

THE *BARCLAY* CASES: BEYOND KILBRANDON**Jeffrey Jowell, Iain Steele and Jason Pobjoy**

The Supreme Court in Barclay (No 2) held that UK courts did not have jurisdiction to challenge the granting of Royal Assent to the Sark Reform Law in the circumstances of that particular case. Inevitably, the judgment reconsidered the constitutional relationship between the UK and the Crown Dependencies. By leaving open an appropriate challenge to a Projet de Loi in a UK court, it allows a potential future challenge to the refusal of Royal Assent. Alluding to recent democratic developments in the Dependencies, the judgment endorses or even possibly crystallises conventions identified in the 1973 Kilbrandon Report, such as the need for prior consultation before an international agreement is applied to the Dependencies. Significantly, it held that the unorthodox statement in Barclay (No 1), that the UK could intervene in the affairs of the Crown Dependencies on the broad ground of “public interest”, had no authority because of the lack of representation of Guernsey in that case.

1 Like so much on our constitutional map, the relationship between the Crown Dependencies (“the Dependencies” or “the Islands”) and the United Kingdom is not clearly delineated. Unlike the British Overseas Territories (“BOTs”), many of which now have recently modernised constitutions which spell out the respective powers of the UK and the BOTs in relative detail, those of the Dependencies rest largely on the common law, ancient Royal Charters and constitutional convention about which there is not always agreement.

2 The 1973 *Kilbrandon Report*¹ has generally been regarded as an authoritative codification of the relationship between the UK and the Dependencies. But it was a document of its own time, when colonial attitudes were not entirely erased, the international principle of self-determination was not well developed, the notion of subsidiarity was totally unheard of and the modern principles of judicial review were just emerging.

¹ Royal Commission on the Constitution 1969–1973, *Report*, Vol I, Cmnd 5460 (1973) (“Kilbrandon Report”).

3 In 2010, the House of Commons Justice Committee produced a Report which sought to update the relationship,² to which the UK Government responded.³ A further Justice Committee Report⁴ and UK Government response⁵ followed in 2014. Another recent source on the relationship is two cases brought by the Barclay brothers in respect of the Island of Sark, in the Bailiwick of Guernsey: *R (Barclay) v Lord Chancellor and Secy of State for Justice*⁶ (“*Barclay (No 1)*”) and *R (Barclay) v Sec of State for Justice and Lord Chancellor (No 2)*⁷ (“*Barclay (No 2)*”).

4 Sir David Barclay and Sir Frederick Barclay own property on the Island of Sark. *Barclay (No 1)* involved a challenge to the laws reforming the composition of the Chief Pleas and the offices of the Seigneur and Seneschal passed by the Island legislature and given Royal Assent on the advice of the UK Secretary of State for Justice and a Privy Council Committee. The substance of the challenge was that the reforms gave rise to breaches of the claimants’ rights, including under art 3 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedom (“ECHR”) (right to free elections) and art 6 of the ECHR (right to a fair hearing). That challenge succeeded in part and the law was amended. *Barclay (No 2)* involved a challenge to the amended law, the Reform (Sark) (Amendment) (No 2) Law 2010 (“2010 Reform Law”), which the claimants argued breached art 6 by virtue of the provisions governing (i) the appointment of the Seneschal, (ii) his possible removal, (iii) renewal of his appointment after the age of 65 and (iv) his remuneration. The Administrative Court allowed the claim in respect of issue (iv) only, and there was a leap-frog appeal to the Supreme Court.⁸

² House of Commons Justice Committee, Eighth Report of Session 2009–10, *Crown Dependencies* (2010), HC 56-1.

³ Ministry of Justice, *Government Response to the Justice Select Committee’s Report: Crown Dependencies* (Cm 7965, November 2010).

⁴ House of Commons Justice Committee, Tenth Report of Session 2013–14, *Crown Dependencies: Developments since 2014* (2010), HC 726.

