

[Return to Contents](#)

The Cry For Constitutional Reform- A Perspective From The Office Of Bailiff

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"[I]t is very desirable that the Bailiff should not be president of the court and president of the States; as president of the States, the Bailiff often comes in contact with the members, who are not always very sparing in their attacks upon him, and I think it tends to lower the dignity of the president of the court, and very often makes him a political man" [1]. Thus spoke Helier Simon, an *écrivain*, while giving evidence on July 26th 1859 to the Royal Commissioners appointed to enquire into the civil laws of Jersey. It was an observation which found no favour when the Commissioners reported in 1861, but the opinion of Mr. Simon has been echoed from time to time ever since. It was repeated to the Privy Council Committee in 1946 [2] and again to the Royal Commissioners on the constitution in 1973. More recently it has been renewed by some senior members of the States in both Bailiwicks of Jersey and Guernsey, and has been given an added impetus by a decision in October 1998 of the European Commission of Human Rights [3]. It must now be taken seriously. The purpose of this article is to attempt to lay the foundations for intelligent discussion of an issue which is of fundamental importance for the Bailiwicks. The author can speak with inside knowledge of course only in relation to the Bailiwick of Jersey, but the remarks which follow may be of interest in Guernsey too. It may be objected that he is inevitably partisan. It is of course true that those who are amongst the trees cannot always see the wood. But there ought on the other hand to be certain advantages from looking outwards from within the thicket. This is not intended to be a polemic. Others must judge the success or failure of the end result.

History

The history of the office of Bailiff is a subject worthy of study in its own right, and cannot be attempted here [4]. The present rôle of the Bailiff can only be fully appreciated in the context of the Island's constitutional history, but the briefest historical excursion must suffice. The office is certainly of great antiquity. According to Le Quesne [5] the name was derived from the Latin word *bajulus*, signifying "protection". The first recorded Bailiff of Jersey is Sir Philippe Levesque who was appointed in 1277. But there seems little doubt that the office was in existence before 1204 and may even have ante-dated the Norman conquest [6]. The titles Custos, Warden and Bailiff seem to have been used interchangeably in the 12th and early 13th centuries. Only after the separation from Normandy in 1204 did the functions of the official who is now known as the Lieutenant Governor and the functions of the Bailiff begin to diverge. Originally the Bailiff was probably a sub-warden, entrusted with the administration of justice and civil affairs. The Warden, or Captain, eventually became known as the Governor with the responsibility for the defence of the Island and for military affairs. Yet defence and military affairs were not in medieval times the discreet and contained sphere of activity which they are now in time of peace. In time of war, with the enemy at the gate, the influence of the military, with the Governor (or his delegate) at its head, was all-pervasive. Most readers will know how King John, in order to maintain the

loyalty of the Islanders, granted privileges including the right to be governed by the laws and customs then in force; how the benches of Jurats became established by the constitutions of King John and how "[t]he Islanders ... found judicial 'autonomy' through the liberties of their Jurats as custodians of their customary law"; [7] how the States Assembly emerged in the 15th century from the process of consultation by the Royal Court with the rectors and *connétables* of the twelve parishes.

The decision by King John not to incorporate the Islands into the realm of England but to establish separate administrations, sowed the seeds not only for the unique constitutional status of the Islands but also for future conflict amongst the Crown's appointees and between those appointees and the local people.

The Islanders remained fiercely loyal to their King/Duke, but equally determined to maintain their own laws and customs and to claim their distinct identity. As the years unfolded, and further privileges were conferred as the price of and reward for continuing loyalty, the Islanders' *quasi*-independent status grew. At first through the Royal Court and then through the States, the Islanders asserted their privileges and freedoms conferred by successive Royal Charters.

The office of Bailiff has been throughout the centuries at the centre of this constitutional development, and usually not far from any controversy which raged. Much of course depended on the personalities and characters of the Bailiff and other leading Island figures. Some Bailiffs found themselves in conflict with their Jurats or with the States. But taking the broad view, as the author must for these purposes, the critical disputes arose between the Bailiff and the Governor. Perhaps none was more critical than the long feud between Sir John Peyton, appointed as Governor by James I in succession to Sir Walter Raleigh, and Jean Hérault, the Bailiff between 1615 and 1621 and again between 1624 and 1626 [8]. Both were men of strong and uncompromising character. When Peyton claimed that the power of appointing bailiffs lay with the Governor, and that Hérault's appointment was accordingly defective, Hérault asserted that the Bailiff could only be appointed by the King. An Order in Council of August 9th 1615 found in Hérault's favour [9]. He then however propounded the novel theory that the Governor was a mere military officer and that the Bailiff was the King's representative and the real head of the insular government. The Privy Council did not agree but by its Order of February 18th 1617 [10] the Council laid the foundation of the division of responsibility which exists today.

"[W]e hold it convenient that the charge of military forces be wholly in the Governor, and the care of justice and civil affairs in the Bailiff."

The necessity of balancing the powers of the Governor and the Bailiff was emphasised by the Commissioners Conway and Bird in their report of 1617:-

"And for the civil government in cases where the civil and martial may be for His Majesty's service mixed, your honours may be pleased to limit the pretences. A worthy Governor being a sure pillar to that estate, which lies remote from this Kingdom and a worthy Bailiff being a principal support for the conservation of the estate, if their virtue and good affections be seconded with meet and due limited commission; for where they cease to balance one

another equally the danger grows alike from either of them being left with unlimited power, if malice, ambition, or desire of change possess them." [\[11\]](#)

Hérault may not have been the first Bailiff to view himself not only as a servant of the King but also as a protector of the Islanders' privileges. But he certainly secured for the office, and for the Royal Court and the States, a recognition by the Crown that in the spheres of justice and civil affairs the Bailiff took precedence over the Governor. The Governor remained however a potent force. England had made peace with Spain in 1604 and the French wars of religion had ceased; but renewed hostilities with France were imminent. Peyton needed money for insular defence. He called a meeting of the States on April 15th, 1620 at which Hérault protested angrily that it was for the Bailiff to convene the Assembly. A marker had been laid down, but the transfer of political and administrative authority over domestic affairs from the Crown to the States was gradual.

