BINDING PRECEDENT IN THE CHANNEL ISLANDS

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This article explores the difference between Jersey and Guernsey law on whether there is a doctrine of binding precedent in respect of decisions of higher courts. Developing the approach set out in the Jersey decision of State of Qatar, *it is argued that such a doctrine is not just contrary to the customary law heritage, but inconvenient for good adjudication. In particular, it is useful if the Channel Island courts can consider local social and legal issues fully, rather than treating themselves as bound by higher decisions by courts with less (if any) local knowledge. A doctrine of binding precedent is inappropriate given the importance of non-domestic court sources of law, and particularly so where areas of law have been imported from foreign jurisdictions whether through judicial or legislative action.*

1 There are ways in which the legal systems of Jersey and Guernsey are, as George Bernard Shaw said of Great Britain and the United States of America, divided by a common language.[1] Many differences are attributable to whether one Bailiwick rather than the other attracted the attention of the Privy Council in London at a particular time. Guernsey has the *Approbation des Lois* (1583)[2] making a highly imperfect statement of the laws, customs and usages of the Island; and Jersey has the very different Code of 1771. There was a Royal Commission sent by London to Jersey in 1861 to report on its civil law, but none was sent to Guernsey. A more random difference that has opened up is in the theory of judicial precedent. Guernsey has a theory of binding precedent; Jersey does not.

2 The principal reasons given for Jersey's approach are those set in the *State of Qatar v Al Thani*, citing in particular the customary law heritage of the Island and the absence of a large body of domestic

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* In writing this article, the author has had the benefit of many discussions on the subject with Advocate Gordon Dawes. These have greatly assisted, although any errors are the author's own.

[1] The statement is widely attributed to Shaw, but is not actually found in any of his published works.

[2] See Dawes, *Introduction to Terrien's Commentaries on the Civil Law*, at 53.

case-law to make a theory of binding precedent worthwhile.[3] The Guernsey approach was settled by the general exposition of the local law of precedent given in the case of *Morton v Paint*, and the rules of binding precedent set out in that decision were taken to be simply what "the hierarchy of the courts and the doctrine of precedent requires".[4] The two jurisdictions went on separate paths, and no one especially noticed, which is probably because the hierarchy of precedent is seldom critical given the lack of local precedent.

3 This article will consider the customary law argument against the Channel Island jurisdictions following an English approach to strictly binding precedent, supplementing it with a related reason: the institutional expertise in local law in both Islands tends to be strongest lower down in the hierarchy of Royal Court / Court of Appeal / Privy Council.[5] Perhaps more innovatively, it will be argued that the language of "binding" and "persuasive" precedent is often inadequate to describe the relationship of both Islands to English case-law. Viewed realistically, and as shown by the recent *Glenalla* and *Z Trust* cases in Guernsey and Jersey respectively,[6] the pragmatic view is that the courts of the Bailiwick often do not need to be persuaded by English case-law in any true sense of the word. Once the Bailiwicks hitch their star thoroughly to the English common law or rules of equity in a particular area of law (*e.g.* trusts or negligence), the rule of law means that the local courts will have to follow English decisions unless there is an objective reason to the contrary, *e.g.* a local statute, a pre-existing rule of customary law, the durability of the English decisions has been thrown into doubt, or the rule has itself been abandoned in England as being unsatisfactory.

Binding precedent

4 It should first be noted that there is no suggestion that precedent is or should be irrelevant in either jurisdiction. Even jurisdictions which claim not to have a doctrine of judicial precedent will, on closer examination, have concepts such as "settled case-law" or "*jurisprudence constante*" which achieve similar stability in their legal

[3] 1999 JLR 118, at 124.
[4] (1996) 21 GLJ 36, at 55.
[5] It is noted that in the Bailiwick of Guernsey context, there will frequently be another layer, in that Alderney cases will typically start in the Court of Alderney, and Sark cases will start in the Court of Seneschal.
[6] 2018 GLR 66 and [2019] JCA 106.

system.[7] The rule of the *Code Napoléon* may well be that "it is forbidden to follow a precedent only because it is a precedent",[8] but this only occurs when a precedent is followed blindly.

5 In a functional sense, precedent is only binding if there is a duty to follow it regardless of the degree of obvious error in doing so. Precedent, as Dicey pointed out, was that, on one view, "the resolution to follow precedents is the same thing as the determination that, when once you have decided a question wrongly, you will go on deciding it wrongly ever after";[9] or at least reserving to a higher court the decision as to the existence of an error.[10] Even in the English common law, there is much more to the use of case-law authority than the strict rules of binding precedent. Most precedent considered by the High Court or above will be "persuasive" rather than binding. The potentially binding part of a decision is the *ratio decidendi*, that is, "any rule of law expressly or impliedly treated by the judge as a necessary step in reaching his conclusion, having regard to the line of reasoning adopted by him".[11] However, whether this is binding depends on where a court sits in the hierarchy: higher courts bind lower courts, but the English High Court does not bind the county or crown courts; and the English Court of Appeal binds itself. Even when there is an ostensibly binding decision, there are many devices that can allow a court to slip the chains of binding precedent. The most obvious is that a decision may be *per incuriam*, meaning that an important line of argument is missed, whether this be a matter of case-law, statute law or international law. It may also be that a relevant part of a binding decision had never been

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[7] The importance of this concept of "settled case-law" is shown by that, of 29 November 2017, a search for this phrase under the EU law section of the Bailii website had 7671 hits.

[8] MG Algero, "The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation", (2005) 65 *Louisiana Law Review* 775, at 788.

[9] Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century*, (London: MacMillan, 2017) pp.260-261. Dicey was drawing from Jonathan Swift's satirical works in making this comment.

[10] *E.g.* the rule in *Lambeth LBC v Kay* [2006] 2 AC 465, that only the House of Lords can overrule its previous decisions on the requirements of the European Convention on Human Rights even where those decisions have been rejected in clear terms by the European Court of Human Rights.

