Jurats as Adjudicators in the Channel Islands and the Importance of Lay Participation

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Abstract: Many legal systems place great importance upon lay persons adjudicating in courts and tribunals but how those persons are chosen, the precise role that they perform and the qualities that they are supposed to bring to the legal process are issues that often excite lively debate. This paper is about the Channel Islands, which enjoy as part of their legal systems adjudicators known as *Jurés-Justiciers* or 'Jurats' who normally have no legal qualifications or training before being able to take up such posts. Historically, the Jurats have played an essential part in the Channel Islands, being able to maintain their curious constitutional position in the British Isles by their knowledge and application of the customary laws prevailing in each island and their jealous protection of such customs from outside interference. Nevertheless, in the twenty-first century, when legal principle from one jurisdiction can more readily influence the development of law in another related system and public expectations are no less demanding than elsewhere in the British Isles, it is important to reassess the role of the Jurats. In so doing, it will be readily appreciated that the Jurat system, albeit in need of some reform, is no mere curiosity of the past but something of which Channel Islanders can be justifiably proud.

Keywords: bailiff, bailiwick, Channel Islands, diversity, Guernsey, Jersey, Jurat, *Juré-Justicier*, *Juré-Justicier Suppléant*, lay participation

I. Introduction

The Channel Islands consist of two separate 'bailiwicks', being the old term for an area of jurisdiction under a *bailie* or Bailiff: one comprising Jersey, the other Guernsey and a number of her dependent islands, notably including Alderney and Sark. The Channel Islands form part of the British Isles but are not part of the United Kingdom

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and are actually situated much closer to the coast of Normandy than England.

Since the eleventh century, the Channel Islands have been dependencies of the Crown, when the Crowns of England and France (including the Duchy of Normandy of which the Channel Islands formed part) were united. They are, further, neither separate Member States nor associate members of the European Union, but nevertheless enjoy the benefit of certain rights conferred by the Treaty of Rome 1957. Importantly, the Channel Islands enjoy the right to govern themselves on all internal domestic matters.

As one might expect, therefore, the law in the Islands has developed differently from that of the UK. Indeed, as the Bailiwicks of Jersey and Guernsey are separate legal systems, albeit united ultimately in the hands of the Crown, there are even significant differences between the laws of each Bailiwick. This paper seeks to explore in greater detail one such difference, being the existence of an official known as a *Juré-Justicier* or 'Jurat'[2] in the various courts that exist in the Channel Islands. As will be seen, the Jurat system is unique, albeit bearing some comparison with that of lay magistrates.

II. Origins and Overview

Jurats (present in Jersey, Guernsey, Alderney and Sark) appear to have emerged during the thirteenth century[3] and formed the essential part of the Royal Court in each of those islands.[4] The Jurats were not professional judges but men of substance who applied the relevant customary law and rendered judgment. They were judges of both fact and law. The Bailiff (and subsequently *Prévôt* in Sark and Alderney)[5] was not a judge but dealt with matters of procedure, pronounced the judgment of the Jurats and was responsible for its execution.[6]

Over time, the precise roles and respective importance of the Bailiff and the Jurats changed. In Jersey there were and currently remain 12

2 The Jurat system in the Channel Islands is not to be confused with the use of such word in England (especially in respect of the Cinque Ports) to mean a municipal officer similar to an alderman. The precise origin of the word 'Jurat' in the Channel Islands is unclear. There are, however, early references to 'Juré'. The *Oxford English Dictionary* for example refers to 1339 Rolls Parlt. II. 109/2 William Payn, *un des Jurez de l'Isle de Gereseye*.

3 See J. Everard and J.C. Holt, *Jersey 1204. The Forging of an Island Community* (London: Thames & Hudson, 2004) 156–8 and also Professor Holt's address entitled 'Jersey 1204: The Origins of Unity: A Note on the Constitutions of King John' in P. Bailhache, 'A Celebration of Autonomy' (2005) *Jersey Law Review* (hereafter JL Rev) 121–4.

4 J.H. Le Patourel, *The Medieval Administration of the Channel Islands 1199–1399* (Oxford: Oxford University Press, 1937, republished by the Guernsey Bar, 2004) 88.

5 There is an early reference to a Bailiff in Alderney and Sark. Subsequently, even the role of *Prévôt* changed. See N. Van Leuven, 'Constitutional Relationships Within the Bailiwick of Guernsey-Alderney' [2004] JL Rev 131 at 132.

6 Le Patourel, above n. 4 at 88–90.

Jurats and while this used to be the case too in Guernsey, The Royal Court (Reform) (Guernsey) Law 2008 has, from 29 October 2008, increased this number to a maximum of 16 Jurats. In addition, this Law has created the position of *Juré-Justicier Suppléant* to supplement the other Jurats where necessary. The Jurats in Jersey and Guernsey form, with their respective Bailiff (or his substitute) as the presiding judge, the Royal Court of Jersey and the Royal Court of Guernsey. In contrast, in Alderney, there are seven Jurats including a chairman (but no judge) and they comprise the Court of Alderney assisted by the Greffier (a legally qualified clerk to the court) in both civil and criminal matters.[7] Although historically, Sark, in common with the larger islands, did have Jurats until 1675, this system was replaced by the Court of the Seneschal and is now constituted by the Seneschal or his substitute sitting alone.[8]

i. Appointment and Retirement—Jersey

Changes to the role of Jurat, the eligibility and method of election were brought into force by the Royal Court (Jersey) Law 1948. The position immediately prior to this Law is set out in the 1947 'Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands':

> The twelve Jurats are elected by the whole electorate of the Island on a basis of universal adult suffrage. They hold office for life and they sit in the [legislative assembly of Jersey known as the] States like other members and assume important responsibilities in the administrative departments of the States. Jurats are required by law to be chosen from among natives of the Island, and persons carrying on the trade of brewer, butcher, baker, or innkeeper are not eligible. The disability was imposed at a period when persons carrying on these trades were subject to regulation by the authorities. Men are eligible at the age of 21 and women are ineligible. There is a property qualification of an income of not less than £30 per annum. There is still in operation a law of 1771 as follows:—
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> *'On ne doit point faire choix pour remplir la charge de Juge, que de personnes d'intégrité, et bien affectionnées au Gouvernement, et qui se conforment à la Religion réformée.'*

7 Government of Alderney Law 2004.

8 The Seneschal's Court was established by Order in Council in 1675 when the previous Court of five Jurats (the most senior being the chairman) was replaced. See now The Reform (Sark) Law 2008, s. 5. The Seneschal, who must be ordinarily resident in Sark, is appointed by the Seigneur, with the approval of the Lieutenant Governor. There is also provision for the appointment of a Deputy Seneschal, who has similar duties to that of Seneschal, but not those of returning officer in respect of elections, and one or more legally trained Lieutenant Seneschals. Such Lieutenant Seneschals must be Advocates of the Royal Court of Guernsey or barristers or solicitors from England and Wales, Scotland or Northern Ireland, of ten years' standing or more. Curiously, Jersey qualified lawyers are not eligible. In civil cases the Seneschal has authority over the Seigneur himself.

> There is no authorised English translation of this law, but we were informed that it has not been constructed as debarring Nonconformists, but it disqualifies Roman Catholics, Jews and Freethinkers.