An important milestone was passed in 1771 when the so-called Code of Laws was adopted by Order-in-Council of March 28th in that year. The Order marked the end of the legislative power of the Royal Court, and provided "that no Laws or Ordinances whatsoever, which may be made provisionally or in view of being afterwards assented to by His Majesty in Council, shall be passed but by the whole Assembly of the States of the said Island....." [\[12\]](#). In 1800 the influence of the Crown was still substantial. Dr. Kelleher has described the relationship in these terms:-

"By the beginning of the nineteenth century Jersey had achieved a high degree of self-government. The Crown was still effectively in control, but delegation enabled the local legislature, the States, (*Les États*), to exercise a greater share of power in initiating legislation and finance, subject to final ratification.

The States were composed of both elected members and Crown appointees. Each parish was represented by its municipal head, the *connétable*, who combined his rôle of parish administrator with membership of the legislature. Twelve Jurats or 'popular law-finders' were elected for life on an Island-wide franchise and sat both in the Royal Court and the States; The Island's rectors, appointed by the Crown, likewise sat in the legislature. The bailiff, the chief magistrate and effective civil head of the Island, also a Crown appointee, presided over the States." [\[13\]](#)

At the end of the twentieth century much has changed; the jurats and the rectors have been replaced by senators and deputies, all directly elected by the inhabitants [\[14\]](#). Five Crown appointees - the Bailiff, Lieutenant Governor, Dean, Attorney General and Solicitor General remain as *ex officio* members of the States. All have a right to speak but not to vote, save that the Bailiff has a casting vote as President of the Assembly. In the nineteenth century the Bailiff could convene the States only with the prior consent of the Governor [\[15\]](#). Today the States convene in ordinary session as they may by standing order determine. In extraordinary session they may be convened at the discretion of the Bailiff or on the requisition of seven or more elected members [\[16\]](#). In the Crown memorandum in the Jersey Prison Board case in 1891, the States were described as "[h]istorically and constitutionally ... not a provincial parliament or local legislature, but a municipal corporation or common council for the whole Island" [\[17\]](#). One hundred years later the States of Jersey are without doubt a provincial parliament or local legislature. They are

recognised by the Crown as having, for practical purposes, autonomy in relation to domestic affairs [18], and play an active part in the affairs of the Commonwealth Parliamentary Association. The Crown remains responsible for defence and for the Island's external relations [19]. It also has a reserve or residual power to ensure good government. But in terms of *de facto* responsibility for domestic affairs the Crown has withdrawn from the scene in favour of the States. Yet Jersey remains a dependent territory - a Crown dependency - closely linked to the Crown through Her Majesty's officers in the Bailiwick.

The Bailiff's functions today

In a sense this close relationship between the Crown and the States is best exemplified by the office of Bailiff. The Bailiff is appointed by the Queen and holds office during Her Majesty's Pleasure. He is also the President of the States and the Island's chief citizen, and is paid out of the public purse. He is of course accountable to the Crown, but in a real sense is also accountable to the people of Jersey and their elected representatives. No Bailiff could long continue if he did not enjoy the confidence of the States. His office bridges the divide between Her Majesty's Government in Whitehall and the Insular Government. He is a Crown Officer but he is also the guardian of the islanders' privileges and freedoms under the constitution. The oath administered to the Bailiff provides "that you will uphold and maintain the laws and usages and the privileges and freedoms of this island and that you will vigorously oppose whomsoever may seek to destroy them." [20] In earlier times, when the functions of the Bailiff were performed in the Island by a Lieutenant-Bailiff, the Bailiff himself would from time to time appear before the Privy Council to present the island's case [21]. None of this is inconsistent with the Bailiff's status as a Crown Officer. The Bailiff's function in this context is to protect against attack the Islanders' privileges and freedoms conferred by kings and queens down the centuries. It matters not from where the attack comes, even if from Her Majesty's ministers in England. In that event the Bailiff leads the States in resisting that attack.

But the threat to the Islanders' privileges and freedoms could come from the States Assembly itself. It is worth noting that the power of the States to enact legislation is limited. Primary legislation can be enacted only with the sanction of Her Majesty in Council. This requirement for royal sanction is an important safeguard against abuse of power for it enables every inhabitant to exercise his constitutional right to petition the Queen against the grant of royal sanction [22]. If the States were to seek to avoid the necessity for obtaining royal sanction by enacting regulations beyond their powers, the Bailiff would have the power (and arguably a duty) to intervene. Article 22 of the States of Jersey Law 1966 confers power on the Bailiff to enter his dissent to any resolution of the States susceptible of implementation if he is of the opinion that the States are not competent to pass the resolution. Where he does so, the resolution must immediately be transmitted to Her Majesty and, in the meantime and unless the consent of Her Majesty is obtained, the resolution is of no effect. Interestingly the Lieutenant-Governor has a similar power to veto any resolution of the States (other than a draft law which requires royal sanction in any event) but only in respect of such matters as may concern "the special interest of Her Majesty" [23]. What constitutes the "special interest" of Her Majesty is an interesting and undecided question. In the author's view it would not include the interests of Her Majesty's Government. The power of veto could only be exercised in the personal interests of Her Majesty or of Her Subjects in the Island. If that view is correct, the powers of veto and dissent are the opposite sides of the same coin. Saving any personal interest of the Queen, both the Lieutenant Governor and the Bailiff may intervene only to protect the interests of the people. These

powers of veto and dissent were described by the States in a memorandum submitted to the Privy Council in 1882 as "the negative voice which the constitution has entrusted respectively to the Governor and to the Bailiff...". The Bailiff's power has its origin in an Order in Council of June 2nd 1786. Neither power appears to have been exercised for a long time.

It is important to emphasise that the Bailiff's powers and duties in relation to the public administration are to be exercised constitutionally. In particular they are to be exercised in the context of the constitutional convention which has evolved over the past 100 years, but which has crystallized since 1948, that the Bailiff does not usurp political responsibilities which are properly the functions of the elected members of the States. The Bailiff's duties are to advise and to warn, but not to take political decisions.

