

A Sustainable Position?
The impacts of Human Rights upon the Office of Bailiff and the Need for Reform.

This paper will examine and scrutinise the need for reform of the Office of Bailiff within the Island of Jersey. It will be shown that within the modern political context, the current functions of the Bailiff represent a risk to the continuing good governance of the Island, both from internal and external sources. Governmental reforms have not kept pace with the changing wider political context in which they operate; with the growth of Human Rights and its impacts upon modern government, the powers of the Bailiff are increasingly becoming unsustainable. Reform is now a necessity.

This paper shall investigate the impacts of the European Convention of Human Rights upon Jersey law. The strict requirement for judicial independence and impartiality will be analysed, along with the potential breach caused by the duality in the Bailiff's functions. The threat of reform imposed from an outside power will be investigated by exploring the Royal Prerogative, emphasising Jersey's inability to resist outside political pressures. Furthermore, the impacts of the Human Rights (Jersey) Law 2000 shall be examined, evaluating the impact of the new constitutional relationship between the Royal Court and the States Assembly upon the Bailiff.

Article 6: The Meaning of Fair and Impartial Tribunal

The European Convention of Human Rights Article 6 requires an 'independent and impartial tribunal established by law'. The convention is clear on its demands in this respect¹. In practice this has been strictly interpreted and applied². All that is needed are circumstances 'casting doubt' on impartiality or creating a legitimate fear that the court may be influenced by previous actions³.

The most significant case in relation to the role of the Bailiff is Strasbourg ruling of McGonnell⁴. It was found that the role of the Bailiff of Guernsey was sufficient to 'cast doubt on his impartiality'⁵ when acting in a judicial capacity on appeal over a particular piece of legislation, which when adopted, the Bailiff presided over the States deliberation. McGonnell shows that the court 'considers any direct involvement in the passage of legislation, or executive rules [as potentially casting doubt] on judicial impartiality'⁶. Those supporting the decision believe that when applied to the Jersey, McGonnell holds significant implications; by requiring the Deputy Bailiff to adjudicate over any legalisation which the Bailiff presided over the States when adopted (and *visa*

¹ 'Regard must be had to the manner of appointment of its members and their terms of office, the existence of guarantees against outside pressures and...whether the body presents an appearance of independence.The court must be impartial from an objective viewpoint', Findlay v UK-para,72

² Powell-(2002)-p10

³ Matthews-(2000). The convention, however, does not require any particular form of constitutional arrangements

⁴ McGonnell-(2000)

⁵ McGonnell-(2000)-para,57

⁶ Matthews-(2000)-p2,

versa)⁷. This is an important acknowledgement of the potential conflict of interests that may arise through the duality of the Bailiff's role.

Bailhache distinguishes this case and argues that it cannot be applied to Jersey's constitution⁸, highlighting a number of unusual procedural aspects unique to Guernsey planning law that may have influenced the Strasbourg ruling. Additionally, administrative responsibilities of the Guernsey Bailiff are more considerable than those of the Jersey Bailiff. These differences when combined, Bailhache argues, imputes the impartiality of the Guernsey Bailiff far more than would be the case under Jersey procedures. Such distinctions are however, insignificant to the overall similarities between the two Offices⁹. McGonnel's objection was to an objective bias whereby the act of simply presiding over the States deliberation when the development plan was adopted was sufficient to cast doubt on the Bailiff's independence¹⁰, easily applicable to the Jersey Bailiff

The reasoning behind the decision itself has also been subject to criticism. Mathews highlights the area for concern:

'Although Article 6 guarantees two distinct features of the tribunal [both] independence *and* impartiality, this decision appears to run them together'¹¹.