As a result of the 1948 Law Jurats were no longer elected by the general population but by an electoral college. This electoral college, members of whom nominate and elect Jurats, consists of the Bailiff as its president (although ordinarily he will not vote save in prescribed circumstances), the Jurats, the constables of the parishes, the elected members of the States (deputies and senators), the members of the Jersey Bar and locally qualified solicitors. The Lieutenant-Governor, the Dean, the Solicitor General and the Attorney General are also described in the 1948 Law as being members of the electoral college, but have no vote, and cannot nominate candidates.[9]

To be eligible to be elected as a Jurat in Jersey a person must be over 40, a British subject, and either have been born in Jersey or have lived in Jersey for the five years before standing for election. The 'unusual if not unique'[10] restriction of office to natives of Jersey was therefore removed by the 1948 Law. Similarly, the previous restrictions in respect of religious affiliation were expressly eschewed in the 1948 Law, and the Law was amended in 1951 to avoid any 'doubt' that women were not disqualified by reason of sex or marriage. Current disqualifications from the office of Jurat[11] are now related to:

- fitness to hold office (being subject to a curatorship or attorney, or their property being under the control of the Royal Court, or *en désastre*[12]);
- financial probity (having made an arrangement with creditors, having received poor relief);
- holding of paid office with the States or a parish;
- criminal convictions;
- being the holder (or employed by a holder) of a liquor licence (the taverners of old); or
- being or employed by a brewer.

It will also be seen that the previous disqualification in respect of butchers and bakers has now disappeared.

A Jurat in Jersey can be elected as a deputy or a senator, but will cease to be a Jurat when he or she takes the oath of deputy or senator. Equally, a senator or deputy is not disqualified from being appointed Jurat (after election) but he or she will stop being a senator or deputy as soon as they take the oath of office as Jurat.

When an election is necessary, a meeting of the electoral college is arranged, and a ballot taken. The meeting is in public but there is a

9 The Deputy Bailiff is not stated to be a member of the electoral college, and neither are the Commissioners.
10 Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands (1947) (hereafter 1947 Privy Council Report) at 9.
11 Article 3 of the Royal Court (Jersey) Law 1948.
12 I.e. bankrupt under the Bankruptcy (Désastre) (Jersey) Law 1990.

secret ballot. The quorum of voting members of the meeting is 40. The scrutiny of the ballot papers is conducted by the Bailiff, the Greffier acts as clerk, and the Bailiff declares the result.[13]

Anyone wishing to contest the appointment of a Jurat can present what is known as a remonstrance to the Royal Court. This can be on the basis as expressly set out in the Law, for example, that the Jurat elected is actually disqualified from the office, that he or she has tried to buy votes by a direct or indirect gift, promise or threat, or because the formalities in respect of the meeting of the electoral college were not complied with.

The mandatory retirement age for Jurats in Jersey is 72; however, a Jurat who then ceases to hold office can be appointed by the Bailiff to 'act as a Jurat' for any period, or in relation to any cause or matter, up to the age of 75.[14] A Jurat who does not fulfil his or her duties for a period of 12 months without good reason, or who is unable, through physical or mental incapacity to do so, may be asked to resign.

ii. Appointment and Retirement—Guernsey

Prior to the reforms that followed the 1947 Privy Council Report, the position stated was as follows:

> The twelve Jurats are elected by an electoral college, the States of Election, consisting of the Bailiff, 2 Law officers, the Jurats, 10 rectors, 20 Constables, 180 Douzeniers [parish representatives] and 18 Deputies [elected representatives]. They hold office for life and sit in the [legislative assembly of Guernsey known as the] States and serve in most administrative departments of the States. Candidates for office must be British subjects. Roman Catholics, brewers and publicans are excluded; otherwise there are no restrictions.

Jurats in Guernsey continue to be elected by the States of Election, but which now consists of the Bailiff (who presides), the Jurats, the rectors or priests-in-charge, the Deputies, 34 representatives of the Douzaines, HM Procureur and HM Comptroller (i.e. the Law Officers). In contrast to Jersey, therefore, the legal profession is not part of the electoral college. Voting is by secret ballot, and the elected Jurats must poll more than 50 per cent of the votes cast. Only one vacancy can be filled at any one time, and the quorum of the electoral college is 20.[15] Every prospective candidate for the office of Jurat has to be nominated and seconded in writing by a Member of the States of Election or by a Douzenier.

For a person to be elected Jurat in Guernsey he or she cannot be an alien, but otherwise there is now[16] no discrimination in respect of

13 Article 4 of the Royal Court (Jersey) Law 1948, soon to be amended by the Royal Court (Amendment No. 12) (Jersey) Law 2010 in respect of procedure and particularly where the vacancy is contested.
14 Article 9 of the Royal Court (Jersey) Law 1948.
15 Reform (Guernsey) Law 1948, s. 9.
16 Since the coming into force of the Royal Court of Guernsey (Miscellaneous Provisions) Law 1950.

religious belief or gender, and women are eligible to be elected regardless of marital status. Unlike in Jersey there is no lower age limit for the election to the office of Jurat, and no-one is disqualified by reason of their trade or profession.[17] A Jurat can no longer be a Douzenier or People's Deputy as well as a Jurat and must vacate office on being so elected, and vice versa.[18]

In Guernsey, the retirement age is 70, but a Jurat can stay on until 72 (and 75 for those appointed before the 2008 Law) with the approval of the other Jurats. A Jurat retains the title of Jurat for life, even when no longer in office.

Juré-Justicier Suppléants are appointed from the ranks of Jurats; they can only be appointed if they have been a Jurat for at least five years, and must be between the ages of 65 and 72. *Juré-Justicier Suppléants* are appointed by the other Jurats, and on appointment he or she ceases to be a Jurat (thereby creating a vacancy for another Jurat to be elected). A *Juré-Justicier Suppléant* can then remain in office until the age of 75. A *Juré-Justicier Suppléant* is removable from office by the Jurats, or, if he or she informs the Bailiff that they wish to retire, by the Bailiff.

This arrangement enables experienced Jurats to continue to be able to fulfil their public duties, but allows for a little more flexibility, and a less onerous role, while making room for younger Jurats to be elected.

iii. Appointment and Retirement—Alderney

Jurats in Alderney are appointed by the Secretary of State.[19] There are few restrictions on the appointment of Jurats and specifically there are no restrictions on their appointment by virtue of sex, marriage, religion or property. There is also no lower age limit in respect of the appointment of Jurats in Alderney.[20] Although there is no prohibition on appointment of a Jurat who is engaged in an occupation for which a licence is required, if a Jurat is, for example, a holder of a liquor licence, he or she is not able to sit on any case when the court is dealing with any matter relating to a licence for the carrying on of that occupation. This is less restrictive than the position in Jersey.

In Alderney Jurats hold office 'during good behaviour', retiring at age 70. There is, however, provision for the Secretary of State to authorize a Jurat to continue to sit and act as Jurat for a specified period after the age of 70.[21]

17 Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950, s. 3.
18 The Reform (Guernsey) (Amendment) Law 2003, s. 2.
19 Government of Alderney Law 2004, s. 5, currently the Secretary of State for Justice.
20 Government of Alderney Law 2004, s. 3.
21 *Ibid*. s. 7.

iv. Oaths of Office

In Jersey, Guernsey and Alderney, the Jurats have to swear oaths of office. The former two oaths are still administered in French, are reasonably lengthy and appear to modern eyes as quite antiquated. Curiously, the Jersey oath as required by the 1948 Law has yet to be amended and still refers to the pre-1949 position of the Queen as reigning in all of the island of Ireland. Understandably, but nevertheless in breach of this statute, a corrected oath is administered in practice. The oath in Alderney is relatively short and in English.

v. Respective Roles of Judge and Jurats in Jersey

The general proposition has already been observed that the Royal Court of Jersey is comprised of the Bailiff (or his substitute) and 12 Jurats.[22] However, their functions and interrelationship have naturally evolved since their emergence some eight centuries ago. In Jersey their respective roles are now governed by the Royal Court (Jersey) Law 1948. Article 15 of this Law provides that 'in all causes and matters, civil, criminal and mixed, the Bailiff shall be the sole judge of law and shall award the costs, if any'. The statute further makes clear that questions of procedure are of law and therefore are matters for the Bailiff alone. It will be appreciated, therefore, that given the Bailiff's role, including as head of the judiciary in Jersey, qualification and suitable experience as a Jersey lawyer is a prerequisite. In more recent times, a practice, or at least an expectation, also appears to have emerged for the Bailiff to have first served as Attorney General and then as Deputy Bailiff. The Bailiff is, however, appointed to such role by the Crown and no formal requirements are laid down for appointment to such office.[23]

It will be seen that the 1948 Law, therefore, removed from the Jurats their previous role as judges of law. Meanwhile, the Bailiff's previous casting vote should the Jurats be unable to agree as to their decision was preserved.[24] As the Bailiff may only agree with one of the Jurats (when there are two in number) or where there are more than two, so as to find a majority opinion, it would appear that he may

22 See further below but note that the Judicial Greffier or Master is a qualified Jersey lawyer and enjoys the jurisdiction of the Royal Court in respect of certain matters (mostly procedural) under the Royal Court Rules (2004) (hereafter RCR 2004).