What then are the principal functions of the Bailiff today? They may conveniently be grouped under four headings, viz. -

the Presidency of the Royal Court,

the Presidency of the States,

ancillary functions deriving from the Presidency of the Royal Court, and

ancillary functions deriving from the Presidency of the States.

(1) Presidency of the Royal Court

The Bailiff is the *Chef Magistrat* (Chief Justice) and presides over the Royal Court. His judicial functions are beyond the scope of this article and little more need be stated under this heading. It may however be worth recording that he is a judge of law but not generally of fact [24]. He sits with two or more jurors whose functions are to decide the facts in civil cases and to determine sentence in criminal cases [25]. The Bailiff is also ex-officio the president of the Court of Appeal. [26]

It was to the Bailiff that King Charles II entrusted the Royal Mace in perpetuity. The Book of Warrants of the Lord Chamberlain, Edward, Earl of Manchester contains an entry dated July 31st 1663 ordering the preparation and delivery to "the Bailiff of Jersey a silver mace gilt of 200 ounces" [27]. The Bailiff is also custodian of the Island's seal, first granted by King Edward I in 1279. [28]

(2) The Presidency of the States

The Bailiff is ex-officio the President of the States. This presidency finds statutory form in Article 1 of the States of Jersey Law 1966 but may be traced back to the very origins of the States as a parliamentary assembly in the sixteenth century. The States Assembly emerged from the process whereby the Royal Court, then a legislative as well as judicial body, consulted with the rectors and *connétables* of the twelve parishes. The Bailiff presided over the Royal Court and it was natural that he should preside also over the enlarged body which incorporated the members of the court. The Bailiff has no right to vote other than by a casting vote when the votes of elected members are equally divided. Traditionally he exercises his casting vote in order to preserve the status quo. Generally the Bailiff acts as a

speaker, as in any democratic assembly, ensuring good order and the observance of the rules of the assembly [29]. Until relatively recently the rules were unwritten. In 1966 however the States adopted standing orders for the regulation of their proceedings and business. As in many Commonwealth jurisdictions, those standing orders borrow heavily from the standing orders of the House of Commons at Westminster. Standing Order 49 provides that "any question of order or procedure not provided for in these Standing Orders shall be decided by the Bailiff, whose decision in the matter, or on any disputed point of interpretation of any of these Standing Orders, shall be final." For completeness we should add that Article 59 of the States of Jersey Law 1966 contains a saving provision relating to the prerogatives, rights and privileges attaching to (*inter alia*) the office of Bailiff.

Ancillary functions deriving from the Presidency of the Royal Court

These functions naturally embrace ultimate responsibility in Jersey for the administration of justice. The Judicial Greffier, or Clerk of the Royal Court, is appointed by the Bailiff [30], but may be suspended only by the Superior Number of the Royal Court and dismissed by Her Majesty in Council.

The Bailiff presides over the College of Electors, a body established by the Royal Court (Jersey) Law 1948. Formerly the Jurats were members not only of the Royal Court but also of the States, a dual function which came to an end in 1948. The Jurats are now appointed by the College of Electors which is composed of the Jurats, the *Connétables* of the twelve parishes, the elected members of the States and all practising advocates and solicitors of the Royal Court. The Bailiff is a member of the College but may vote only in the event of a tie after a second ballot. [31]

The Bailiff also presides over the Licensing Assembly, more properly known as the Assembly of Governor, Bailiff and Jurats. This Assembly is the remains of a body which once exercised considerable administrative authority. Its history is outside the remit of this article; the *Loi (1921) sur l'Assemblée de Gouverneur, Bailli et Jurés (Transfert de Pouvoirs etc.)* transferred to the States all the functions of the Assembly save the function of granting licences for the sale of intoxicating liquor. That function was confirmed by the Licensing (Jersey) Law 1974. The Licensing Assembly meets regularly four times a year, although it can convene in extraordinary session.

Numerous statutes empower the Bailiff to issue search warrants. [32]

(4) Ancillary functions deriving from the Presidency of the States

The principal derivative function is that the Bailiff is the Island's chief citizen. It may seem curious to describe this status as a derivative function. In one sense it is not a derivative function at all. The Island is a Bailiwick and its chief citizen is a Bailiff. That status antedated the emergence of the States Assembly and did not therefore historically derive from the Presidency of the States. But the author is attempting to describe the functions in the context of the current state of the constitution. With the development of the States into a parliamentary assembly it is, in the author's view, inconceivable that a Bailiff could remain the Island's chief citizen if he were not the President of the States. The authority to speak on behalf of the Island would disappear if the Bailiff's rôle were confined to the Royal Court. The status of chief citizen is accordingly described as a derivative function. The Bailiff represents the Island abroad and at home when dignitaries, whether members of the Royal

Family, ministers, ambassadors or senior officials, visit the Bailiwick. When important matters arise in relation between the Island and Her Majesty's Government, and a delegation of the States attends upon the relevant minister, it is usually the Bailiff who leads that delegation. The Bailiff's presence is not designed to trespass upon the political responsibilities of the President of the States Committee in question, but to add weight to the delegation. He will introduce the discussion but leave the development of the argument to the Island's elected representatives and senior officials.