In a case of subjective or actual bias, independence and impartiality are treated as two distinct features. As the Bailiff neither spoke nor voted, the court inappropriately merged two distinct features guaranteed within Article 6¹². It is clear, however, that the court considered the mere fact that the Bailiff presided over that States debate as sufficient to breach Article 6¹³. Although criticism of the case exists, the validity of the decision as a whole is not affected¹⁴. Additionally, the reasoning behind McGonnel has been confirmed by Procola v Luxembourg¹⁵. The message emanating from both this decision and McGonnel is that direct involvement with the subject matter prior to the judicial ruling will lead to a lack of impartiality, and therefore breach Article 6¹⁶.

Cornes criticises the courts reasoning within these two decisions, claiming that the structural impartiality of an institution should not be damaged simply by a duality within the roles of one of its members. Indeed, it would be incorrect to assume that normally judges have no view on a particular piece of legislation. Cornes argues the more important issue is 'what the nature of the view was [and how] was it expressed'¹⁷; actual impartiality. Although logically watertight, this view, however, seems somewhat immaterial. The authorities of McGonnel and Procola have firmly entrenched a strict

⁷ Stevens-(1999), Le Sueur (forthcoming)

⁸ Bailhache-(1999)

⁹ Matthews-(2000)-p1

¹⁰ Cornes-(2000)

¹¹ Matthews-(2000)-p2

¹² Matthews-(2000)-p3

¹³ Cornes-(2000)

¹⁴ Matthews-(2000)-p3

¹⁵ (1996)

¹⁶ Cornes-(2000)

¹⁷ Cornes-(2000)-p168-169

Strasbourg methodology requiring *both* objective and subjective impartially. As a result, it seems clear that McGonnel cannot be dismissed so lightly.

Two Jersey Court of Appeal decisions contrary to McGonnel, which Bailhache argues may be used as a persuasive authority to dismiss the ECHR jurisprudence¹⁸, are Bordeaux Vineries¹⁹ and Eves v Le Main²⁰, highlighting the special position of the Bailiff within the States as incapable of making him responsible for the Assembly's decisions²¹. These cases cannot be used as a means to dismiss a potentially adverse Strasbourg ruling due to the strict requirements of Article 6, not mirrored under domestic law at that point. An additional case Bailhache relies upon is R v Gough, which used 'real danger of bias', creating a far more easily satisfied test for impartiality²². Contrary to the argument put forward by Bailhache, Gough can be distinguished and dismissed, firstly being prior to the Human Rights Act, the court did not have to give a strict effect to Strasbourg jurisprudence via statutory interpretation²³; and secondly, the case concerned the impartiality of the Jury and not the Judiciary, which is arguably less stringent²⁴. These cases cannot, therefore, be used as a defence to a potentially adverse ECHR decision.

A different aspect to which Article 6 also applies is to the manner of judicial appointments. The leading authority in this area is Starrs v Ruxton, where the appointment methods of temporary Scottish Sheriffs were deemed not to be independent and impartial due to a lack of a security of tenure. As Lord Reid comments, the importance of security of tenure is well recognised...[a lack of which]...could give rise to a reasonable perception of dependence upon the Executive'²⁵. When applied to the appointment process of the Bailiff, similar questions may also be raised. Le Rendu highlights:

'As the Crown Officers hold their office at Her Majesty's pleasure, they can be dismissed for offences other than gross misconduct, and moreover, there is no democratic veto on the use of this power'²⁶.

What raises a potential breach of Article 6 is that the Bailiff could be dismissed at will without any effective safeguards²⁷. Although this is unlikely due to the fact that political controversy would ensue, the potential exists. As Lord Reid highlighted, the adequacy of the judicial independence cannot be tested on the assumption that the Executive will always act with appropriate restraint²⁸. It seems likely, therefore, that the current appointment process would be held as a breach of Article 6, even taking into account the fact that the 'power [of dismissal] is rarely invoked'²⁹.