[11] See *R (Kadhim) v Brent LBC* [2001] QB 955, at para 16, Buxton LJ approved the statement of Professor Cross in Cross and Harris, *Precedent in English Law*, 4th edn (1991), at 72.

argued in the precedents but was assumed to be correct;[12] or the court may even in extreme cases only accept a precedent as binding on its precise facts.[13]

6 Debates as to "binding precedent" need to be read in the context that the most interesting questions of the application of precedent are (a) about how to turn non-binding precedent into a coherent legal answer, and (b) how to avoid applying ostensibly binding precedent so that it is not just a matter of going on deciding things wrongly ever after. This must apply even more so when the amount of case-law in a particular jurisdiction is quite sparse.

Precedent in the Channel Islands

Guernsey

7 It is useful to start with the Channel Island jurisdiction that does have a doctrine of binding precedent. The classic exposition of the Guernsey rules of precedent is that by Southwell JA in the case of *Morton v Paint.* It suffices for the moment to set out the part relating to binding precedent:[14]

(a) decisions of the Privy Council on appeals from the Guernsey court are binding on the Royal Court and the Guernsey Court of Appeal;

(b) however, Privy Council decisions on appeals from other jurisdictions are not binding can only be of persuasive authority;

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[12] *FSHC Group Holdings Ltd v GLAS Trust Corp Ltd* [2019] EWCA Civ 1361, at para 137.

[13] *E.g. R v Judge of the City of London Court* [1892] 1 QB 273, at 290 considered a decision of the Court of Appeal which held that a charterparty for the purposes of a statute gave the charterer use of part of a ship, a proposition a subsequent Court of Appeal thought to be thoroughly wrong. Lord Esher MR said:

> "I desire to speak with great respect of *The Alina* [*i.e.* a recent Court of Appeal decision]; but I think that rules of interpretation are laid down in that case which are absolutely novel. I will obey that case, because it is the decision of the Court of Appeal until it has been reviewed by the House of Lords, and then I will obey whatever the House of Lords determines; but I will not be bound by *The Alina* one particle beyond what it actually decides and determines."

[14] *Morton* v *Paint* (1996) 21 GLJ 36.

(c) decisions of the Guernsey Court of Appeal (and of its predecessor, the *Cour des Jugements et Records*[15]) are binding on the Royal Court;

(d) decisions of the Guernsey Court of Appeal are not binding on itself (*per Smith v Harvey*[16]).

8 Guernsey thus has a doctrine of binding vertical precedent, which is to say that the higher courts bind lower courts, but no court binds itself. It does not follow the approach of the English Court of Appeal in binding itself.[17]

9 This will appear eminently logical to any lawyer trained in the English common law or any other jurisdiction which operates a doctrine of binding precedent. (It should be noted for completeness that the case itself did not concern the hierarchy of precedent within Guernsey, but the relationship with English common law precedent in the area of occupier's liability. The rules from *Morton v Paint* are thus, strictly speaking, *obiter dicta*. However, they are nevertheless the most authoritative statement of Guernsey's approach to precedent.)

Jersey

10 In respect of binding authority, the largely orthodox position in Jersey is that set out in the case of *State of Qatar v Al Thani*:[18]

> "(1) Although the Judicial Committee of the Privy Council is our ultimate court of appeal, Jersey is not, and never has been a colony to which the corpus of English law has been exported. The original source of Jersey law was the *Très Ancien Coutumier* followed by the *Grand Coûtumier of Normandy* . . . Since 1861 the influence of English law in some areas has been more pervasive, but we do not consider that this influence has changed the fundamental jurisprudence (in the English sense) of the Island.

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[15] The article will consider below whether the historic position of the *Cour des Jugements et Records* as giving binding precedent needs to be perpetuated in modern Guernsey law.

[16] 14 May 1981, unreported (Guernsey CA Judgments 1964–1989, at 197). It should be noted that the doctrine that the English Court of Appeal binds itself was an invention of the 1940s, given its blessing by the House of Lords following a spirited attack by Lord Denning.

[17] *Young v Bristol Aeroplane Co Ltd* [1944] KB 718.

[18] 1999 JLR 118, at 124–125

> (2) As part of the *pays de droit coutumier*, our jurisprudence (in the same English sense) may be said to have more in common with France than with England. Like the *parlement de Normandie* (which was in fact a law-court) the Royal Court was until the end of the 18th century a law-making body as well as a law-enforcing body. The Code of 1771 abolished the power of the Royal Court to legislate, ante-dating by some 20 years the abolition of the equivalent power of the *parlements* in France . . . It is true that Jersey has no equivalent of art. 5 of the Civil Code which expressly prohibits the establishment of rules of precedent by the judges. But until relatively recently the Royal Court could resolve cases before it, as judges in France are required to do, only by recourse to one of the primary sources of law, *i.e.* the customary law or legislation, and by giving an interpretation which accorded with the contemporary situation of society. Of course in Jersey, as in France, a line of cases deciding a point in a similar way could establish what in France is called *jurisprudence constante* (settled jurisprudence) which resembles a rule of precedent. The *jugements motivés* contained in the records of this court prior to 1950 contain many instances of references to the settled law and custom of the Island.
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> (3) The mass of case-law which underpins the English doctrine of precedent does not exist in Jersey. [Professor] Cross has noted that the strict rule of precedent to which we have referred above was the creature of the 19th and 20th centuries when law reporting reached its present high standard in that country. The position is quite different in Jersey . . ."

11 To summarise, there are three points:

(1) Jersey is a customary law jurisdiction so there is no basis for importing rules of precedent peculiar to English common law.

(2) If precedent is binding in the strict sense, then decisions have a legislative effect contrary to the abolition of the Royal Court's power to legislate.

(3) The lack of a large body of case law makes a rule of binding precedent much less useful.

12 This approach was endorsed by the Jersey Court of Appeal in *Crociani v Crociani*.[19] The lack of a strict rule of precedent in Jersey

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[19] 2014 (1) JLR 426, at para 76. The 2019–20 Study Guide, Jersey Legal System and Constitutional Law ("Jersey Study Guide") at 1.25 also cites

was made recent in *Rawlinson & Hunter Trustees v Chiddicks* (the *Z Trust Case*) by the Jersey Court of Appeal. Logan Martin JA notably said:[20]

> "I have been assisted by having seen in draft the judgment to be delivered by the learned Bailiff. I agree with his statement [at para 251] that the Norman and civil law origins of the law of Jersey mean that a binding system of precedent does not exist as it does in the law of England (and that is the same in other equivalent jurisdictions)."