23 Article 2(1) of the Departments of the Judiciary and the Legislature (Jersey) Law 1965.

24 Article 15(4)(a) of the Royal Court (Jersey) Law 1948:
'In all causes and matters, civil, criminal or mixed, the Bailiff shall have a casting vote whenever the Jurats—

(a) being 2 in number, are divided in opinion as to the facts or as to the damages to be awarded or as to the sentence, fine or other sanction to be pronounced or imposed; or
(b) being more than 2 in number, are so divided in opinion with respect to any one or more of the matters specified in sub-paragraph (a) that the giving of a casting vote is necessary for the finding of a majority opinion.'

not arrive at a wholly independent view of the fact in dispute, the amount of damages or sentence. While it has been held that the casting vote must be exercised 'judicially' and, for instance, that no convention exists as to preferring a lenient sentence in a criminal case,[25] the reality is that the Bailiff merely has a choice between the views of the Jurats so that a majority may be formed and this is now enshrined in the 1948 Law. Such an interpretation is confirmed by the position prior to 1948 and as referred to in the 1847 'Report of the Commissioners Appointed to Inquire into the State of the Criminal Law in the Channel Islands':

> . . . [the Bailiff] can vote only for one of the opinions which the Jurats support: and it has happened that he has been compelled to support an opinion at variance with his own, because, of the two opinions held by the Jurats, neither accorded with his view . . .[26]

When the Royal Court hears a case, more frequently it does so as the Inferior Number and is constituted by the Bailiff[27] or his substitute (see further below) and, where necessary, two Jurats.[28] When sitting as the Superior Number, the Bailiff (or his substitute) will sit with not less than five Jurats.[29] In practice, the Superior Number rarely sits in civil matters[30] but it does do so in disciplinary proceedings in respect of members of the Jersey legal profession. The Inferior Number of the Royal Court can, however, in any matter, refer the case to the Superior Number 'whenever it deems it proper so to do'. This appears to be an often overlooked power.[31] The requirement of the Inferior Number to sit with only two Jurats has potential difficulties, aside from the increased possibility of disagreement. The loss of a Jurat, for instance, through illness, would mean that the court was no longer quorate. In long running cases[32] in particular, this would inevitably cause serious prejudice to litigants. The better course would be for the Inferior Number to sit as the Bailiff (or his substitute) with three Jurats, albeit with a quorum set as the judge and two Jurats. To

25 *Sheldon* v *AG* 1996 *Jersey Law Reports* (hereafter JLR or J&GLR) n. 19, overruling *AG* v *Perron* Royal Ct, 10 November 1989, unreported.
26 1847 Report of the Criminal Commissioners at 42. The comment in fact related to a decision on the law which after the 1948 reforms became the exclusive province of the judge. Nevertheless, the observation demonstrates the limited ambit of the casting vote and remains instructive.
27 See generally RCR 2004 r. 3/6.
28 Jurats have to sit as set out in the 1948 Law unless an exception applies. Two Jurats are required for the Inferior Number in accordance with article 2 of the *Loi (1862) sur la procédure devant la Cour Royale*: *'A l'avenir, dans toutes causes, le Nombre Inférieur ne sera composé que du Chef Magistrat et de 2 Jurés-Justiciers.'* This is also implied from article 15(4) of the Royal Court (Jersey) Law 1948.
29 Article 16(1) of the Royal Court (Jersey) Law 1948.
30 The Superior Number retains residual importance as the appellate tribunal where a petition of *doléance* is brought.
31 Article 18 of the Royal Court (Jersey) Law 1948.
32 Such as the recent *Alhamrani* case, the trial of which lasted over 100 days. Consideration had to be given to insurance cover being taken out so as to guard against the possibility of a Jurat becoming incapable of completing the trial.

achieve this, an amendment would, however, be required to article 2 of the *Loi (1862) sur la procédure devant la Cour Royale* which requires the current two-Jurat composition, although it should be noted that in earlier times, the requirement was for 'at least' two Jurats to sit in the Inferior Number.[33]

In civil cases the judge and Jurats retire together to consider their decision, and there is no summing up as to the facts or law in open court. As will be seen, this differs from the practice in Guernsey prior to various statutory reforms implemented in 2008 and also from the position in criminal trials in both Islands.

In a civil case, as in a criminal case, the Jurats are the judges of fact. They also determine the level of damages in civil matters. In respect of the role performed by the Jurats in civil cases, Commissioner Page QC observed the following in an interview with the writer:

> Entrusting findings of fact to the judgment of lay-judges is, I think, sound in principle and very effective in practice; and—except in what appears to be the relatively rare case where Jurats disagree—having findings of fact made by a concurring two-man lay tribunal can only serve to add weight to those findings and act as a safeguard against irrational or perverse conclusions. (The possibility of disagreement between the two Jurats appears to me to be adequately addressed by providing for the Judge, in such circumstances, to assume the role of a third member of the fact-finding tribunal with a casting vote.) These same factors ought also to contribute substantially to the desirable aim of attaining finality on decisions of fact at trial as far and as often as possible.

The benefits accruing from the division of responsibilities between judge and Jurats are further described as follows:

> Having not only to state the relevant law and formulate the precise legal issues involved in the case but also, not infrequently, to explain and rationalise them for the benefit of one's Jurat-colleagues, is a salutary discipline for any Judge. It tends to prevent corners being cut that are better not cut, and serves to remind one of the importance of trying to avoid language and terminology that means little to anyone outside the legal profession. This applies, in my experience, at three stages: during the trial itself; at the end, during the court's deliberations; and when it comes to the written judgment. If at any of these stages the issues are not readily comprehensible to the Jurats, something is wrong. In a complicated case, talking through the issues on more than one occasion can also be of value—to the Judge as much as to the Jurats.

Pursuant to article 17 of the Royal Court (Jersey) Law 1948 and subject to a number of pre-conditions, it is, however, possible for the Bailiff or his substitute to make findings of fact without the participation of the Jurats and it is also implicit from the Bailiff's further power to grant

33 See above n. 26 at 31.

interim injunctions in chambers under Royal Court Rules 3/8 that preliminary findings in this respect may be made despite the absence of Jurats. Limited exceptions also apply in other areas, for instance, in an application for leave to apply for judicial review where the Inferior Number may be constituted by the Bailiff sitting alone.[34]

In relation to criminal trials, for non-statutory offences, defendants have a choice between a trial before a jury, i.e. an Assize trial, or a trial before Jurats (in practice forming the Inferior Number). In the latter case, the Jurats determine whether or not the defendant is guilty, with the judge having a casting vote in the event of disagreement. For statutory offences all trials have to be before the judge and Jurats. It should be borne in mind that drug-related offences are all statutory offences, and trials for those offences are therefore not conducted before a jury.

