

SHORTER ARTICLE

THE BAILIFF'S ROLE AS GUARDIAN OF THE
CONSTITUTION**Robert MacRae**

The Bailiff's role as guardian of the constitution is less well known than other aspects of this office. In 2019 the Attorney General was asked a written question in the States Assembly as to the nature of the role. This article expands upon the answer that was given and is believed to be the first detailed explanation in modern times of the origin and extent of the role.

1 The Bailiff's role as guardian of the constitution goes to the root of Jersey's constitutional arrangements, including its links to the Crown, and its relationship and dealings with the government and Parliament of the United Kingdom.

2 The constitution of Jersey is largely unwritten. It has been interpreted from time to time, both judicially and administratively.¹ Its workings, however, are dependent on the people involved in its operation, both in Jersey and in the United Kingdom, and the understanding of and familiarity that they have with the complex relationship between the two jurisdictions. Whereas the constitution of a sovereign state is not defined by its relationship with a neighbouring state, the constitutional status of Jersey is by contrast largely dependent on its continuing relationship with the Sovereign. In the *Review of the Roles of the Crown Officers*, the report of a committee chaired by Lord Carswell, presented to the States in December 2010,² it was observed that: "The constitutional relationship between the

¹ See, e.g., *R (Barclay) v Justice Secy* 2014 JLR 201; [2014] UKSC 54; [2015] 1 AC 276; *Relationships between the United Kingdom and the Channel Islands and the Isle of Man*, Part XI of vol I of the Report of the Royal Commission on the Constitution, 1969–73 (London, 1973, HMSO).

² R. 143/2010; the other members of the committee were M-L Backhurst, G Crill, S Mountford and I Strang, <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20Crown%20Offices%20Review%20Report%20101202%20WM.pdf> (last accessed 10 January 2020)

United Kingdom and Jersey . . . is subtle and unwritten, enshrined in custom and practice developed over many years".³ To that one should add the caveat that such custom and practice is always developing. The relationship is more than one of historical and political ties; it is organic but nonetheless founded upon legal principles, and depends for the future on a mutually firm understanding and application of such principles. It is against this broader background that the Bailiff's role as guardian of the constitution has to be viewed.

3 Constitutional questions are inevitably considered in the judicial context by the courts which themselves perform what is often described as the role of "Guardian of the Constitution". Jersey is no exception in that the Royal Court will exercise its normal jurisdiction to protect the fundamental rights of individuals against encroachment by the state, and indeed protect the constitutional rights of Islanders *vis-à-vis* United Kingdom authorities or courts.⁴ The court in this judicial context watches over the constitutional rights and privileges of the Bailiwick. But the role of the Bailiff as guardian of the constitution goes well beyond his or her role as chief justice, as is clear from what follows.

4 The role goes to the fundamental nature of the office of Bailiff. In Norman law a Bailiff was a "guardian" or "protector". Pesnelle states that—

"Bailli signifie la même chose que Gardien; comme Baillie signifie Garde & Protection . . . Le Bailli donc étoit comme le conservateur du Peuple & des Loix."

[Bailli means the same thing as guardian; as Baillie means Guard and Protection . . . the Bailiff was thus regarded as the protector of the People and the Laws.]⁵

The oath which the Bailiff takes before the Royal Court on assuming office is entirely consistent with this notion—

"You swear and promise before God . . . that you will uphold and maintain the laws and usages and the privileges and freedoms of

³ *Ibid* at 40.

⁴ Article 19 of the Royal Court (Jersey) Law 1948 specifically charges the Jurats to decide whether Orders in Council or Warrants *etc* from the United Kingdom should be registered or whether the matter is one in which it would be proper to suspend registration. A casting vote is conferred on the Bailiff.

⁵ Pesnelle, *Ancienne Coûtume de Normandie* (Rouen 1771, 4th edn), Tome I, Ch I, "*De Jurisdiction*", art 1, at 4

this Island and that you will vigorously oppose whomsoever may seek to destroy them.”

