JUDGING THE JURATS: EXPLORING THE LEGITIMACY OF THE JURATS' ROLE

Eleanor Curzon Green

Guernsey currently has no jury system, no lay magistrates, no sentencing guidelines and no sentencing council. Instead, it has Jurats: lay people, elected to serve for life by an electoral college. They receive no formal training as adjudicators of fact and sentence. Sentencing is the most public arena of the criminal court. If adjudicators of sentencing are not perceived as legitimate, the whole criminal justice system could be undermined. This first academic enquiry examines the contemporary legitimacy of Guernsey Jurats as adjudicators of sentence.

Introduction

> *Lord Samuel:* The Jurats here have nothing to do in regard to the determination of sentences. If a person has committed an offence and the sentence has been imposed, do the Jurats have any powers in saying what the sentence should be?
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> *Sir Victor Carey:* Most certainly.
>
> *Lord Samuel:* They have?
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> *Sir Victor Carey:* They have, yes.
>
> *Lord Samuel:* That is a judicial function.
>
> *Sir Victor Carey:* That is a judicial function that they have.[1]

1 This exchange draws attention to a judicial anomaly: Jurats and their sentencing powers, which remain in relative academic obscurity. Few historical documents and only one academic article, written over ten years ago by a Jersey advocate,[2] are dedicated exclusively to them.

[1] Evidence given before the Privy Council Committee on proposed reforms in the Channel Islands (Guernsey September 1946), at p 47.

[2] Hanson, "Jurats as adjudicators in the Channel Islands, and the importance of lay participation", 39(3) *Common Law World Review* 250 (2010).

Guernsey's Jurats remind one legal philosopher of that "rare species of turtle that survives on just one of the Galapagos Islands".[3]

2 In Guernsey there is no jury system, no lay magistrates, no definitive sentencing guidelines, and no sentencing council. The Royal Court of Guernsey, when sitting as a Full Court, is composed of by seven or nine Jurats presided over by one professional judge (the Bailiff, Deputy Bailiff or Lieutenant-Bailiff). The Jurats are lay people, elected by an electoral college to serve up to the age of 70,[4] and are predominantly retired male professionals who receive no training nor remuneration for their role as the tribunal of fact in both civil and criminal cases. In criminal cases they are also adjudicators of sentence. This is the focus of analysis in this article.

3 Jurats are adjudicators of sentence for the most serious criminal offences. It is important that they are perceived as *bona fide* by Islanders, or trust and confidence in the court may be undermined. A lack of confidence in judicial institutions means that people perceive them as illegitimate.[5]

4 A criminal justice system survey in Guernsey concludes that there are "reservations about how reflective Jurats [are] of the wider community".[6] Calls for the introduction of a jury system and a proposal that sentencing legislation requires refreshment and amendment are also recorded. Both the Commissioners Report of 1848[7] and Privy Council Evidence in 1946 called for Jurats' criminal functions to be removed, and replaced with a jury system. These indicate a pressing need to examine the current role of Jurats as adjudicators of sentence. Guernsey, being, like Jersey, a "microstate",[8] may also present alternative ways of "doing justice"[9] so that research will benefit those interested in exploring unique sentencing regimes.

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[3] Haack, "The pluralistic universe of law: towards a neo-classical legal pragmatism", 21(4) *Ratio Juris* 453, at 463 (2008).

[4] Their term may be extended to the age of 72 with the approval of the other Jurats: s 10, Royal Court Reform (Guernsey) Law 2008.

[5] Bühlmann and Kunz, "Confidence in the judiciary: comparing the independence and legitimacy of judicial systems", 34(2) *West European Politics* 317 (2011).

[6] *Guernsey Justice Review* (2020), at 80.

[7] Second report of the Commissioners appointed to inquire into the state of the criminal law in the Channel Islands—Guernsey (London, HMSO, 1848).

[8] Raynor and Miles "Evidence-based probation in a microstate: the British Channel Island of Jersey", 4(3) *European Journal of Criminology* 299 (2007).

[9] Tonry, *Doing Justice, Preventing Crime* (Oxford, OUP, 2020).

5 Does the current system enhance or undermine the Jurats' legitimacy as adjudicators of sentence? A review of the limited literature on Guernsey Jurats prefaces two elements required for legitimacy: trustworthiness and procedural justice. This will support an assessment of *who* the Jurats are and *how* they sentence to determine whether the present system enhances or undermines trustworthiness and procedural justice in the adjudication process.

Literature review

6 There is little analytical literature on Jurats and their role. It is discussed briefly in Dawes's *Laws of Guernsey*[10] and Ogier's *The Government and Law of Guernsey*.[11] Only one academic article explores the position of contemporary Jurats, written over ten years ago by Advocate Timothy Hanson.[12] It is also a descriptive piece, outlining the history, appointment and role of Jurats in the Channel Islands, but it focuses primarily on Jersey's Jurats. Guernsey and Jersey have different judicial systems (Jersey also has a jury system) and the two Islands see themselves as quite distinct. This article focuses exclusively on Guernsey's Jurats.

7 Regarding Guernsey's sentencing regime, where Jurats are a core component, recent reports and surveys have examined Islanders' perceptions. In the *Crime and Justice Survey 2018*, commissioned by Guernsey's Committee for Home Affairs, 43% of respondents indicated little awareness of the work of the criminal justice system, and 48.6% of respondents replied, "not very much", with regard to their knowledge of the judiciary; the proportion was higher when asked about the police, Office of the Children's Governor and the Child, Youth and Community Tribunal. The judiciary, including Jurats, is the least understood of the Island's criminal justice institutions. Regarding sentencing itself, only one question was posed: whether respondents had heard of the types of sentences that can be imposed on offenders. Nowhere in the survey are Jurats or their role as sentencers mentioned. The survey's purpose is to provide insights into public perceptions of the criminal justice system but attitudes to Jurats and the current sentencing system are not explored. Similarly, the Sumnall Report,[13]

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[10] Oxford, Hart Publishing, 2003.

[11] Guernsey, States of Guernsey, 2nd edn, 2012.

[12] "Jurats as adjudicators in the Channel Islands and the importance of lay participation", 39(3) *Common Law World Review* 250 (2010).

[13] "Review of the interaction of health and justice system in relation to the possession of drugs for personal use" (2020) https://gov.gg/CHttpHandler.ashx?id=127702& p=0> [Accessed 3 May 2021]

commissioned by the Committee for Health & Social Care, provides limited insight into how drug offenders are sentenced. Discussion of sentencing underscores the lack of formal sentencing guidelines. Where they exist, Professor Sumnall calls for urgent refinement. Despite this perspective, the role of Jurats in sentencing drug offences is not mentioned.

8 The third and most recent report is the *Guernsey Justice Review*,[14] designed to "identify the potential scope of a review of Bailiwick justice policy and the resources and governance structure needed to support it". Survey respondents indicated that they were "more confident in their knowledge about sentencing than about other aspects of the justice system", with 93% feeling they had some knowledge on the topic.[15] But the questions regarding "sentencing", as in the Crime and Justice Survey (2018), do not include questions about *who* is doing the sentencing or *how* it is being done. It is difficult to ascertain what respondents consider to be their specific "knowledge about sentencing" and their confidence in that knowledge, limiting the utility of this research.