Questions of credibility are a matter for the Jurats and in the case of *Attorney General* v *O'Brien*[35] it was held that it is not the function of the Court of Appeal to say that the evidence of the accused should have been accepted.

The judge has the specific role of summing up the case to the Jurats (or the jury). He must therefore take care in respect of his interventions and summing up, whether sitting with Jurats or a jury.[36] However, he is entitled to rely on the fact that the Jurats are permanent members of the court with experience of assessing evidence and finding facts,[37] although this will not give licence to the judge to descend into the arena.[38] In *Snooks* v *Attorney General*[39] it was held that the directions given to the Jurats by the presiding judge should be delivered in open court, not in chambers. It was also held that it was not necessary for such directions to be the same as those given to a jury. The summing up should clearly also contain full and adequate directions on relevant matters of law.[40] Despite conducting a summing up in open court, the judge may still retire with the Jurats because it is

34 RCR 2004 16/2 and 16/6. See also n. 22.
35 *Attorney General* v *Edmond O'Brien* 2006 JLR 133.
36 *Michel* v *AG* [2009] UKPC 40.
37 *Snooks* v *UK* 2002 JLR 489.
38 *Ibid. Michel* v *AG* [2009] UKPC 40 at para. 34: 'He must not cross-examine witnesses . . . He must not appear hostile to witnesses, least of all the defendant. He must not belittle or denigrate the defence case. He must not be sarcastic or snide. He must not comment on evidence while it is being given. And above all he must not make obvious to all his profound disbelief in the defence being advanced.'
39 1997 JLR 253.
40 'The judge was entitled to take into account that jurats were experienced arbiters of fact and there was no reason why his directions should not affect the nature of his summing up to them. In many cases it would be unnecessary to give directions on how to approach the evidence, although ordinarily a direction on the burden and standard of proof were required': P. Bailhache, Bailiff.

important that he is aware of their views given his casting vote in the event of disagreement.[41]

The role of the Jurats in criminal trials before the Inferior Number is not analogous to that of a jury, and has been said to be more akin to the role of lay magistrates in England.[42] Part of the reasoning of there being little to object to in the Bailiff retiring with the Jurats has been the then permissible practice in England and Wales of the legal adviser (or clerk) retiring with lay magistrates. A 2007 document entitled 'The Responsibilities of Justices' Clerks to the Magistracy and the Discharge of their Judicial Functions', however, makes clear that such practice is now circumscribed.[43] The Jurat system has been adjudged to be compliant with Article 6 of the European Convention on Human Rights.[44]

The Superior Number sentences in criminal cases both following Assize trials and on committal from the Inferior Number, when it is considered likely that the sentence will be in excess of four years' imprisonment (which is the limit of the sentencing jurisdiction of the Inferior Number).[45] The Jurats, not the Bailiff, are responsible for sentencing unless the Jurats are not agreed, when the Bailiff will have a casting vote.[46]

Until 1997[47] the Jurats sat in on Assize trials[48] in order to determine the sentence. This is no longer the case, and sentencing takes place separately by the Inferior or Superior Number as appropriate. It is therefore particularly important that the Jurats, who then have to

41 *AG* v *Young & Williams* 1998 JLR 111.

42 *Snooks and Dowse* v *The United Kingdom* [2002] ECHR 182A para. 33, citing *Mort* v *United Kingdom* (dec) no. 44564/98 where the court held that 'no problem arises in the normal course of events if a justices' clerk retires with the justices and it is not known what assistance, if any, he or she in fact furnishes to them'.

43 'Wherever possible, this advice should be given in an open court before the Justices retire, but on occasions it may be necessary for the legal adviser to enter the retiring room at the invitation of the Justices to give advice. Before the legal adviser attends the retiring room, the request and the reason for it must be given in open court. The advocates must have an opportunity to make representations on any fresh advice given in the retiring room. If the legal adviser feels that they have a duty to give advice to the Justices which has previously not been given, the legal adviser should provide that advice in open court. The Justices can then decide on whether to take it into account. If the legal adviser realises that the Justices should have received advice on a particular issue before retiring, the legal adviser should either invite the Justices to return to Court and give the advice, or detail the advice to the court, and then deliver the advice to the Justices in the retiring room. Any other reason for visiting the retiring room should be clearly outlined in open court': Lord Justice Leveson.

44 *In re Sinel* 2000 JLR 18 (CA) where it was said that: 'There is no evidence before this court that they have ever not been true to their oaths of office. In my judgment the Jurats clearly form an independent and impartial tribunal for the purposes of article 6.' See also *Snooks* v *UK* 2002 JLR 489.

45 RCR 2004 r. 3/5.

46 Article 15(4) of the Royal Court (Jersey) Law 1948.

47 Article 2 of Loi (1997) (Amendment No. 7) *réglant la procédure criminelle*.

48 Assize trials are for customary law offences, statutory offences are heard by the Inferior Number or in the Magistrates' Court. A defendant can opt to be heard by the Inferior Number, even in respect of customary law matters.

determine the sentence without having heard the evidence, have sufficient information before them to sentence fairly.[49] Jurat John de Veulle OBE describes the process in relation to sentencing:

> Jurats discuss the conclusions (or recommendations) of the Crown between themselves, and are open minded about whether to endorse or vary them and take full account of the submissions of the defence. The Jurats have no formulated policy on sentencing; they are fully aware of precedent and, at the time of sentencing, they have all the papers and reference cases before them. They will of course have pre-read the files, and there are occasions where some elements are briefly discussed in the privacy of the Jurats' Room before the hearing but, in my experience, these discussions are always subordinated to the need to hear defence submissions, and there is seldom if ever any formulated view before the hearing.

vi. Other Roles

The Jurats still maintain other roles, such as responsibility for liquor licensing (hence the prohibition on members of the licensed trade being elected as Jurat), gambling licensing and as returning officers at elections. Five Jurats further make up the Probation Board which leads the Probation Service. Two Jurats may also be called upon in the *remise de biens* procedure that grants the debtor certain indulgences while the Jurats attempt to realize his assets with a view to discharging his indebtedness.[50]

Jurats in Jersey also have a role in respect of the passing of contracts for the sale of land owned by a minor subject to a *tutelle* or a person subject to a curatorship, to avoid such transactions being subsequently set aside. Currently Jurats are the only members of the Prison Board of Visitors, but following recommendations by the Education and Home Affairs Scrutiny sub-panel in 2009,[51] it is likely that this role will no longer be restricted to Jurats, and will more closely follow the English Independent Monitoring Board model. Jurats also take part in civic and ceremonial activities, for example on Liberation Day[52] and Remembrance Day.

One further and rather important role that should be highlighted is the fact that certain senior Jurats (who generally are not qualified as

49 *Harrison* v *The Attorney General* [2004] JCA 046: '… the Crown is obliged to identify what is the Crown's opinion as to the appropriate sentence to laymen and women who are required to adjudicate on the submissions of the Crown and defence' (para. 47) and 'But in every serious case there will be Jurats sitting in the sentencing court who have not attended the trial. We therefore emphasise the importance of the advocates for both the prosecution and for the defence making sure that the circumstances of the offence are fully and satisfactorily explained to the sentencing court' (para. 173).