5 When the Privy Council Committee⁶ came to the Channel Islands after the Liberation in May 1945, they examined, *inter alia*, the role of the Bailiff. Their report of March 1947⁷ noted that—

“the Bailiff as President of the States exercises important functions in advising the Assembly on constitutional procedure which, from the nature of the constitution, requires an intimate knowledge of the privileges, rights and customs of the Island . . .”⁸

6 How the Bailiff discharges his or her duty in practice will depend inevitably to some extent on how the incumbent views that duty. The duty will not change but the way in which it is discharged may vary. Furthermore it is not possible to be precise about the extent of the role, at least in part because the challenges facing the Island in the future cannot be predicted today. What follows are a handful of the many circumstances which have arisen in which the Bailiff’s role as guardian of the constitution has been of significance.

7 Thomas Le Breton (and John Hammond from 1858) occupied the office of Bailiff at the time of the Victoria College dispute which involved challenges to the Orders in Council of 1853⁹ and 1858¹⁰

⁶ The Rt Hon J Chuter Ede, Home Secretary (chairman), the Rt Hon Lord Samuel, the Rt Hon Lord Ammon, the Rt Hon RA Butler, and the Rt Hon Sir John Beaumont. It was a very distinguished Committee.

⁷ Cmd. 7074.

⁸ Albeit speaking of the Bailiff of Guernsey, the Report concluded (at 17) that “in the event of differences between the Crown and the States it would be the historical duty of the Bailiff to represent the views of the people of the Island. In the course of . . . discussions arising from communications [through the official channel], it is the duty of the Bailiff to represent the views of the Island in constitutional matters. The opinion was expressed that if the Bailiff were not President of the States, this duty would tend to fall on the Law Officers of the Crown, who would be less able to discharge it than the Bailiff . . .” “It was suggested that the Bailiff should be excluded from the States . . .” “We do not think that . . . any person other than the Bailiff could perform those duties of a constitutional nature which attach to the President of the States.”

⁹ Order in Council of 4 January 1853 making Regulations for Victoria College.

¹⁰ Order in Council of 31 July 1858 purporting to amend a draft Law adopted by the States.

purporting to legislate over the head of the States of Jersey. The non-registration of the Orders, and the subsequent registration of a Jersey Law,¹¹ were important milestones in underpinning Jersey's legislative autonomy. The Lieutenant-Governor of the day¹² dissociated himself from any objection to the Orders, and it was left to the Bailiff together with the Jurats to petition Her Majesty in 1853 citing the *Patente de l'Impôt*, whilst a separate representation of the States described the powers that would have been conferred on the Lieutenant-Governor by the Order in Council as—

“an encroachment on the prerogatives of the Bailiff [as President of the States and of the Assembly of Governor, Bailiff and Jurats¹³] . . .”

The Petition of the States against the 1858 Order in Council—

“respectfully submitted that, upon the clearest principles of legislation and constitutional government, no amendments can . . . be introduced to an Act passed by the representatives of the people [of Jersey] . . . until those amendments . . . have been submitted and have been assented to by those representatives.”

On 2 February 1859, the offending Order in Council was annulled by Her Majesty in Council.

8 Sir George Bertram was Bailiff at the time of the celebrated *Prison Board Case* of 1891–94 in which the question before the Privy Council was whether the Crown had power to legislate for the Island without the advice and consent of the States. An Order in Council had been made on 23 June 1891 without any consultation with the States purporting to vary an Order in Council of 1837 and providing that the Lieutenant Governor (and not the Bailiff) should preside over the Prison Board whenever he was present. The Order in Council was referred to the States by the Royal Court; the States subsequently petitioned for the revocation of the Order. The role of the Bailiff (and the Attorney General of the day) was central. The Privy Council heard argument over several days, but their Lordships interrupted the proceedings to advise Her Majesty to withdraw the Order. The Crown subsequently did so, and as a result argument was never heard on some of the interesting points raised by the pleadings. After withdrawal, Counsel for the States, RB Haldane QC (later Lord Haldane, Lord Chancellor), wrote to the Bailiff sending him notes on what would

¹¹ *Loi* (1860) *au sujet du Collège Victoria*.

¹² Major General Sir James Love.

