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A BRIEF HISTORY OF GUERNSEY LAW

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Introduction

1 This paper is an attempt to tell the story of the evolution of Guernsey law from its earliest identifiable origins to the present day.¹ Along the way it also attempts to identify and consider the various sources or strands of Guernsey law. This is all very much work in progress given the size of the subject and the fact that it is little studied. What we can do, reasonably confidently, is to pick out the bones of the story even if the anatomy is left rather incomplete at the end of the exercise, which begs the question of why bother in the first place?

The importance of an understanding of Guernsey legal history

2 The study of the history of any body of law is important to that jurisdiction; however, that importance becomes of much greater significance when one is not just studying history for the sake of it but actually looking for current law in that history.

3 It is possible in daily practice in England to have little or no conception of English legal history beyond the oldest of cases commonly referred to. These days it is uncommon that one goes back much more than twenty-five years or so, rare that one must refer to cases fifty years old or more and rarer still that one refers to cases over a hundred years old. The idea of looking at a textbook much more than five years old for any modern-day solution is very odd – certain volumes of Halsbury's Laws of England apart.

4 In Guernsey, however, there is comparatively so little settled law in the sense of being able to state with confidence what the law is that one is often required to go back to first principles in order to determine what Guernsey law is, or rather might or should be. It follows that an understanding of Guernsey legal history is merely an extension of that knowledge required in any other jurisdiction for everyday practice. Without being able to navigate one's way around Guernsey legal history, legal research becomes very difficult, if not impossible. You will always be at a disadvantage. It follows that the study of Guernsey legal history is not an academic nicety but a practical necessity for anyone concerned with Guernsey legal issues.

In the beginning ...

¹ See also Darryl Ogier's excellent recent work, *The Government and Law of Guernsey*, pub. by the States of Guernsey, 2005.

5 We begin with geography and politics rather than law. The Islands' association with the United Kingdom is anomalous. Geographically they are plainly much closer to what is now France than England, and remember that Guernsey is in fact the Island situated furthest from France - but you can still see the French coast on a sunny day. No one has yet seen Bournemouth from Guernsey with the naked eye; it is 80 miles away.

6 With the Roman invasion of North-West Gaul by Julius Caesar between 58 and 50 BC the Islands would have become a part of the province of Lugdunensi Secundum ("*seconde lyonnaise*"). This province coincided reasonably closely with what was later to become the Duchy of Normandy. Roman law dominated to the exclusion of all that went before. Gallic law did not survive. One of the great professors of the Faculty of Law at Caen, Robert Génestal, who wrote an important paper on the Formation and Development of the *Coûtume* of Normandy which appears in the *Travaux de la Semaine d'Histoire du Droit Normand* held in Guernsey in 1927,² described Roman law as -

"... un droit uniforme, qui s'est répandu par voie de naturalisation dans l'immense empire."

which translates as -

"... a uniform law, which spread by way of naturalisation in the immense empire,"³

in other words a *ius commune*, a common law.

7 As to the law which went before he noted that -

"*Nous savons bien peu de choses du droit des populations antérieures à la conquête romaine et l'on admet généralement que la Gaule s'est si complètement romanisée qu'il serait vain de rechercher dans l'ancien droit français des traces de coutumes gauloises.*"⁴

which translates as -

"We know very little indeed of the law of the peoples prior to the Roman conquest; it is generally conceded that Gaul was so completely Romanised that it would be vain to look for traces of Gaulish custom in ancient French law."

8 This makes it easy to the extent that we have a clear and uncluttered starting point; Roman law as the law of the geographical area known as Gaul, and indeed, the law of the

² Published in 1928; see pages 37 – 55. For a more detailed account of the history of public law in Normandy see his study, *Histoire du Droit Public Normand*, Caen, 1928, a 75 page monograph. This is a very helpful introduction to the topic of Norman ducal institutions. See also the great study, *Norman Institutions* by Charles Homer Haskins, 1918, republished by Frederick Ungar Publishing Co. in 1960. Génestal referred to this work as "*l'ouvrage fondamental*". Recent and accessible Norman histories are to be found in *The Normans* by Marjorie Chibnall, Blackwell Publishers Limited, 2000 and *The Normans* by Trevor Rowley, Tempus, 1999.

³ *Ibid* p39.

⁴ *Ibid* p45.

Empire as a whole. An Empire which dominated the area we now know as Europe. This ancient Roman base is fundamental to our story. If one was to pick a powerful symbol of Roman law it would be Justinian's Institutes.⁵ This short text first appeared in 529AD; it was the work (at least indirectly) of one of the last great emperors of the Eastern empire and amounted to a student text of Roman law by contrast to Justinian's much more substantial Digest.

Decline and fall

9 But of course, the Roman empire did not last. As Rome declined, barbarian invasions began in about 406AD and by 476 the Western Roman Empire was no more. The Franks dominated Northern Gaul, led first by the Merovingian dynasty, only to be replaced in the mid-eighth century by the Carolingians. Again *Général* is confident -

*"Il est incontestable et incontesté que le droit généralement appliqué dans cette province était, au IX^e siècle, le droit franc. Le fond de notre coutume est donc d'origine franque."*⁶

which translates as -

"It is incontestable and uncontested that the law generally applied in this province was, in the 9th century, Frankish law. The foundation of our custom is therefore of Frankish origin."