¹⁸ Bailhache-(1999)

¹⁹ (1993)

²⁰ (1999)

²¹ Le Quesne JA, found in Bailhache-(1993)-p13, (1999)-p8

²² Bing-(1998)-p148

²³ Bing-(1998)

²⁴ Quinn-(2004)

²⁵ Lord Reid in Stars v Ruxton, -para,33-46

²⁶ Le Rendu-(2004)-p35

²⁷ Anderson-(2000), White-(2001)

²⁸ Lord Reid in Stars v Ruxton, -para,39

²⁹ Le Rendu-(2004)-p35

Application of the ECHR to Jersey

The key issue when discussing the impact of the European Convention on Human Rights is how far could reforms be enforced upon the Island against its will by an outside power? It is clear that Jersey's unique constitutional status has been recognised by the ECHR both through case law³⁰, and also through the Convention itself by requiring incorporation into domestic law through the Human Rights (Jersey) Law 2000³¹. As with the UK, Strasbourg would not be able to enforce reforms upon the Island without co-operation from Island authorities themselves³². Therefore, the convention does not represent a direct risk.

The most significant tool in which reforms potentially could be enforced is through the use of the Royal Prerogative. However, as the Royal Commission highlighted, this is a difficult and complex area, compounded by 'developments in the international field'³³. Although the Island has been granted a great deal of autonomy³⁴, the UK Government is ultimately responsible for the Island's international relations³⁵. As a result, it is clear that in times of severe Island-wide public disorder or in circumstances of a complete breakdown in the administration of justice, the prerogative may be justifiably invoked to impose reform in an aim to ensure good governance³⁶, a view also expressed by Jersey's Attorney-General³⁷. Whether there are other circumstances where intervention via the Prerogative would be justified, the Royal Commission considered it 'so hypothetical as not worth perusing'³⁸. In any event, it seems clear that a Strasbourg ruling against the Office of Bailiff and the resulting breach of Article 6 would not constitute public disorder or the breakdown of administration of justice, and therefore, would not create a sufficiently serious situation as to require the use of the Royal Prerogative³⁹.

There is an alternative method that the UK could use to force the Island Government to initiate reforms itself rather than reforms being forced upon them via the means of exerting severe political pressure on the Insular Authority. As Le Rendu highlights, the Island Government has always 'sought to avoid either being a burden or an embarrassment to the UK'⁴⁰. If Jersey did become an embarrassment, the UK would be likely to use a wide variety of political means to stop the cause of discomfort⁴¹. Indeed, as Le Rendu comments, 'Jersey's ability to resist an ultimatum from the UK is limited'⁴².

³⁰ X v. United Kingdom-p104

³¹ s.22(6) HRA, McGoldrick-(2001)

³² Windlesham-(2005)

³³ Royal Commission-(1973)-p415-para,1379

³⁴ Le Rendu-(2004)-p55. Le Rendu argues that this independence is essential for the stability of the finance industry within Jersey.

³⁵ Plender-(1990)

³⁶ Le Rendu-(2004)

³⁷ Sir W. Balhache, statements within the States proceedings: 14/5/02

³⁸ Royal Commission-(1973)-p454-para,1502

³⁹ Royal Commission-(1973)-p457-para,1513

⁴⁰ Le Rendu-(2004)-p69

⁴¹ Le Herissier-(1972)

⁴² Le Rendu-(2004)-p68.

The Impacts of the Human Rights (Jersey) Law 2000

The 2000 law incorporated convention rights into Jersey domestic law. In doing so, commentators such as Le Sueur argue that it has created a 'new constitutional relationship between the Royal Court and the States'⁴³, impacting the way in which law and politics interact. Le Sueur argues that this is achieved through Article 4 and 5 by placing an obligation on Royal Court to interpret legislation compatibly with convention rights, and permitting the Court to make a declaration of incompatibility as to a specific piece of legislation. This impacts the relationship between the Legislature and Judiciary by requiring the court not to simply implement the will of the states, but to 'scrutinise legislation for its compliance with Human Rights'⁴⁴. As President of the Royal Court, Articles 4 and 5 may bring the Bailiff into conflict with the States, particularly when judicial interpretation is required⁴⁵. The potential impact of this more onerous obligation may be gleaned by investigating the impacts of the HRA within the UK. Beloff illustrates:

'[It] was an aid for construction of ambiguous primary and secondary legislation, to resolve uncertainty or to fill gaps and buttress the principles of the common law'⁴⁶.