13 We shall turn to this case soon to consider what it says about the rationality of binding precedent in jurisdictions that import law almost *en bloc* from a neighbouring jurisdiction, but for the present it is worth emphasising that the *State of Qatar* approach has become firmly embedded in Jersey jurisprudence even whilst it appears quite alien to Guernsey.

A historic reason for the difference?

14 In both Jersey and Guernsey, the historic position did include an element of binding vertical precedent.

15 In Jersey, until 1948, Jurats were judges of law as well as fact. It followed from this that the Inferior Number of the Royal Court was bound by decisions of law by the Superior Number of the Royal Court. The Jersey Legal Systems and Constitutional Law Study Guide attributes this to the simple and obvious reason that the Superior Number's decisions were the decisions of more judges, and that "the usual rule is that a decision heard by more judges is more significant".[21] Whilst questions could be asked about whether and how far this rule continues to confer precedence to pre-1948 Superior Number decisions, this would be of limited interest, particularly when we consider that such decisions were given by way of a brief summary, a *jugement motivé*, rather than with full reasons. Suffice it to say that by the time the Court of Appeal (Jersey) Law 1961 was passed, such matters were a thing of the past. There was therefore no reference in Jersey's 1961 Law to the Court of Appeal inheriting the historic superiority of the Super Number.

16 The pre-Court of Appeal position in Guernsey is of potentially more interest, because the Guernsey Court of Appeal did expressly

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Channel Islands Knitwear v Hotchkiss 2001 JLR 570, at 580 for this proposition, but the decision is not quite in point.

[20] [2019] JCA 106.

[21] Jersey Study Guide, at para 1.26(ii).

step into the shoes of a local appellate court. As stated in *Morton v Paint*, the Guernsey Court of Appeal is very much the successor of the *Cour des Jugements et Records*. The Court of Appeal (Guernsey) Law 1961 expressly transferred the jurisdiction of the previous court to the new Guernsey Court of Appeal, so it is perfectly logical that for this reason alone the Guernsey Court of Appeal should bind the Royal Court of Guernsey.

17 What is argued here is that, whilst it would undoubtedly have a certain logic, such a result is not strictly required by the Court of Appeal (Guernsey) Law 1961. It cannot be argued that that statute positively requires that the new Court of Appeal should set binding precedents. The key provision is art 14 of the 1961 Law:

> "For all the purposes of and incidental to the hearing and determination of any appeal and the amendment, execution and enforcement of any judgment or order made thereon, the Court of Appeal shall have all the power, authority and jurisdiction which vested in the Royal Court sitting as a '*Cour des Jugements et Records*' and shall have power, if it appears to the Court of Appeal that a new trial ought to be had, to order, if it thinks fit, that the verdict and judgment be set aside and that a new trial be had."

18 This provision makes the Guernsey Court of Appeal the successor of the *Cour des Jugements et Records* in respect of hearing appeals and resolving them. As with cases such as *Hulme v Matheson Securities (Channel Islands) Ltd*, the provision is key to identifying the powers of the Guernsey Court of Appeal to dispose of a case.[22] The provision, however, says nothing about the conduct of the Royal Court of Guernsey in subsequent cases, and whether it should see itself as bound by the *ratio* of earlier Court of Appeal decisions.

Back to basics—what is precedent good for?

19 It is important to remember that there is no magic in any particular rules of precedent. In England, it was once thought by no less an authority than Professor Dicey that it was essential for the rule of law that the House of Lords should bind itself.[23] Yet, in 1966, the House of Lords issued a Practice Statement renouncing that position.[24]

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[22] (1997) 24 GLJ 75.

[23] Dicey, *Law and Public Opinion*, *supra*, at 346–347.

[24] [1966] 1 WLR 1234, renouncing the position formalised in *London Tramways v London City Council* [1898] AC 375.

20 Lord Justice Laws said the following on the English approach to precedent, which is worth repeating:[25]

> "Now, I do not suppose that the rules of precedent were evolved or designed to work as an integrated whole; but in looking for the methods and morality of the common law the combined effect of these precepts is worth considering as a single structure, a coherent system of *stare decisis*. If the High Court bound itself, the law would either ossify or there would be excessive calls on the Court of Appeal. If the Supreme Court bound itself, unjust and outdated law would persist—as was occasionally found before the Practice Statement—subject only to the possibility of legislative change. But if the Court of Appeal did not bind itself, the sacrifice of certainty would be unacceptably high. As it is, a balance is struck."

21 It might be added that any legal system's approach to judicial decisions seeks a balance between the certainty that can arise from knowing past decisions will be followed and the "practical injustice"[26] that can result from blindly following them.

22 What is required for the Channel Island jurisdictions is a clear identification of the particular factors that apply in the Channel Islands. If we look at the dynamics that Lord Justice Laws gives as explaining the contours of the English system of precedent, we see that Sir Philip Bailhache, as Bailiff in *State of Qatar*, was entirely right to see that very different dynamics apply in Jersey.

23 The point identified in *State of Qatar* was that Jersey simply lacks the body of case-law for a system of precedent to achieve the same results as in England. Instead of a large number of cases drawing the limits of particular principles of law derived from decided cases, Jersey would typically throw up isolated cases—small outcrops of binding *ratio*, but mined exhaustively for *obiter dicta*. Nevertheless, whilst this shows that a doctrine of binding precedent will be of limited value in Jersey, it does not necessarily show while this would not be of some use. At the very least, it would give clarity to the hierarchy of such precedents as do exist.

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[25] Sir John Laws, "Our lady of the common law", ICLR Lecture, 2012 (https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Speeches/lj-laws-speech-our-lady-of-common-law.pdf) (last accessed, 13 January 2020).
[26] *Gale v Rockhampton* 2007 JLR 332, at para 55.

The particular circumstances of Channel Island law

24 Four things should be noted about Channel Island law which are relevant to the practicality of a system of binding precedent. The first two of the *State of Qatar* reasons made valid points derived from legal history or from the implications of the enactment of the Code of 1771. These ultimately do not go to whether a system of binding precedent would be good or bad, workable or unworkable, in the Channel Islands. This article will offer a different analysis, reinforcing the key jurisprudential point made in *State of Qatar* as to the lack of domestic case-law.