10 Surely though we are missing an important part of the story; and indeed we are. The high point of the Carolingian dynasty was the reign of Charlemagne. With his death in 814 the Carolingians too went into decline. Viking raiders appeared on the shores of Northern Gaul, coming principally from Denmark. Their raids increased in frequency and daring, even to the point of taking and re-taking Rouen and actually pillaging Paris in 845. The Vikings began to establish permanent settlements c.850. They besieged Paris in 885. The French crown had been weakened by dynastic struggles and the division of the kingdom into near autonomous and hereditary principalities or near mini-states. Eventually in 911 Charles III of France "the Simple"; felt compelled to reach an accommodation with the latest Viking invaders led by one Rollon. By the *Traité de St Claire sùr Epte* Charles granted the first tranche of what would become the Duchy of Normandy to Rollon, who was, in effect (if not initially in name), the first Duke of Normandy. Two further grants of land in 924 and 933 completed the process. The Channel Islands are believed to have been annexed to the emerging duchy in about 933.

The emergence of customary law

⁵ See *Nouvelle Traduction des Institutes de L'Empereur Justinien* by Claude-Joseph De Ferriere, Paris, 1719, and Moyle, *The Institutes of Justinian translated into English*, 5th ed. Oxford, 1913.

⁶ *Ibid* p44.

11 It is important when considering the history of Guernsey law to consider the broader context of that history. We have reached the tenth century. The memory and practice of Roman law were distant. The Carolingian Empire had splintered into separate kingdoms and sub-divided into what were little more than near independent principalities or counties. Society itself had regressed to the extent of being a less complicated place where the focus of concern was now land and succession to land whilst feudalism was emerging. It followed that as strong centralising power declined, so regional law and custom thrived. The Duchy of Normandy was one such area. Indeed, the extent of its independence from the Kingdom of France and the strength of its own central power and administration were major contributory factors to the distinctiveness of its custom.⁷ Norman custom became an important identifying feature of Normandy itself.

The Viking influence

12 It is worth pausing to consider why, if Normandy was the product of Viking invasion and settlement, Frankish law remained the basis of Norman customary law? Surely there was a Viking influence? Indeed there was, but of a very limited extent. It is only in areas such as the law relating to wrecks (*vrek* or *varech*) or in the use of words such as *murdrum* for murder and a few other such examples that one can detect a Scandinavian legacy of any kind.⁸ It is important to remember that the Viking settlers were always in a minority and seem to have assimilated very swiftly, whilst retaining control.

The emergence of Norman law

13 The development of Norman law went hand in hand with the creation and growth of its institutions. The strong central administration featured a sophisticated hierarchy of judges, treasurers and administrators. The Duchy was divided into counties (*comtés*), *vicomtés*, and eventually *bailliages*, or bailiwicks. The individuals at the head of these administrative units also performed judicial functions but subject to a central, supreme *Echiquier* (Exchequer) which itself had a dual judicial and accounting function.

14 From a base of Germanic Frankish law, local, Norman custom would have begun to emerge, rather in the way that English common law does to this day. There are many different definitions of customary law and the following is as good as any -

*“Coutume est un droit non écrit, un droit municipal de quelque lieu, de quelque ville, de quelque contrée & de quelque pays, introduit par l’usage, du tacite consentement de ceux qui s’y font volontairement soumis; & cet usage, après avoir été observé pendant un temps considérable, a force & autorité de Loi. ... La Coutume imite la Loi, elle l’interprete, & quelquefois même elle la corrige & l’abroge”.*⁹

which translates as -

⁷ *Ibid.* p40.

⁸ See the work of J Tardif, as cited by Génestal, *ibid.* p48 – 50.

⁹ De Ferrière, *Dictionnaire de Droit et de Pratique*, 1779.

“Custom is unwritten law, the municipal law of some place, some town, some area and some country, introduced by usage, by the tacit consent of those who voluntarily submit themselves to it; and this usage, after having been observed during a considerable length of time, has the force and authority of Law ... Custom imitates Law, interprets it, and sometimes even corrects and abrogates it.”

15 Of course, by 1066 William the Conqueror had captured England and was both King of England and Duke of Normandy. The influence of Norman law and institutions upon English law and institutions is hard to under-estimate. I remind you of the name of the central court/treasury in Normandy, the Exchequer. It is no coincidence that one of the senior officers of state in the United Kingdom today remains the Chancellor of the Exchequer.

The 13th century Coutumiers

16 Meanwhile, in 1204 King John lost Normandy to the French King, Philippe Auguste. The lottery of history had pitted against each other a near useless wastrel and one of France’s most effective monarchs. Except for a period during the Hundred Years War when England occupied continental Normandy (1418 – 1450), this marked the end of the English crown’s dominion over the Duchy, all save the Channel Islands, the last vestiges of that Duchy.

17 One would have expected the reintegration of the Duchy into the Kingdom of France to have had a profound effect upon its laws, customs and institutions and indeed it did, but not to the extent that one might anticipate from a modern perspective. The Court of Exchequer survived, albeit to some greater or lesser extent subsidiary to the *Parlement* of Paris. More importantly, from our perspective, Norman law survived. This was because it had already crystallised before the events of 1204¹⁰ and the French King, most likely out of a desire not to alienate the peoples of the Duchy, respected the Duchy’s laws and customs, treating it as a continuing distinct jurisdiction.