9 The 2020 report's authors recommend Guernsey's sentencing system requires further investigation.[16] The 2020 *Justice Review* specifically recommends that:

> "An independent review of sentencing legislation and sentencing outcomes should be a priority for the next phase of the Justice Review. The Review should examine the purposes of sentencing, existing sentencing regimes, and potential additions or subtractions to the options available to the courts, and make recommendations to the States about potential legislative change. This need not entail creating a more prescriptive sentencing framework with the potential to curtail judicial discretion. The States should set the direction for future justice policy by clarifying, eventually in legislation, what the prevailing purpose of the criminal justice system should be.[17]

This recommendation demonstrates the urgent need to examine Guernsey's sentencing system. But there is no indication from the States of Guernsey about when the next phase of the justice review will take place. An enquiry is long overdue. Jurats exist within this

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[14] *Guernsey Justice Review* (2020) https://www.gov.gg/CHttpHandler.ashx?id=123940&p=0> [Accessed 4 May 2021]
[15] *Ibid*, at 57.
[16] *Ibid*, at 76.
[17] *Ibid*, at 135.

piecemeal sentencing system but are only mentioned twice in the 145-page document. When they are mentioned, a lack of confidence in their ability to represent their community is indicated.[18]

10 Collectively, these few reports highlight the virtually non-existent discussion of Jurats in the existing literature on criminal justice and sentencing practice in Guernsey. Like the Higgs Boson particle, we are aware of its existence, but it is extremely hard to detect! Literature makes it difficult for the inquisitive Islander to understand *who* is sentencing and *how* sentencing is being carried out in Guernsey's courts. This is worrying, given that Jurats are adjudicators of sentence in the most serious criminal cases. It is hard to detect whether Jurats are perceived as legitimate adjudicators of sentence.

The criteria for legitimacy

11 Jurats have been adjudicators of fact and sentence for at least 842 years. This appears to have resulted in a tacit acceptance that Jurats are appropriate adjudicators of sentence in Guernsey, but we are no wiser as to *who* they are and *how* they exercise their judicial power. Given their power in both civil and criminal contexts, they must be viewed as legitimate adjudicators. Securing the legitimacy of judicial institutions and figures is necessary for a democratic society to function.

12 How do we explore the legitimacy of the current Jurat system? The meaning and conception of "legitimacy" is elastic and attracts different definitions. As Komárek notes, "disagreements about legitimacy's precise meaning have the potential to generate debate and invite engagement from different sides".[19]

13 Two academic aspects are considered to be generally required for legitimacy to arise:

(a) *Trustworthiness*:[20] requiring trust and confidence in judicial institutions. Transparency and clarity are also listed as key criteria.[21]

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[18] *Ibid*, at 6.

[19] Komarek, "Judicial legitimacy in the European Union" in C Kilpatrick and J Scott (eds), *New Legal Approaches to Studying the Court of Justice: Revisiting Law in Context* (Oxford: Oxford University Press, 2020), at 126.

[20] Levi, Sacks and Tyler, "Conceptualizing legitimacy, measuring legitimating beliefs", 53(3) *American Behaviour Scientist* 354 (2009).

[21] Roberts and Plenisčar, "Sentencing, legitimacy and the public", in Meszko and Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Amsterdam: Springer, 2015), at 34.

(b) *Procedural justice*:[22] requires that procedures employed are fair, that "decision making is viewed as being neutral, consistent, rule-based and without bias",[23] and grounded in sound principles.[24]

These two elements are interlinked. With the current Jurat system, I explore the extent to which *who* they are and *how* they sentence increases their legitimacy.

Who are the Jurats?

Historical origins

14 With their long history as adjudicators, their longevity as a judicial institution creates a "legitimation narrative",[25] fostering a sense through familiarity, where "frequent and intense interaction[s] . . . make perceptions of legitimacy more robust over time".[26] Thus, Jurats are likely to be perceived as relatively legitimate by Islanders. But there has been no ethnographic study about Islanders' trust of Jurats or belief in their procedural fairness, making it difficult to know whether Jurats are indeed viewed as legitimate through historical legacy or not. Available historical documents do indicate that longevity may be a source of contemporary trust in the current system.

15 The names of every Jurat since 1299 are on the Roll of Honour board in the Jurats' Chambers within the Royal Court of Guernsey. Formally mentioned in the *Rolls of the Assizes*,[27] Jurats are described as "*duodecim hõies Juř Regis qui vna cū Batlio Insule in absencia Justič ϵ vna cū Justič cum huc aduenint debent Judicare de ommibz casibz in hac Insula*",[28] demonstrating that Jurats have always had wide-reaching judicial powers.

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[22] Tyler, "Procedural justice, legitimacy, and the effective rule of law", 30 *Crime and Justice* 283 (2003).
[23] *Ibid*, at 299.
[24] Roberts and Plenisčar "Sentencing, legitimacy and the public", in Meszko and Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Amsterdam: Springer, 2015), at 34.
[25] Lenz and Viola, "Legitimacy and institutional change in international organisations: a cognitive approach", 43(5) *Review of International Studies* 939, at 969 (2017).
[26] *Ibid*, at 955.
[27] *Rolls of the Assizes held in the Channel Islands*, 1309 (Jersey, Labey and Blampied, 1903), at 29.
[28] "12 men Jurats of the King who together with the Bailiff of the island in the absence of the justices & together with the justices when they shall come hither ought to judge of all cases in this island" (trans Miss EM Walford).

16 The second notable document is the *Précepte d'Assize,* produced in 1441. A translation of *Précepte d'Assize* by former Bailiff Havilland de Saumarez[29] suggests the origins of Jurats, first coming into existence in "accordance with the institution of the custom of Normandy and are appointed in the name and in the place of four knights".[30] Jurats are described as "*douze hommez dez plus notablez et sidcres sages loyaulz et riches en la dicte ysle*" ("twelve of the most notable, impartial, wise, loyal and rich" men of Guernsey),[31] to be elected by the inhabitants and residents of the Island.

17 The wide-ranging responsibilities of Jurats are also outlined within the *Assize*, "they have cognisance, jurisdiction, power of sentence and judgement, in company with the said Bailiff, of all matters in causes, both civil and criminal, whensoever arising in the said island",[32] aside from acts of treason, false coiners and if someone lays hands on the Bailiff or Jurats when exercising their duties. The power and responsibilities of Jurats extended far beyond the courtroom into Island life. The fact that Jurats continue to possess extensive judicial powers has avoided greater interrogation, although the current regime has far less judicial power than in previous eras.

18 The third historical document to mention is an Order in Council from 21 November 1673. It dictates that Jurats

> "should not rise from the bench without the Bailiff's leave, and should pay him proper respect, upon pain of suspension or even imprisonment pending apology, that the Jurats should not offer counsel, and their judgements should not be arbitrary but accord with Guernsey's laws and customs."[33]

The Order also commented on elections for Jurats, revealing that "bribes, feasting, drinking, promises, threats, or other indirect means to corrupt or win any [of] the electors" were forbidden, and could result in a Jurat having to withdraw from office if elected via such methods.[34] Jurats were not entitled to do anything they chose to. Rules and conventions have existed regarding their adjudication and election. Constraint on their judicial discretion may have engendered trust in them.