⁵ Ministry of Justice, *Government Response to the Justice Select Committee’s Report Crown Dependencies: Developments since 2010* (Cm 8837, March 2014).

⁶ 2009–10 GLR 297, 2009–10 GLR 314, [2009] UKSC 9, [2010] 1 AC 464.

⁷ 2014 GLR 201, [2014] UKSC 54, [2015] AC 276.

⁸ [2013] EWHC 1183 (Admin). For further background on the decisions in *Barclay (No 1)* and *Barclay (No 2)* see M Pullum and R Titterton, “From Sark to the Supreme Court” (2015) 19 *Jersey and Guernsey Law Review* 33

5 The central issue to be decided by the Supreme Court in *Barclay (No 2)* was whether the UK courts, rather than the Guernsey courts, had jurisdiction to review the granting of Royal Assent to laws passed by the Guernsey legislature and, if so, whether the UK courts should exercise that jurisdiction. If the answer to these “jurisdictional issues” was yes, then the substantive issue would fall to be decided, namely, whether the granting of the Royal Assent offended the UK’s international law obligation as set out in the ECHR (which had, under art 56 of the ECHR, been extended to cover the Dependencies).

6 The Supreme Court heard argument only on the jurisdictional issue, concluding that in this particular case the matter was not suitable for review in the UK courts, while nevertheless leaving the door open to such review being carried out in a future appropriate case.

7 Despite deciding on the ground of jurisdiction alone, *Barclay (No 2)* raises complex questions, some hitherto unconsidered, about the intricate relationship between the UK and the Dependencies in the context of the UK’s obligations in international law, and the international reach of the Human Rights Act 1998 and its interaction with Guernsey’s own Human Rights (Bailiwick of Guernsey) Law 2000.

8 The purpose of this note is to consider the extent to which Lady Hale’s judgment, which received the unanimous support of the other Justices,⁹ clarified or evolved the principles guiding the UK–Crown Dependency relationships.

Mechanisms for the UK to impose its will on the Dependencies

9 There are six potential ways in which the UK is said to be able to impose its will on the Dependencies: (i) by means of refusal of Royal Assent to a bill (*Projet de Loi*) passed by the relevant Island legislature; (ii) by means of a provision in an Act of the UK Parliament, which extends the Act to the Dependencies expressly or by necessary implication; (iii) by use of a “permissive extent” provision in an Act of the UK Parliament, which confers a delegated power to extend provisions in the Act to the Dependencies; (iv) by means of a prerogative legislative instrument (*i.e.* primary legislation) issued by the Privy Council; (v) by means of the exercise of the power to intervene on the ground of “good government”; or (vi) by entering into

and P Johnson, “Sark, the Supreme Court and the Status of the Channel Islands: Or Barclay Bites Back” (2016) 20 *Jersey and Guernsey Law Review* 125.

⁹ Lord Neuberger (President), Lord Clarke, Lord Mance and Lord Reed.

an international treaty (or other commitment) with other countries which apply to the Dependencies (with or without their consultation or consent).

10 What then are the limits, if any, to the power of the UK (Crown or Parliament) to impose its will upon the Dependencies through any or all of the above mechanisms?

Kilbrandon's view

11 Kilbrandon's ultimate verdict on the strictly legal relationship between the UK and the Dependencies was that—

“In the eyes of the courts Parliament has a paramount power to legislate for the Islands in any circumstances and we have proceeded on that assumption”¹⁰—

Kilbrandon was clear, however, that the “paramount power” of the UK over the Dependencies is tempered and that—

“A constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on *domestic matters*.”¹¹

12 Kilbrandon did not seek to define the precise areas of the autonomy of the Dependencies under constitutional convention. In other words, he did not seek to define a “domestic matter”. The right to set its own levels of taxation is often asserted to be such, but in recent years aspects of taxation have come under international scrutiny and regulated by a number of international agreements. Other areas too, previously regarded as of purely domestic interest, have become the subject of international co-ordination and control.