18 That crystallisation was evidenced by the production of two “*coutumiers*”¹¹ which are accepted as dating back to the 13th century. The first was the *Trés Ancien Coutumier* (“TAC”) which is usually dated to early in the 13th century (say approximately 1218 – 1223) and the second, *Summa de Legibus Normannie in Curia Laicali*. When translated into French, it was known as the *Grand Coutumier*.¹² The *Grand Coutumier* can be dated to some time after 1235 because it takes account of a modification to the law made by the *Echiquier* in that year. However, it does not take account of a Royal ordinance dated 1258 forbidding private war and judicial duels. It follows that the *Grand Coutumier* can be dated

¹⁰ See Génestal, *ibid*, p42.

¹¹ In the sense of a work which compiles customs, a collection of customs if you like. This is as opposed to the *coutume* or custom itself.

¹² You will quite often see this work referred to as the *Grand Coutume*. Note that the use of the words *coutumier* and *coutume* can be controversial. For some the word *coutumier* should be applied to the TAC and the *Grand Coutume* so as to indicate that they were not official redactions by contrast to the official *coutume* of 1583. So long as it is remembered that the 13th century compilations were not “official” there is no mischief.

to some time shortly either side of 1250. The *Grand Coutumier* very swiftly eclipsed the *Trés Ancien Coutumier*. It was the *Grand Coutumier* which was the cornerstone of Norman customary law until it was finally replaced in 1583.

19 Where can one find this *Grand Coutumier* today? One of the frustrations of reading a work such as Terrien's commentary from 1574 is that he does not actually set out the unbroken text of the *coutume*, only selected extracts (*inter alia*) according to his own purposes and ordering of materials. However it can be found in various collections of French customary laws and in particular one entitled *Nouveau Coutumier General, ou Corps des Coutumes Generales et Particulieres de France, et des Provinces Connue sous le nom des Gaules* which dates back to 1724. It is a massive work comprising 4 large volumes. The Norman section is at the beginning of volume 4. Rather more accessible is the 19th century edition produced by WL de Gruchy in Jersey entitled *L'Ancienne Coutume de Normandie*.

20 The *Grand Coutumier* comprises 125 articles starting with jurisdiction, judicial officers, various ducal rights (for example wrecks and treasure trove), various forms of feudal tenure, legal procedure and legal remedies, succession law, criminal law and punishment, various forms of civil dispute, possession actions, other forms of court action and prescription. There is little in the way of substantive law beyond the provisions for succession. It is noteworthy that the *Coutumier* very much assumes the continuance of the duchy, again suggesting crystallisation of the *coutume* prior to 1204. The key point to note is the comparatively limited purview of the *Coutumier*; it is in no sense a complete legal code, certainly not for today.

21 But the *Grand Coutumier* did not stand alone. It was supplemented and reinforced by a number of other texts. The first of these was the *Charte aux Normands* of July 1315. This charter, granted by Louis X, amounted to a series of privileges guaranteeing the specificity of Normandy; for example, respect for the *Grand Coutumier*, the confirmation of a sovereign Norman Court (*i.e.* without a right of appeal to Paris) and limitations on the right of the King to raise (new) taxes. This document remained of central importance to the people of Normandy until the revolution of 1789.¹³

22 Procedural law evolved and developed in works known as *styles* as in "style of procedure". There was an *Ancien Style* from c. 1386 – 1390 followed by *Instructions et enseignements* from a little later (written for the instruction of judges) followed by the *Nouveau Style* of 1457. There was a still later *Style* of 1515.

23 Some time before 1418 there appeared a work called *La Glose de Grand Coutumier* or simply the *Glose*, comprising a paraphrase of the *Coutume* augmented with case law together with commentary and interpretation of the *Coutume*, including indications of what was and was not in usage. The *Glose* was published in a 1483 edition of the *Coustumier*

¹³ There is, in some respects, an interesting parallel to be drawn between the experience of continental Normandy with the French Crown and insular Normandy with the English Crown. The analogy breaks down fully by 1789 though.

du pays et duchie de Normendie.¹⁴ Although the *Coutume* had been compiled in the form of a written document, Norman law was not static. It evolved through case-law in a way not dissimilar to English common law.

What happened to Guernsey?

24 We left Guernsey back in 1204; it is time to catch up to the 16th century. Guernsey and the other Channel Islands were, of course, a part of the Duchy of Normandy. When King John lost continental Normandy in 1204 he managed to retain insular Normandy. Apart from occasional and temporary incursions and invasions by the French (admittedly sometimes measured in years), the Islands remained ever after in the hands of the English Crown and are still known as Crown Dependencies. Their position was formalised by the Treaty of Paris in 1259. Le Patourel says -

“By this treaty the king of England renounced all rights which he might have in the duchy and the land of Normandy, and in the islands, if any, which were at that time in the possession of the king of France; and he undertook to do liege homage in the future, not only for those lands in Gascony which he had succeeded in defending, but also for those lands in Aquitaine which the king of France undertook to convey to him, “and for all the land which he holds on this side (*i.e.* the French side) of the sea of England, and for the islands if there are any which the king of England holds which are of the kingdom of France.” The islands off the French coast which the king of England held in 1259 were the Channel Islands and the Ile d’Oléron.”¹⁵

25 So, in some sense, the Islands remained a part of the Kingdom of France, which potentially had significance for the laws that should be respected in those Islands. Perhaps more significant was the latent political aspiration of the English Crown at the time. Peace with France did not last. The English Crown’s ambitions in France, and, of course, Normandy survived. There was a sense in which it suited the English Crown politically to preserve the Channel Islands as truly resembling a remaining fragment of the Duchy, as some kind of potential stepping stone towards the whole. There was also the strategic significance of the Islands to consider as well as the practical difficulty of governing the Islanders against their will given their proximity to the enemy and the cost of garrisoning the Island in such circumstances.¹⁶

26 It followed that merely because continental Normandy had returned to the French Royal domain there was no cultural or legal rupture within Guernsey itself. Norman laws

¹⁴ The first known printed edition.