(1) *Customary law base*

25 First, much of Channel Island law has a customary law base. By this we include not just the process of both Channel Island jurisdictions borrowing from Norman customary law after the Separation/*Commise* of 1204.[27] Both jurisdictions joined with mainland Normandy in borrowing civil law sources such as the writings of Pothier and Domat on contract, which was very much a process of customary law method.[28]

26 This is not just a matter of jurisprudential history, that is, the very legitimate question posed in *State of Qatar* of how English rules of precedent could have legitimately become part of legal systems which are definitely not part of the common law world. It is a matter of the basic theory of how customary law works. Customary law evolves with usage, and the first evidence of the customary law should be an enquiry into usage.[29] In today's world, an enquiry into usage is seldom necessary. Particularly where there is established precedent, usage tends not to stray away from what the law requires. Nevertheless, there

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[27] The terms "the Separation" and "the *Commise*" are how Jersey and Guernsey respectively refer to the Channel Islands becoming politically separated from mainland Normandy, and ultimately remaining under the Crown of England. They mean the same events.

[28] *Routier, Principes Généraux du Droit Civil et Coutumier de la Province de Normandie* at 1 (1742), 17th principle:

> "When a *coutume* does not contain a provision to cover the matter in issue, recourse should be had to the usage in the province. If usage does not cover the point, recourse should be had to the neighbouring coutumes, to the general spirit of the coutumes of France, or finally to the rationale of Roman law."

[29] Jersey Study Guide, para 2.10 *et seq*.

are cases where such an enquiry has taken place in both Jersey and Guernsey in the recent past.[30]

27 The point is that where usage changes, the customary law should change. It is not a matter of overruling earlier decisions as wrong in law. It is a matter of factual enquiry, which is best carried out by the court of first instance.

(2) *Institutional competence*

28 In most legal systems, it can be assumed that the higher up the court hierarchy we go, the greater the institutional competence to resolve difficult points of law. In the Channel Islands legal systems, the institutional competence is to a significant extent reversed:

(1) The greatest local competence will typically lie with the Royal Court being, with exceptions, staffed by judges with decades of Jersey or Guernsey law experience as advocates. Even amongst the exceptions, there will often be substantial local judicial experience,[31]

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[30] In Jersey, (1) *Connétable of St Helier v Gray* 2004 JLR 360 where a 1946 Royal Court decision that promotion in the Parish honorary system should be purely on seniority was set aside as the practice had fallen into disuse; and *Moran v St Helier (Deputy Registrar)* 2007 JLR *N* [50], [2007] JRC 151 at para 26, on the registering of surnames of babies born to unmarried parents. In Guernsey, *In re Conqueror Holdings Ltd*, [2019] GRC 038, 29 June 2019, see para 40 onwards as to an enquiry into commercial usage as a potential basis for developing relevant customary law. Although not presented as a matter of customary law method, the same approach can be found in the Jersey case of *Toothill v HSBC* 2008 JLR 77, at para 28:

> "The law of undue influence in Jersey is similar to that of English law and we find that the principles underlying the decisions in *O'Brien* and *Etridge* are entirely consistent with those of Jersey law. Furthermore, there are strong policy grounds for thinking that the law in this jurisdiction should be the same as in England. *The majority of banks who lend money on the security of immoveable property in the island are UK owned. Their guidelines and procedures have been established in accordance with the clear judicial guidance offered in Etridge and their personnel will have been trained accordingly.*" [Emphasis added.]

[31] For example, the Hon Michael Beloff QC's four years as a Commissioner of the Jersey Royal Court (2014–18) followed 19 years of service in the Jersey and Guernsey Courts of Appeal.

although occasionally a one-off appointment might be called on to consider difficult issues of customary law.[32]

(2) The Jersey and Guernsey Courts of Appeal are normally comprised of three judges. At the most, one of those judges will be from a Channel Island background.[33] Frequently, all three of the judges will be from another United Kingdom jurisdiction, although they will often have gained significant knowledge of local law through years of service.

(3) The Judicial Committee of the Privy Council will from time to time have members who used to sit on the Jersey Courts of Appeal. Lord Hodge, for example, was a member of the Guernsey and Jersey Courts of Appeal from 2000 to 2005, and sat on four of the five Privy Council appeals from the Channel Islands in 2018 and 2019. However, the amount of experience across the panel of judges is obviously limited.

29 So, whilst there are considerable advantages to the Channel Islands to be able to call on some of the greatest legal minds of the United Kingdom (and wider Commonwealth) to staff its appellate courts, there is a significant disadvantage in a lack of local knowledge.

30 This is a problem of which the Channel Islands' appellate courts have been mindful. The Privy Council has at times recognised the danger of importing its English (or Scottish) law assumptions. In *La Cloche v La Cloche (No 1)*, the Judicial Committee was clear that, had the local judges given a clear lead, then the London-based judges would have been reluctant to intervene.[34] John Martin QC, a judge of the Islands' Courts of Appeal, recently argued that English-trained judges are aware of the risk of bringing English assumptions, and are "exceptionally sensitive to the different origins and traditions" of the Islands.[35] The future Lord Hoffmann, when sitting in the Jersey Court of Appeal, noted the fact that a particular decision had been made by a Bailiff "well versed in the customary laws of this Island" amongst the reasons to be reluctant to overrule a longstanding authority.[36] A later

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[32] *E.g.* Pamela Scriven QC, who as Commissioner in *X Children v Minister for Health & Social Services* would have had to have ruled on the position of Periodical Payment Orders in Jersey customary law had the case not settled before judgment, see [2018] JRC 226.

[33] There is nothing to prevent two Channel Island judges sitting on the Courts of Appeal, but in practice it does not happen.

[34] (1869–71) LR 3 PC 125. See also *Benest v Pipon* (1829) 1 Knapp 60.

[35] *Booth v Viscount* [2019] JRC 122, at para 72.