50 See F. Benest and M. Wilkins, 'Can we be at ease with the Remise?' [2004] JL Rev 42.

51 States of Jersey Education and Home Affairs Scrutiny Panel—Prison Board of Visitors Review Sub-Panel, 2 April 2009.

52 The Channel Islands were occupied by the Germans during the Second World War.

lawyers) are routinely appointed Lieutenant Bailiffs. Aside from the Deputy Bailiff—who in practice has to be suitably qualified and experienced as a lawyer to be appointed by the Crown and can (with the authority of the Bailiff) perform any function appertaining to the office of Bailiff[53]—the Bailiff has a customary law power to appoint Lieutenant Bailiffs[54] who may also act in his place. The power to appoint a Lieutenant Bailiff is in addition to that of appointing Commissioners who may sit as judges of the Royal Court[55] provided, however, that they are suitably qualified as lawyers. The Bailiff, Deputy Bailiff and any Lieutenant Bailiff or Commissioner appointed all take an oath (administered in English) which includes a promise 'to take heed of the good advice and counsel of the Jurats' as may be required in any case.[56] To the extent that this part of the oath refers to the adjudicatory function performed by the Jurats under the 1948 Law, it may be considered rather inapposite given that the Jurats are furnishing neither 'advice' nor 'counsel' to the judge. At the time of this paper, in addition to seven Commissioners, there are two Lieutenant Bailiffs in Jersey who are both Jurats, namely, Jurats de Veulle OBE and Le Brocq.

While the power to appoint Lieutenant Bailiffs is longstanding, it is surprising, given the 1948 reforms and the requirements for appointment of a Commissioner, that a person with no formal legal qualifications should be able to fulfil the role of the Bailiff in the Royal Court, although it is fair to observe that in practice any Lieutenant Bailiff that was not appropriately legally qualified would tend to sit as a judge in a narrow category of cases, such as in respect of sentencing[57] or in less contentious cases, and not in the trial of any matter. Nevertheless, it is not always the case that the matter coming before the (Jurat) Lieutenant Bailiff is straightforward. For example, in the 2005 case of *VKS* v *Health & Social Services Committee*[58] an *ex parte* order was made by a Lieutenant Bailiff (who was not a qualified lawyer) for removal of a baby from the mother shortly after birth. The decision was later reversed by a differently constituted Royal Court as the risk to the child did not in fact justify such 'a draconian procedure'.

Notwithstanding such concerns, however, the fact that in practice Lieutenant Bailiffs have performed their role appropriately is supported by the absence of any recorded complaint in modern times.

53 Article 9 of the Departments of the Judiciary and the Legislature (Jersey) Law 1965.

54 A power recognized in article 1(3) of the Departments of the Judiciary and the Legislature (Jersey) Law 1965.

55 By virtue of article 10 of the Royal Court (Jersey) Law 1948.

56 See schedule to the Departments of the Judiciary and the Legislature (Jersey) Law 1965 and to the Royal Court (Jersey) Law 1948.

57 For example, *AG* v *Picot* [2000] JRC 101; *AG* v *Last* [2000] JRC 224. Nevertheless, sentences are imposed sometimes for serious offences, such as indecent assault in these two matters.

58 2005 JLR 390; see also *AG* v *Tucker* [2000] JRC 53A, application for review of Magistrates' Court refusal to grant bail came before the (Jurat) Lieutenant Bailiff.

Nevertheless, the possible constitution of a Jurat as a judge of law in the Royal Court in this way appears not to have been considered in the 1947 Privy Council Report. The view is merely expressed that a Lieutenant Bailiff should be ineligible to sit as a judge in the Court of Appeal (that was then being proposed) but that consideration might be given to the possibility of Jurats assisting with some of the work of the magistrate in the lower criminal court.[59] In contrast, reliance was placed by the Privy Council upon the fact that the Bailiff was 'learned in the law' and that the then proposed position of Deputy Bailiff would require a person holding 'proper legal qualifications'.[60]

vii. Respective Roles of Judge and Jurats in Guernsey

The Royal Court of Guernsey sits either as the Ordinary Court comprising the Bailiff (or his substitute) and at least two Jurats, or the Full Court comprising the Bailiff (or his substitute) and at least seven Jurats. In Guernsey, as in Jersey, Jurats are sole judges of fact and sit with the Bailiff (or other presiding judge) who determines the law and procedure. The competence of Jurats as sole judges of law was removed by an Order of the Royal Court in 1964 (bringing into force a provision in The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950).[61] However, pursuant to section 6(5) of the 1950 Law, the Bailiff does have a casting vote as exists in Jersey whenever the Jurats are divided. The fact that the Jurats in practice sit in uneven numbers, however, means that there is also no reported instance of such casting vote having been exercised in Guernsey. Interestingly, it should be noted that the Bailiff's oath in Guernsey is different from that in Jersey, not only in that it is still taken in French, but because it includes a specific promise to execute and carry out the 'judgments made and announced by the Jurats'.[62] As is the position in Jersey, there is no formal requirement for the Bailiff to be a qualified lawyer but since 1895 all Guernsey Bailiffs have been qualified lawyers and usually having first served as HM Procureur and then Deputy Bailiff.[63] A 'Judge of the Royal Court' may now also be appointed by the Bailiff after the 2008 Law, but such judge has to be a suitably qualified lawyer, and is the functional equivalent of a Commissioner in Jersey. In addition, and as is further discussed below, the Bailiff enjoys a customary law power to appoint Lieutenant Bailiffs who may or may not be qualified lawyers.

59 Above n. 10 at 38.
60 *Ibid.* at 7 and 38.
61 See Darryl Ogier, *The Government and Law of Guernsey* (published by the States of Guernsey, 2005) 70.
62 *Ibid.* at 65.
63 *Ibid.* at 64. The post of Deputy Bailiff being created by The Deputy Bailiff (Guernsey) Law 1969.

In an interview with the writer, Jurat Derek Le Page describes the decision-making process of the Royal Court of Guernsey in more detail as follows:

> **Criminal trial:** The role of Jurats in Guernsey is very different from that of our Jersey colleagues. In the Royal Court of Guernsey there is no trial before a jury, that role is always fulfilled by Jurats. In any trial, either criminal or civil, matters of law are the sole responsibility of the presiding Judge; Jurats are the arbiters of fact. In criminal trials, the quorum is seven Jurats with a maximum of twelve. In practice a panel of nine or ten Jurats sit. A majority verdict is acceptable. In criminal trials the Jurats retire alone. The senior Jurat present will chair the discussions. A full review of the evidence will be undertaken with every Jurat given the opportunity to express his/her view on each matter. In conclusion a vote is taken with the unanimous or majority decision declared to the Court by the senior Jurat present. No reasons for the decision are given. The senior Jurat on the panel declares the verdict with no indication of each Jurat's decision. Sentencing following a guilty verdict will be conducted by the same Jurats who sat on the trial. The presiding Judge will sit with them to guide them upon matters of law and general sentencing policies. No recommendation regarding sentence is made by the Crown.[64] Sentencing following a guilty plea follows a similar pattern.
> **Civil trial:** The quorum is two Jurats, but in practice three Jurats sit. The presiding Judge retires with the Jurats in order to guide them on matters of law and record the reasons for the Jurats' decision. He does not take part in the discussions. He does not express a view or vote upon the final judgment. In practice each Jurat then declares his/her decision for or against the plaintiff and a reasoned judgment is given including any dissenting views on any matter. Following the introduction of The Royal Court (Reform) (Guernsey) Law, 2008 the parties may elect that the Judge sits alone even where matters of fact are in dispute.[65]

In criminal trials, therefore, it is important to note that (contrary to Jersey practice) the Bailiff (or his substitute) does not retire with the Jurats when they consider their verdict. Until its repeal by the 2008 Law, section 6(4) of The Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950 also expressly required the Jurats in criminal and civil cases to seek any further direction, advice or information from the Bailiff in open court. In the Guernsey Court of Appeal case of *R* v *Heywood*[66] it was decided that directions to the Jurats should be the same as to a jury, given that they were also laypersons and that it could not be assumed that the bench did not contain a recently elected or inexperienced Jurat. The Bailiff's summing up had to be appropriate to the whole bench and it was essential for justice not only to be done, but manifestly to be seen to be done. Given (as we have seen) the slightly greater latitude permitted in a

64 This, however, used to be the practice until s. 8(2) of the 1950 Law altered the position.
65 Section 13 of the Royal Court (Reform) (Guernsey) Law 2008.
66 Unreported, 31 January 1972.

summing up in Jersey to Jurats, it is interesting that the stricter Guernsey practice resulted from this appeal, presided over as it was by the former Bailiff of Jersey, Sir Robert Le Masurier.