¹⁵ See John Le Patourel’s paper, *The Origins of the Channel Islands Legal System in Feudal Empires, Norman and Plantagenet* published by the Hambledon Press. This work is a collection of Le Patourel’s papers and was published in 1984. John Le Patourel was a native Guernseyman who became the Island’s most prominent historian, with a national and international reputation. See the foreword to his work *Medieval Administration of the Channel Islands 1199 – 1399* in the edition re-printed by the Guernsey Bar in 2004.

¹⁶ On this topic see StJohn Robilliard’s paper *Perceptions of Duke and Duchy in Commise 1204*, published by the Guernsey Bar, 2005.

and customs continued to apply, albeit now in the context of a separate jurisdiction from the Norman mainland.¹⁷

Distinct Guernsey law

27 It is tempting to date a distinctive Guernsey law from this time; but in truth it is likely to have emerged before then in the form of regional differences pre-dating the rupture of 1204. Darryl Ogier notes, for example, that the first known reference to Guernsey's Royal Court is in a charter of 1179.¹⁸ In other words a distinct legal infrastructure pre-existed 1204 and therefore very likely distinct customs also, if only those imposed by geography. The process would have been accelerated considerably after 1204. Le Patourel writes -

“Basically, then, the medieval law of the Channel Islands was the customary law of Normandy, which found its fullest expression in the *Grand Coutumier* of the mid-thirteenth century. The origin of their legal systems has therefore to be sought in this general context, for the fact that they were ruled by the king of England who respected their Norman law was in itself a sufficient reason for giving them a very independent judicial administration. But, like many other more or less isolated or otherwise distinct communities in Europe during the Middle Ages, the islands had a body of custom which was all their own.”¹⁹

28 So, we have custom on custom; a common Norman base with local variation in the context of a separate legal jurisdiction. The *Grand Coutumier* was known and used in the Islands (in Jersey it was known as the *Summa of Maukael*) but subject to local usages. Indeed there are intriguing examples of difficult legal issues arising in the Islands being referred to Norman courts for an opinion after 1204. Le Patourel cites an example in 1328 concerning an issue relating to the rights of a priest's illegitimate children.²⁰ Much later in history John Kelleher cites the example of a ship abandoned off the coast of Sark in May 1608. An agent was sent by the Guernsey authorities to Rouen to consult the judges and advocates of the Admiralty Court (*l'Amirauté en la Table de Marbre*).²¹

The Constitutions of John and the Précepte d'Assize

29 This separateness of identity of institutions and law is evidenced in various documents, but particularly two rather shadowy documents, one known as the Constitutions of King John and the other the *Précepte d'Assize*. As its name implies, the former is said to date back to the reign of John (who died in 1216); the substance of the second is said to date to 1331 but the document itself claims to have been produced in

¹⁷ The desire to preserve what Le Patourel calls the *status quo ante bellum* is evidenced by charters identified by Le Patourel in *Medieval Administration of the Channel Islands 1199 – 1399* at pp.36 *et seq.*

¹⁸ *Ibid.* p78.

¹⁹ *Ibid.* II p203.

²⁰ *Ibid.* II p202.

²¹ See John Kelleher's paper *The Mysterious Case of the Ship Abandoned off Sark in 1608: The Customary Law Relating to Choses Gaives* published in *Commise 1204*.

1441.²² The second is particularly suspicious because it refers to the right of the Bailiff and Jurats to inspect the castles and fortresses of the island to ensure that there are, *inter alia*, sufficient canons and powder. It is unlikely, although not technically impossible, that there would have been much in the way of artillery in Castle Cornet in 1331.

30 The Constitutions of King John are discussed at some length in Everard & Holt's *Jersey 1204*.²³ For them, the document (at least the most frequently cited version) dates back to the late thirteenth or fourteenth century. Its importance is that it evidences the establishment of the institution of the Jurats in the Islands who were "to keep the pleas of the Crown and other rights pertaining to the Crown". Another of the constitutions refers to the obligation of the Warden ("*ballivus*"), under the supervision of the jurats, to deal with certain forms of action which could otherwise only be initiated by the issue of a writ in the King's name.²⁴

31 The *Précepte* itself is a quite lengthy account of the various offices and mutual rights and duties *inter alia* of the Bailiff, the Jurats, the Governor, Greffier, Sergeant, and Prévot. It also mentions the very important right that *nul individu n'est obligé de plaider hors de l'île*, i.e. the notion that you could not action a Guernseyman (presumably over a Guernsey matter) outside of the Island, and particularly not in the King's Courts in London. This last privilege reflects a tension that emerged during the late thirteenth and early fourteenth centuries, when Justices would be sent from England to hold periodic assizes and enquiries (pleas *de quo warranto* i.e. by what right ...) in the Islands. This caused great resentment and was eventually abandoned in 1331 with the position being formalised in 1348 when the Keeper of the Islands (predecessor of the Governors) was given full judicial powers, powers which could only be exercised by the Courts.²⁵

