

## THE ROLE OF THE ATTORNEY GENERAL AS *PARTIE PUBLIQUE* IN CIVIL CASES

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*This article considers the origin and extent of the role of the Attorney General of Jersey as guardian of the public interest in civil cases.*

1 It is well understood that the Attorney General has a role to make and respond to court applications as guardian of the public interest. This article examines the history of the role, the corresponding role of the Attorney General in England and Wales, and the extent of the role today under Jersey law in civil proceedings. Consideration of the Attorney General's specific functions in the protection of charities and charitable interests were considered in an earlier issue of this *Review*.<sup>1</sup>

### *Partie publique*—history

2 The *Procureur-Général* has always occupied a central role in the functioning of the Royal Court in the civil sphere as well as in the criminal. As Philippe Le Geyt in his *Manuscrits sur la Constitution, les Lois, & les Usages de Jersey* (written in the 17th century) said of the role of the Attorney General and Solicitor General<sup>2</sup>—

“... outre le particulier intérêt du Prince et la poursuite des crimes, ils sont chargés de la poursuite générale de tous les infracteurs des lois, privilèges, libertez et franchises de l'isle, et l'on a coutume de les entendre quand il s'agit de la police, des communautez et des pauvres.”

[... over and above the particular interest of the [Crown] and the prosecution of crimes, they are responsible for upholding the laws, privileges, liberties and freedoms of the Island against all who would contravene the same, and by custom they are heard in matters concerning public order, public bodies and the poor.]

3 In *Les Lois et Coutumes de L'Ile de Jersey* by Jean Poingdestre (also written in the 17th century), the author says<sup>3</sup>—

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<sup>1</sup> MacRae, “The Attorney General's role in relation to charities” (2018) 22 *Jersey & Guernsey Law Review* 34.

<sup>2</sup> Tome 4, at 104 (States of Jersey, 1846).

<sup>3</sup> At 24–25 (J Bigwood Ltd, 1928).

*“Felin tient que la pñce du Procureur & Aduocat Fiscal, est requise non seulement par voyde solemnitég & biensceance, mais affin que l’Acte soit réglé par leur conseil & aduis, & qu’ils le puissant empescher, s’il est contre le service du Roy, ou contre le bien Public: auquel cas il faudroit dire que tout acte ou leur pñce est requise, fait en leur absence, ou sans leur consentement, est nul et sans effet . . .”*

[Felin holds that the presence of the Attorney and Solicitor [General] is required not only as a matter of solemnity and good practice, but in order that the matter before the court be determined with their advice and counsel, and that they may intervene, if the matter is against the interests of the Crown, or against the public interest; in which case it should be noted that any act where their presence is required, but done in their absence, is void and of no effect . . .]

4 The position set out by Le Geyt and Poingdestre endured into modern times (and was noted by the Royal Commissioners in 1847<sup>4</sup> and by Le Gros a century later, citing an instance from 1605<sup>5</sup>). That the Royal Court was not properly constituted unless the Attorney or Solicitor General were present was confirmed in *Cook v Procureur-Général du Roi*<sup>6</sup> in which the court held that the Attorney General was an integral part (*partie intégrante*) of the court—

*“La charge de Procureur-Général du Roi est impersonnelle et la partie publique est toujours présente à la Cour, dont elle fait partie intégrante.”*

[The office of Attorney General is unbiased and the *partie publique* is always present at the Court, of which he or she is an integral part.]

5 This can be seen in practice when the court, *e.g.* on a Friday morning, performs one of its central constitutional functions of deciding whether or not to register an Order in Council. The court does so under this key provision of the Code of Laws of 1771<sup>7</sup>—

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<sup>4</sup> *First Report of the Commissioners appointed to inquire into the state of the criminal law in the Channel Islands—Jersey* (London 1847 HMSO). At xxxii they stated “Two Law Officers of the Crown, the Procureur Général and Avocat de la Reine . . . attend the Court; which, indeed, cannot act unless one of the two be present.”

<sup>5</sup> *Traité du Droit Coutumier de Jersey* (1943), at 446.

<sup>6</sup> (1912) CR 54; (1908–1916) TD 98.

<sup>7</sup> Reiterating the terms of an earlier Order of Council, 21 May 1679.