¹³ See “The Assembly of Governor, Bailiff and Jurats: rise and (Near) Demise” (2018) 22 *Jersey & Guernsey Law Review* 188.

have been his argument had the case proceeded to the end. The notes make interesting reading and were published by this *Review* in 2001.¹⁴

9 Perhaps the severest test in recent times of the Bailiff's role as guardian of the constitution was during the German Occupation (1940–45) when Sir Alexander Coutanche held the office; he was also called upon to discharge the function of the Lieutenant-Governor following the recall by the UK Government of Major-General JMR Harrison. Coutanche described the tightrope on which he had to walk in protecting the privileges of the Island, and the rights of Islanders without incurring the wrath of the occupying forces in his memoir.¹⁵

10 He also had great significance in his role (along with the other Crown Officers of the day) in the lead-up to the Report of the Privy Council on Proposed Reforms in the Channel Islands of March 1947. Sir Alexander was also influential in ensuring that UK legislation did not apply directly to Jersey. A notable example of this was the Exchange Control Act 1947, the object of which was to conserve the exchange resources of the United Kingdom and other members of the sterling area (of which Jersey was a part). As a result of correspondence with the Secretary of State, a prior Law was passed by the States which enabled any order or instrument made by the Treasury for the purposes of the 1947 Act to have effect in the Bailiwick, without registration, from the day upon which such order or instrument was expressed to come into operation. In other words, whilst Jersey co-operated with the regime of exchange control laid down by the 1947 Act, the Law passed by the States ensured that this was achieved though legislative provision made in the Island (enabling enforcement in Jersey of orders or instruments of the UK Treasury), and not by the direct application of an Act of the United Kingdom Parliament. Although this may appear to be a somewhat technical point, it is an important illustration of the Bailiff's role in watching over and protecting the legislative independence of the Bailiwick. It is not in any sense an example that is "dated": it could easily have a present-day equivalent.

¹⁴ "Jersey Prison Board Case—Notes of Proposed Arguments" (2001) 5 *Jersey Law Review* 254.

¹⁵ *The Memoirs of Lord Coutanche* (Phillimore & Co, Chichester, 1975). Baron Hans Max von Aufsess, Head of the Civil Affairs branch of the Military Administration during much of the Occupation, described Coutanche as "cold and vulpine-visaged" and a "wily lawyer" in his Occupation Diary (published by Phillimore & Co Ltd in 1985), which Lord Coutanche (as he then was) would no doubt have taken as compliments.

11 Again, on a matter that may appear technical, but which is of no small constitutional relevance, it was with the advice of this Bailiff that s 16 of the Wireless Telegraphy Act 1949 (which dealt with the power of the Secretary of State to make orders or regulations) was modified to add sub-s (3) so as to provide that any order or regulation made by the Secretary of State under the Act should not have effect in Jersey (or Guernsey) unless it had been transmitted to the Bailiff and communicated by him for registration to the Royal Court. The successors to the 1949 Act were the Communications Act 2003 and the Wireless Telegraphy Act 2006. The provisions concerning the requirement for registration by the Royal Court were re-iterated in these Acts to provide that—

“Any statutory instrument made by [the Secretary of State] [OFCOM] pursuant to this Act shall not have effect in Jersey until it is registered in the Royal Court of Jersey and where any such statutory instrument is so registered, it shall have effect on the day following the day of such registration or on the day specified in the instrument for its coming into force, whichever is the later.”¹⁶

12 Sir Robert Le Masurier was Bailiff at the time of the Kilbrandon Report,¹⁷ commissioned in contemplation of the accession of the United Kingdom to the European Economic Community. In 1967, this Bailiff was in receipt via the official channel of a letter from the UK Permanent Under-Secretary of State¹⁸ concerning the announcement of the UK Government to re-apply for membership of the EEC. Under art 227(4) of the Treaty of Rome, Jersey would have been incorporated into the EEC. The letter read—

“The chances of securing . . . a modification [of art 227(4)] must be considered remote; but in any event it must be questionable whether such arrangements would be desirable because, if Jersey were excluded, the Island would have to face the Common External Tariff that would need to be erected against it by the United Kingdom and the other Community countries.”