In respect of civil cases, Jurat Le Page also suggests that the demarcation in role between judge and Jurats is carefully adhered to. This may in part be because in civil cases, until the 2008 reforms, the practice was that the Bailiff summed up to the Jurats in open court and did not retire with them. Consequently, the drafting of agreed questions to the Jurats developed with a view to elucidating their reasoning.[67] Only recently, by virtue of section 14(2) of The Royal Court (Reform) (Guernsey) Law 2008, has the Bailiff enjoyed a choice in civil cases and now 'need not sum up but may [instead] retire with the Jurats' where he can give appropriate directions in private, but subject to a reasoned judgment being subsequently handed down. In other respects, however, the decision-making process appears to have been bolstered as a result of various provisions contained in the 2008 Law. A specific instance of the new regime in practice is provided by the (civil) case of *Daniel* v *Gover* which is reported as follows:[68]

> Further to s.14(2) of the 2008 Law, the Deputy Bailiff did not sum up to the Jurats in open court, but instead retired with them, and subsequently delivered the reasoned judgment of the court as required by s.16(1) of the Law. When they retired, the Deputy Bailiff reminded the Jurats of their respective roles. The Deputy Bailiff is the sole judge of questions of law and procedure and the Jurats are the sole judges of questions of fact. The Jurats were directed to take account of all the evidence presented to the court; the oral evidence of the plaintiff and the defendant, who were the only two witnesses to give evidence, and the documents produced to the court. It was for the Jurats and not the Deputy Bailiff to decide what evidence they accepted and what evidence they rejected or of which they were unsure. Although the Deputy Bailiff reminded the Jurats of aspects of the evidence, he directed them that if he appeared to have a view of the evidence, or of the facts, with which they did not agree, they were to reject his view. The Jurats were directed to take account of the arguments and speeches they had heard, although they were not bound to accept them. The Jurats were further directed that they were entitled to draw inferences—i.e. to come to common-sense conclusions based on the evidence that they accepted—but that they might not speculate about what other evidence there might have been or allow themselves to be drawn into speculation. The Deputy Bailiff directed that the standard of proof was the civil standard of the balance of probabilities and that to establish something on the balance of probabilities meant to prove that something was more likely so than not so. In the judgment, findings of fact were the unanimous findings of the Jurats, unless indicated otherwise.

67 *IDC* v *Lainé*, unreported, Guernsey Court of Appeal, 18 December 2003.

68 2007–08 GLR Note 27. This was the first civil case to be heard by the Royal Court following the enactment of the Royal Court (Reform) (Guernsey) Law 2008, which came into force on 29 October 2008.

> The court recorded that it had taken account of the requirements of s.16(5) of the Law, namely:
>
> 'A reasoned judgment in civil proceedings in which the Jurats (and not the Bailiff alone) are sitting shall contain—
>
> (a) the Jurats' findings and decisions,
> (b) any dissenting findings or decisions made by different Jurats,
> (c) the identity of the Jurats making dissenting findings or decisions,
> (d) the Bailiff's findings, decisions and directions of law and procedure, and
> (e) the application of his findings, decisions and directions of law and procedure to the facts.'

Where the Jurats are divided and, indeed, even when they cannot agree upon whether or not a decision appealed from comes within a band of reasonable decisions, the finding of the majority of the Jurats will be respected and will only be overturned upon a conventional ground of appeal.[69]

In Guernsey, unlike Jersey, the Jurats in the Royal Court do not deal with children cases. Although the system is about to change in respect of child law as a result of the Children (Guernsey) Law 2008, children cases are heard by a judge and two members of the Children Panel.

viii. Other Roles

The Jurats in Guernsey have numerous other duties conferred upon them by statute. They conduct the Contract Court, hear appeals from the Magistrates' Court, act as Commissioners in *saisie*, *en désastre* and compulsory liquidation hearings and conduct appeals submitted under the Housing (Control of Occupation) (Guernsey) Law 1994 as amended. They also supervise the destruction of Guernsey currency notes, have a role in liquor licensing, consenting to Orders in Council, admissions to the Guernsey Bar and have a number of other functions. As members of the Royal Court, Jurats are also present at certain ceremonial occasions including Liberation Day and Remembrance Day.

In common with Jersey Jurats, a certain number of Jurats in Guernsey are appointed as Lieutenant Bailiffs. In more modern times, Lieutenant Bailiffs are also recruited from suitably experienced lawyers (as is in fact required by the 2008 Law in respect of a 'Judge of the Royal Court') but, historically, a Lieutenant Bailiff was by custom always appointed from the ranks of the Jurats.[70] Currently, Jurats Le Page, Le Poidevin, Bisson and Tanguy also hold the office of Lieutenant Bailiff and the concerns expressed earlier as to this practice similarly apply. In fact, it is a concern that appears to be supported in the

69 *Minister of the Environment Department* v *Johns*, unreported, Guernsey Court of Appeal, 22 November 2007.

70 R. Hocart, *An Island Assembly. The Development of the States of Guernsey 1700–1949* (Guernsey: States of Guernsey, 1988), *Guernsey Museum Monograph* No. 2 at 3.

2008 Law itself which expressly provides in section 2(2) that 'the office of Jurat is incompatible with that of a Judge of the Royal Court'. However, as is the position in Jersey, a Lieutenant Bailiff who was not appropriately qualified as a lawyer would tend to preside in a narrow category of cases and usually in non-contentious matters such as in the Contract Court and Liquor Licence Extension Court.[71]

ix. Roles in Alderney

In Alderney Jurats determine both fact and law, in very much the same way as lay magistrates do in England and Wales. The Court of Alderney is presided over by a chairman, who is one of the seven Jurats. The court is advised by a (Guernsey) legally qualified Clerk of the Court. In 2005 this post was amalgamated with the Clerk to the States of Alderney (Legislature)—and called the Greffier. All the Alderney judiciary are lay persons. Jurats in Alderney are also commonly appointed Commissioners in compulsory liquidations (as in Guernsey).

III. The Argument for Lay Participation and the Value of Diversity

Jurats tend now not to be drawn from those that are trained or qualified as lawyers although there are instances in the past where such persons have been elected.[72] There is a great deal of literature upon the significance of such lay participation in the legal process and the many benefits that are said to result.[73] One of the most important of these is the notion that lay participants are more representative of the local community than their professional counterparts. As a result, they tend to import local knowledge into the adjudicative process, enhance the legitimacy of the legal system and increase public confidence in it.[74]

Lay participation *per se*, of course, does not always engender such confidence and this is even evident from past dissatisfaction with the role of Jurats in the Channel Islands. In respect of Jersey, for example, the Report of the Civil Commissioners 1861 made certain critical observations as to the role of the Jurats, as did some of the persons who gave evidence. The Commissioners were, for example, unimpressed that as the Jurats were volunteers there was often delay in getting cases heard due to the difficulty of maintaining judicial continuity. The

71 See Ogier, above n. 61 at 68 and 69.
72 E.g., p. 42 of the 1847 Report of the Criminal Commissioners where one Jurat used to be a barrister and another an *écrivain* (or Jersey solicitor).
73 See, e.g., M. Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago, 1981) 57; J.W. Raine, *Local Justice: Ideals and Reality* (Edinburgh: T&T Clark, 1989) 170–1.
74 Sean Doran and Ruth Glenn, *Lay Involvement in Adjudication. Research Report 11, Review of the Criminal Justice System in Northern Ireland* (London: The Stationery Office, 2000) 10.