[36] *Re Barker* 1985–86 JLR 186, at 191.

composition of the Jersey Court of Appeal expressed its concurrence with this approach in *Gale v Rockhampton* when invited to overrule an earlier decision that Jersey did not follow the English law of nuisance but its own law of good neighbourliness in *voisinage*.[37]

31 The point to be taken from this issue is that the higher courts may fall into error on matters of local Channel Island law. It may require the Royal Court to point out such errors, which will not be done best if it treats itself as bound by possible errors above. To give a very important example, there is a principle expounded in the Guernsey case of *Singleton v Le Noury* that the fundamentals of customary law could not overturned by judicial decision.[38] That case concerned the rule, common to both Channel Islands, that a *servitude* could not be obtained by prescription. The identification of what is or is not a fundamental rule of customary law is surely a matter that the relevant Royal Court should not only be the first court to rule on, but should respectfully correct the United Kingdom judges even if sitting in the Privy Council should an error originate at that level.[39]

(3) *Importation of English law*

32 In both Channel Islands, there are areas of law which have been imported effectively *en bloc* from England.

33 We are not here talking about decisions where the respective Royal Courts look to foreign systems on a comparative basis to identify the best direction to take the customary law when dealing with gaps in domestic sources.[40] In such cases, there is an open choice the Channel Island courts to look to other jurisdictions and to prefer the authority that it finds most persuasive.

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[37] [2007] JCA 117B, at paras 43 and 171.
[38] 2003–04 GLR 218.
[39] Ideally, the Privy Council ought not to be deciding points on arguments that were not really ventilated at trial, but see *Arorangi Timberland Ltd v Minister for the Cook Islands National Superannuation Fund* [2016] UKPC 32 for a case where the Privy Council decided a case by elevating a minor point to a full ground of appeal. The extent to which the Privy Council can lead itself astray by ignoring the conventional approach can be seen in Lord Sumption's stinging dissent.
[40] *E.g.* the use of English law to deal with certain issues around wills, *Russell v Gillespie* 2003–04 GLR 54.

34 We are instead talking about more radical (although fairly common) scenarios such as that described by the Privy Council on the recent appeal from Guernsey in *Investec v Glenalla Trust*:[41]

> "The law of trusts in Jersey is a comparatively recent import from England. Its widespread use in the custody and management of wealth dates from the rise of a significant financial services industry in the 1960s. The international appeal of Jersey trusts is to a significant extent dependent on the certainty which it derives from the English case law. *Naturally, English trust law must be modified where it conflicts with established principles of Jersey customary law, and it has also been modified by Jersey statutes.* These general remarks apply equally to the trust law of Guernsey." [Emphasis added.]

35 Sumption JA, sitting in the Jersey Court of Appeal, cautioned against departing from English case-law in areas of law which had borrowed heavily from that source. He explained that the borrowing of English law can become systematic in particular areas of law, meaning that the fundamental rule of law requirement of regularity and predictability means that the Channel Island courts should follow where the English courts lead absent a good reason:[42]

> "In a relatively small jurisdiction, there will be many issues which arise too rarely for the courts to have generated a coherent body of indigenous legal principle. In the interests of legal certainty, it is undesirable for the courts to *reinvent the legal wheel* each time that an issue of principle arises which is not covered by existing Jersey authority, when there is a substantial and coherent body of case-law available from a jurisdiction with which Jersey has close historical links and with which, on most issues, it shares common social and moral values and a common legal culture and from which it derives most of its criminal statutes." [Emphasis added.]

36 Sumption JA was raising a problem which has recurred throughout the centuries of Channel Island law. *L'Approbation des Lois*, the partial and highly imperfect summary of Guernsey's customary law that was enacted by the Privy Council in 1583, arose from complaints that Guernsey's judges were forsaking the customary law of Normandy by taking on a broad discretion to themselves as to how to resolve cases.[43] If Jersey or Guernsey borrow too habitually from a

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[41] [2018] UKPC 7, at para 57.

[42] *De la Haye v Att Gen* 2010 JLR 218, at para 79.

[43] *Second Report of the Commissioners Appointed to Inquire into the State of the Criminal Law in the Channel Islands: Guernsey*, 1848, p.viii.

neighbouring legal system, it can be disconcerting for the courts to depart at least without an objective and predictable reason. For those complaining about too much judicial freedom in the early 1580s, departing from Norman Law apparently required a basis in established sources of reference in respect of Guernsey law "the Booke of Preceptes and Booke of Extente".[44]

37 This issue is typically approached from the perspective of the important question of when Jersey or Guernsey courts should depart from the English common law in these areas. It is important to note obvious reasons, *e.g.* (1) as noted by the Privy Council in *Glenalla*, there may be contradictory principles of local customary law; (2) as noted by Sumption JA in *Simon v Helmot*, there may be "local considerations" such as different social conditions that point in an opposition direction;[45] and (3) it may be that the position reached by the English common law is clearly unsatisfactory, particularly in those cases where it was so unsatisfactory in England as to be superseded in that jurisdiction by statute, *Morton v Paint* being an obvious such case.[46]

38 It is also not just in matters of customary law that these issues arise. The statute books of Jersey and Guernsey have many examples of statutes that closely follow English precedents. For example, when the Companies (Guernsey) Law 2008 and the Companies (Jersey) Law 1991 both follow the English model of company law, it would be somewhat remarkable if basic English decisions on limited liability such as *Salomon v Salomon*[47] were not followed. Privy Council authority, on appeal from Hong Kong, is that where a legislature within the "Privy Council family" chooses to enact a law following a British statute, then it should be taken as having almost irrebuttably chosen to follow the case-law settled by the highest British courts:[48]

> "Since the House of Lords as such is not a constituent part of the judicial system of Hong Kong it may be that in juristic theory it would be more correct to say that the authority of its decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only: but looked at realistically its

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[44] *Ibid*. These sources were the the *Précepte d'Assize* of 1441, which included a probably fictitious judgment of 1331 on Guernsey's legal position, see H de Sausmarez, "Guernsey's *Précepte d'Assize* of 1441: Translation and Notes", (2008) 12 *Jersey & Guernsey Law Review* 207.

[45] 2009–10 GLR 465, at para 13.

[46] (1996) 21 GLJ 36.

[47] [1897] AC 22.

[48] *De Lasala v de Lasala* [1979] 2 All E.R. 1146, at 1153d.

> decisions on such a question will have the same practical effect as if they were strictly binding, and the courts in Hong Kong would be well advised to treat them as being so."