A secondary derivative function is that the Bailiff is the channel of communication between the Insular Authorities and Her Majesty's Government. In the absence of a cabinet or central executive committee charged with the responsibility for governmental relationships with the United Kingdom, the Bailiff is the universal joint which enables the machinery of government to operate. He is the conduit through which official correspondence between the Insular Authorities and the Home Office is conducted [33]. Government by committee will not function unless some central authority exists. If, for example, the Education Committee is negotiating an agreement with the relevant authorities in Whitehall and beyond as to the funding of university education for Jersey students, the formal exchanges in those negotiations are relayed through the official channel of Bailiff to Lieutenant-Governor to Home Office. The negotiating position of the Insular Authorities (in this example represented by the Education Committee) is expressed in the formal letter of the Bailiff to the Lieutenant-Governor. The draft of that letter is prepared by the Committee's officials or by the Greffier of the States on their behalf and forwarded to the Bailiff's Department. The draft expresses the Committee's political stance. The Bailiff's function is to ensure that the letter is expressed in the appropriate diplomatic language and that it reflects the Island's constitutional position. The formal letter goes over the signature of the Bailiff to the Lieutenant-Governor; it is forwarded by Government House to the Home Office. The Home Office reply is also addressed to the Lieutenant-Governor but refers of course to the Bailiff's letter. "Official correspondence" therefore consists of letters from the Bailiff to the Lieutenant-Governor and from the Home Office to the Lieutenant-Governor, and copies of these are held by the Greffier of the States. Most official correspondence concerns international agreements or European Union matters which fall within the competence of the Policy and Resources Committee. The drafts of such correspondence are now prepared by officials in the Policy and Resources Department on behalf of the Committee.

The Bailiff exercises a power of control over public entertainment, which may not take place without his permission. This function probably emerged in the eighteenth century in response to disorder caused by licentious theatrical productions. Neither Poingdestre nor Le Geyt, writing at the end of the seventeenth century, records its existence. It found statutory expression for the first time in the Unlawful Public Entertainments (Jersey) Regulations 1992 which were enacted to confer powers of seizure and forfeiture of anything used in the commission of an offence. In exercising this censorial power the Bailiff may now seek guidance from an advisory panel for the control of public entertainment established by the States in 1988 [34]. This power to permit public entertainment is to be distinguished from the power to grant a seventh category liquor licence for places of entertainment which is vested in the Licensing Assembly. Article 71 of the Licensing (Jersey) Law 1974 provides that the grant of a seventh category liquor licence is restricted to premises in respect of which the Bailiff is prepared to authorise the offering of entertainment. The Bailiff's permission for public entertainment now serves two distinct purposes. Firstly it enables a control to be exercised on proposed venues from the viewpoint of public safety. An applicant for a permit is required to satisfy the Bailiff that the fire service, public health and

other relevant authorities have no reasonable objection to the arrangements which have been made. Secondly it enables an assessment to be made as to whether the public entertainment conforms to a reasonable standard of public decency. Some critics argue that this is inevitably subjective and is inconsistent with artistic freedom of expression within the constraints of the law of obscenity. Other critics (or even the same critics) would contend that there is no democratic accountability for the exercise of censorial powers. It might also be said that the exercise of these powers, which will sometimes require the Bailiff to take politically controversial decisions, should not be within the remit of the President of the Royal Court or the President of the States. [35]

The Bailiff is also the President of the Emergencies Council. This Council was established by the Emergency Powers and Planning (Jersey) Law 1990 and is composed of the Presidents of the Policy and Resources, Defence, Harbours and Airport, Public Services, Health and Social Services, Agriculture and Fisheries and Tourism Committees, and a *connétable* nominated by the Committee of *Connétables*. The Lieutenant-Governor and Attorney General are entitled to attend meetings of the Council which convenes routinely every quarter. The Council's functions are "to co-ordinate the planning, organisation and implementation generally of measures which are designed to guard against ... any happening ... that in any way endangers or may endanger the health or safety of the community or that in any way threatens to deprive the community of the necessities of life". In the event that the Lieutenant-Governor considers that events have occurred, or are about to occur, which threaten the national defence or the safety of the community, he may, after consultation with the Council, declare a state of emergency. Wide powers are thereupon vested in the Council to make orders for securing the essentials of life to the community.

Other relatively minor functions are vested in the Bailiff by various statutes. An example is the Civil Aviation (Investigation of Accidents) (Jersey) Order 1975. This Order empowers the Bailiff, *inter alia*, to request the Secretary of State to appoint an inspector to investigate any accident involving an aircraft, to appoint a Review Board, and to appoint a Commissioner if a public enquiry is directed by the Royal Court.

The perennial question

Are these functions too disparate or in potential conflict one with another to be held by one person? The question is one of perennial interest. In 1861 the Royal Commissioners appointed to examine the civil, municipal and ecclesiastical laws of Jersey observed:

"The Bailiff, in the first place, as President both of the States and of the Royal Court, combines legislative with judicial functions. Whatever may, in the abstract, be the objections to this combination, it will suffice for our present purpose to state that in Jersey there neither exists, nor can be provided, any other functionary at once learned in the law and of sufficient dignity to preside in the legislative body, and we therefore do not recommend any change in this respect". [36]

It was last raised before the Royal Commissioners in 1973. In their report the Commissioners recorded that they had received suggestions from the Guernsey Labour Group and the Jersey Communist Party that the office of Bailiff should be split. They stated:-

"The suggestion was opposed by representatives of both the States of Guernsey and the States of Jersey when we put it to them. They drew attention to the fact that in 1947 a Privy Council Committee looked at the matter and recommended no change. The Committee considered that the objection to the combination of the dual functions of the Bailiff would be justified only if it were established that in the States the Bailiff exercised undue influence in the course of deliberations or that in the court he allowed his political position to influence his decisions. No evidence had been tendered to the Committee in support of such contention. The Committee also considered that the Bailiff as President of the States exercised important functions in advising the Assembly on constitutional procedure, which, from the nature of the constitution required an intimate knowledge of the privileges, rights and customs of the Islands. We were told in both Islands that the States considered these arguments to be equally applicable today, that the arrangement whereby their President is appointed by the Crown is acceptable to the members of the States, and that importance is attached to the maintenance of the status of the office of Bailiff as the Island's chief citizen and representative." [\[37\]](#)

In their conclusions at paragraph 1527 the Commissioners state:-

"On the proposal put to us by private organisations in Jersey and Guernsey for splitting the office of Bailiff, we take the same view as the Privy Council Committee of 1947. Although an arrangement under which one person presides over both the Royal Court and the Legislative Assembly may be considered to be contrary to good democratic principle and to be potentially open to abuse, it appears in practice to have some advantages and not to have given grounds for complaint; and as the office of Bailiff is an ancient and honourable one which the States in each Island wish to see continued with its present range of functions, we see no reason for recommending a change."