Rolls of the Assizes

32 A number of Rolls of the Assizes from that time survive. Le Patourel identifies records for the eyres of 1299, 1304, 1309, 1320, 1323 and 1331.²⁶ The Rolls of the Assizes for 1309 were published by the *Société Jersiaise* in 1903. They are a fascinating record of the events and concerns of Channel Island society almost 700 years ago. Note, for example, this unfortunate happening -

"They present also that since the last assizes Robert Burnof was found bound by the throat with a certain rope fastened to a certain boat, and he had fallen through drunkenness out of the said boat, & William Goies who was with him in the aforesaid boat drew him in by the said cord. And the said William was not suspected thereof. Verdict, by misadventure."

²² There is a copy at the end of Warburton's *Traité sur l'histoire, les lois et coutumes de L'île de Guernesey* written in 1682, but not published (at least not published in French) until 1831.

²³ Pub. by Thames & Hudson, 2004 at pp. 156 *et seq.*

²⁴ *Ibid* p160 of Everard & Holt.

²⁵ See Le Patourel, *The Origins of the Channel Islands Legal System*, *ibid.* at II 208.

²⁶ *Ibid.* II 208.

Charters

33 In addition to the Constitutions and the *Précepte*, various Charters were made in respect of Guernsey from time to time by the English Crown. These have been collected together, translated and commented on by Dr Timothy Thornton in his monograph, *The Charters of Guernsey*.²⁷ These charters are formulaic and essentially serve to state and re-state (a) how matters stood as between the Crown and the Island in the past (b) to confirm old privileges (c) sometimes grant new ones and (d) essentially confirm the continuance of a special relationship between Bailiwick and sovereign. Dr Thornton says in his introduction -

“The century following John’s loss of Normandy saw the customs of the island tested by forces which were increasingly and dominantly English, but it saw them successfully defended. The story of the island’s charters is the story of the way this defence of the island’s customs and privileges played out, and of the way that further privileges were granted and won. This reflects on the power and influence of the island community, but also on the power and interests of the Crown. The context for this was provided chiefly by the wider relationships and tensions between the English and the French.”

The Charter of 1560

34 The 1560 charter (letters patent) of Elizabeth I was of particular importance, going “... into detail about aspects of the island’s position which were expressed previously, and many which were not”.²⁸ Clause 1 notes, *inter alia*, the “very many rights, jurisdictions, privileges, immunities, liberties” which the people of Guernsey have enjoyed including “... the right of jurisdiction they were vested with, to take into their consideration, to decide, discuss, hear, and determine, and to proceed in the premises, and keep records of their proceedings *according to the laws and customs practised of old*, and approved in the said islands and other places aforesaid; except in certain cases reserved from time to time to our royal cognisance”.²⁹ Clause 2 praises the islanders for their past courage and loyalty (which included recovering Jersey from the French on one occasion) and candidly observes that the charter is “... to the end, not only to show some distinguished testimony and certain marks of our favour ... but also to encourage them, and their posterity for ever, to persevere and continue inviolably in their accustomed and due obedience towards us and our heirs and successors”. *Quid pro quo* indeed. Clause 3 provided for freedom from all English “... tributes, tolls, customs, subsidies, hidage, taylage, pontage, panage, murage, fossage, works and warlike expeditions (except in case our body of ourself, the aforesaid Queen, her heirs and successors, should be held in prison (which God avert)), and of and from all other contributions and exactions whatsoever ...”. This was, *inter alia*, a very early free trade agreement. Clause 4 maintains the neutral trading status of the

²⁷ Pub. by Woodfield, 2004.

²⁸ Thornton, *ibid.* at p74 *et seq.*

²⁹ Which would typically comprise treason, forgery of money and assault of the Bailiff or certain other Crown office holders. Emphasis in the quotation is added.

island even in times of war to the effect that “both enemies and friends, could and might freely, lawfully, without danger or punishment, come to, resort to, go to and fro and frequent the said islands ... to conduct their lawful business there”. Clause 5 confirms the giving and granting to the bailiff and jurats of the island “full and absolute authority, power and faculty to have the cognisance, jurisdiction, and judgment concerning and touching all and all sorts of pleas, processes, law-suits, actions, quarrels, and causes arising within the islands and maritime places aforesaid; both those actions which are real, personal, and mixed and those which are criminal and capital, and to proceed in the said islands, and not elsewhere, in hearing the parties ...”. Clause 6 confirmed the right not to be “... cited, or summoned, or drawn into any lawsuit, or forced in any manner by any writs or process, issued from any of our courts of the kingdom of England, to appear and answer ... touching or concerning any thing, dispute, causes, or matters in controversy whatsoever, arising in the aforesaid islands ...”. Clause 7 sweeps up any other rights and privileges not expressly mentioned and confirms them. Clause 8 reserves the Crown’s sovereignty over the islands and historic rights generally, subject to a right of appeal in all cases reserved to the Crown’s cognisance “but in no other case”. Clause 9 appears to confer a right to obtain copies of the charter freely on request. Clause 10 simply confirms what has gone before, notwithstanding any want of particularity there might be.