Such activities have brought the UK Judiciary under direct attack both from the Government and the media⁴⁷. The potential, therefore, exists for similar conflicts to arise under the 2000 Law within Jersey, which due to the duality of the Bailiff's position, such conflicts are potentially far more significant.

One could argue that the Bailiff would not be placed in conflict with the States, but used as a valuable resource⁴⁸. Le Sueur highlights the growth of institutional dialog within the UK as a means to avoid declarations of incompatibility⁴⁹; as 'defender of the Islands rights and privileges'⁵⁰, such a technique could be utilised within the Jersey constitution to avoid conflict. Nevertheless, although risks of incompatibility are low due to checks by both States Departments and the Attorney-General⁵¹, Le Sueur continues to question the logic of such an assumption, suggesting that the Attorney-General would be in a better position to be consulted and utilised by the states, discounting the use of the Bailiff on grounds of legitimacy:

'Traditionally, courts explain their views...only through judgments and not through statements outside the courtroom. From his position as Presiding Officer it would be inappropriate for the Bailiff...to influence debate by restating or amplifying views expressed in the Royal Court.'⁵²

⁴³ Le Sueur-(forthcoming)-p2

⁴⁴ Le Sueur-(forthcoming)-p7

⁴⁵ Le Sueur-(forthcoming)

⁴⁶ Beloff-(2002)-p1

⁴⁷ Bradley-(2003)

⁴⁸ Beloff-(2002)-p6

⁴⁹ Le Sueur-(forthcoming)

⁵⁰ Bailhache-(1999)-p3, Working Party on Public Entertainment-(2002)

⁵¹ Bailhache-(1999)

⁵² Le Sueur-(forthcoming)-p9

This is a subtle, but particularly powerful argument, working also in the opposing direction when the Bailiff acts in a judicial capacity⁵³. Bailhache dismisses such reasoning, claiming that no special arrangements or changes are required for a human rights challenge. Bailhache is mistaken in dismissing the significance of Human Rights so readily. The significance of a Human Rights challenge is not the challenge itself, but from the new constitutional relationship created by the 2000 Law. This new relationship, by placing greater obligations on the Royal Court, inherently brings the Bailiff into potential conflict with the States, therefore requiring reform.

Conclusion

Overall it can be seen that there is an urgent need for significant reform of the Office of Bailiff. A number of different aspects of the Bailiff's functions conflict with Article 6 of the ECHR, the most significant of which is the overlap between the legislature and Judicial competences. It has been shown, therefore, that if a Human Rights action was brought to Strasbourg, the duality of the functions would be held in breach.

Although analysis of the applicability of the Convention to Jersey law shows clearly that it could not directly impose reforms without the will of the Island government, an alternative means to which reforms could be imposed is through the use of the Royal Prerogative. Examination into the potential use of the Royal Prerogative, however, clearly shows that it could only be used against the will of the States in circumstances where there was a clear breakdown of the administration of justice; circumstances unlikely to be caused by a prejudicial Strasbourg ruling. Alternatively scrutiny of the dependency relationship highlights the fact that the UK could exert severe political pressure to the Island Government through a number of means, effectively forcing the Island to co-operate with reforms. It has also been shown that by considering the impacts of the Human Rights (Jersey) Law 2000, a new constitutional relationship between the Royal Court and the States has been created. This new relationship clearly makes the Bailiff's role within the States significantly more difficult to justify due to increased obligations placed upon the Royal Court.

It has been demonstrated that reform of the Office of Bailiff is long overdue, and is essential not only for the continuing good governance of the Island, but for a modern and robust legal system. The role of Bailiff may have once served the Island well, however, legal and political developments both within and outside Jersey has created many risks to the Island's dependency and reputation for stable governance. Reform is now a necessity.

⁵³ Matthews-(2000), Le Sueur-(forthcoming)

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