13 Kilbrandon looked at the question the other way around by enumerating, “merely for convenience”,¹² five categories in which the UK should be free to exercise its “paramount powers”. Central to those was “the international responsibilities of the UK”. Kilbrandon justified this power on the ground that to hold otherwise would be to assign responsibility to the UK without power to put that responsibility into effect.¹³ But even in the area of international affairs, Kilbrandon considered that convention had a part to play in that the UK was expected to consult with the Dependencies before committing themselves to an international obligation.

¹⁰ Kilbrandon Report, *supra* n 1, para 1469.

¹¹ Kilbrandon Report, *supra* n 1, para 1469 (emphasis added).

¹² Kilbrandon Report, *supra* n 1, para 1469 (emphasis added).

¹³ Kilbrandon Report, *supra* n 1, para 1433.

14 Outside of the international area, the following areas were reserved by Kilbrandon for the full exercise of power by the UK—

- (a) defence;
- (b) “matters of common concern to the British people throughout the world” (dealing largely with citizenship matters);
- (c) “the interests of the Islands.” This category deals with the power of the UK to intervene—even through direct rule—on the ground of the Crown’s “ultimate responsibility for the good government of the Islands”.¹⁴ Kilbrandon nowhere defines the limits of that phrase, which has sometimes been interpreted to embrace the plenary powers under colonial legislation where the UK is entitled to intervene in the affairs of a colony (now BOT) in the broad interests of “peace, order and good government”. However, he said that—

“The UK government and Parliament ought to be very slow to seek to impose their will on the Islands merely on the grounds that they know better than the Islands what is good for them.”¹⁵

- (d) The domestic interests of the United Kingdom. This category is somewhat surprising given Kilbrandon’s acknowledgment that domestic matters of the Dependencies are within the conventional autonomous powers of the Islands. Kilbrandon did say that intervention on this ground was “likely to be rare”, but “may be needed” and therefore “has to be envisaged” (paras 1505–6).¹⁶ Examples of intervention on that ground were provided in the Kilbrandon Report¹⁷ (at paras 1421–1429), such as relating to the Marine (etc) Broadcasting (Offences) Act 1967, designed to give effect to the European Agreement for the Prevention of Broadcasts Transmitted from Stations Outside National Territories (Strasbourg, 22 January 1965, Cmnd 3497). The Manx authorities felt that it was for them to enact any legislation to give effect to the agreement but the UK provided for the extension of the Act to the Isle of Man by Order in Council (1967, SI No 1276). In relation to that issue, and a second issue relating to pirate broadcasting at sea by Radio Caroline, the Island claimed that the Act outlawing such broadcasting, which the UK extended to the Island without its consent, effected a

¹⁴ Kilbrandon Report, *supra* n 1, para 1361.

¹⁵ Kilbrandon Report, *supra* n 1, para 1502.

¹⁶ Kilbrandon Report, *supra* n 1, paras 1505–1506.

¹⁷ Kilbrandon Report, *supra* n 1, paras 1421–1429.

change in the Manx criminal law without its consent and in breach of the conventional relationship between the Island and the UK. Kilbrandon justified the intervention on the ground that the UK was empowered to comply with its international obligations (as to which see below) *and to protect its own domestic interests*, qualifying such a power only with the caveat that the UK should not—

“confuse its essential interests with its own convenience and preference or the damage to those essential interests with mere irritation or annoyance.”¹⁸

Barclay (No 1)

15 In *Barclay (No 1)*, the UK Supreme Court considered a judicial review of the decision of the Committee for the Affairs of Jersey and Guernsey and the Lord Chancellor and Secretary of State for Justice to advise the Queen to grant the Royal Assent to a Sark Law which was alleged, *inter alia*, to violate the right to fair trial under art 6 of the ECHR. At para 18 of his judgment, Lord Collins appeared to accept the submissions of the UK government that Royal Assent may be withheld on the ground that a *Projet de Loi* “violates the Crown’s international obligations”, but also that it violates “any fundamental constitutional principle, or if it is clearly not in the public interest for it to become law”. This contention, that the UK can intervene on the ground of broad “public interest”, is a surprising statement and goes further even than Kilbrandon’s category both of “the interests of the Islands” and “the UK’s domestic interests”.