“... *aucuns Ordres ... ne seront point exécutés dans l’Isle, qu’après avoir été présentés à la Cour Royale, afin d’y être enregistrés et publiés: et dans les cas que tels Ordres ... soient trouvés contraires aux Chartres et Privilèges, et onéreux à ladite Isle, l’enregistrement, l’exécution, et la publication en peuvent être suspendus par la Cour.*”

[... no Orders ... shall be executed in the Island, but that they have been presented to the Royal Court, in order there to be registered and published: and in case such Orders ... shall be found to be contrary to the charters and privileges, and onerous to the said Island, the registration, execution, and publication thereof may be suspended by the court.]

6 It is clear from *Cook* that the court could not purport to register an Order in Council other than on the conclusions of the *partie publique*.<sup>8</sup> This remains the case in spite of the following provision made by r 2 of the Royal Court (General) (Jersey) Rules 1963—

“POWER OF COURT TO SIT AT ANY HOUR AND IN ABSENCE OF ATTORNEY GENERAL

The Royal Court may sit at any hour and may sit and shall be properly constituted notwithstanding the absence of the Attorney General.”

7 The effect of this was that the Attorney General was spared the need to attend *all* sittings of the court (even when no matter of public interest was in issue). It is not clear whether by 1963 the Attorney General still did attend every sitting, or whether the requirement had been eased in practice and r 2 merely confirmed this. Whichever it was, r2 did not—and could not, under the power to make rules of court—remove the substantive function of the *partie publique* and his or her standing as an integral part (*partie intégrante*) of the court. The Attorney General’s role in representing and protecting the public interest before the courts of Jersey remains.

8 As for the nature of the role as guardian, this was confirmed by the Judicial Committee of the Privy Council in a Guernsey case in 1861.<sup>9</sup> The Judicial Committee held—

“They [the Law Officers of the Crown] are both *ex officio* guardians of the public and parochial interests. Both of those

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<sup>8</sup> In the wording of the standard Act of Court: “in accordance with the conclusions of Her Majesty’s Attorney General” (“*conformément aux conclusions du Procureur Général de la Reine*”).

<sup>9</sup> *In re States of Guernsey* (1861) 14 Moo PCC 369, 391.

Officers may be consulted by the Crown, the Lieutenant-Governor, the States, the Royal Court, and the Public bodies in all matters which relate to the public weal.”

9 Recent instances where the Attorney General has discharged the role of *partie publique* in civil cases before the court are set out in the table below.

10 Generally the Attorney General is said to be invited (convened) by the Royal Court to assist it in relation to matters of public interest should they arise in proceedings before the court. Nonetheless, as we have seen above, the rationale for the judgment in *Cook* appears to hold good in spite of r 2 of the Royal Court (General) (Jersey) Rules 1963, and a forceful argument can be made that the Attorney General—as an “integral part” of the court—has standing to be heard on a matter of public importance at his or her own instance and without the need to seek leave.

Case	Reference	Issue at stake
<i>Att Gen v Le Marquand</i>	1987–88 JLR 626	<i>Clameur de haro</i> —ancient customary law remedy for private land owners. Attorney General appeared to make submissions as to relevant law.
<i>P v P</i>	[2002] JRC70A	<i>Mareva</i> injunction; matrimonial proceedings; maintenance. The court requested the Attorney General as <i>partie publique</i> to appear to make such submissions as he saw fit in the absence of the defendant.