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[29] Published at 12 *Jersey & Guernsey Law Review* 207 (2008).
[30] *Ibid*, at 212.
[31] *Ibid*, at 212.
[32] *Ibid*, at 212.
[33] Ogier, *op cit*, at 121.
[34] *Ibid*, at 121.

19 Such documents outline the longevity of Jurats as adjudicators, and as lay participants in the court. The role of Jurat has until recently been held for life unless they are appointed as Bailiff or found to be "guilty of being false to his oath".[35] Longevity and historical documents that construct a favourable picture do not however necessarily mean that Jurats are an institution that has always been trusted or viewed as legitimate.

20 Historical accounts reveal that Jurats have not always been infallible, fostered trust, nor been immune from criticism. Whole Jurat benches were dismissed for corruption in the fourteenth century, others were imprisoned or suspended.[36] The 1848 report from the Royal Commissioners raised the first publicly documented criticism of Jurats. A similar inquiry was carried out in Jersey in 1847, but the situation in Guernsey was decidedly different. The report states that:

> "We were assured, from more than one quarter [of Islanders interviewed], that, but for the dread of the great power and influence possessed by the Jurats, important evidence would have been offered to us . . . we think that the preponderance of the Jurats was shown to be sufficient to suggest such an apprehension."[37]

This statement prompts a more critical enquiry to be made regarding Jurats and their judicial powers.

21 In the 1848 report, the authors produced recommendations: that all judges should be trained lawyers (implying that Jurats should be too); that Jurats and judges should be appointed; and that in criminal trials the Bailiff should be the sole judge with a jury, with the jury foreman being a Jurat.[38] Only one of these recommendations (that the judge should deal with all issues of law) has ever been implemented, and not until 1950 under the Royal Court of Guernsey (Miscellaneous Reform) Provision, 100 years after the report's publication. Conversations about reform have not continued in any meaningful way into the 21st century. Jurats have remained steadfast adjudicators of fact and sentence in Guernsey's Royal Court, seemingly immune from analytical inquiry or debate.

22 One other historical document that raises a critical opinion is the transcript from the *Privy Council Committee on Proposed Reforms in the Channel Islands, Guernsey, September 1946*. The Committee

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[35] De Saumarez, *op cit*, at 213.
[36] Priaulx, *The Bailiffs and Jurats of Guernsey* (*Société Guernsiaise*, 1973), at 7.
[37] *Report of the Commissioners appointed to inquire into the state of the criminal law in the Channel Islands—Guernsey* (London, HMSO, 1848), at v.
[38] *Ibid*, at xxxvii.

interviewed islanders from the Bailiff and Jurats to Deputies and Advocates, revealing a variety of attitudes towards Jurats. Sir Victor Carey, for example, suggested that Jurats should no longer be judges of law, echoing the calls of the 1848 report, but that they should be retained because of their historical significance.[39] Another interviewee, Miss E Blatchford, suggested that Jurats should be allowed to be female (women were not permitted to become Jurats until 1950, with the first female Jurat elected in 1985) and that Jurats should be replaced by a jury system.[40] This transcript, combined with the concern regarding Jurats' powers outlined in the 1848 report, suggests that for the past 173 years at least, concerns have been publicly raised regarding Jurats which may reduce trust and confidence in the institution.

23 Longevity does not guarantee that Jurats will be perceived as trustworthy, as the occasional criticism demonstrates. But longevity can create a sense of familiarity and results in an entrenched judicial structure. Equally, familiarity can breed contempt, but, as Lenz and Viola (2017) note, "age may compensate for such incongruence for extended periods of time".[41] Sir Victor Carey's wish to reform the role of Jurats whilst supporting their existence because of their "historical significance" supports the view that the longevity of Jurats may well continue to be a prime source of their legitimacy.

The selection process

24 Jurats continue to exert considerable judicial authority today, like their judicial cousins, the lay magistrates of England and Wales. Given this authority, "both the composition of the lay magistracy and the way they are *selected* are matters of legitimate public interest" [emphasis added].[42] This statement can equally apply to Jurats. Their selection is important to explore because it can affect the extent to which Jurats are perceived as trustworthy. It is assumed that Islanders want to trust that their judiciary and system of adjudication guarantee judicial independence and public confidence.

25 Jurats are elected by an electoral college, the aptly named *States of Election*, which has been in existence since the early 1600s.[43] In England and Wales lay magistrates are selected by appointment.

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[39] Evidence given before the Privy Council Committee, Guernsey, 1946, at 57.
[40] *Ibid*, at 99.
[41] Lenz and Viola, *op cit*, at 956.
[42] Dignan and Wynne "A microcosm of the local community? Reflection on the composition of the magistracy in a Petty Sessional Division in the North Midlands", 37 (2) *The British Journal of Criminology* 184 (1997).
[43] Ogier, *op cit*, at 38.

Academic commentators often view the English system of government as the epitome of Montesquieu's separation of powers doctrine where the legislative, executive and judiciary are independent of each other.[44] Selection by appointment is considered effective for cultivating trust and confidence in the judiciary. What does this mean for the selection process of Jurats in Guernsey?

26 The sole function of the States of Election is to elect Jurats. A retiring Jurat triggers the search for a replacement. Each candidate must be nominated in writing by a Deputy or Douzenier and seconded by another. Conventionally, Deputies carry out this function. The States of Election will then meet to elect a new Jurat. Deputies who have proposed and seconded the candidate give a speech proposing their Jurat candidate who is not present at the meeting. Speeches concluded, each member of the States of Election who is present participates in a secret ballot, with one vote each. They are counted, and the Presiding Officer, typically the Bailiff, declares the result. The candidate must receive more than 50% of the votes of those present to be elected. If no candidate has received more than 50% of the vote, then the candidate with the least number of votes is removed from the election process and the voting is repeated. When one of the remaining candidates receives over 50% of the vote he or she will be declared as the next Jurat.

27 At each election only one Jurat is elected. Those who are unsuccessful are entitled to run again in subsequent elections. HM Sheriff must then inform the elected candidate in person of the appointment. The new Jurat is sworn in at the Royal Court. The selection process may appear acceptable but, on closer inspection of the composition of the States of Election, further probing is required.

28 The 38 People's Deputies, the largest single body of people in the States of Election, constitute Guernsey's parliamentary assembly, the States of Deliberation. These Deputies are the ones in whom "executive power is vested"[45] and constitute the Island's government. Elected by universal suffrage every four years, Deputies are all independent politicians, as there are no political parties in Guernsey. But there are still political allegiances and agendas. One of these Deputies (or sometimes a Douzenier) must propose and second a candidate for Jurat. This means that Jurats must be nominated and endorsed by politicians. This raises questions regarding the extent to which Jurats can be perceived as an independent bench of adjudicators if their selection process is so intertwined with the executive. It may undermine the

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[44] See Krause, 'The spirit of separate powers in Montesquieu", 62(2) *The Review of Politics* 231 (2000).
[45] Ogier, *op cit*, at 40.

extent to which Jurats are viewed as wholly independent and consequently trustworthy.

29 However, Deputies account for only 38% of the States of Election. They alone are unlikely to be able to guarantee the appointment of any candidate because the nominee must receive 50% of the votes of those present at the election meeting. This requirement appears to be a "check on the balance of power", ensuring that the election cannot be dominated by the Deputies. This check may reduce or eradicate any accusations that seek to suggest that the Jurat selection process does not produce independent Jurats.

