[13] Here

[8] And Jersey Law says the same Human Rights (Jersey) Law 2000, art 1.
[9] Report of the Royal Commission on the Constitution 1969-1973 (1973) (Cmnd 5460) ('Kilbrandon'), [1469].
[10] Kilbrandon, [1469].
[11] [1969] 1 AC 645, 722-3; 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.
[12] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, [48]; adopting Kilbrandon, [48].
[13] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276, [48].

the court adopted Kilbrandon's reasoning that unless Parliament could legislate, the UK would have the responsibility in international law, but no power to put it into effect.[14]

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.[15] If the Crown[16] 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 right.[17]

If Parliament can legislate for the Channel Islands (against the 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.

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

[14] Kilbrandon, [1433]
[15] 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).
[16] Assuming the Crown, that is the British Government, are seeking compliance with the international obligation.
[17] For a discussion of the background see House of Commons Library Paper (SN/PC/01764) "Prisoners' voting rights (2005 to May 2015).

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.

Furthermore, the Supreme Court did not consider the implications under Article 3 of the First Protocol to the European Convention of Human Rights (right to free elections). In *Matthews v United Kingdom*[18] 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 Article 3 of Protocol No. 1.*

[18] (1999) 28 E.H.R.R. 361 (App 24833/94).

As Sir Jeffrey Jowell has stated[19] Parliament (a legislature for which Islanders have no right to elect members) legislating for the Islands - even in a limited capacity - could breach Article 3 of the First Protocol. 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 (Article 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* legislate power for the UK Parliament in respect of the Channel Islands - for example where the Insular authorities refuses to give effect to fundamental rights. But it is difficult to see it retaining a full power whilst remaining complaint with Article 3 of the First Protocol.

Registration

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 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.[20] 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.

[19] Jeffrey Jowell QC "The UK's power over Jersey's domestic affairs" in *A Celebration of Autonomy 1204-2004* (Ed P. Bailhache).
[20] In the same way, an Act of Parliament (or an Insular Law) requires Royal Assent as a necessary step.

Historically,[21] the status of registration has been far from clear.[22] 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 31[23] complicates matters it requires the States of Jersey to give assent before an Act of Parliament can be registered. As it was explained in *In the Matter of the Terrorist Assets Freezing Case*:[24]

> *The effect of Article 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.* [25]

Even if registration was merely an administrative act before the enactment of article 31[26] the enactment of article 31 suggests strongly that it has become a legislative act – even though this issue was expressly left open by the court.[27] While it could be argued that the Monarch and the Privy Council[28] gave Assent to the 2005 Law and so has 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 Parliaments legislative power - so why can it

[21] In Jersey, *Ex p Bristow* (1960) 35 PC 115 stated that registration was not required for validity; expressly disapproved in the *Terrorist Asset Freezing Case* [2011] JRC 47, 2011 JLR 117.
[22] 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 Courts 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 clear.
[23] 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 a 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).
[24] [2011] JRC 47, JLR 117.
[25] *In the Matter of the Terrorist Assets Freezing Case* [2011] JRC 47, 2011 JLR 117, [12].
[26] Although, when enacted it was article 30 it was renumbered subsequently.
[27] *In the Matter of the Terrorist Assets Freezing Case* [2011] JRC 47, 2011 JLR 117, [17].
[28] Including UK Ministers.

do so in Jersey? Only if Parliament's power was not supreme (over the Privy Council) before the 2005 law could it be limited by that law; but if it was supreme it could only be limited by itself.[29]

Further, it is important to emphasis 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.

These issues do not resolve the question of whether Parliament can legislate without the Island's consent as every Channel Island lawyer knows this issue remains a contentious one. However, it is suggested that they do cast doubt on the Kilbrandon Commission's view of the issue[30] and the Supreme Court's acceptance of that position.