39 If we look for a reason why a Channel Island court should depart from English authority in these sorts of cases, one answer is given by the decision of Jersey Court of Appeal in the case of *Hotchkiss v Channel Island Knitwear*, with the then Bailiff of Guernsey party to the court's sole judgment.[49] There may be a different legislative history or context. We may add to this that statements might be made in the UK Parliament which, under *Pepper v Hart*,[50] have had an interpretative effect which does not apply in the Channel Islands; or there might have been such statements in Jersey's States Assembly or the States of Deliberation in Guernsey.

40 However, whether the importation was by judicial or legislative borrowing, the realistic function of the Jersey or Guernsey court in such scenarios is not to decide if it is persuaded by the relevant English or British authority. The use of the expression "persuasive authority" is misleading—but unfortunately our jurisprudential vocabulary categorises precedent into "binding" or "persuasive" even though the latter covers a multitude of sins. The Royal Court of Jersey or Guernsey will not, as it would when conducting a comparative law exercise to fill a gap in customary law, be deciding if it is persuaded by the logic of the English cases. In the words of Sumption JA in *De la Haye*, the Royal Courts should not be in the business of "reinventing the wheel",[51] so that they do not need to be persuaded as to the correctness of the English "wheel". The question for the Jersey or Guernsey court will be one of identifying the nature of English authority, and then of deciding if there is a local reason for saying that that wheel is inappropriate.[52] There is an independent and very important function in reaching a conceptually separate conclusion as to whether there are local legal, social or other reasons for ploughing a different furrow. The principal function of the Channel Islands court in cases where the local jurisdiction has imported English law will be to determine what that English law is.

41 There will, of course, be cases where English law is in such a state of confusion as to defeat the Royal Courts in this function, but such cases where either the confusion or manifest injustice of established English law will oblige it to strike out on a different path will be

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[49] 2001 JLR 570, 579, at para 21.
[50] [1993] AC 593.
[51] 2010 JLR 218, at para 79.
[52] *Helmot v Simon* 2009–10 GLR 465, at para 13.

comparatively rare.[53] By and large, where the Channel Islands have imported English law, then the Jersey or Guernsey court will be aiming at locating the position that would be reached if the matter were argued in England.

(4) *Lack of domestic precedent*

42 The final but key point in *State of Qatar* was that the English system of binding precedent went hand-in-hand with systematic law reporting. English judges could use a vast body of reliably reported cases. By contrast, Jersey decisions were only recorded in summary form until 1950, and a full English-style judgment only became the rule in the 1960s. Beyond this, there are simply fewer cases. Any practitioner of Jersey or Guernsey law will be familiar with how much use is made of a small pool of local case-law authority.

43 Why does this matter? Is it not still the case that there is merit in treating the authorities of the Channel Islands senior courts as binding? This will create certainty where certainty is possible just because that will cover less ground than in England, it does not mean that it is meritless.

44 The better view, this article suggests, is that any certainty gained will be somewhat sporadic and capricious. It is useful to recall *dicta* of Lord Scarman from the *Gillick* case highlighted by the Guernsey Court of Appeal in *Morton v Paint*:[54]

> "It is, of course, a judicial commonplace to proclaim the adaptability and flexibility of the judge-made common law. But this is more frequently proclaimed than acted on. The mark of the great judge from Coke through Mansfield to our day has been the capacity and the will to search out principle, to discard the detail appropriate (perhaps) to earlier times and to apply principle in such a way as to satisfy the needs of his own time."

45 The process that Lord Scarman talks of requires a large amount of case law precedent to demonstrate fundamental principle, against which certain precedents or lines of precedent may be seen to be mere

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[53] *Re Esteem* 2002 JLR 53, where the Royal Court of Jersey did not follow the "first in, first out" approach to tracing established in *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 572. *Per* Birt DB, at para 196:

> "We are not bound by *Clayton's Case* and we see no advantage in adopting into Jersey law a rule which has been much criticised and which can clearly produce capricious and arbitrary results."

[54] (1996) 21 GLJ 36, at 40, citing *Gillick v West Norfolk and Wisbech Area Health Authority* [I986] AC 112, at 183D.

awkward detail that can be discarded. Without a large body of case law, the few precedents may quickly be seen as fixed points on the legal landscape when in truth they are points of detail. This is particularly so given that they are only strictly binding in respect of the material facts of the particular case.

46 Whereas in England the range of legal materials that will be considered in common law adjudication is overwhelmingly that of domestic case-law, in Jersey and Guernsey non-statutory law will draw on sources such institutional writers historically recognised in the particular jurisdiction from Terrien to Pardessus, and Thomas Le Marchant to Charles Le Gros, foreign (particularly, but not exclusively, English) case-law, and *L'Approbation* in the Bailiwick of Guernsey. Local case-law is only a part of the picture from which the Channel Island courts expound the local non-statutory law whether it be customary, civil or common law in origin.

47 It is, of course, the role of the courts to "declare" the customary law,[55] and there is a natural limit to how far it is possible to revisit earlier sources of law when court decisions have taken understandings of the law in a different direction to a more accurate exposition of the underlying customary law sources.[56] As stated at the beginning, stability in how the law is understood is a vital part of the rule of law, and this means that considerable regard is necessary in all systems to case-law precedents. The point is only that, in a small jurisdiction, it is particularly inconvenient to elevate a natural stabilising deference to earlier cases to something even higher. Whereas in England a bad precedent will tend to be undermined and distinguished by decisions of a rival binding status, pushed into the judicial limbo of being "correct on its own facts" before finally being dispatched, in Jersey and Guernsey there are too few cases for this dynamic to work as well. Instead, a doctrine of binding precedent will tend to elevate a decision far above the underlying principles with which it may sit badly.

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[55] *Cannon v Nicol* 2006 JLR 299, at para 109.
[56] *E.g. Jubilee 3 v Capita Symonds* 2011–12 GLR 25.

Where does this leave binding precedent?