30 But the second largest group in the States of Election is the 34 Douzeniers. They represent the Island's parishes and are quasi-political in their responsibilities, described by a States of Guernsey website as a "sounding board" for the Deputies. The prospect of the selection process being in keeping with the separation of powers' doctrine is potentially thwarted if the Douzeniers have political affiliations or allegiances with Deputies.

31 In a charter from 29 September 2011, it is stipulated that, "The States acknowledge that the Douzaines are the grass-roots level of government" and that the States circulate *Billets d'État* (items for discussion at each States of Deliberation meeting) to the Douzeniers, consulting them on such matters. The relationship between the States and the Douzeniers is described as a "partnership" in this charter.[46] Therefore, it would appear that both Deputies and Douzeniers, the only people allowed to propose, second and speak on behalf of candidates at the election meeting may be politically affiliated, albeit not to specific political parties. Together, they compose 71% of the States of Election. A true separation of powers is open to challenge.

32 It has been noted by Audette and Weaver that "courts are supposed to be 'above politics'" and that any political influence is likely to be perceived as "procedurally unjust by the public".[47] The composition and procedures of the States of Election indicate that the selection process for Jurats may be deemed by the public to be unjust, lacking in independence and affiliated with politics. In the current system, the executive and the executive's "partners" are in sole control of the nomination, election and overall selection process. This seems to

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[46] Ogier, *op cit*, at 18.

[47] Audette and Weaver, "Faith in the court: religious out-groups and the perceived legitimacy of judicial decisions", 49(4) *Law & Society Review* 999–1022.

contravene a true separation of powers model, and potentially limits the trustworthiness of Jurats.

33 Judicial independence is "integral to the rule of law" and the rule of law is a "necessary presupposition for the protection of human rights".[48] Without an independent judiciary, the ability for citizens to enjoy human rights is limited. An absence of the rule of law also prevents the existence of a successful democracy.[49] Additionally, if there is limited separation between the judiciary and the executive then there is a danger that the judicial branch of government is nothing more than an extension of the executive branch, albeit a branch that is limited in its autonomy.[50] With these democratic ideals in mind, the current selection process for the Jurats appears to undermine the rule of law because of the executive's involvement in the selection process. If the judicial independence of Jurats is doubted, trust and confidence in the ability of Jurats to be independent adjudicators of sentence is flawed.

34 Furthermore, the fact that there is only ever *one* election for each Jurat makes guaranteeing the independence of each election of paramount importance. For example, if the Jurat is aged 42 when elected, he or she could spend the next thirty years imposing sentences on defendants. Given that there are, on average, 41 opportunities for Jurats to impose sentences in the Royal Court each year[51] it follows that during a 30-year judicial tenure a Jurat could be involved in sentencing a total of 1,260 people (1.9% of the Island's current population). One former Jurat, Eleazar Le Marchant, is recorded as having served for 53 years between 1778 and 1832.[52] A generation's worth of sentencing can, therefore, be affected by the result of a single Jurat's election. This emphasises the importance of trying to ensure that the process by which a Jurat is elected is as fair and independent as possible.

35 The merits of using an election rather than appointment or random selection need to be better understood to add legitimacy to the Jurat selection process and to generate trust and confidence in the elected Jurat. There is an extent to which an "election is usually seen as enhancing the accountability of judges and appointment enhancing the

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[48] Warren, "Does judicial independence matter?" *Victorian Bar News*, 12–20 (2010).
[49] Dworkin, *Justice in Robes* (Cambridge, MA and London: Belknap Harvard, 2006).
[50] Jackson and Kovalev, "Lay adjudication and human rights in Europe", 13(1) *Columbia Journal of European Law* 83, at 88 (2006).
[51] *Guernsey Justice Review*, at 14 (2020).
[52] Hanson, *op cit*, at 269.

independency of judges".[53] Applying this to the Jurats, the election process may enhance the accountability of the Jurats, but it is likely that the fact this election process is so politically connected reduces the extent to which Jurats can be perceived as being independent from the executive.

36 On the other hand, one election and a lack of re-election means that a Jurat's adjudication of sentence is unlikely to be affected by any upcoming election or political pressure, as occurs in the United States,[54] arguably increasing their independence. Security of judicial tenure is something which is highly recommended for professional judges because it reduces their susceptibility to political pressure. However, Jurats are lay adjudicators, and it is not known whether security of their judicial tenure, and a lack of accountability by an election, is something which enhances the trustworthiness of the institution. It has, however, been demonstrated that the independence of the election process itself may be limited under the existing model. If accountability and independence are limited, trust and confidence in the Jurats are likely to be undermined, rather than enhanced, diminishing legitimacy.

The representativeness of Jurats

37 A significant amount of literature covers the benefits and importance of diverse lay participation through juries and magistrates in England and Wales. In Guernsey, the only point at which lay participation features in the criminal justice system is through the office of Jurat. It is said that "the roots of lay participation lie in the notion of participatory democracy, specifically 'judgement by one's peers'".[55] If one is to be "judged by one's peers", it suggested that those doing the judging should be representative of the community. If Jurats are found to be unrepresentative of the community, it will reduce the level of trust and confidence in their ability to be effective adjudicators of sentence, giving rise to accusations that they are "out of touch" with the Island

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[53] Kritzer, "Impact of judicial elections on judicial decisions", 12(3) *Annual Review of Law and Social Science* 353 (2016).

[54] Cohen, Alon and Neeman, "Judicial decision making: a dynamic reputation approach", 44(S1) *Journal of Legal Studies* S133 (2015); Berdejó and Yuchtman, "Crime, punishment, and politics: an analysis of political cycles in criminal sentencing", 95(3) *The Review of Economics and Statistics* 741 (2013).

[55] Gibbs and Kirby, "Judged by peers? the diversity of lay magistrates in England and Wales", *Howard League What is Justice?* Working Paper 6, Institute for Criminal Policy Research, Birbeck, University of London at p 3 (2014).

community and not performing "local justice", and thus their legitimacy may be questioned.

38 The only existing academic commentary on lay participation and the representativeness of Jurats in the Channel Islands can be found in Hanson's article. He suggests that Jurats are diverse by referencing a Jersey Court of Appeal case which held that, "by virtue of such diversity . . . Jurats are in a good position to perform their sentencing duty".[56] However, even if Jersey's Jurats are deemed to be "diverse", does that necessarily apply to Guernsey's Jurats?

39 When looking at the Guernsey bench of Jurats, it is evident that they are not diverse in terms of gender, age or ethnicity. As it currently stands, only six out of the sixteen active Jurats are women. If the *Jurés-Justiciers Suppléants* (who can sit if another Jurat is unavailable) are also included, there are only six women out of twenty one (29%). This is, in fact, the most representative that the Jurat bench has ever been in terms of gender. The gender disparity is significant compared with magistrates in England and Wales, where there is a majority female body (56% approx.). This difference may in part be attributed to the fact that in England and Wales women have been allowed to be jurors and magistrates since the Sex Disqualification (Removal) Act 1919, whilst it was not until 1950 that the same right was granted to women in Guernsey, and not until 1985 that a female Jurat was elected. Given that the population of Guernsey is majority female and has been in every census since 1976, the absence of female representation on the Jurats' bench is noteworthy.