evidence provided to the Commissioners also alleged various other failings, although it is fair to observe that a certain amount of dissatisfaction arose from the then dual role of the Jurats as members of the court as well as members of the States with party allegiances.[75] The complaints include that some of the Jurats were partners in the different banks in the Island, and 'have acted as judges in their own cases'. In addition, it was alleged that the Jurats were 'sometimes illiterate', 'inefficient as law reformers' and 'not all familiar with the English language'.[76] More recently, in Guernsey, one particular litigant was most anxious to explore any link between the Jurats involved in his particular cases with freemasonry, albeit that the Court of Appeal felt this to be 'misconceived'.[77]

In the Channel Islands, as small communities enjoying a fairly high standard of living, it is arguable that currently there is somewhat less distance between a professional judge and the community[78] whom they serve when compared to other larger, more diversified regions. Nevertheless, the Jurats clearly do add a separate and important dimension to the legal process and are varied in their backgrounds. Current Jurats have, for example, been appointed from accountants, dentists, teachers, company managers, doctors, bankers, former politicians, nurses, the police force, pilots and retailers. By virtue of such diversity, the Court of Appeal of Jersey has in fact recognized in *Harrison* v *AG* that the Jurats are in a good position to perform their sentencing duty, necessarily being a more integral part of public opinion, collectively and individually, than is an English judge.[79]

For the purpose of this paper, the views of the senior Jurats in both principal Islands have been sought as to how they see the importance

75 G. Le Quesne, *Jersey and Whitehall in the Mid-nineteenth Century* (Jersey: Société Jersiaise, 1992). Party strife appears to have disappeared by 1875: 'There were no longer Laurel Jurats and Rose Jurats, nor Laurel litigants and Rose litigants. The political character of the Court, which had been such a reproach to it, was purged away'; *ibid.* at 48.

76 See index to evidence taken under 'Jurats'. In the mid-nineteenth century, many English people settled in Jersey, and there were moves to bring Jersey under the control of the English Parliament. Abraham Le Cras, an Englishman who had moved to Jersey, had been very active in lobbying the Commissioners to recommend changes in their report, but they did not endorse his demands, which they said would 'stop little short of an absolute adoption of the English law and the annexation of the island to an English circuit' (1861 *Report of Civil Commissioners* at 247). Following the Report of the Commissioners, in 1861 a bill was introduced into the English House of Commons to 'amend the constitution of the Court of Jersey'. Despite the Government's declaration that 'it is not the habit of this house to legislate on the internal concerns of Jersey', there was a long debate, but the Bill was withdrawn. It was reintroduced in 1864, at which time the States took a plebiscite on the question, 'Jurats or paid Judges?' Le Cras worked hard to encourage people to vote for change, but only succeeded in securing 189 votes in the whole island.

77 *Vekaplast Windows (CI) Ltd* v *Jehan*, Guernsey, unreported, 22 July 1996.

78 Not least because of the ever-increasing number of lawyers that are practising in Jersey and Guernsey.

79 2004 JLR 111 at para. 46.

of their role. Jersey Jurat John de Veulle OBE describes the advantages that are provided by Jurats as follows:

> Jurats bring to trials a relatively sophisticated, perceptive and conservative view. As a group they have wide ranging experience and are specifically elected by the College for the strengths that they bring to the bench. Their decisions are more likely to produce a better and more equitable result than that which flows from the vagaries inherent in the random selection of a twelve person jury . . . the general view of the Jurats is that they bring to the system an everyday commonsense contribution to the structure of justice.

Guernsey Jurat Derek Le Page is similarly convinced as to the value of Jurats to the Guernsey legal system:

> Jurats bring consistency and the ability through experience to identify and concentrate upon the relevant facts. Issues regarding the acceptability of evidence, hearsay, and the need for corroboration, for example, are understood.

Commissioner Howard Page QC refers to his 'considerable respect and enthusiasm' for the system of judge and Jurats:

> The fact that the Jurats are members of a small standing college of lay-judges, all of whom have considerable experience of, and have attained some distinction in, other walks of life contributes significantly to the degree of authority with which judgments of the Royal Court are regarded by the community at large, and also the consistency of decisions, in a way that could not be replicated if the lay members of the court were picked at random on an ad hoc basis, case by case, or if the court consisted of a judge sitting alone. Also, as a visiting Commissioner, I have certainly felt greatly assisted and assured by being part of a larger tribunal that includes members of the local community of experience and distinction. If there were any indication that they were inclined to regard their role as something of a formality, there would be cause for concern: but in practice, the time, sense of dedication and independence of mind that they bring to the discharge of their (honorary) functions never ceases to impress. I would happily see something similar adopted in the English courts.

While Jurats do have a varied background, they also share certain common features. In general, they tend to be retired or at the very least not in full-time employment and necessarily have to have sufficient income and assets to give them the freedom to perform their office, which is essentially unpaid. They also tend to be in the 60–70 age range: the average age of current Guernsey Jurats (including *Suppléants*) is over 66 and in Jersey is 68. In Alderney, the average age of a Jurat is slightly more youthful at 59. Interestingly, in Guernsey in the eighteenth century, Hocart states that the average age of a Jurat upon election was between 35 and 40 but some were as young as 24 and 25, and occasionally remained in office for as long as 50 years.[80]

80 Above n. 70 at 3. Eleazar Le Marchant was in service for 53 years from 1778 to 1832.

Until the 1980s, the Jurats were also male strongholds. The appointment of women has come rather late in the day—in Jersey the first female Jurat was elected in 1980 and in Guernsey 1985—but there have been four women serving recently at the same time[81] in Jersey and in Guernsey there are currently four female Jurats also. While parity with men has not yet been achieved (and indeed it ought to be noted that the 2001 census for Jersey and Guernsey recorded that there were more women than men) the current figures of serving female Jurats are perhaps not too surprising given the majority of men in public office in each Bailiwick and the wider sexual inequalities that continue to exist.[82]

As to ethnic diversity, it is appropriate to observe that all of the current Jurats are British as is required for eligibility to the post, either having been born in the island concerned or having lived there for any requisite amount of time. The fact that they are also white is not necessarily too surprising given the 2001 census. The population in Jersey is recorded as 53 per cent Jersey born, and a further 36 per cent elsewhere in the British Isles. The largest group remaining are those born in Portugal and amounting to 6 per cent of the population. The 2001 census for Guernsey does not have exactly comparable figures although does confirm that the majority are also Guernsey born.

Of course it is difficult to see how one can avoid completely a charge that there is some elitism or limit to the diversity of adjudicators in any legal system and it is a complaint that is more readily seen in England and Wales. The judiciary in England and Wales have for example been described with some justification a few years ago as 'male, pale and stale'.[83] Remarkably, it was not until October 2004 that Linda Dobbs QC was appointed as the first black person to become a High Court judge; being the same year that saw Brenda Hale as the first woman to become a Law Lord.[84] As far as magistrates are concerned, the position is far less distorted, and near equality in the sexes was noted as long ago as in the 1990s but, of course, magistrates are appointed rather than elected and such equality might therefore be easier to achieve.[85] Further, following a campaign to attract a wider

81 Jurats Le Brocq, Clapham, King and Newcombe. The latter retired on 23 October 2009. There were two previous Jersey female Jurats: Myles and Le Ruez.