The House of Commons Justice Committee

16 In the same year, the issue was considered by the House of Commons Justice Committee.¹⁹ At para 51, the Committee stated that—

“[i]t would certainly be legitimate to withhold Assent if the legislation would put the relevant island in breach of an international obligation which applies to the island and for which the UK is responsible.”

17 The Committee also considered the extent to which the Crown was responsible for “the good government of the Islands”,²⁰ commenting that there is—

¹⁸ Kilbrandon Report, *supra* n 1, para 1511.

¹⁹ House of Commons Justice Committee, *supra* n 2.

²⁰ Kilbrandon Report, *supra* n 1, para 1361.

“a high degree of consensus . . . that good government would only be called into question in the most serious of circumstances [such as] a fundamental breakdown in public order or endemic corruption in the government, legislature or judiciary.”²¹

18 The Justice Committee here therefore considerably narrows Lord Collins’ broad category of “public interest” intervention and also narrows Kilbrandon’s category of “good government”, likening it to the accepted prerogative power of the Crown within the UK, to maintain the Queen’s peace in times of grave emergency or breakdown of law and order.²²

Barclay (No 2)

19 Argument in *Barclay (No 2)* was confined only to the jurisdictional issue, namely, whether a challenge to the 2010 Reform Law could be brought in the courts of England and Wales rather than the Guernsey courts. However, in order to decide this issue the Supreme Court had to navigate through a mix of international law and the domestic law of the UK and Guernsey.

Constitutional context

20 The multi-layered context is as follows. First, the UK is a party to the ECHR. It had, pursuant to the mechanism under art 56 of the ECHR, extended its obligation to its Dependencies. So as to ensure its domestic application, under our dualist system, the ECHR was incorporated into UK law through the Human Rights Act in 1998 (“HRA”). There was discussion as to whether that Act should be extended to the Dependencies but in the end it was decided that the Dependencies would pass their own legislation on human rights,²³ which Guernsey did. Like all Guernsey legislation, it required Royal Assent, on the advice of the Privy Council, advised by the Committee for the Affairs of Jersey and Guernsey, of which the Secretary of State for Justice and Lord Chancellor is a member.

21 The Human Rights (Bailiwick of Guernsey) Law 2000 (“Guernsey Human Rights Law”) mirrored the UK’s HRA, although, as Lady Hale pointed out, it did not have to adopt the 1998 Act model.²⁴ Thus,

²¹ House of Commons Justice Committee, *supra* n 2, para 37.

²² See, e.g., *R v Secy of State for the Home Department, ex p Northumbria Police Authority* [1989] 1 QB 26.

²³ An amendment to apply the Act to the Islands and the Isle of Man was withdrawn in the House of Commons: see *Barclay (No 1)*, para 16.

²⁴ *Barclay (No 2)*, para 37.

where the Guernsey courts review primary legislation for conformity to Convention rights, they may “where possible” read it down so as to interpret the challenged provision as compatible with ECHR rights. Where that course is not possible, the court is confined to issuing a declaration of incompatibility, leaving the legislation intact (though in breach of the international obligation). As with the HRA, the Guernsey Human Rights Law does permit the courts to invalidate the actions of a “public authority” which has acted in breach of ECHR rights. There is an appeal from the decision of the Guernsey courts, not to the UK Supreme Court, but to the Privy Council. Lady Hale described this scheme as providing “a delicate balance . . . which respects the supremacy of the Island legislatures”.²⁵

22 The question as to whether the actions of the appellants were open to being challenged in the courts of the UK, rather than those of Guernsey, depends centrally on whether duties fall on the appellants under the HRA. In other words, does the HRA apply to territories outside of the UK but for whose international relations the UK is responsible? In particular: (1) could it be said that the Secretary of State for Justice and the Council for the Affairs of Jersey and Guernsey and the Committee of Privy Council were acting as “public authorities”, under the UK HRA when they recommended and approved the 2010 Reform Law? or (2) could it be said that their acts amounted to UK primary legislation, defined under s.21(1) of the HRA as including an Order in Council made in the exercise of Her Majesty’s Royal Prerogative? If so, review of the Order in Council would be permissible in a UK court.