The letter confirmed the Island's worst fears, and a special committee was set up to respond, presided over by this Bailiff, and consisting of

¹⁶ <http://www.legislation.gov.uk/ukpga/2006/36/introduction/enacted>

¹⁷ Report of the Royal Commission on the Constitution, 1969–1973, entitled *Relationships between the United Kingdom and the Channel Islands and the Isle of Man*.

¹⁸ Sir Philip Allen (on 3 May 1967).

the Law Officers and Senator Ralph Vibert,¹⁹ along with constitutional and other experts.²⁰ (Senator Vibert later assumed chairmanship. The end-result of the work of the Special Committee was “Protocol 3”).²¹

13 In more recent times the Bailiffs of the day have made important contributions to the understanding and development of constitutional issues affecting the Island (the *Clothier Report*²² during the tenure of Sir Philip Bailhache; and the *Carswell Review*²³ during the tenure of Sir Michael Birt).

14 In their reactions to the events of their time, the approach of each Bailiff to his or her duty to “uphold and maintain . . . the privileges and freedoms of this Island” will vary—inevitably. But this is not to say that the duty of the Bailiff as *Gardien* is in any sense unclear. In whatever manner each Bailiff actually discharges the duty laid down in the oath, the requirement imposed by it is as relevant today as it was when Thomas Le Breton in the 1850s “vigorously opposed” those who asserted the right of the Privy Council to legislate over the head of the States Assembly, or when Sir Robert Le Masurier in the 1960s first presided over the Special Committee from which the idea for Protocol 3 would eventually spring. As I have stressed, the constitutional relationship is founded on legal principles, and depends for the future on maintaining a firm understanding and application of such principles (in both jurisdictions).

15 Against this background, the view recently expressed by Lord Carswell in his address to members of the States of Jersey²⁴ on 11 November 2016 seems wholly apposite—

“that the Bailiff should continue to be the guardian of the constitution and to be the conduit through which official correspondence passes . . . he has unique knowledge and experience of Jersey’s constitutional affairs and . . . he should continue to be in a position where he can bring his experience

¹⁹ See Vibert, *Memoirs of a Jerseyman* (La Haule Books, Jersey, 1991) at 135 *et seq.*

²⁰ E.g. Professors R Jennings and S de Smith, and Dr H Thurston.

²¹ See also Johnson, “The Genesis of Protocol 3: the Channel Islands and the EEC” (2013) 17 *Jersey & Guernsey Law Review* 254

²² <https://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/ID%20ClothierReport%20100331%20CC.pdf> (last accessed 10 January 2020).

²³ <https://statesassembly.gov.je/AssemblyReports/2010/38785-20056-6122010.pdf> (last accessed 10 January 2020).

²⁴ See Appendix 1 to P. 84/2017, at 25.

and judgment to bear on matters which may have a constitutional implication.”

16 Recommendation 4 of Lord Carswell's Report was indeed that: “The Bailiff should continue to be the guardian of the constitution”. Writing in support of this recommendation on 25 January 2011, Sir Michael Birt (then Bailiff) pointed out that—

“The constitutional relationship between Jersey and the United Kingdom is unwritten and to some extent uncertain. It is based upon custom and practice over many centuries. It is therefore essential from the point of view of preserving Jersey's constitutional autonomy that day to day practice is consistent with that autonomy. A decision taken by Jersey for short term advantage in relation to a particular matter may create a precedent which weakens Jersey's long term constitutional position. It is therefore of vital importance that the Chief Minister of the day is alerted to any possible implications for the constitutional relationship when a particular matter arises. He cannot rely on his civil servants for this as nowadays they tend to be appointed from the United Kingdom and are therefore unfamiliar with the subtleties of the constitutional relationship; and in any event, as non-lawyers, they would not be in a position to advise on the complexities of the constitutional relationship. As the review makes clear . . . the Bailiff is particularly well suited to provide advice on the constitutional relationship.”