48 We should now try to draw the argument together.

49 First, in matters where customary law applies, it is important that the courts of Jersey and Guernsey, starting with the Royal Courts, take the lead in recognising local usage and changes of usage. It is not a matter of overruling a higher court to say that the policy requirement which underpinned pre-existing authority has changed over time, as the House of Lords said when overruling its earlier unanimous authority that gave barristers immunity from suit for negligence in litigation.[57] However, unlike in the English system, there is nothing to be gained from reserving to the highest court such corrections, and much to be lost in terms of local knowledge. Local knowledge is typically to be found principally in the Royal Court, and possibly in the Court of Appeal. It is likely to be lacking at Privy Council level. This makes it unwise to defer to the hierarchy of the courts in always treating an earlier decision as binding.

50 Secondly, it is also important that the courts most capable of correcting case-law decisions by those with higher status (but less customary law knowledge) should be able to do so. They stand, perhaps, in the position that the British courts do with respect to the European Court of Human Rights. The European Court is authoritative as to the interpretation of the European Convention on Human Rights, but in reaching its decision in United Kingdom cases will at times make errors of British law. The House of Lords is clear that, in subsequent cases, the British courts have the right and duty to point out errors that they feel have been made. Sometimes the Strasbourg Court accepts its error, sometimes it makes it clear that the distinctions seen by the British courts are of no relevance.[58] This analogy, it must

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[57] *AJS Hall v Simons* [2002] 1 AC 615, *per* Lord Hope:

> "I believe that none of your Lordships would wish to go so far as to hold that Rondel v. Worsley [1969] 1 AC 191 was wrongly decided and that it should be overruled. The issue is whether the decision which was reached in that case can now be justified. It seems to me to be preferable that we should address this issue by examining the circumstances relevant to this issue as we find them today, and that we should express our decision so that it applies only to the future—not to a period in the past as well, the commencement of which would be very difficult at this stage to identify."

[58] *Hutchinson v United Kingdom* (2015) 61 EHRR 13, where the European Court of Human Rights gave way; and *Manchester City Council v Pinnock* [2011] 2 AC 104 where the "unambiguous and consistent approach" (see at para 47).

be admitted, is not perfect. The Judicial Committee of the Privy Council is the highest court in the Jersey hierarchy, whereas the European Court of Human Rights is an international court outside the British judicial hierarchy. But it is still true that the Judicial Committee of the Privy Council may benefit from correction on local matters, and, like the European Court of Human Rights, might even welcome it.

51 This is not to say that the Royal Court should forever raise its doubts. Much as Lord Rodger said "Strasbourg has spoken, the case is closed" in respect of the need for the British courts to give way to a clear and consistent line from the European Court of Human Rights,[59] so a lower Jersey court cannot forever be questioning a concluded position reached by the jurisdiction's higher appellate courts.

52 This, perhaps, leads to another question. It may be that it is unnecessary to consider these sorts of issues within a debate on binding judicial precedent. The issues could be validly approached from the perspective of what makes a decision *per incuriam* in the Channel Islands context, and thus disqualifies the decision from being a strictly binding precedent. Whilst it is an argument against a system of binding precedent that higher decisions may have an inherent flaw if matters are resolved at the level of the respective Courts of Appeal or the Privy Council without proper argument below, it could be argued in the alternative that even within a binding system of precedent such decisions ought to be treated as having been reached *per incuriam*. The assistance of counsel could help those higher courts appreciate local factors, but cannot be assumed to be a substitute for full consideration at first instance by the most appropriate Channel Island court. The Royal Courts of Jersey and Guernsey (and, indeed the Court of Alderney or the Court of the Seneschal in Sark) would have to decide at first instance if the lack of appropriate local consideration made a difference to depart from higher precedent.

53 Although the relationship between the recent *Glenalla* and *Z Trust* cases is not one of binding precedent on any view (the former being a Privy Council appeal from Guernsey, the latter a Jersey Court of Appeal decision), the two cases illustrate an important point. Sir Michael Birt, writing in this issue of the *Jersey and Guernsey Law Review*, has noted that the Jersey Court of Appeal in the *Z Trust* case treated itself as being realistically bound by the Privy Council decision in *Glenalla* given that the judges were dealing with Jersey law albeit in the context of a Guernsey appeal. They treated themselves as bound, as Sir Michael points out, despite there being doubts as to whether the importation of English trust law into Jersey could lead to a form of

[59] *Secy of State for the Home Department v AF* [2010] 2 AC 269, at para 98.

security which customary law had never recognised. Jersey law, outside the Security Interests (Jersey) Laws of 1983 and 2012, has never recognised non-possessory security over movable property, so could the importation of English trust law lead to a retired trustee holding a lien over trust property. The matter is to go on appeal to the Privy Council, but that is surely no substitute to the Jersey Court of Appeal (staffed as it was by the Bailiff and British judges with significant Jersey experience) giving a decision on whether this amounted to a customary law impediment to the importation of the particular part of English trust law. Rules of precedent (whether strictly binding or *de facto* binding) should not mean that the least locally qualified court in the hierarchy is the first to decide if this is a "*Singleton v Le Noury*" type case where a rule of customary law is of fundamental importance and cannot be swept away, or whether (as may or may not be the case) it is an inconvenient and anachronistic obstacle to a just and efficient rule of law.

54 In short, adherence to binding precedent—including treating non-binding precedent as if it were binding—is a bar to the lower Jersey courts performing their function of giving an informed ruling on local and customary law issues.

55 Thirdly, a system of binding precedent within the Jersey or Guernsey court hierarchies is senseless in areas where law has been imported from outside (nowadays overwhelmingly from England). An important part of those decisions will typically be to identify where English law lies. Where there is an intention to create a particular local jurisprudence separate from that of the English common law (or the British courts interpreting strikingly similar statutes) then that ought to be clear. Otherwise, gaps between Jersey and Guernsey decisions and those of the English courts are likely to be accidental. The gaps may arise because the Jersey or Guernsey courts made an error; the gaps may arise because English case-law has moved on. But if, for example, there were a (fictitious) decision of *Windu v Dooku* on the duty of care in negligence by the Jersey Court of Appeal, it would be inconvenient if the Royal Court of Jersey held itself to be bound to follow its own Court of Appeal against a later (equally fictitious) UK Supreme Court decision of *Palpatine v Palpatine*, despite knowing that the Court of Appeal was only ever trying to follow English law and never trying to create a domestic jurisprudence.