23 A similar matter had been considered by the House of Lords in *R (Quark Fishing Ltd) v Secy of State for Foreign and Commonwealth Affairs*,²⁶ where the majority held that the instructions of the UK Secretary of State (refusing a fishing licence) had been given “in the right of” the Overseas Territory concerned, rather than the UK, and thus the impugned act was not that of a UK public authority. Subsequently, in *R (Bancoult) v Secy of State for Foreign and Commonwealth Affairs*,²⁷ the majority of the House of Lords held that Orders in Council (ordering the removal of the indigenous population) were made in the right of the UK and not the British Indian Ocean Territory, that is, as part of the machinery of government of the UK, and in the interests of the UK.

²⁵ *Barclay (No 2)*, para 31.

²⁶ [2005] UKHL 57, [2006] 1 AC 529 (“*Quark Fishing*”).

²⁷ [2008] UKHL 61, [2009] 1 AC 453 (“*Bancoult (No 2)*”).

Lady Hale's approach

24 Charged with these issues, Lady Hale at once set them in the context of the evolution of the UK–Dependency relationship, and the possibility of their future development. She observed that²⁸—

“Not being part of the United Kingdom, unlike Wales, Scotland and Northern Ireland, the bailiwicks are not represented in the Parliament of the United Kingdom. They are economically self-sufficient. They pay no taxes to the United Kingdom and they receive no contribution from the revenues of the United Kingdom. They were not settled by, or conquered by or ceded to the United Kingdom as colonies. Their link with the United Kingdom and the rest of the Commonwealth is through the Crown, not in the sense of the ultimate executive authority in the United Kingdom, but in the sense of the person of the Sovereign. The Sovereign’s personal representative in each Bailiwick is the Lieutenant Governor.”

25 This background reinforces what is often forgotten about the relationship of the Dependencies with the UK, namely, that both history and continuous practice support the case for autonomy of the Dependencies in domestic affairs. This case is reinforced by constitutional principle, namely that the law-making institutions of the different legislatures represent the people of the Islands (who are not represented in the UK Parliament as is the case with the overseas territories of other former metropolitan powers).²⁹

26 Turning to the UK’s powers to interfere with the Dependencies, Lady Hale noted Kilbrandon’s view that the UK has the “paramount power” to legislate for the Islands on any matter, domestic or international, without their consent, but she also noted that the last occasion on which Her Majesty in Council had legislated for Guernsey was in 1949, concerning a scheme which had the prior approval of the States of Guernsey.³⁰ She added that “[i]t is the practice to consult the Islands before any United Kingdom legislation is extended to them” and accepted the finding of Kilbrandon that “it can be said that a constitutional convention has been established whereby Parliament does not legislate for the Islands without their consent on domestic matters”.³¹

²⁸ *Barclay (No 2)*, para 8.

²⁹ See J Jowell, “The UK’s Power over Jersey’s Domestic Affairs” in P Bailhache (ed), *A Celebration of Autonomy 1204–2004* (2004), 249, 265.

³⁰ *Barclay (No 2)*, para 12.

³¹ *Barclay (No 2)*, para 12.

27 On international matters, Lady Hale was clear that, since the Dependencies are not states in international law³²—

“... it is the clear responsibility of the United Kingdom Government, in international law, to ensure that the Islands comply with such international obligations as apply to them. Just as the United Kingdom Parliament has the constitutional right to legislate for the Islands, even without their consent, on such matters, so must the United Kingdom executive have the constitutional power to ensure that proposed Island legislation is also compliant ... [T]o hold otherwise would be to assign responsibility to the United Kingdom without the power to put that responsibility into effect.”