40 The average age of Jurats may also limit the diversity of the bench. Hanson indicated in 2010 that the average age for Guernsey Jurats was 66. It is difficult to establish precisely what is the current average although the election of Jurat Joanne Wyatt at the age of 44 was heralded as a triumph *inter alia* because she was not of retiring age. But the majority of Jurats continue to be of retiring age, with the most recently elected Jurat, as of 26 May 2021, being a retired doctor. An older population of lay adjudicators is not that uncommon and there is nothing inherently wrong with having older adjudicators of sentence, particularly if these retired professionals are more able to digest complex case information, for example. But the reality is that the majority of those who appear before the Royal Court are substantially younger than the sitting Jurats. This means that defendants are not being judged by their "peers"; defined as someone who belongs "to the same

[56] Hanson, *op cit*, at 268.

societal group especially based on age, grade or status".[57] They are being judged by someone who is of parental or grandparental age. The likelihood that a 20-year-old in possession of an illegal substance who appears before the Jurats in the Royal Court will feel that he is being judged by his peers is remote. If the Jurats do not represent a cross-section of the community in respect of age, there is a chance that they really will be viewed as "out of touch", unable to guarantee a fair trial and that the Jurat's decision-making process will suffer because of a lack of diverse multi-generational attitudes.

41 Furthermore, because Jurats are predominately composed of retired professionals, they are open to attack for being exclusively middle-class, much like the criticism levied against professional judges, and not representative of the Island community. Jurats are the lay representation which creates the expectation that they should be more representative of the community than professional judges. It is arguably desirable from a legitimacy perspective that Jurats are more representative of the community in respect of gender, age and class. However, the current system does not allow for this.

42 Jurats are essentially volunteers, sitting for 85 days a year in court. This means that a young person aged 25 and interested in becoming a Jurat must hypothetically be prepared to give up 85 working days a year (17 weeks), for the next 47 years. For most people, the financial burden alone that this entails makes the office of Jurat unattainable. That leaves retirees or those with extremely sympathetic employers as the only possible candidates for Jurat. In this context, the average Jurat is unsurprisingly a retiree. Importantly, the presence of younger Jurats will not necessarily improve the effectiveness or legitimacy of Jurats as adjudicators of sentence either. The current system is not designed to attract or facilitate the introduction of a Jurat from any other demographic. The representativeness of Jurats is inherently limited by the current system. Confidence in the ability of Jurats to be fair and unbiased adjudicators, preventing Islanders from being judged by their peers, may reduce.

43 The ethnic diversity of Guernsey Jurats may also be limited. Information from the 2020 Electronic Census does not indicate Islanders' racial diversity. The last official census in 2001 makes it almost impossible to determine whether the current Jurats' bench accurately reflects the racial diversity of the island. However, the more reflective of the community the Jurats are, the more likely it is that they will be trusted and deemed to be legitimate adjudicators.

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[57] Merriam-Webster "Peer" in *Merriam-Webster.com Dictionary* Available at <https://merriam-webster.com/dictrionary/peer> [Accessed: 26 May 2021]

How do the Jurats sentence?

44 In the Royal Court of Guernsey, a bench composed of seven or nine Jurats, presided over by the Bailiff, constitutes the Full Court. This deals with the most serious criminal offences, *viz.* around 42 criminal trials a year.[58] Therefore, Jurats are only involved with a relatively small percentage of all criminal trials. But these trials deal with the most serious offences. This requires that Jurats are perceived as both trustworthy and in keeping with procedural justice when determining fact and sentence. "Procedural justice" in this context means that "decision making is viewed as being neutral, consistent, rule-based and without bias",[59] and grounded in sound principles.[60] In exploring the extent to which the current system advances procedural justice, and legitimacy, we must observe the sentencing process in Guernsey.

The sentencing process

45 The most recent relevant Royal Court Practice Direction is from 2004 and is the most useful summary available:

> "In Guernsey the determination of the sentence to be handed down is a matter for both the presiding Bailiff and Jurats who are sitting on the case. It is the function of the Bailiff to furnish such information to the Jurats concerning previous decisions as to sentence in similar cases and most importantly any guidance from the Court of Appeal. Where there are no local guideline cases the Bailiff is left to glean guidance from other jurisdictions and in practice this will usually mean England and Wales. The authorities which the judges have are principally Archbold, Blackstone, Dr. Thomas' Sentencing Practice and the Criminal Appeal Reports. The Royal Court is now expected to give full reasons for its sentence and accordingly after deliberation it is necessary for the Court to prepare a statement of reasons as to why the particular sentence has been deemed appropriate and this has to be redacted following the deliberation of the presiding Bailiff and Jurats."[61]

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[58] *Guernsey Justice Review*, at 84 (2020).

[59] Tyler, "Procedural justice, legitimacy, and the effective rule of law", 30 *Crime and Justice* 283 (2003).

[60] Roberts and Plenisčar (2015) "Sentencing, legitimacy and the public", in Meszko and Tankebe (eds), *Trust and Legitimacy in Criminal Justice: European Perspectives* (Amsterdam: Springer, 2015).

[61] Practice Direction 1/2004 Criminal Sentencing in the Royal Court, Royal Court of Guernsey https://www.guernseylegalresources.gg/CHttpHandler.ashx?documentid=62442 [Accessed: 02 June 2021]

At the time of this Practice Direction, the Sentencing Council of England and Wales did not exist and the Sentencing Guidelines later produced by the Council are not cited as an authority. Today, the definitive Sentencing Guidelines of England and Wales constitute a non-binding authority. This is made readily apparent in several judgments from the Guernsey Court of Appeal. In the recent case of *Leonczuk v Law Officers*[62] it was held that "there is no presumption that these [the Sentencing Guidelines of England and Wales] should be followed and if the Court chooses not to adopt such sentencing levels, there is no obligation to justify why it has not done so".[63] In *Burton v Law Officers*,[64] it was also held that:

> "The Royal Court can rightly claim that, in matters of criminal sentencing, it is not bound by English sentencing decisions, and that it exercises its own decisions, and its own discretion in determining an appropriate disposal in criminal matter coming before it."[65]

Both judgments emphasise the legal independence of Guernsey and that sentences imposed by the Royal Court are not required to correspond to English guidelines at all. Instead, "Guernsey-specific considerations" may "point to the imposition of heavier sentences . . . than may be the case in England and Wales".[66]

46 Jurats (alongside the Bailiff) can impose sentences that are more severe than in England and Wales for the same offence. This is understandable on the basis that the Bailiwick of Guernsey is a separate and autonomous jurisdiction, but it may not seem fair, transparent or reasonable, thereby limiting procedural justice. Given that "Guernsey-specific considerations" are referenced in *Ryder*, it might be expected that Guernsey should have its own set of definitive Sentencing Guidelines. These guidelines could take into consideration local issues and attitudes, enabling Jurats to adjudicate sentence in a fair and transparent manner whilst enhancing the legitimacy of their judicial decisions.