The rôle of the Bailiff is now part of the remit of a Committee under the chairmanship of Sir Cecil Clothier appointed by the States to review the machinery of government in Jersey. [\[38\]](#)

European Convention of Human Rights

A new dimension has recently emerged. On October 20th, 1998 the European Commission of Human Rights concluded in the case of *McGonnell v United Kingdom* [\[39\]](#) that there had been a breach of Article 6(1) of the Convention "as regards the question whether the Royal Court [of Guernsey] is an independent tribunal". The background to the decision is that Mr. McGonnell purchased a plot of land with glasshouses in 1982. He applied for planning permission to build a dwelling which was refused, and an appeal was dismissed in 1984. In 1986 he was in financial difficulties and he moved to live in a flower packing shed on the land. In 1992 he pleaded guilty in the Magistrate's Court to an illegal change of use of the land and was fined £100. In June 1993 the Royal Court ordered Mr. McGonnell to vacate the shed and to restore it back to its use as a packing shed. In August 1993 he applied again to the Island Development Committee for permission for a change of use and this was refused in October 1994. He appealed against that refusal to the Royal Court, presided over by the Bailiff, which dismissed the appeal. Mr. McGonnell subsequently complained to the European Commission of Human Rights that, *inter alia*, the Royal Court was not an

independent and impartial tribunal. Article 6(1) of the Convention provides, so far as relevant -

"In the determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing ... by an independent and impartial tribunal".

The Commission decided that "... it is incompatible with the requisite appearance of independence and impartiality for a judge to have legislative and executive functions as substantial as those in the present case. The Commission finds, taking into account the Bailiff's rôles in the administration of Guernsey, that the fact that he has executive and legislative functions means that his independence and impartiality are capable of appearing open to doubt." [\[40\]](#)

The Commission accordingly found a breach of Article 6(1) of the Convention. The Commission has now referred the matter to the European Court of Human Rights. Analysis of the implications of the decision for the Bailiwicks, if it is upheld, will have to await the outcome of that reference [\[41\]](#) . But in the meantime some observations may be made.

(1) There were some unusual facets of the procedures on planning appeals in Guernsey which may have influenced the decision of the Commission. Firstly, the Bailiff having summed up the issues for the consideration of the Jurats, the Jurats withdrew and reached their conclusion that the appeal should be dismissed. No reasons for the decision were however given. Secondly, an appeal to the Royal Court on a planning matter is effectively final; no appeal lies to the Court of Appeal and although in theory a dissatisfied litigant may petition the Judicial Committee of the Privy Council for special leave to appeal, such appeals are in practice subject to narrow constraints.

(2) The administrative responsibilities of the Bailiff of Guernsey appear on the face of it to be more extensive than those of his *confrère* in Jersey. The description of the Bailiff of Guernsey as "the head of the administration of the Island" (whether or not that is an accurate description for Guernsey) is certainly inapt in this Bailiwick. This may be important in that the Commission was plainly concerned about "the plethora of important positions held by the Bailiff in Guernsey". [\[42\]](#)

(3) This jurisprudence of the European Commission of Human Rights on the appearance of bias jars with a series of decisions in the Courts of Appeal of both Guernsey and Jersey. [\[43\]](#)

In the *Bordeaux Vineries* case Le Quesne JA, delivering the judgment of the Guernsey Court of Appeal, stated:

"[The Bailiff] can properly discharge both responsibilities [i.e. President of the Royal Court and President of the States] because although he is a member of the States his special position there means he is not responsible for the

decisions of the States or acts of its agencies, nor has he any pecuniary interest, or indeed other interest, in those decisions or those acts."

Most notably, in the unreported decision of *Eves v Le Main*, Collins JA, delivering the judgment of the Jersey Court of Appeal, referred to the *McGonnell* decision in the context of an assertion that the Deputy Bailiff had been a judge in his own cause in hearing a complaint about the conduct of a States Committee in breach of Article 6 of the Convention.

"In my judgment this ground of appeal has no substance. The Bailiff and in his place the Deputy Bailiff sit both as President and Deputy President of the States and the head of the judiciary, but this ground alone is insufficient to argue that the Deputy Bailiff should not have presided at the hearing. Although the Deputy Bailiff has duties in the States such duties do not extend to responsibility for the performance by committees or agencies of the States of their functions.

The Deputy Bailiff had had nothing to do with the reaching of the decisions of the committee of course, and his position as Deputy President of the States is, in my judgment, no more of a bar to his hearing this matter than was the position of the Bailiff as determined in *Mayo and others v Cantrade Private Bank Switzerland (C.I.) and others*. [\[44\]](#)

(4) The McGonnell decision is also difficult to reconcile with the leading English case on appearance of bias. In R v Gough, Lord Goff of Chiveley stated the test to be applied by an appellate court in the following terms -

"having ascertained the relevant circumstances, the Court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him ..." [\[45\]](#)

(5) The different functions of the Bailiff of Guernsey appear less objectionable (in the context of the McGonnell decision) than those of the Lord Chancellor in England. Not only does the Lord Chancellor preside over the House of Lords in its legislative capacity and in its judicial capacity, but he is also a member of the Cabinet, the political head of an important Government department, and the chairman of several significant committees. [\[46\]](#)

Other considerations

Two other recent developments which might be said to complicate the position of the Bailiff may be mentioned. The first is the proposed incorporation into domestic law of the European Convention on Human Rights. The potential impact of the Convention upon the office itself has already been mentioned, but the incorporation of the Convention will bring into further sharp relief the dual rôle of the Bailiff. If the Human Rights (Jersey) Law follows the format of the UK Human Rights Act 1998, it will confer upon the Royal Court the power to declare legislation passed by the States to be contrary to the Convention. The assumption is that the States will thereupon amend the offending legislation. Clearly the