17 What then in practical terms does this role as guardian of the constitution empower or require the Bailiff to do?

18 The submission of Sir Michael Birt to Lord Carswell's committee provides helpful background in understanding the workings of the channel for official correspondence with the Ministry of Justice. The Bailiff's role is to keep a “watchful eye on the correspondence”. Occasionally the Bailiff may note a concern from the constitutional point of view, and—

“may alert the Attorney General and/or the Chief Minister to the point. But his role is limited nonetheless to tendering advice. The decision as to how to respond is that of the Chief Minister or the relevant Minister. It may be argued that there is adequate protection for the constitutional relationship from the Attorney General. He is certainly the legal adviser to the Government and the primary responsibility is his. Nevertheless, an Attorney General may be relatively new to the task and not yet steeped in the constitutional relationship in the way that the Bailiff is. The Bailiff is an important additional protection to safeguarding the constitutional position of the Island.”

Bailiffs in the past—as noted above—have been vigilant to protect the legislative independence of the Island; and there is every reason, arguably even more reason, in the 21st century to maintain that vigilance.

19 Today the official channel is much reduced. This is the consequence of the increasing prevalence of direct ministerial communication between ministers of the governments of the United Kingdom and Jersey. Such ministerial correspondence was once the subject of a memorandum of understanding between the Bailiff and the Chief Minister. Pursuant to that MOU it was agreed that ministers should send a copy of all such correspondence to the Bailiff for his information so that he could exercise his duty of advising in any appropriate case. That may not happen as regularly as it did.

20 The role of guardian of the constitution is sometimes thought to be linked to the role of president of the States, but they are in fact separate, even if related. In the discussion as to whether the Bailiff should remain the president of the States or be replaced by an elected speaker, it has not been suggested that the Bailiff should cease to be the guardian of the constitution. In the report of the then Chief Minister in 2014 on a proposition to establish an elected speaker it was stated—

“The Bailiff has an important function, as enshrined in the oath of office, to ‘uphold and maintain the laws and usages and the privileges and freedoms of this Island and that you will vigorously oppose whomsoever may seek to destroy them’. The oath of office is contained in the Schedule to the Departments of the Judiciary and Legislature (Jersey) Law 1965, and will be unchanged by the introduction of an elected speaker.

Successive Bailiffs have been suitably vigorous in undertaking this aspect of their responsibilities and I have no reason to suppose that they will be any less vigorous in future.”²⁵

As to how the Bailiff should inform himself of impending constitutional issues if he were no longer associated with the States Assembly, the report was however silent.

21 As indicated above, the extent of the role of guardian of the constitution cannot be defined with precision in part because the future is unknown. However, in very broad terms, and against the

²⁵ Comments of the Chief Minister presented to the States on 25 April 2014. [https://statesassembly.gov.je/assemblypropositions/2013/p.160-2013com\(4\)corrected.pdf](https://statesassembly.gov.je/assemblypropositions/2013/p.160-2013com(4)corrected.pdf) (last accessed 10 January 2020).

background set out above, the Law Officers and the Bailiff each have roles with respect to the protection of the constitutional relationships both within Jersey and externally with the Crown and the Government of the United Kingdom. The Law Officers are responsible for advising the Government and States Assembly members on the legal and constitutional issues arising from courses of action and propositions intended for debate in the Assembly. The Bailiff's role might be described as including the following—

(i) giving voice to constitutional concerns that might undermine the rights and privileges of the Island and of Islanders, and advising and warning the Chief Minister and Government of Jersey accordingly. In this context the Bailiff's role as presiding officer in the Assembly currently provides the Bailiff with the opportunity to review all propositions brought to the Assembly for debate from a long term constitutional perspective and to highlight any issues or potential concerns that may need to be addressed;

(ii) advising the Lieutenant Governor who in turn advises the Sovereign on constitutional matters affecting the Island's privileges and freedoms (such advice being given direct when the Governor is absent or not in post);

(iii) defending the independence of the judiciary which is, of course, an important pillar of the rule of law and Jersey's unwritten constitution; and

(iv) acting as a natural conduit for communications between the judiciary and the executive, so that each understands the legitimate objectives of the other.

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