56 Such issues can arise in England where Privy Council authority conflicts with Court of Appeal authority. In the case of *Sinclair Investments Ltd v Versailles Trade Finance Ltd*, the English Court of Appeal had to consider whether it was bound to follow its earlier

authority of *Lister v Stubbs*,[60] or a more recent and unanimous Privy Council decision on whether a fiduciary had a duty to account to his principal for bribes received.[61] Lord Neuberger MR said that in such circumstances the Court of Appeal was bound by the ordinary rule of precedent unless it was clear that the Supreme Court would overrule the previous decision. This is to say, that another exception to the binding nature of precedent was recognised, *i.e.* that the Court of Appeal may overrule itself if it would be an unnecessary rigmarole to let the case continue.[62]

57 The problem that a doctrine of strict precedent might create for the courts of jurisdictions such as Jersey and Guernsey can also be illustrated using the area of judicial co-operation in international insolvency. The exact issue is irrelevant but the Privy Council, House of Lords and Supreme Court have been engaged in the question of how broad is the duty of such international co-operation:

2006 (Privy Council: Isle of Man)	*Cambridge Gas Trans Corp v Navigator Holdings plc (Creditors' Cttee)*[63]
2008 (House of Lords)	*McGrath v Riddell*[64]
2012 (UK Supreme Court)	*Rubin v Eurofinance SA*[65]
2014 (Privy Council, Bermuda)	*Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda)*[66]

[60] (1890) 45 Ch D 1.

[61] [2012] Ch 453. The Privy Council decision was *AG for Hong Kong v Reid* [1993] UKPC 36.

[62] In fact, Lord Neuberger MR followed *Lister v Stubbs*, listing criticisms of the Privy Council Decision. Lord Neuberger, on returning to the UK Supreme Court, emphatically overruled *Lister v Stubbs*, see *FHR Ventures v Mankarious* [2015] 1 AC 250. Similarly, the UK Supreme decision on dishonesty in the context of private law rights at a casino (*Ivey v Genting Casinos (UK) Ltd* [2017] 3 WLR 1212) did not strictly speaking overrule the long established precedents of the Court of Appeal in matters of criminal law in *R v Ghosh* [1982] QB 1053. As Baroness Hale pointed out, the relevant aspect of the *Ivey* decision was *obiter* and the Court of Appeal could decide to stick to its precedent, see Hale, "Dishonesty", *Bristol Alumni Association* Lecture, 23 February 2018, at 11–12 (https://www.supremecourt .uk/docs/speech-180223.pdf, last accessed 13 January 2020). In reality, regardless of technicalities on the rules of precedent, the clear *dicta* of the Supreme Court have been followed, *obiter* or not, *R v Pabon* [2018] EWCA Crim 420, at para 23.

[63] [2006] UKPC 26.

[64] [2008] UKHL 21.

[65] [2012] UKSC 46.

[66] [2014] UKPC 3.

58 Each of those decisions, if translated directly into Jersey or Guernsey case-law, would have led to a different principle being adopted.[67] To apply the principle of binding local precedent would risk creating a lottery as to when in the ebb-and-flow of Privy Council/House of Lords/Supreme Court decision-making the local precedent happened to be set. For example, suppose the original decision in *Cambridge Gas* had been on appeal from Guernsey—would it make any sense for Guernsey courts to stick to a largely repudiated decision until such time as someone appeals to the Privy Council on that issue from Guernsey?

59 There is thus a tension between a conscious importation of English law and a locally based system of binding precedent. Even where there has been an almost wholesale importation of an area of English law, it is nevertheless wrong blindly to follow English precedent without a principled enquiry into whether local differences point to a different path. But it would also be wrong to let local rules of precedent inadvertently cause the Islands to strike out on a distinct course when earlier courts had only ever sought to apply English law.

60 Finally, as stated in the previous section, a system of binding precedent works best when such precedents can coalesce in forming general principles. In such a system, bad decisions are gradually distinguished until they vanish from sight. In a system where there is little case-law, binding precedent will elevate the few higher court decisions to a level of particular importance and invulnerability. Being of considerable superiority to other sources of law, they may undeservedly became fixed points in the Jersey or Guernsey legal systems. If they are not binding, then they remain open to be challenged at the Royal Court level for incompatibility with general principle as demonstrable from other sources of non-statutory law.

Conclusion

61 The customary law method of Jersey and Guernsey has always been one where borrowing has co-existed with law of local provenance. Indeed, if a source of law is borrowed for long enough, it becomes part of the local heritage. The goal of local jurisprudence has forever been to take often eclectic sources and, through a reasonably systematic method, weld them into something worthy of being called a legal system. It must be something that is not "set in the aspic" of past generations,[68] but not lapsing into the sort of judicial discretion that

[67] See https://www.supremecourt.uk/docs/speech-170619.pdf, at 6–10 (last accessed 12 January 2020).
[68] *Selby v Romeril* 1996 JLR 210, at 218.

caused many Guernseymen to demand Privy Council intervention in the early 1580s.[69]

62 What has been argued here is that a system of binding precedent is more likely to confound a rational and efficient expounding of Jersey and Guernsey law. It makes no sense to treat foreign decisions as binding, but it equally makes no sense to import a system of local binding precedent into a system which is often trying its best to apply "borrowed" law rather than create anything local. Further, where local law is truly at stake, the Royal Courts have a function of informing the higher courts of local social, economic and legal concerns. The higher we move up the judicial hierarchy, the more remote the courts are from those issues, so that the more they would benefit from the sort of correction that the British courts often offer to the European Court of Human Rights.

63 This might to a great extent, certainly in matters where the higher courts may have overlooked local legal or social concerns, be rationalised outside the confines of a binding precedent debate, but resolved instead by categorising relevant decisions of the Jersey and Guernsey Courts of Appeal or the Privy Council as having been made *per incuriam*. There is certainly a good argument that any decision on customary law or on the weight to be placed on local conditions that is made without being first fully argued in the relevant Royal Court should be treated as *per incuriam* and thus not a binding precedent at all.

64 However, it would be best not to clutter up either Jersey or Guernsey with a strict system of precedent, but rather to continue the historic approach where different sources are intelligently and systematically brought together.

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[69] See para 1 above.