47 Surprisingly, Guernsey has no legislation outlining the aims or purposes of sentencing as exists under s 57, Sentencing Act 2020 in England and Wales. Nor are there any "local" definitive sentencing guidelines resembling those produced by the Sentencing Council of

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[62] [2019]GCA042; 2019 GLR *N* [3].
[63] *Ibid*, at para 12.
[64] 2011–12 GLR 438.
[65] *Ibid*, at para 29.
[66] *Ryder v Law Officers* 2009–10 GLR 238, at para 14.

England and Wales. Jurats do have guideline judgments for a handful of offences, but these are the product of the Guernsey's Court of Appeal's judgments in specific cases. Lucia Zedner draws attention to potential issues with reliance on guideline judgments, noting that because "guidance as to sentence tend[s] to focus on the most serious incidence of each type of offence and as such diverge[s] markedly from the common ranges of sentence for that crime", guideline judgments tend "to be out of line with levels of sentence commonly handed down in trial courts" resulting in "little opportunity to develop an overall framework capable of ensuring consistency among different offences".[67] Consistency and transparency are required to achieve procedural justice and "the promotion of consistency can also enhance public confidence in the system's fairness".[68] The lack of guidelines across a scale for all offences in Guernsey is arguably a significant hindrance for securing the legitimacy of Jurats as adjudicators of sentence.

48 Legislation does prescribe specific sentences for some offences, such as minimum terms for mandatory sentences of life imprisonment; see the Criminal Justice (Minimum Terms for Sentences of Life Imprisonment) (Bailiwick of Guernsey) Law 2011 and the maximum punishment for sexual offenders in the Sexual Offences (Bailiwick of Guernsey) Law 1983), but such legislation remains rather sporadic. As pointed out in the *Guernsey Justice Review*, "the various legal provisions which make up sentencing policy have never been systematically reviewed"[69] and Dawes also comments on "the comparative lack of sophistication in Guernsey sentencing law".[70] The judicial discretion available to the Bailiff and Jurats in the Royal Court is extensive. If procedural justice requires that decisions made by adjudicators are consistent, rule-based and derived from sound principles, it seems unlikely that the current system helps to enhance the legitimacy of Jurats as adjudicators of sentence.

49 Observations in some Court of Appeal judgments seem, however, to disagree. A seven-judge Court of Appeal in *Wicks v Law Officers*[71] stated that the Jurats are perceived to be supremely beneficial to the adjudication of sentence because the Royal Court has "the significant advantage that sentence in the court [is] not passed by a single

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[67] Zedner, *Criminal Justice*, at 177 (Oxford: Clarendon Law Series, 2004).
[68] O'Malley, "Living without guidelines", in Ashworth and Roberts (eds), *Sentencing Guidelines*, at 227 (Oxford: OUP, 2013).
[69] *Guernsey Justice Review*, at 76 (2020).
[70] Dawes, *op cit*, at 512.
[71] 2011–12 GLR 382.

professional judge but by a panel of Jurats who, by their independence and election by the community, were particularly well placed to reflect local concerns".[72] As already discussed, the legitimacy that is derived from their "independence and election by the community" can be challenged. Later in the judgment it is said that Jurats "are elected for their independence of character and other attributes".[73] Nowhere are these "other attributes" defined or what is meant by "independence of character". This is concerning. Unfounded claims that Jurats represent "local concerns" and that these local concerns should be relevant to sentencing (indicative of a utilitarian consequentialist approach to sentencing), does not indicate that procedural justice is wholly present.

50 What is clear is that Guernsey's Court of Appeal favours the presence of Jurats as adjudicators of sentence. In *Wicks*, the court definitively states in relation to the sentencing regime that "we see no need to direct the Royal Court to engage in a more structured exercise of the kind that appears to have gained support in the mainland jurisdictions".[74] This position is respectfully rejected. A lack of guidelines and a reluctance to introduce any "structured exercise" to the court undermines the extent to which procedural justice can be obtained. Jurats are, therefore, in the unfortunate Catch-22 position whereby they cannot secure further legitimacy through procedural justice because the sentencing regime within which they function restricts the presence of neutral, consistent, rule-based, principled, clear, transparent and unbiased sentencing.

51 The final case to refer to is *Leonczuk v Law Officers*,[75] one of the most recent cases to reference the role of Jurats as adjudicators of sentence in the Royal Court. It holds that:

> "No problem of inconsistency in sentencing has been apparent in Guernsey given the smaller size of the judiciary. In Guernsey, the Jurats sitting in the Royal Court are trusted to arrive at the appropriate sentence having regard to factors such as the individual features of the offence, the victim and the offender, and the requirements of sentencing policy having regard to the prevalence of offending of that kind in Guernsey and the needs of the community."

There are at least two elements of this judgment which do not sit comfortably with enhancing procedural justice. First, it is stated that

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[72] *Ibid*, at para 4.
[73] *Ibid*, at para 20.
[74] *Ibid*, at para 57.
[75] [2019]GCA042; 2019 GLR *N* [3].

"inconsistency in sentencing" is not a problem in the Island. This is a bold claim with no supporting empirical evidence. No research has ever been carried out on the consistency of sentencing in Guernsey. Some may say such research is unnecessary because Guernsey is a small jurisdiction, where the brunt of sentencing is carried out by a small body of people and sentencing disparity is far less likely than in a bigger jurisdiction. Consistency in sentencing is required to secure procedural justice amongst the judiciary and to assume that such consistency exists is insufficient.

52 Secondly, the suggestion that Jurats "are trusted to arrive at the appropriate sentence" is another unsupported claim. The extent to which the Island community of Guernsey possesses any kind of "trust" in Jurats is, in fact, unknown. It is assumed that they are trusted, but as has been explored, there are several reasons why the trustworthiness of Jurats to impose fair, unbiased, neutral and consistent sentencing could be doubted. The fact that Jurats receive no formal training for their role and are therefore determining sentence without necessarily having an appreciation for the complexity of the sentencing process is likely to limit public trust in Jurats as adjudicators of sentence.

Procedural justice in the current system

53 Whilst it cannot be assumed that Jurats possess the requisite neutrality, consistency, and an unbiased, principled approach, it also cannot be assumed that they do not. In other words, given the lack of empirical evidence to support either position, several elements of the current system could, alternatively, be seen as enhancing procedural justice, rather than undermining it. The lack of sentencing law, as Dawes suggests, may present Guernsey with "a positive advantage in some respects".[76]

54 Some of these advantages may include the persistence of extensive judicial discretion when it comes to the adjudication of sentence by Jurats. It allows for more flexible and possibly individualistic sentencing than the more mechanical and restrictive approach that sentencing guidelines offer. Such guidelines have historically been described as "tram lines" and judicial "straitjackets".[77] Although, in 2009, some judicial figures did express the view "that consistency is not

[76] Dawes, *op cit*, at 512.
[77] Roberts, "Sentencing guidelines and judicial discretion", 51 *British Journal of Criminology* 997, at 1008 (2011).

possible in a system that treats each case on its individual merits",[78] others would likely disagree.

55 Additionally, it is not as though there are no guidelines for Jurats. The *Richards* guidelines apply to the sentencing of drug-related offences and are very prescriptive.[79] Guidelines also exist in relation to the making of indecent images.[80] It is, therefore, not accurate to suggest that Jurats are free to impose whatever sentence they like. Jurats are bound by the judgments of the Guernsey Court of Appeal and the Privy Council. These guideline judgments tend to relate to the most serious offences and provide an element of consistency and transparency for determining sentence, helping to enhance the perceived legitimacy of Jurats as adjudicators of sentence.