<i>Bâtonnier v An Advocate</i>	[2003] JRC227	Representation alleging professional misconduct of lawyers. Attorney General appeared as <i>partie publique</i> .
<i>Connétable of St Helier v Gray and Att Gen</i>	2004 JLR 360	Attorney General appeared as <i>partie publique</i> and offered submissions in respect of customary law change <i>vis-à-vis</i> honorary police.
<i>In re CJR</i>	[2006] JRC116	Powers of curators. Court convened Attorney General as <i>partie publique</i> (court had concerns as to whether the application fell within art 43(17)(d) of the Mental Health (Jersey) Law 1969).
<i>In re Le Claire</i>	[2011] JRC229	Public elections. Attorney General made submissions as <i>partie publique</i> .
<i>Lloyds Trust Co (CI) Ltd v Fragoso</i>	[2013] JRC211	Attorney General appeared as <i>partie publique</i> re constructive trust being held for Mozambique
<i>Le Cornu v Att Gen</i>	2015 (1) JLR 58	Public elections. Challenge to result. Attorney General appeared and made submissions as <i>partie publique</i> .
<i>In re Walton Dégrèvement</i>	2015 (1) JLR 129	Attorney General convened by court as <i>partie publique</i> in matter concerning whether a <i>dégrèvement</i> of an undivided share of immovable owned in common could take place.
<i>Le Cornu v Att Gen</i>	[2015] JRC051	Costs hearing in respect of earlier matter. Court notes at para 22 that the Attorney General was convened to assist the court, but not “as a proper party as such”.

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<i>In re F Trust</i>	2017 (2) JLR 26	Trust was exclusively charitable. Attorney General represented general charitable interest.
<i>Holmes v Law Society of Jersey</i>	[2018] JRC010	Judicial review of Law Society and Bâtonnier in respect of legal aid. Attorney General intervened to address issues of general importance, but not specifics of applicant's circumstances.

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### England and Wales

11 In *Gouriet v Att-Gen*,<sup>10</sup> the House of Lords noted and held that the Attorney General described the wide range of functions possessed by the Attorney General when acting in a special capacity as “guardian of the public interest”. The Attorney General continued—

“Some might express the view that that was a somewhat dramatic, or even pompous, expression. It is not for one moment asserted that the Attorney is the sole guardian of the public interest. All who are concerned with the administration of justice have a role to play as guardians of the public interest. So indeed do many others. But the Attorney has a particular role and a particular responsibility.”

12 The issue in that case was the exceptional nature of the civil remedy of injunction in aid of the criminal law and the extent to which a private citizen, in the absence of any special interest in the civic matter concerned, could invite the Attorney General to exercise his powers in a preventative action before a crime had been committed. Accordingly, the Attorney General's intervention in a case, *ex officio*, may be on his own initiative or at the instigation of an aggrieved citizen; but in either case as a representative of the community at large. Lord Wilkinson said in *Gouriet v HM Att-Gen*—

“The Attorney General's right to seek, in the civil courts, anticipatory prevention of a breach of the law, is a part or aspect of his general power to enforce, in the public interest, public rights. The distinction between public rights, which the Attorney General can and the individual (absent special interest) cannot seek to enforce, and private rights is fundamental in our law.”

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<sup>10</sup> [1978] AC 435, at 442.

13 In *The Attorney General, Politics and the Public Interest*, the author says<sup>11</sup>—

“Occasionally the law reports contain references to the Attorney General ‘intervening’ in a private suit or appearing as an amicus curiae. In what respects are these roles distinguishable from the standing accorded to the Attorney General or Solicitor General when either of the Law Officers appears ex officio as ‘guardian of the public interest’ to protect or enforce public rights? The role of an amicus curiae or friend of the court is by no means restricted to participation by the Law Officers of the Crown, it being open to the presiding judge in any case to grant leave to a person, not necessarily a member of the Bar who is not engaged in the case being litigated, to assist the court in the capacity of an adviser by drawing to its attention legal authorities that might otherwise be overlooked. By its very definition an amicus curiae is not an adversary in the proceedings. In sharp contrast, where standing is granted to a person who is accepted as an intervener in the proceedings before court, the intervener becomes a party to those proceedings in the fullest sense of the word. When the Attorney General sees fit to intervene in his official capacity he is entitled to tender evidence, cross examine witnesses, and appeal the judgement in the same manner as if he were an original party to the suit. What then dictates which of the roles, intervener or amicus curiae, is properly assumed by the Attorney General?”

14 This point arose in the English courts in *Adams v Adams*,<sup>12</sup> the issue being whether or not the English law would recognise a decree of divorce pronounced in the Rhodesian courts following the country’s unilateral declaration of independence. Counsel for the Attorney General claimed a right to intervention on the ground that constitutional issues were involved in which the sovereign’s interest might be effected. Sir Jocelyn Simon, President, held—

“In my view the Attorney General has a right of intervention in a private suit whenever it may affect the prerogatives of the Crown including its relations with foreign states . . . and he certainly has in such circumstances a locus standi at the invitation of the court.”