Two hats

The Supreme Court also considered whether the Crown could be acting "in right of" Guernsey, rather "in right of" the United Kingdom.[31] 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 Michael Beloff QC (a 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*

[29] As happened with the Parliament Acts 1911-49: see *R (on the application of Countryside Alliance and others and others) v Her Majesty's Attorney General* [2007] UKHL 52, [2008] AC 719.
[30] While it might be possible to say it was wrong at the time the Kilbrandon Commission reported, the Commission could hardly have found otherwise when all the witnesses said otherwise.
[31] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276 at [51-57].

> *Island's legislative process. But they were doing so because of the United Kingdom's continuing responsibility for the international relations of the Bailiwick.*[32]

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*[33]

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

In *Barclay*[34] and in the earlier *Bancoult (No 2)*[35] reference was made to a John Finnis paper *Common Law Constraints: Whose Common Good Counts?*[36] where he criticised the earlier House of Lords's decision in *Quark Fishing*[37] and suggested that a Minister of the Crown acting as the mouthpiece and medium of the Sovereign was in the Supreme Court put it "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.

While Finis 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). Put another way can the sovereign be advised to make legislation by someone other than a UK Minister? 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?

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[32] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276 at [57].
[33] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276 at [57].
[34] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [2015] 1 AC 276 at [52].
[35] *R (On the Application of Bancoult) v Secretary of State for Foreign Affairs* [2008] UKHL 61, [2009] 1 AC 453 at [39, 40 and 48].
[36] University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 10/2008
[37] *R (Quark Fishing) v Secretary of State for Foreign Affairs* [205] UKHL 57, [2006] 1 AC 529.

Both Finis[38] and the Supreme Court[39] refer to Halsbury's Laws:[40]

> *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*.

Taken at face value the determination of upon whose advice is given to the Privy Council is based on having responsible government. So can the advice be given by someone else other than a Minister of the United Kingdom? In Jersey there is now a Council of Ministers (cabinet) 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.[41] Similarly, while Guernsey rejected ministerial government the adoption of Policy Councils are more or less the same as 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 insular authorities.[42] If the Ministry of Justice adopts Insular advice and becomes little more than a post box for the Privy Council can it be said that it is the United Kingdom government, rather

[38] John Finnis paper *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] (he refers to the same passage in the earlier edition).
[39] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54, [52]
[40] (5th Ed, Lexisnexis 2009), *Commonwealth*, Vol 13 at [717].
[41] See generally, Walter Bagehot, *The English Constitution* (Chapman and Hall 1867).
[42] See House of Commons Justice Committee, *Crown Dependencies: developments since 2010* (Tenth Report of Session 2013-4) (HC Papers 726), p 7 to 14.

than the Insular government which is responsible for the Islands? We are not 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 Secretary of State for Justice is a post box for the Islanders and Her Majesty is acting on the advice of her responsible governments in the Channel Islands.

A side wind: Judicial review

The Supreme Court mentioned[43] the House of Lords findings in *Bancoult (No 2)*[44] 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*.

As mentioned above in relation to Article 3 of the First Protocol, as extended Acts of Parliament are made by an unrepresentative body (in respect of the Island) does this open it up to challenge for judicial review regarding their application within the Crown Dependencies[45] (although clearly not in the United Kingdom)? Acts, in so far as they relate to Jersey, lack the "unique authority" derived from its representative character and so following Lord Hoffmann's logic they could be reviewed. However, they are not an executive action and so it remains unclear

[43] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54 at [45]
[44] *R (On the Application of Bancoult) v Secretary of State for Foreign Affairs* [2008] UKHL 61, [2009] 1 AC 453, [35] with Lord Rodger (at [105]), Lord Carswell ([122]) expressly agreeing and Lord Mance ([141]) and Lord Bingham ([69]) doing so by implication.
[45] Where they are extended by Order in Council, those Orders should be subject to judicial review.

how this might be dealt with by the Jersey Courts. This is a complicated issue and not one which can be fully resolved here but it does provide food for thought.