Bailiff may, in his judicial capacity, be called upon to impugn legislation adopted by the legislative assembly over which he has presided. The likelihood of the scenario coming to pass is probably remote. Before any legislation may be presented to the States, the Committee concerned will be required to certify, no doubt on the advice of the Attorney General, that the proposed measure conforms with the requirements of the Convention. In cases of difficulty the Attorney General will no doubt seek expert opinion before giving his advice. Nonetheless arguments will certainly be raised in the Royal Court by counsel seeking to challenge the *vires* of a law or regulation if that suits the client's cause. On the other hand it may be asked whether a challenge to the *vires* of a regulation on human rights' grounds is different from any other such challenge. Or indeed is it different in principle from an adjudication as to the meaning of a statutory provision? It is submitted that the important question is whether the Bailiff's function in the States is capable of affecting the performance of his judicial functions. Does he have an interest one way or another in the legal validity or meaning of a statutory provision passed by an assembly over which he presides? [47]

The second development is the emergence of judicial review of administrative action as a potent force for challenging governmental or official decision-making. The growth of judicial review was emphasised by Le Quesne JA in *Burt v States of Jersey* when he stated -

"... [T]he question of the appropriate procedure for judicial review of administrative action, which has been burgeoning in England over the last twenty years, is in dire need of review here, if only to cope with the necessity for expedition in determination by the court of the validity of governmental decisions which are under challenge." [48]

Whether or not procedural rules are required, there is little doubt that the recourse to the remedy of judicial review has expanded in this jurisdiction as well. Does this affect the rôle of the Bailiff? It might be said that the emergence of judicial review does not involve a qualitative change in the Bailiff's functions because the Bailiff has been presiding over statutory appeals from decisions of States Committees for at least fifty years. The argument appears however already to have been recognised. Under the Advocates and Solicitors (Jersey) Law 1997 which makes provision, *inter alia*, for professional examinations, the President of the Board of Examiners is the Deputy Bailiff [49]. Although, happily, a decision of the Board has not yet been subjected to judicial review, the Bailiff would be now able without inhibition to preside over a court hearing such a challenge, although the Deputy Bailiff of course would not. Conversely a court hearing a challenge to a decision of the Bailiff in relation to the control of public entertainment would necessarily have to be presided over by the Deputy Bailiff. But both these examples are of administrative bodies in which the Bailiff/Deputy Bailiff play a participatory rôle in the decision-making process. They are arguably different from the States Assembly where the Bailiff or his Deputy plays a fundamentally impartial rôle, and undoubtedly different from the committees of the States in the decisions of which neither plays any part at all.

Conclusion

Whatever the outcome of the reference to the European Court of Human Rights may be, it is right and appropriate that both the machinery of Government and the functions of the Bailiff in relation to that machinery should be reviewed from time to time. Both in Europe and throughout the Commonwealth, of which the Bailiwicks of Jersey and Guernsey form part,

there is a concern to protect the independence of the judiciary which is one of the principal foundations of the rule of law. The position of small *quasi-autonomous* states like Jersey and Guernsey is different however from that of great nations. As Commissioner E. A. Alkema observed in his dissenting opinion in *McGonnell v United Kingdom* -

"Of course, maintaining the rule of law is essential also in small insular communities such as Guernsey. For that purpose it is not, however, necessary to require that such societies have similar elaborate constitutional structures as generally are to be found in States of an ordinary size. Careful consideration should be given to the peculiarities of small scale societies and to both the specific disadvantages and benefits such scale may entail for the proper functioning of the body politic." [\[50\]](#)

In the Commonwealth too the special position of small jurisdictions has been acknowledged. At a Joint Colloquium of Commonwealth organisations held in June 1998 guidelines on the relationship between parliament and the judiciary were drafted; they will be submitted to Commonwealth Heads of Government for adoption as a Commonwealth model. The Principles provide:

"The successful implementation of these Guidelines calls for a commitment, made in the utmost good faith, of the relevant national institutions, in particular, the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and rule of law, including the independence of the judiciary, so that the legitimate aspirations of all the peoples of the Commonwealth should be met.

.....

It is recognized that the special circumstances of small and/or under-resourced jurisdictions may require adaptation of these Guidelines." [\[51\]](#)

It is submitted that two propositions would be generally accepted.

The removal of one of the Bailiff’s principal functions would involve a schism unprecedented in 800 years of constitutional evolution. If however the choice lay between separating the Bailiff from the Royal Court or from the States, there is little doubt that separating him from the Court would cause greater upheaval than separating him from the States. For a number of reasons, both historical and practical, the Bailiff must remain president of the Royal Court.

Derivative functions may naturally be pared away. But it would not be possible for a principal function to be removed while functions deriving from that principal function remained. For example, the Judicial Greffier could not continue to be appointed by the Bailiff if the latter were no longer President of the Royal Court. Equally, as suggested above, the Bailiff could not remain the Island’s chief citizen if he were no longer President of the States.

If therefore the conclusion is reached that the Bailiff’s functions must be reduced, it seems that there are essentially two options. Firstly, provision could be made for an elected

president of the States. In that event provision would have to be made for the derivative functions to be performed by the elected president or in some other manner. Secondly, one or more of the functions deriving from the presidency of the States could be assigned elsewhere. What would be the consequences of such changes?

The substitution of an elected speaker for the Bailiff as president of the States seems superficially straightforward. The States meet in general once every two weeks and the duties of a speaker *per se* are accordingly not time-consuming. The Bailiff is however a lawyer whose training as a Crown Officer will (or should) have given him a detailed understanding of the constitutional relationship between the Island and the United Kingdom both in theory and in practice. The elected president will not necessarily be a lawyer and is unlikely to have that constitutional knowledge. The States would need therefore to look elsewhere for advice and protection. Advice would clearly be available from the Attorney General. But what about protection? Sometimes situations arise where the Bailiff needs to take a view on the Island's privileges against a tight time-scale or against an embargo against consultation. A recent case in point was the decision in 1997 of the Home Secretary, Jack Straw, to announce a review of the regulation of financial services in the Crown dependencies. The Bailiffs of Jersey and Guernsey were informed but only on a confidential basis and on condition that they did not inform politicians. Both Bailiffs took the view that the constitutional rights of the Islands were being infringed and sought to persuade the Home Office to defer the announcement in the House of Commons so that proper consultation could take place. Those attempts were to no avail but they laid the foundations for a later formal protest by the States [\[52\]](#) . An elected president would need a secretariat of some seniority and legal expertise to compensate for the absence of the Bailiff and Deputy Bailiff. At the very least the States would need a legally qualified Greffier.