15 He went on to say—

“I think that the Attorney General also has the right of intervention at the invitation or with permission of the court

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<sup>11</sup> At 153 (John Edwards 1952).

<sup>12</sup> [1971] P 188.

where the suit raises any question of public policy on which the executive may have a view which it may have a desire to bring to the notice of the court. Public policy is a matter of which the Courts take direct judicial cognisance, and they do not allow evidence on the point.”

16 The President considered the role of the Attorney General in the context of the dispute before it and said—

“Although in later stages of the instant case, counsel for the Attorney General claimed to be doing no more than drawing relevant legal considerations to the attention of the court, he intervened by wish as a party rather than be heard as *amicus curiae*; and I was left clearly under the impression that there were matters here, not merely affecting prerogative power in the narrower sense, extending to matters of policy, upon which the Crown wish to express a view . . . I would, in any event, have wished to hear argument on behalf of the Crown. Counsel for the wife expressed the preference that the Attorney General should be an intervener, rather than merely address the court as *amicus curiae*. There seemed to me to be manifest advantages in having the Attorney General a party, so that my judgment can, if so desired, be tested on appeal in all events. I therefore readily allow the intervention of the Attorney General, who is now a proper party to the suit. His counsel indicated that he would not in any event be asking that his costs should be paid, and was willing that this should be made a condition of his being allowed to intervene.”

#### **The extent of the role of the *partie publique* in Jersey today**

17 There are numerous instances in statute which presuppose the customary law role of the Attorney General as *partie publique*. Examples include—

(1) Rule 38 of the Matrimonial Causes Rules 2005<sup>13</sup> provides that if the Attorney General wishes to show cause against a decree nisi being made absolute, he or she need only give notice to that effect to the court and to the party in whose favour the decree was pronounced. Other parties seeking to intervene must obtain leave.

(2) Rule 25D of the Adoption Rules 1962 provides for the right of the Attorney General to intervene in certain adoption proceedings.

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<sup>13</sup> And its counterpart in the Civil Partners Causes Rule 2012.

(3) Article 6 of the Human Rights (Jersey) Law 2000 confers a right on the Attorney General to intervene where the court is considering whether to make a declaration of incompatibility under that Law.

(4) Article 10 of the Trade Marks (Jersey) Law 2000 enables the Attorney General (as of right) to present a petition to the Royal Court for the revocation of the registration of a trade mark.

(5) Article 8 of the Advocates and Solicitors (Jersey) Law 1997 makes it clear that a person may only be admitted as an advocate or solicitor of the Royal Court upon hearing the Attorney General's conclusions (in other words the Law reflects the fact that the *partie publique* must move the court to administer the oath).

(6) Under the Royal Court (Jersey) Law 1948 it is only "on the motion of the Attorney General" (and not otherwise) that court may administer the oath of office to a newly elected Jurat; or, in certain circumstances, declare null and void the appointment of a Jurat by the Electoral College.

(7) The Law Society of Jersey Law 2005 provides that the Attorney General may in certain circumstances refer complaints against advocates and solicitors to the Royal Court. Moreover art 35 provides that nothing in the Law "limits the inherent jurisdiction of the Royal Court to exercise disciplinary control over practitioners". This provision brings into focus the *partie publique* as an integral part (*partie intégrante*) of the court in the sense that—although not specifically provided for in the 2005 Law—it is through the medium of the Attorney General/*partie publique* that the court will be seised of the facts of a case in which the inherent jurisdiction comes into play. In other words it is confirming the customary law function of the Attorney General to consider and, if need be, seise the court of any matter of disciplinary control of the legal profession beyond the confines of a complaint under the 2005 Law.

(8) Under the *Loi (1862) sur les teneures en fidéicommiss et l'incorporation d'associations*, the permission of the court to form a trust of Jersey immovables or to obtain an act of incorporation under that Law may only be given after the court has heard the "*conclusions*" of the Attorney General.

18 In 2018 the Royal Court, in the case of *X v Minister for Health & Social Services*,<sup>14</sup> considered an application by the Attorney General to intervene as *partie publique* which was resisted by the plaintiff. There is no reasoned judgment on the issue but the court granted the

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<sup>14</sup> [2018] JRC 226.