56 The benefits of local knowledge amongst Jurats when sentencing was also implied in *Wicks*. Ethnographic studies have not been carried out on Jurats, but it has been shown that when professional judges possess knowledge about a local community this information can "help to improve judicial decision-making and can assist professionals in making more nuanced decisions about both treatment needs and the risks individual defendants pose to public safety".[81] This finding implies that Jurats are potentially in a strong position to impose appropriate sentences on offenders because of their greater appreciation of the concerns of the local community, although this appreciation of local concerns may be hindered by their limited representativeness.

57 Jurats serve until the age of 70 and sit for at least 85 days each year. This means that the people involved in sentencing are going to be the same for years, if not decades, with each Jurat becoming increasingly "professionalised" in theory. The increasing professionalisation of Jurats means that their ability to understand the complexities of criminal trial procedure will likely increase over time, allowing them to produce potentially more consistent and informed decisions, increasing procedural justice and trustworthiness. Serving effectively for life has also been argued to increase judicial autonomy.[82] The

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[78] Tata, "The struggle for sentencing reform: will the English sentencing guidelines model spread?" in Ashworth and Roberts (eds), *Sentencing Guidelines* 236, at 240 (Oxford: OUP, 2013).

[79] *Richards v Law Officers* 2000–02 GLR 247.

[80] *Wicks v Law Officers* 2011–12 GLR 482, at 485 *et seq.*

[81] Donoghue, "Reforming the role of magistrates: implications for summary justice in England and Wales", 77(6) *MLR* 928, at 936 (2014).

[82] La Porta *et al*, cited in Bühlmann and Kunz, "Confidence in the judiciary: comparing the independence and legitimacy of judicial systems", 34(2) *West European Politics* 317–345 (2011).

alternative viewpoint is that their increasing professionalisation leads to Jurats being hardened against defendants, imposing harsher sentences as their time at the bench progresses. However, their exposure to court proceedings is likely to result in less of the court's time being wasted on explaining basic procedural matters, as is the case in many English trials before a jury.

58 In respect of sentencing, the same small group of Jurats and judges are consistently making decisions and determining sentences together. Consequently, there is likely to be an increased homogenization in decision-making. Any new Jurat to the bench will likely be swiftly incorporated into the existing adjudicative status quo. This consistency can help to create procedural justice and enhance trust in judicial institutions. Additionally, the fact that a simple majority, rather than a unanimous verdict is required, means that any maverick Jurat is going to be unable to topple the decision-making process single-handedly. Therefore, the argument goes, consistency, and predictability of decision-making is likely to be increased by the fact that Jurats serve until age 70 and for so many days each year with a simple majority at their disposal. Problematically, a simple majority means that a 5:4 decision in favour of guilty is acceptable and therefore, Jurats who favoured a not guilty verdict have to determine the sentence for an offender they did not believe should be sentenced in the first place. This indicates that the sentencing process may not be wholly objective. However, those who favour Jurats as sentencers would likely say that their long service and experience enable them to put on the required "hat" to sentence the offender appropriately.

59 There might not even be a need for sentencing guidelines in such a small jurisdiction, irrespective of their introduction in other small jurisdictions across the globe. The role of the media, for example, is a powerful tool of condemnation on the Island and it has been hypothesised by Zedner that "the more subject to public scrutiny the process, the less need there is for the constraint of rules".[83] The local paper, *The Guernsey Press*, has a substantial readership (a daily adult readership of over half the Island population and produces daily articles informing Islanders of both minor and serious offences committed on the Island.

Reforming the current system

60 Evidently, but without supporting objective research, the current system does possess what could be considered positive features such as Jurats' longevity, security of tenure, and local knowledge, and that may

[83] Zedner, *Criminal Justice* (Oxford: Clarendon Law Series, 2004), at 186.

enhance their trustworthiness and the presence of procedural justice in their adjudication. But other elements of the current system, such as absence of diversity, sentencing principles/guidelines, training, and the selection process itself, may undermine that trust and procedural justice. The legitimacy of Jurats as adjudicators of sentence is by no means guaranteed by the current system. It is therefore arguable that their legitimacy needs to be enhanced. Enhancing the legitimacy of the current system can be achieved by implementing specific reforms.

61 To identify and prioritise them, I have taken the factors discussed in this article and divided them between those which allegedly enhance and those which allegedly undermine the legitimacy of the current Jurat system in Table 1 (see below). In this table there are nine undermining factors that could thwart the legitimacy of Jurats. Any reforms must target the elimination of these undermining factors. Three reform proposals are outlined here, aimed at enhancing the current legitimacy of Jurats as adjudicators of sentence.

1. *A Sentencing Council*

62 Currently, Jurats adjudicate within a sentencing system devoid of agreed sentencing principles. The introduction of an independent Sentencing Council would counter this. Such a Council, drawing from the purposes of the Sentencing Council of England and Wales, would:

- Increase the transparency of sentencing.
- Promote greater public awareness and understanding of sentencing policy and practice.
- Increase the consistency of sentencing.

Introducing a Sentencing Council would serve to increase the legitimacy of Jurats as adjudicators of sentence through an increased transparency and consistency in sentencing (if it is lacking) and an expansion of public knowledge of the sentencing process. Improving the knowledge of Islanders regarding Guernsey's judicial institutions and adjudicators could facilitate familiarity and increased levels of trust, enhancing the legitimacy of Guernsey's Jurats as adjudicators of sentence. A Sentencing Council does not necessarily require that definitive sentencing guidelines be immediately introduced, although the prospect of introducing such guidelines could be explored within the Council.

63 The responsibilities of the Guernsey Sentencing Council could also reflect some of the responsibilities of the Sentencing Council in England and Wales, which include:

- Maintaining the independence of the judiciary;
- Monitoring public confidence in sentencing and the criminal justice system.

Table 1: *Factors that enhance and undermine the legitimacy of Jurats*

	Enhance	*Undermine*
Who the Jurats are	Historical longevity. Security of judicial tenure. Use of an election may enhance accountability. Professional background may enable complex cases to be better adjudicated.	Accounts of historical criticism and corruption. Election is politically affiliated undermining judicial independence. Only having one election reduces their accountability. Lack of diversity in terms of age, gender, nationality and race preventing defendants from being "judged by their peers"
How the Jurats sentence	Serve for life and with a professional judge likely resulting in increased professionalisation and homogenization and, therefore, consistency in decision-making. Judicial discretion is maintained which allows for flexibility and consideration of local needs and "local justice". Guideline's judgments and legislation exists for some of the most serious offences to help guide sentencing. Public censure from the local media reduces the need for any strict sentencing rules.	Lack of sentencing guidelines may limit the extent to which a clear, transparent, consistent and unbiased approach to sentencing can exist. Lack of any formal training means that Jurats may sentence without understanding the ramification of imposing those sentences. Lack of sentencing principles, purposes or aims with which to guide Jurats could result in potentially arbitrary decision making. Lack of understanding of what the qualities and attributes of Jurats should be. No empirical evidence to confirm the absence of inconsistent sentencing.