In the author's view a more likely, and sensible, scenario would be the creation of a cabinet based no doubt upon the existing Policy and Resources Committee. An elected president with executive responsibilities, particularly in the sphere of official correspondence, might not feel the same constraints as bind the Bailiff under the convention that he should not involve himself in political decision-making. Damaging tensions between the elected president of the States and the president of the Policy and Resources Committee would be highly likely. These tensions could be avoided if the derivative function of acting as the channel of communication for official correspondence, and spokesman for the insular authorities, were assigned to the president of the Policy and Resources Committee. The elected president of the States would then be merely a speaker and, presumably, the civic head of the Island. But the responsibilities for official correspondence could not be vested in a committee. An individual, as in the Isle of Man, would need to be vested with the authority to speak on the Island's behalf by signing official letters to the Lieutenant-Governor. This need not sound the death-knell for the Committee system. Nonetheless executive power comparable to that of a chief minister in systems of cabinet government would have to be vested in the president of the Policy and Resources Committee.

The assignment of other derivative functions would not cause the same difficulties. Indeed a strong argument could be advanced for assigning the responsibility for controlling public entertainment to a States Committee [\[53\]](#) . Equally the Emergencies Council could be chaired by an elected member. In this respect, and indeed generally, the removal of the Bailiff from the political/administrative scene would however cause ripples throughout the system. The Bailiff's position as a Crown Officer gives him access to Whitehall to an extent which might not be possible for an elected politician. He is accountable to the Crown and

can accordingly be entrusted with confidences which are of benefit to the States [\[54\]](#) . On the other hand it must be accepted that other small dependent territories survive and even prosper without an official with a foot in both camps [\[55\]](#) . The irony is that a constitutional change of the kind under discussion in this article would be likely to enhance considerably the authority and influence of the Lieutenant-Governor. Without a Crown Officer as President of the States the Home Office would look increasingly to the Lieutenant-Governor for advice and he, in turn, would be bound to involve himself to a greater extent in matters politic in order to be able to give that advice [\[56\]](#) . Jean Hérault would turn in his grave.

In a debate in the House of Lords on the issue of separation of powers and in particular the rôle of the Lord Chancellor on February 17th, 1999 an intervention during the speech of Lord Irvine of Lairg, L.C., was made by Lord Renton. "My Lords, before the noble and learned Lord sits down, he may be interested to know that this afternoon I visited my noble and learned friend Lord Hailsham who, alas, is not at all well physically, though his mind is alert as ever. I told him of the debate that we were going to have and his only comment was, 'do be careful!'" Even apparently minor matters of constitutional reform can have unforeseen consequences. The injunction of Lord Hailsham to "take care" is one which we would do well to heed.

Sir Philip Bailhache has been the Bailiff of Jersey since 1995.

Footnotes - [\(Top\)](#)

[\[1\]](#) - *Minutes of evidence heard before the Commissioners appointed to enquire into the Civil, Municipal and Ecclesiastical Laws of the Island of Jersey*, London 1861, paragraph 4443.

[\[2\]](#) - *Minutes of evidence heard before the Privy Council Committee on Channel Islands reform*, Jersey 1947. See, e.g., the evidence of Advocate H. W. Giffard at page 119. [Lord Ammon: I see you are of the opinion that the Bailiff should not preside over the States, why?] - Because he may be called here to give an interpretation of a law which directly or indirectly he has helped to frame.

[\[3\]](#) - Application No. 28488/95; *Report of the Commission*. The decision is discussed below.

[\[4\]](#) - See, e.g., Le Patourel, *op. cit.*; Eagleston, *The Channel Islands under Tudor Government 1485-1642*, CUP 1949; Falle, *Caesarea, London 1734* page 210 *et seq.*; Le Quesne, *A Constitutional History of Jersey*, London 1856 page 18 *et seq.*; Bois, *op.cit.*, page 25 *et seq.*; Syvret and Stevens, *Balleine's History of Jersey*, Phillimore 1981, page 29 *et seq.*,

[\[5\]](#) - *Op. cit.*, at page 18

[\[6\]](#) - Bois, *A Constitutional History of Jersey*, States Greffe 1970, page 20; Le Patourel, *The medieval administration of the Channel Islands*, OUP 1937, page 121 *et seq.*

[\[7\]](#) - Le Patourel; *op.cit.* page 113.

[8] - See the detailed account of the struggle in Eagleston, *op. cit.* at page 109 *et seq.* The account is particularly interesting given the perspective of the author who was for 20 years an Assistant Secretary at the Home Office in charge of Channel Islands' business.

[9] - The relevant part of the Order is printed in Le Quesne, *A constitutional History of Jersey*, London 1856, at page 248 *et seq.*

[10] - See Le Quesne, *op.cit.* page 259 *et seq.* Hérault's temper emerges from an earlier part of the Order. "We do acquit the said *Bailly* of any undutifulness to the King's Majesty, or any injustice in the civil government; but not from the heat of words which have unfitly fallen from him, for which we thought fit to give him a sharp reprehension".

[11] - Eagleston, *op.cit.*, at page 162; Le Quesne, *op.cit.* at page 263.

[12] - Code of Laws 1771, States Printers 1968 edition page 3.

[13] - Kelleher, *The triumph of the country*, Jersey 1994, at page 16.

[14] - Assembly of the States (Jersey) Law 1948; States of Jersey Law 1966.

[15] - Le Quesne, *op.cit.* at page 48.

[16] - Article 16 States of Jersey Law .

[17] - *Jersey Prison Board case, Crown memorandum, page 129.*

[18] - *Report of the Royal Commission on the Constitution, 1969-1973 Volume I Part XI* para 1371 *et seq.*

[19] - See Plender, [1999] 3 JL Review 136.