28 Like Kilbrandon, however, she qualified that position with the recognition, also made in the Justice Committee’s 8th Report, that—

“[t]he United Kingdom has also undertaken not to act internationally on behalf of a Crown Dependency without prior consultation; recognises that their interests may differ from those of the UK ... and so it may have to represent them both; and supports the principle of the dependencies’ further developing their own international identities.”³³

In recent years this has been effected through the mechanism of “letters of entrustment”, which allow the Dependencies in appropriate circumstances to enter into binding agreements themselves without the need for ratification by the UK.

29 Since the only issue in *Barclay (No 2)* was the jurisdictional one, all else said in the case is strictly *obiter*, but, insofar as comments deal with the circumstances under which Royal Assent may be withheld from *Projets de Loi* passed by the Island legislatures, Lady Hale’s remarks are highly significant in respect of current judicial thinking on the question of the UK–Dependency relationship. Two points are particularly noteworthy.

30 First, Lady Hale noted the view of the Justice Committee’s 8th Report that—

“it would certainly be legitimate to withhold Assent if the legislation would put the relevant island in breach of an international obligation which applies to the island and for which the United Kingdom is responsible.”³⁴

³² *Barclay (No 2)*, para 48.

³³ *Barclay (No 2)*, para 11.

³⁴ *Barclay (No 2)*, para 17.

However, she also noted the position of the States of Guernsey and the Attorney General of Jersey (the intervenors) that Assent may be withheld if the *Projet de Loi* would breach an international obligation, which has been extended by agreement to the Islands, but that this does not apply where the relevant agreement has already been incorporated into the domestic law of the Islands.³⁵ It was submitted that the democratic decision of the Island legislature should not be supplanted by the executive's view of an executive-agreed treaty obligation.

31 Secondly, Lady Hale also squarely raised the issue discussed above of the UK's or the Crown's responsibility for "good government" on the Islands, juxtaposing the narrower view raised by the Justice Committee's 8th Report and the broader view of Lord Collins (with which the UK Government in their evidence both in *Barclay (No 1)* and in *Barclay (No 2)* agreed). On these two issues she said the following³⁶—

"It is not necessary for this court to express a view on these contentious issues. We flag them up because they would arise in the (no doubt highly unlikely) event of a recommendation that Royal Assent be withheld. We note only that, as the interveners were not party to *Barclay (No 1)* . . . any statement in the judgments in those cases as to the scope for withholding Royal Assent *cannot be treated as authoritative*."

The jurisdictional issue

32 On the central issue in *Barclay (No 2)*, the Supreme Court allowed the appeal and held that, although they had jurisdiction to do so, this was not an appropriate case for the UK courts to review the Order in Council leading to the grant of Royal Assent to the 2010 Reform Law. This was for the following reasons.

33 First, in relation to the issues of whether the appellants were acting "in right of" the UK or Guernsey, there was no hard and fast rule and "the consequence will depend on why that question is being asked".³⁷ In this case the appellants were advising Her Majesty both in right of Guernsey and Sark (on the final stages of the legislative process) and in right of the UK (because of its continuing responsibility for the international relations of the Bailiwick).

34 Secondly, because of the responsibilities of the appellants acting in right of the UK, for which they were politically responsible, they should

³⁵ *Barclay (No 2)*, para 17.

³⁶ *Barclay (No 2)*, para 18 (emphasis added).

³⁷ *Barclay (No 2)*, para 56.

also be legally responsible in UK courts.³⁸ (Whether they may also be responsible to the Guernsey Courts was not argued before the Supreme Court and therefore left open.)