L’Approbation des Lois

35 Ironically, it was not very many years later that Queen Elizabeth I had reason to enquire into the “true state of that Isle” and sent commissioners to Guernsey to make enquiries. An Order in Council dated 9th October 1580 records that they found complaints of “want of due administration of Justice through the libertie, the Bailiffe and Jurats do take unto them selves to directe their Judgements by presidents, wherein there is neyther certainty nor rule of Justice ... forsaking the Customarye of Normandie whereunto they should holde them selves ...”. The Bailiff and Jurats were ordered to follow the *Grand Coutumier* save in those respects where local practice and law differed, as to which they were to produce for the Privy Council a written report.³⁰ Meanwhile they were only to observe variations from the *Grand Coutumier* such “... as they can shew have ben used there time out of minde ...”. The order appears not to have been respected because a further Order in Council followed dated 30th July 1581 again required the making of “... a booke of the sayd Lawes and Customs ...”.

36 There had been a number of printed editions of the *Grand Coutumier*. De Gruchy records editions in 1483 (as noted above), 1490, 1510, 1515, 1523, 1527, 1534, 1539, 1552 and 1578. There had also been a number of commentaries, namely those of Le Rouillé and Tanneguy-Sorin, but principally that of Guillaume Terrien which had appeared posthumously in 1574. It was to Terrien that the Bailiff and his team turned. They sought to define Guernsey law by reference to Terrien’s commentary. They purported to go through Terrien literally chapter by chapter saying whether it coincided with Guernsey law

³⁰ The Bailiff and Jurats were to be joined by 12 men appointed by the Governor for the purpose of producing their report.

and summarising any distinctions. This text was called *L'Approbation des Lois* and itself became Guernsey law by an Order in Council dated 27th October 1583.

37 Somewhat bizarrely, this entire process appears to have overlooked the fact that in continental Normandy the *Grand Coutumier* was finally being comprehensively reformed and rewritten as an official code. Just 17 weeks earlier, on 1st July 1583 the new *Coustumes du Pays de Normandie, anciens ressorts et enclaves d'iceluy, or la Coutume Redigée or Reformée*, the Reformed Custom came into force. It was not as if this came as a surprise. The obsolescence of large parts of the *Grand Coutumier* had long been appreciated and commented on; after all, it was over 300 years old even then.

38 In any event, *L'Approbation* was considered to be seriously defective, as appears from the 17th century work of the Guernseyman Thomas Le Marchant, *Remarques et Animadversions sur L'Approbation des Lois et Coutumier de Normandie*, although the book was not actually published until 1826. Le Marchant was fiercely critical of the *Approbation* and wrote a substantial work literally taking it apart, pointing out where it was wrong and seeking to remedy the deficiencies. He did not hold back in his criticism of the *Approbateurs*. His comment on *L'Approbation's* treatment of p1 of *Livre 1* of Terrien is as follows -

“*L'Approbation commet une très-lourde faute dès l'entrée...*”

which translates as -

“The Approbation commits a very serious fault right at the start ...”

39 If one pauses to think, Le Marchant is a commentary on a commentary (*L'Approbation*) on a commentary (Terrien) on the *Grand Coutumier*, now over 400 years old by the time he was writing.

Other Guernsey law texts

40 There is a very readable, if brief, account of Guernsey's history, laws and customs in Warburton's *Traité sur l'Histoire, Lois et Coutumes de L'île de Guernesey*, written in 1682 but again not published until 1831 (although there was an earlier English edition).³¹ This is presented from an English perspective, but plainly a very well informed one.

41 In the 18th century another Guernseyman, Laurent Carey, produced his *Essai sur les Institutions, Lois et Coûtumes de L'île de Guernesey*. Yet again this was a text written long before it was published. Carey died in 1769 but his work was not printed until 1889. It is 232 pages long and well worth reading from cover to cover, even if some of the French is very difficult. He has been accused of merely regurgitating Terrien and Thomas

³¹ There is some argument as to the true authorship of this treatise. Darryl Ogier argues persuasively that it was in fact Lord Hatton, Governor of Guernsey between 1670 and 1706. See his paper at p870 of the 1990 Transactions of the *Société Guernesiaise*.

Le Marchant, but that is unfair. It is a useful distillation of Guernsey law, practice and legal institutions. It also demonstrates how Guernsey would look to the *Coutume Reformée* where necessary, notwithstanding *L'Approbation* and the nailing of Guernsey's legal colours to the mast of Terrien and the *Grand Coutumier*. It followed that commentators of the *Coutume Reformée* were regularly consulted, as indeed they are to this day. These included figures such as Routier, Pesnelle, Bérault, Godefroy, D'Aviron and, above, all Henri Basnage, whose work is particularly well written. There was also a very helpful *Dictionnaire Analytique, Historique, Etymologique Critique et Interprétatif de la Coutume de Normandie* written by M. Houïard and published in 1780. The work is substantial, being in four volumes.

42 Returning to Guernsey, Carey's work was followed, at least chronologically, by a passionate statement of the *Rights and Immunities of the Island of Guernsey*, generally credited to William Le Marchant, and printed in 1771. This takes the form of a speech in defence of Guernsey against the Crown's attempts to impose customs controls in the Islands so as to prevent the smuggling of alcohol into England from the Islands. The work is only 60 pages long.