The current selection process for Jurats, being potentially politically affiliated, is a factor that may undermine trust and confidence in the bench. Having an independent body directly responsible for maintaining the independence of Jurats (and the judges) will enhance trust and confidence, address issues about their lack of independence, and strengthen legitimacy. Researching public confidence in and attitudes about the current sentencing regime will enable debate about the legitimacy of Jurats to arise from a more empirically and ethnographically informed position, helping to eliminate any misconceptions about Jurats as adjudicators of sentence. The Council could also work towards creating a more consolidated sentence regime in the Island, something favoured in recent reports and academic discussion.

64 Four out of the nine undermining factors would be reduced, if not eventually eradicated, with the introduction of the council. Therefore, the introduction of a Sentencing Council would only serve to enhance the legitimacy of the existing Jurat regime, and the sentencing regime more generally.

2. *Defined Jurat attributes*

65 As it stands, one of the biggest threats to confidence in the Jurats arguably arises from their selection process, which potentially limits their independence, given how politically intertwined the process is. It is proposed that one aspect of the election process is modified to further legitimate Jurats as adjudicators of sentence. Currently, it is difficult to know exactly *who* a Jurat or the "ideal" Jurat should be. Nowhere is there a list of requirements for Jurats to possess prior to election or to help guide the States of Election when making their decision.

66 In contrast, a list of desired attributes exists for lay magistrates in England and Wales, stipulating that they are required to possess (Judiciary, n.d.):

- Good character
- Understanding and communication
- Social awareness
- Maturity and sound temperament
- Sound judgment
- Commitment and reliability

Each quality is then defined more substantively. This list was immediately accessible from a quick online search. There is no equivalent list of attributes for the office of Jurat, nor is there a qualified list in any legislation. Given that the *Wicks* judgment cites the "attributes" of Jurats as a reason for the election of lay people to the

office, it would be helpful, if not essential, to know what desirable Jurat "attributes" are, and how they are to be objectively assessed.

67 Furthermore, if Islanders are made aware of the criteria required to run for election as a Jurat, it may encourage a more diverse selection of people to seek nomination. Three out of the nine undermining factors are likely to be removed with the introduction of a list of requisite Jurat attributes.

3. *Judicial tenure*

68 Currently, Jurats serve until the age of 70 or more. This has been the case for some time and the security of their judicial tenure has been argued to be an element that enhances the legitimacy of Jurats as adjudicators of sentence. However, the office of Jurat is only being filled by those within a certain socio-economic bracket. This prevents the Jurats' bench from being representative of the Island's population, limiting their legitimacy and defeating one of the purposes of lay participation, namely, to expand the socioeconomic spectrum of the judiciary. An alteration to a Jurat's tenure could enhance diversity and reduce the possibility that Jurats' sentencing decisions will be perceived as "out of touch", a perspective which limits their legitimacy.

69 The tenure of Jurats should be altered from life service to a period of not more than five years. With this adjustment, a more diverse bench of Islanders may be encouraged and able to seek the office of Jurat. Employers may be more sympathetic to their employees taking up the office as it would be for a limited period. Five years is roughly the length of service expected of a lay magistrate. If the tenure of Jurats was reduced it would mean that Jurats might not become entrenched in their behaviour, reducing the potential that they will become hardened against defendants, and help to ensure that the presence of lay adjudicators acts as a "safeguard against professional powers",[84] rather than an accomplice.

70 With a tenure of only five years many more Islanders would be able to participate in the Island's criminal justice system. The office of Jurat is currently the only location in the criminal justice system in which lay participation features and currently it has a restrictive pathway to entry. Expanding lay participation can bring about significant benefits to the community, such as increasing general political participation and understanding of individual rights and

[84] Donoghue, "Reforming the role of magistrates: implications for summary justice in England and Wales", 77(6) *MLR* 928, at 933 (2014).

responsibilities.[85] Encouraging this might inspire more Islanders to seek the office of Jurat, adding to the diversity of the Jurats' bench.

71 These are not the only potential reforms that could be introduced to the current system to enhance Jurats' legitimacy as adjudicators of sentence. The proposed reforms do, however, combine to reduce the impact of the identified "undermining" factors. The greater the legitimacy, the more trust, confidence, and procedural justice there is within judicial institutions; all crucial elements for ensuring the continuance of successful democracy in Guernsey.

Conclusion

72 Guernsey's one-of-a-kind Jurats currently act within a system that is potentially undermining their legitimacy as adjudicators of sentence. Enhancing their legitimacy is a necessity, or there is a chance that calls for their replacement by a jury system will be amplified. For their legitimacy to thrive, Jurats must be perceived as trustworthy and as providing procedural justice in their adjudication of sentence. As discussed, their historical legacy is likely to be a key argument for their legitimacy because longevity results in familiarity which, in turn, breeds trust. Their secure judicial tenure, professional background, and local knowledge have been presented as enhancing trust and procedural justice and, therefore, their legitimacy as adjudicators of sentence. However, this legitimacy is arguably not built on a stable foundation.

73 Factors within the current system undermine the legitimacy of the institution and are more extensive than those which enhance it. For example: when apparent longevity seemingly enhanced their trustworthiness, historical accounts of corruption and criticism undermined it; where the use of an election was argued to enhance their accountability, the election was shown to be politically affiliated in ways that undermined their independence, essential for the rule of law; whilst judicial discretion, which allowed for the possibility of "local justice", hampers procedural justice; and where the security of judicial tenure was praised for fostering trust, the fact that the tenure could reduce the diversity of the Jurat bench limited this trust. The fact that many of the "enhancing" factors can be challenged by the "undermining" factors indicates that the legitimacy of Jurats may be under threat.

74 This can lead to practical problems because, as Roberts states, "the likelihood of an offender desisting from future offending may well be

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[85] Selman Ayetye, "Ghana's jury crisis: implications for constitutional human rights", 20(1) *Oxford University Commonwealth Law Journal* 1–26 (2020).

affected by his or her perceptions of the legitimacy of the justice system".[86] If adjudication by Jurat, who sentence in the most serious cases, is not perceived to be legitimate, compliance with the criminal law could be undermined. Professor Ashworth states that "it is sentencing, largely, that gives criminal law its bite",[87] and if Jurats as the adjudicators of sentence are not perceived as legitimate, it will appear that they have bitten off a little more than they can chew. Guernsey prides itself on being a low crime jurisdiction (but with comparatively high sentencing rates) and, if it intends to keep it this way, it might consider bolstering up trust, confidence, and procedural justice in the current system. If the legitimacy of Jurats could be enhanced, there is no reason why Jurats could not be successfully introduced in other jurisdictions.

Eleanor Curzon Green, prior to undertaking training at City Law School to become a barrister, completed her MSc in Criminology & Criminal Justice at the University of Oxford, her Graduate Diploma in Law at BPP University and her BA in History at the University of Cambridge. She is also an assistant researcher at the Sentencing Academy and in 2021 published—with Professor Julian V. Roberts— The Suspended Sentence Order in England and Wales *(Sentencing Academy). She has also received the Lord Bingham Scholarship from Gray's Inn and a Bursary Scholarship from Carey Olsen.*

[86] Roberts, *Punishing Persistent Offenders* (Oxford: OUP, 2008), at 120.
[87] Ashworth, *Principles of Criminal Law*, 4th edn (Oxford: OUP, 2003), at 20.