[20] - See the schedule to the Departments of the Judiciary and the Legislature (Jersey) Law 1965.

[21] - Bois: *op.cit.* at page 25.

[22] - The right was exercised by a Senator and others at the time when the controversy relating to the flooding of Queens Valley was at its height and the States had passed a law imposing a duty on the Jersey New Waterworks Company to expropriate land and to construct a reservoir. The petition was ultimately unsuccessful but delayed the grant of royal sanction for some 18 months whilst a review was undertaken by the Crown.

[23] - Article 23 States of Jersey Law 1966.

[24] - See Article 13 B Royal Court (Jersey) Law 1948 (inserted by Royal Court (Amendment No. 10) (Jersey) Law 1998).

[25] - See Article 13 Royal Court (Jersey) Law 1948. The Bailiff does however have a casting vote whenever an even number of Jurats are divided in opinion.

[26] - See Article 2 Court of Appeal (Jersey) Law 1961.

[27] - On the foot knob of the Mace a Latin inscription is engraved which reads in translation :- "Not all doth he deem worthy of such a reward". Charles II, King of Great Britain, France and Ireland, as a proof of his royal affection towards the Isle of Jersey (in which he has been twice received in safety when he was excluded from the remainder of his dominions) has willed that this Royal Mace should be consecrated to posterity and has ordered that hereafter it shall be carried before the Bailiffs, in perpetual remembrance of their fidelity not only to his August father Charles I but to His Majesty during the fury of the Civil Wars, when the Island was maintained by the illustrious Philip and George de Carteret, Knights, Bailiffs and Governors of the said Island."

[28] - *Prison Board case; Crown Appendix Part II No.53.*

[29] - See generally *Syvret v Bailhache and Hamon* 1998 JLR 128, but especially at pages 154-157 in relation to the Bailiff's prerogative powers and pages 157-168 in relation to inherent powers.

[30] - See Article 2 (4) Departments of the Judiciary and the Legislature (Jersey) Law 1965.

[31] - Article 5 (19) Royal Court (Jersey) Law 1948.

[32] - See, e.g. Article 29 Firearms (Jersey) Law 1956, Article 33 Weights and Measures (Jersey) Law 1967, Article 17 Misuse of Drugs (Jersey) Law 1978, Article 20 Drug Trafficking Offences (Jersey) Law 1988.

[33] - The Home Secretary is the Privy Councillor responsible to the Crown for the affairs of Jersey, Guernsey and the Isle of Man (the "Crown Dependencies"). Relationships between the Insular Authorities and the United Kingdom Government are therefore conducted through the Home Office. The Home Secretary's responsibilities stems from his status as a Privy Councillor, not from his position as a member of the Cabinet.

[34] - States Minutes 1988, page 377.

[35] - Both the author and his immediate predecessor have suggested that the Bailiff might be divested of this function, but thus far to no avail.

[36] - *Report of the Commissioners*, at page xxxiv.

[37] - *Report of the Royal Commission on the Constitution, 1969-1973* HMSO, London. Vol I, Part X1, page 437, paragraph 1447.

[38] - Act of the States of Jersey of March 2nd, 1999.

[39] - Application No. 28488/95; *Report of the Commission*.

[40] - *Report of European Commission of Human Rights page 10.*

[41] - The hearing before the Court took place on September 28th, 1999 but at the time of going to press no decision had been made.

[42] - *Op.cit.* page 10.

[43] - *Bordeaux Vineries Limited v States Administration Board* (1993) 16 Guernsey Law Journal 33; *Mayo Associates SA and others v Cantrade Private Bank Switzerland (C.I.) Limited and another* 1998 JLR 173; *Eves v Le Main*, January 22nd, 1999 unreported.

[44] - January 22nd, 1999 unreported CA, at page 8.

[45] - [1993] AC 646 at page 670; [1993] 2 All ER 724 at page 737. See also ex p. *Pinochet Ugarte* (No 2) [1999] 1 All ER 577.

[46] - The Lord Chancellor's position is not without its critics. See Pannick, *When legal and judicial functions no longer mix*, The Times February 9th, 1999. The reader will also find an interesting analysis of the wider issues of judicial independence in Stevens, *The independence of the judiciary; the view from the Lord Chancellor's Office*, the Clarendon Press, Oxford. See also an interview with Lord Browne-Wilkinson in *The Lawyer*, May 17th 1999.

[47] - See the discussion of non-pecuniary interests leading to automatic disqualification on ground of apparent bias in ex p. *Pinochet Ugarte* (No 2) [1999] 1 All ER 577, esp. Lord Browne-Wilkinson at page 587 *et seq.*

[48] - 1996 JLR 1 at page 11. But see also dicta of Southwell JA in *States Greffier v Les Pas Holdings Ltd* 1998 JLR 196 at page 206 *et seq.*

[49] - The Board of Examiners constituted under the Advocates (Jersey) Law 1968 was presided over by the Bailiff.

[50] - *Op.cit.* page 12.

[51] - *Latimer House Guidelines, published in Parliamentary Supremacy and Judicial Independence – a Commonwealth Approach, edited by Hatchard and Slinn, published by Cavendish Publishing Ltd 1999. The Colloquium included participants, representing 20 countries and 3 overseas territories. The organisations involved were the Commonwealth Lawyers' Association, the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association, and the Commonwealth Parliamentary Association. The author participated as a representative of the Commonwealth Parliamentary Association.*

[52] - A comparison with the Isle of Man is interesting. The imperative apparently being that local politicians should not be informed, the author understands that the Manx Cabinet Secretary was told of the impending review subject to the same conditions of confidentiality. No constitutional protest in relation to the failure to consult emanated from the Isle of Man.

[53] - A proposition to that effect was brought by a private member in 1992 but defeated by 38 votes to 3.

[\[54\]](#) - Even unwelcome confidences such as the intention of the Home Secretary to establish the Edwards review of the financial services industry without consultation.

[\[55\]](#) - e.g. Isle of Man and Bermuda .

[\[56\]](#) - The Bailiff's power of dissent would presumably disappear, leaving only the Lieutenant- Governor's power of veto.