Jurisdiction

The UK Supreme Court concluded that UK in its right over a colony or dependency is accountable to the UK courts.[46] Before considering the implications of this in practice, it is worth considering the significance of a UK Court determining it has jurisdiction over the matter. There was originally a belief amongst scholars that the jurisdiction of a court is 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"[47] it was put similarly by F.A. Mann, "the international jurisdiction to adjudicate is… not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate".[48] This strict view of how a court determines its jurisdiction is ancient[49] 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.*[50]

[46] *Barclay, R (On the Application of) v Secretary of State for Justice* [2014] UKSC 54 at [37].
[47] J. Beale "Jurisdiction of a Sovereign State" (1922) 36 *Harvard Law Review* 241, 243; although he later retracted his view suggesting that jurisdiction was purely domestic.
[48] F. Mann "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984-III) 186 *Recueil de Cours* 9, 67.
[49] U. Huber "De Conflictu Legum diversarum in diveris imperiis" 2 Praaelectriones Juris Civils (3rd Ed Utrecht 1711); translation by E. Lorenzen "Huber's de Conflictu Legum" (1919) 13 *Illinois Law Review* 375, 403.
[50] *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), 43-44 (cited in A. Von Mehren "Theory and

Thus, in 1964 F.A. 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;[51] however when he reviewed the question twenty years later he was not so sure.[52] By the 1980s courts exercised jurisdiction over disputes taking place abroad where the activity and the person were not linked with the jurisdiction.[53] Indeed, in *Re Barcelona Traction, Light and Power Company (Belgium v. Spain)*[54] 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.*

Put simply, it is a matter for domestic courts, such as the UK Supreme Court, to determine its own jurisdiction;[55] albeit with limits it sets itself in mind 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

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, 145).

[51] F. Mann "The Doctrine of Jurisdiction in International Law" (1964-I) 111 *Recueil de Cours* 1, 35.

[52] F. Mann "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984-III) 186 *Recueil de Cours* 9, 30.

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

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

[55] 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.

their life, is involved in a road traffic accident with her next door neighbour.[56] 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.[57]

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 law[58] whether the UK courts can judicially review the activities of a Privy Counsellor in relation to decisions in relation to Jersey. In the same way, it is for the US Supreme Court to determine whether the United States courts can review decisions in relation to Jersey. Likewise, it is the Judicial Committee of the Privy Council to determine whether the Jersey Courts have jurisdiction over matters in the United Kingdom or United States.

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 enforcement jurisdiction. It is the ability of a court to give effect to a judgment by its own acts which is central.[59] Accordingly, had the Administrative Court's order[60] 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?

[56] Article 15 of the French Civil Code would actually grant jurisdiction if the person were French.
[57] F. Mann "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984-III) 186 *Recueil de Cours* 9, 32.
[58] Or respectively the law of England, Scotland and Northern Ireland.
[59] F. Mann "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984-III) 186 *Recueil de Cours* 9, 34.
[60] See *Barclay, R (on the application of) v Secretary of State for Justice* [2013] EWHC 1183 (Admin)

In other words, 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.[61] In other words, the local law is recognising the authority of foreign courts (the English courts in this case) to determine a matter.

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. As the enforcement jurisdiction of any court depends on an ability to enforce it – there are no means by which the UK Court could enforce its quashing order in the Bailiwick if it was not so recognised.

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 and considering 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) the 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.

[61] F. Mann "The Doctrine of Jurisdiction in International Law Revisited After Twenty Years" (1984-III) 186 *Recueil de Cours* 9, 37.

The position would be different if the recommendation was ordered to be quashed by the Administrative Court before Royal Assent was given. The Secretary of State for Justice would be situated in England[62] when the Privy Council meeting was held. Thus, he would clearly subject to the enforcement jurisdiction of the English courts and he would be acting improperly should he put the 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 excessive of their jurisdiction.

Conclusion

In *Barclay* the Supreme Court made a number of significant statements. While it might be possible to say they are *obiter* or do not are precedent in relation to Insular law, the purpose of this short discussion is to point out that even considering the Supreme Court's reasoning there remain a number of live issues which must be resolved as the Court ignored the unrepresentative capacity of the United Kingdom Parliament and did not give enough weight to the existence of representative government in the Islands.

[62] 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.