Attorney General leave to intervene in August 2018 after a contested hearing. (In view of the analysis above it is quite possible that the Attorney General did not need leave). It is worth reciting in general terms the argument before the court in *X v Minister for Health & Social Services* as a recent example of the extent of the Attorney General's role.

19 The case of *X* was a substantial personal injuries action where the Attorney General sought leave to intervene in order to make submissions on the court's power to make a periodical payments order absent the consent of the parties.

20 The Attorney General submitted that he was entitled to seek leave to intervene in private proceedings even when not invited to do so by the court and that, in those circumstances, the Attorney General should be permitted to intervene if a point of law or public interest had arisen, and it was reasonable for the Attorney General, in the circumstances, to wish to address the court in relation to that issue.

21 It was argued that a point of law of public interest had arisen, namely whether the Royal Court had the jurisdiction to make a periodic payment order in a damages claim, whether under its inherent jurisdiction or by development of the customary law, and the principles to be followed should such a jurisdiction be found.

22 The Court was reminded of its previous decision in *Le Cocq v Att Gen*<sup>15</sup> as approved by the Court in the *Att Gen v Hill*<sup>16</sup> when it held that "It is his [the Attorney General's] function to safeguard the public interest in the widest sense."

23 The plaintiffs argued (*inter alia*) that the Attorney General had no *locus* to intervene because (i) there was no point of considerable or general public importance which the Attorney General had identified; and (ii) to the extent that the general public interest was engaged it was protected by the defendant who was a Minister. It was not challenged that the Attorney General had *locus* to apply to intervene in civil proceedings where there was a point of considerable or general public interest.

24 The plaintiff's advocate noted the Attorney General's submission that there was a public interest in the development of the law on a principled basis and the risk of making a substantial lump sum award (as argued on behalf of the plaintiffs in the case) might, depending on the facts, create a particularly extreme risk of under compensation or

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<sup>15</sup> 1991 JLR 169.

<sup>16</sup> Royal Ct, 25 January 2000.

over compensation, as the case may be (the mean estimated claim of the plaintiffs was £238m. in damages).

25 The defendant's advocate said that his instructions came from the Minister's insurer. It was argued (and presumably accepted) that only the Attorney General was likely to make submissions in the public interest, as opposed to the private interests of the parties.

26 The court gave leave to the Attorney General to intervene and at a subsequent hearing submissions were made on his behalf as to the court's power to make periodical payment orders. The case subsequently compromised before judgment was delivered by making of an agreed periodic payment order.

27 Another recent instance of the Attorney General making an application to the Royal Court as *partie publique* in the public interests was the application in November 2016 for a judicial review of the Law Society's decision to amend the legal aid guidelines in September 2016 on the footing, *inter alia*, that the Law Society had acted unlawfully misdirecting itself as to the status of the guidelines, failing to make sufficient enquiries in the process of review, had no evidential basis for the amendments and drew irrational conclusions as a consequence of the foregoing errors. The Attorney General sought interim relief including, *inter alia*, interim suspension of the guidelines pending the declaration as to their lawfulness. The judicial review and connected proceedings were ultimately compromised by consent but there was no doubt that the Attorney General had locus as *partie publique* to issue the proceedings in the public interest.

### **Conclusion**

28 The role of the Attorney General to intervene, apply and respond to proceedings in the public interest remains an important part of his function. The Attorney General remains a guardian of the public interest and although time resources and other factors do not always permit the Attorney General to appear as a party in all cases of significance where the public interest is engaged and might, absent his intervention not be adequately safeguarded, he or she retains a function to safeguard that interest in the wider sense, and in a sense which is at least as wide as the power of his counterpart in England and Wales. It should be remembered that the Attorney General of Jersey as a Crown appointee is constitutionally independent of

Government and is likely to be in a good position to make submissions having regard to the wider public interest.<sup>17</sup>

*Robert MacRae, QC was in practice as an advocate of the Royal Court until his appointment as HM Attorney General for Jersey in 2015.*

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<sup>17</sup> I am very grateful to Advocate Steven Pallot for his significant contribution to this article.