35 Thirdly, however, this was “clearly” a case in which the UK courts’ jurisdiction should not be exercised.³⁹ Even though the UK’s HRA defines primary legislation (in s.21) as an “Order in Council made in exercise of the Royal Prerogative”, the purpose of the HRA does not include review of an Order in Council giving Royal Assent to Island legislation. Nor does it apply to an Order in Council legislating directly for an Island. This is because the HRA was not intended by Parliament to apply to Island legislation. Nor is it for the courts of England and Wales to interpret the law of the Channel Islands. These matters rest with the Island Courts, with ultimate appeal to the Judicial Committee of the Privy Council.⁴⁰

36 In addition, Lady Hale considered that challenges to the compatibility of the 2010 Reform Law with ECHR rights would “subvert the scheme of the Island’s own human rights legislation”.⁴¹ It would also subvert the method by which the UK extended the ECHR to the Dependencies, which was not by extending the HRA to them, but extending the scope of the ECHR in international law by a declaration under art 56, and then leaving it to the Islands to legislate in the manner they considered appropriate to incorporate Convention rights. Here too, the definition of “primary legislation” under the HRA could not cover primary legislation in Guernsey.

37 It was held too that the above reasoning would still apply if it were said that the challenge was not to the legislation itself, but to the *advice* given to the Privy Council by the Minister of Justice and the Committee for the Affairs of Jersey and Guernsey. Lady Hale agreed with the Divisional Court on that matter that—

“it would be a ‘surprising’ outcome if the courts of England and Wales could quash the final stages in the Island’s legislative process when the courts of the bailiwick must respect the primacy of the legislative process.”⁴²

38 Further support for the view of the Supreme Court that this was not an appropriate case for review in the UK courts was based upon the view that the Guernsey courts are simply better able to assess, at a local level,

³⁸ *Barclay (No 2)*, para 57.

³⁹ *Barclay (No 2)*, para 58.

⁴⁰ *Barclay (No 2)*, para 36.

⁴¹ *Barclay (No 2)*, para 37.

⁴² *Barclay (No 2)*, para 38.

the scope of the requirements of ECHR rights. The Strasbourg Court itself has shown, said Lady Hale, “increasing respect for the particular national context and cultural traditions where interferences with qualified rights are concerned”.⁴³ There is an ultimate safeguard too, in the appeal to the Judicial Committee of the Privy Council, “which has the inestimable benefit of the considered judgments of the courts . . . in the Island jurisdictions” and where “the Island authorities will have every opportunity to take part in the case”.⁴⁴

Conclusions

39 The *Barclay* litigation has clearly shown that the UK–Dependencies relationship has developed since *Kilbrandon* in the following way.

40 First, the outcome on the particular facts of *Barclay (No 2)*, namely, that the 2010 Reform Law cannot be challenged in the UK courts, rests heavily on the general notion that the legislatures of the Dependencies have an autonomous role which cannot lightly be challenged in the UK courts.

41 Secondly, the unorthodox view put forward by the UK government of the power of the UK to intervene in the affairs of the Dependencies on the ground of the “public interest”—a view accepted in *Barclay (No 1)* in clear opposition to the narrower interpretation put forward by the House of Commons Justice Committee’s 8th Report—was held to have no authority because of the lack of representation of Guernsey in that case.

42 Thirdly, although *Barclay (No 2)* leaves open the possibility of challenge in the UK courts to the domestic laws of the Dependencies, and challenge to the process of granting of Royal Assent in the UK courts, this in itself leaves open the possibility of a challenge to the *refusal* of Royal Assent—a position which the Interveners specifically requested the Supreme Court to reserve, as noted in her judgement by Lady Hale.⁴⁵

43 Finally, Lady Hale’s judgment, on behalf of a unanimous Supreme Court, frequently alludes to modern developments that have surely crystallised the conventions identified by *Kilbrandon*, such as the autonomy in purely domestic matters of the Dependencies, the need for consultation prior to the UK enacting legislation or entering into any international agreement which would apply to the Dependencies, and the narrowing scope for UK intervention where the Dependencies have

⁴³ *Barclay (No 2)*, para 39.

⁴⁴ *Barclay (No 2)*, para 39.

⁴⁵ *Barclay (No 2)*, para 49.

adopted processes that meet the modern requirements of representative government.

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