43 In the nineteenth century two works of particular note appeared, namely James Gallienne's *Traité de la Renonciation par Loi Outrée*³² et de la Garantie which appeared in 1845 and Peter Jeremie's *On Real Property and Taxation in Guernsey*, 1866 (there are in fact several different editions). The former is in French and the latter in English. Jeremie is also noteworthy for the record of his appearance in 1861 before the Commissioners appointed to inquire into the civil, municipal and ecclesiastical laws of Jersey.³³

44 There were others writing at about the same time, who took a very dim view of contemporary Guernsey law and procedure. Jonathan Duncan in *The History of Guernsey with Occasional Notices of Jersey, Alderney and Sark*, London 1841 memorably observed that -

“Justice in all its varied and complicated forms, is administered by the bailiff and jurats. There is no subdivision of legal labour. The same men who authorize a mountebank to exhibit his tricks in the streets, decide on character, property, and life. Such a system may appear absurd and dangerous to an English reader, but he should bear in mind that as there is no *law* in Guernsey, the inconveniences resulting from this system are not so grievous as might be imagined. With very rare exceptions, the jurats are elected from the mercantile class, are utterly ignorant of the principles of jurisprudence, and little versed in its practice; they usually pronounce judgment from a common sense view of the matter in litigation, as arbitrators or referees; they are guided solely by facts, and pay no regard to law, unless in matters of real property, concerning which defined rules exist to a certain

³² *I.e.* distinguishing between voluntary renunciation of *immeubles* and compulsory renunciation by legal process.

³³ See the minutes of his evidence commencing at paragraph 14,057.

extent. *Domat* and *Potier* (sic), *Coke* and *Mansfield*, are treated with little courtesy by the royal court of Guernsey.”

45 This takes us very neatly to the next stage of our story.

What customary law is and what it is not.

46 We had left continental Norman law back in the 15th and 16th centuries. Of course, by this time in history the Renaissance was in full swing. Although the darkness of the early Middle Ages has, perhaps, been over-stated, there was undoubtedly a time when society had regressed which was itself reflected in a less sophisticated law of only limited ambition, customary law. This is, naturally, a gross generalisation. We know that Roman law was being studied in Normandy from the 12th century onwards, but equally Génestal was able to find only two notable borrowings from Roman law by the *vieille coutume* before the 13th century.³⁴

47 More sophisticated law was required than customary law could provide; not that customary law ever intended to do more than it in fact did. If you consider the table of contents for, say, Terrien, it is obviously not a complete legal code. Contract law barely features. It will also be noticed how often Terrien cites Roman jurists and Royal ordinances. It would be interesting to analyse just what proportion of Terrien is in fact made up of customary law. The result might be surprising.

48 This brings us to the very influential French jurist, Jean Domat,³⁵ who summarised matters in his *Les loix civiles dans leur ordre naturel* in this way -

“In France there are four different kinds of laws, - the ordinances, and the customs, which are the laws peculiar to that kingdom; and such parts of the Roman law, and of the canon law, as are there observed.

These four sorts of laws regulate in France all matters, of what nature soever; but their authority is very different.

The ordinances have a universal authority over all the kingdom, and are all of them observed in all parts of the kingdom, except some of them whose dispositions respect only some of the provinces.

The customs have their particular authority; and each custom is confined to the limits of the province or place where it is observed.

The Roman law hath in the kingdom of France two different uses; and have for each of them its proper authority.

³⁴ See Génestal's paper for the 1927 *Rencontre* at pages 53 and 54.

³⁵ Domat lived between 1625 and 1696. *Les loix civiles* appeared in 1689.

One of these uses is, that it is observed as a custom in many provinces, and is there in the place of laws in several matters. These are the provinces of which it is said, that they are governed by the written law; and for the usage of those provinces the Roman law has the same authority as in the other provinces their peculiar customs have.

The other use of the Roman law in France extends to all the provinces, and comprehends all matters; and it consists in this, that those rules of justice and equity which are termed the written law, because they are written in the Roman law, are observed over all the kingdom. Thus, for the second use, it has the same authority as justice and equity have over our reason.”³⁶

49 This important statement demonstrates the *mélange* which was pre-revolutionary French law, but this mixture was reflected in Guernsey law which continued to be influenced by continental Norman law and practice, which itself was inevitably influenced by, say, the *Coutume* of Paris and necessarily was affected by French Royal ordinances. It also explains why we find De Ferrière translating Justinian’s Institutes from Latin into French, and supplying a commentary, in the year 1714³⁷.

Robert Joseph Pothier

50 In 1699, the French jurist Robert Joseph Pothier was born. He died in 1772, having devoted his working lifetime to the study of law. He produced a new edition of Justinian’s Digest, the much more massive companion of the Institutes. He produced his own commentary on the *Coutume of Orléans*, the city where he spent his life. However, his crowning and lasting achievement was his *Treatise on the Law of Obligations* and the various sub-treatises. In French law the notion of obligations covers both the law of contract and tort, but it is fair to say that Pothier’s predominant concern was the law of contract.

51 This Treatise was to be enormously influential, not only in continental law but also English law. It was translated into English in 1806 by William Evans, an English barrister. A facsimile edition of the translation is readily available today. David Ibbetson in his *A Historical Introduction to the Law of Obligations*³⁸ says this -

“Around 1800, the rather half-hearted tentative sallies in the direction of a theorized law of contract were superseded by more full-blooded attempts to fit the Common law into an apparently rational framework. ... in the last decade of the eighteenth

³⁶ Emphasis added. See p94 of *The Civil Law in its Natural Order* by Jean Domat, translated from the French by William Strahan, re-printed in 1980 and available from Lawbook Exchange. See also the important work of Stephanie Nicolle QC, *The Origin and Development of Jersey Law, an Outline Guide*, revised edition 2003.

³⁷ See also John Beaver’s 1724 translation of De Ferrière’s *The History of the Roman or Civil Law. Shewing Its Origin and Progress; How, and When the Several parts of It Were First Compil’d; With Some Account of the Principal Writers and Commentators Thereupon; And the Method to be Observ’d in Studying the Same. Written Originally in French. To Which is Added, Dr. Duck’s Treatise on the Use and Authority of the Civil Law in England. [With] The History of the Origine of the French Laws, Translated from the French by J.B. Esq., With a Preface and Notes Shewing, the Analogy of the Laws of the Antient Gauls and Britons.* London: Printed for D. Browne, 1724. Reprinted 2005 by The Lawbook Exchange, Ltd.

³⁸ OUP 1999.

century there started to appear a steady stream of treatises on the law of contract - Powell (1790), Newland (1806), Comyn (1807), Colebrooke (1818), Chitty (1826), followed by Addison (1847), Leake (1867), Pollock (1876), Anson (1879) - in which the fundamental questions of the nature of contractual liability had to be assessed.

The model from which judges and writers derived their inspiration was the *Traité des obligations* of the French jurist Robert-Joseph Pothier, first published in 1761 and translated into English in 1806.”

52 Returning to 19th century Guernsey there is evidence of both Pothier and Chitty being cited in two cases from 1842.³⁹ Indeed Pothier has consistently been cited in Guernsey (and Jersey) courts to this day. The excitement which is sometimes generated in Jersey about the future of their contract law overlooks the fact that Pothier is the common ancestor of both French and English contract law. It is no coincidence that they are so similar.

The Code Civil

53 The French revolution of 1789 sounded the death knell for French customary law. (It is important to note that Normandy was not alone in having its own customary law. In the North of France there were 65 general customs and more than 300 local variations.) However, it was not until 1804 and the promulgation of the *Code Civil* that customary law came to an end in continental Normandy.⁴⁰

54 The Code had a very substantial and lasting effect, not just on French law, but also much of European law. It was itself very heavily influenced by Pothier; indeed some editions are printed with a concordance demonstrating where in Pothier the relevant article of the Code is to be found, or at least its inspiration.

55 The Code was influential also in Guernsey. The Evidence Law of 1865 plainly borrows from it. An 1854 Ordinance on usufruct or *usufruit* largely copies the relevant articles from the Code. There is more research to be done to identify the full extent of the borrowing.

56 The Code itself is in danger of being misunderstood. It was not a revolutionary document but a reactionary one; only to that extent was it the product of revolution. It marked the end of the revolution, not the beginning. Its production was overseen by lawyers very much the product of the *ancien regime* and *droit*. It maintains *l'esprit* of customary law much more faithfully than any other contemporary source and deserves to be consulted more often in the Islands.

The influence of English law

³⁹ See Robilliard, *The Guernsey Law of Contract, an explanation*, (1998) 2 JL Review 35.

⁴⁰ And not even quite then. Note the paper of Corinne Bléry in *Commise 1204* and how Norman customary law continued to govern property relations between those married before the law changed. In other words Norman customary law survived for as long as the last man or woman married under that law survived, presumably some way into the 19th century.

57 Of course, since the 19th century and throughout the 20th century the story of Guernsey law has been one of the increasing influence of English common law and statute law. In some areas that influence is near total, for example in the law of torts. The extent of the draftsmen's reliance on English statutes, whilst understandable, is regrettable given the rarity these days of deserving English law-making. However, Guernsey law remains very distinct in the context of the law of realty and succession where it retains many customary traits. If, for example, an issue arises relating to servitudes (not easements, note) then one will very swiftly find oneself referring to Basnage's treatise on the subject in volume two of his *oeuvres* as well as the 19th century work of Pardessus, even though he was writing on the *Code Civil*. The Code itself would also be considered. The same is true of contract law also, which would still be influenced powerfully by Pothier and the Code.

The influence of European law

58 I suggest however that there is a more recent influence which is undoubtedly in the ascendant and likely to have a profound effect not just on the law of continental Europe but also English law and, however indirectly, Guernsey law. That influence is EU law. The direct effect of EU regulations in English law and the requirement for domestic implementation of directives is obvious. We may say that the impact of EU law upon Guernsey is minimised by the buffer of Protocol 3, and certainly it helps. However, the reality is that Guernsey law is influenced by the law of its neighbours, whether Normandy, France, England or Jersey. Guernsey has also taken express powers to implement Community provisions by the European Communities (Implementation) (Bailiwick of Guernsey) Law 1994 ("the 1994 Law") and has used those powers⁴¹.

59 There is, besides, a gradual process of assimilation going on in European law; something to which English law and lawyers have not yet fully woken up. It takes little in the way of a stretch of the imagination to foresee a new European-wide *Code Civil*. There is already a draft European contract code. That code will of course have been influenced very heavily by Roman law. We can expect a new *ius commune*, which more or less brings us back to where we started, two thousand years ago.

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⁴¹ See in particular the Guernsey Court of Appeal decision in *States of Guernsey v Jersey Fishermen's Association Limited* noted at (2005) 9 JL Review 354.

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