82 Currently the States of Jersey comprises 41 men (77 per cent) and 12 women (23 per cent) per statistics supplied by the States Greffe. The States of Guernsey comprises 42 men (84 per cent) and 8 women (16 per cent) per http://www.gov.gg/ccm/navigation/government/states-members-and-committees/mandates-and-memberships/. As to inequalities, at the time of writing there is, e.g., no legislation against sexual discrimination in Jersey and in neither Bailiwick is there mandatory provision for maternity pay.

83 Radio 4's *Today* programme, October 2004, quoted in *Counsel Magazine*, November 2004 at 4.

84 Elizabeth Lane was the first woman appointed to the High Court in 1965 and Elizabeth Butler-Sloss was the first woman appointed to the Court of Appeal in 1988.

85 In 1996 there were 48 per cent women. Lord Chancellor's Department, Judicial Statistics England & Wales for 1996, CM 1736, 90.

range of candidates, ethnic minorities are now reasonably well represented.[86] Nevertheless, there remain difficulties in ensuring a sufficient number of magistrates in the younger age range and from more varied socio-economic groups. The perception that magistrates are often middle-aged and middle class has largely been shown to be true and perhaps this is unsurprising given the time required for the role and the fact that magistrates (as opposed to district judges or stipendiary magistrates) are not paid save in respect of receiving allowances in respect of expenses.[87]

Appreciating the need to encourage diversity particularly amongst the professional judges, the Department for Constitutional Affairs has implemented various measures, Lord Falconer (the then Secretary of State for Constitutional Affairs) having stated in a 2004 consultation paper:

> It is a matter of great concern that the judiciary in England and Wales—while held in high regard for its ability, independence and probity—is not representative of the diverse society it serves . . . the diversity of the nation should increasingly be reflected in the diversity of its judges. A more diverse judiciary is essential if the public's confidence in its judges is to be maintained and strengthened.

For the same reasons, it is proposed that the Bailiwicks of Jersey and Guernsey ought to give consideration to increasing the diversity of those who adjudicate in their courts, and particularly to increase the number of female Jurats, although, upon canvassing one Jurat, diversity was not seen to be particularly important:

> Ethnicity and political correctness seem to me to have little to do with the administration of justice. I would welcome any candidate who could contribute positively to that process . . . it is the quality of the candidate that is important.

Merit, of course, must be the criterion on which any judicial appointment is made. It is also right to observe that much of the debate that has taken place in other parts of the British Isles as to diversity does not always fit comfortably with small island communities such as the Channel Islands, where differing cultural and ethnic numbers may be limited by a number of factors.[88] Indeed, sporadically they may increase by virtue of the influx of migrant workers on short-term contracts. Further, there are some academics who have queried exactly what a more demographically representative panel might achieve in practice, suggesting that guilt or sentencing may not turn out to be any different.[89] In addition, jury selection in Jersey (known as *triage*) is

86 The National Strategy for the Recruitment of Lay Magistrates (2003) stated that there were 6 per cent ethnic minority magistrates as against 7.9 per cent of the population as a whole.
87 The Judiciary in the Magistrates' Courts (2000).
88 Not least by housing, employment and other legal restrictions.
89 M. Davies, J. Tyrer and H. Croall, *Criminal Justice*, 2nd edn (London: Longman, 1998) 177.

random and results in juries that do not always have an equal gender make-up. Others have suggested that the decision-making process inevitably is affected by the make-up of those that serve.[90] In an address delivered to the University of Cambridge Law Society on 18 November 1920 Lord Justice Scrutton accurately observed:

> The habits you are trained in, the people with whom you mix, lead to your having a certain class of ideas of such a nature that, when you have to deal with other ideas, you do not give as sound and accurate judgements as you would wish.[91]

Clearly, in various panels set up in the Islands (as elsewhere) women are viewed as making a particular contribution and it is notable that it is a mandatory requirement for at least one panel member to be a woman, for example, in Jersey's Youth Court[92] or in cases involving children in Guernsey.

Whatever one's views are of the merits of the various arguments, at the very least it is important to keep an eye on a system to the extent that it does not, in general terms, reflect the community that it serves and to question why this might be the case.[93] Further, the idea that diversity might have to come at the cost of 'dumbing down' (which in fact has not been suggested by anyone interviewed for the purpose of this paper) should receive short shrift. As Jane McNeill QC once politely remarked:[94]

> It is patronising to under-represented groups to send a message that their inclusion in appropriate numbers can be achieved only by changing the eligibility thresholds.

IV. The Importance of Training

Jurats, who are lay people and do not have the formal legal training of a professional judge, have a particular and definite contribution to make to the legal process, as has already been touched upon above. The fact that they tend to have no or little legal training is arguably a very important characteristic. Some, for example, might argue that such lay involvement is more likely to inject popular values into decision-making than that rendered by a professional judge; a point

90 See generally J.A.G. Griffiths, *The Politics of the Judiciary* (London: Fontana Books, 1977).
91 Quoted by Griffiths, *ibid.* at 174.
92 See article 11 and the schedule to the Criminal Justice (Young Offenders) (Jersey) Law 1994. Currently the Panel consists of eight women and three men with another appointment awaited. Note also the mandatory retirement age of 60 in contrast to that of Jurats.
93 Surprisingly, there are no available figures for the number of women that practise as Jersey lawyers but it is estimated to be about 25 per cent. It is possible that the electoral college (being dominated by men) is self-perpetuating. Alternatively, that women are for some reason not attracted to the post of Jurat or feel unable to take up such post. Greater research into this area would be welcomed.
94 *Counsel Magazine*, July 2005, 4.

already made in *Harrison* v *AG*[95] and indeed addressed as far back as the 1847 Report of the Criminal Commissioners who record an instance of two Jurats preferring a more lenient sentence than that which was known to Jersey law.[96] Nevertheless, it would be naïve and—in an era that espouses the furthering of what has become known as 'the overriding objective'[97]—possibly counter-productive not to ensure that Jurats receive a certain level of training with a view to enhancing proficiency and consistency. Such tension has led some observers to point to 'the contradictory notion that there *is* a place for laypeople in the lower courts, provided that they are "properly" instructed'[98] while more recent studies have argued that the development of legally based skills can only enhance lay decision-making.[99] In the course of a review of the criminal justice system in Northern Ireland during 2000, the current position was neatly encapsulated by the statement that:

> . . . whilst few today would contest the desirability of training lay justices, the nature of that training is a matter on which opinions vary.[100]

Formal training for the judiciary in England and Wales appears to have come surprisingly late. It has been stated[101] to have commenced in September 1963 with a one-day conference held in London which became an annual event until the creation of the Judicial Studies Board (JSB) in 1979. This took over responsibility for the training of judges, initially in respect of the criminal jurisdiction, being extended in 1985 to the family and civil jurisdictions. The JSB responsibility was also subsequently extended to the magistrates. The JSB has a website (www.jsboard.co.uk) which includes various publications, including bench books (or reference materials that are used by judges and magistrates).

Training of both professional judges and Jurats in the Channel Islands has similarly been a rather slow affair. Certainly in Jersey some training of Jurats took place from the 1990s, but even by 2004 it

95 *Ibid.* fn. 67.
96 1847 Report of the Criminal Commissioners at 27. 'The persons thus selected have, therefore, seldom received any legal education; other requisites are more valued. It results almost inevitably that they must often be prompted to act upon their own individual notions of justice, instead of ascertained rules of law . . . Nor is it reasonable to expect that individuals, called upon to act judicially without previous training by legal study or habits, should not be more keenly alive to what may appear to them the expediency in the particular case before them than to the paramount importance of acting on fixed principles of law.'
97 I.e. to progress to trial in accordance with an agreed or ordered timetable, at a reasonable level of cost, and within a reasonably short time. See further T. Hanson, 'No Legal System is an Island, Entire of Itself' [2004] JL Rev 209.
98 Z. Bankowski and G. Mungham, 'Laypeople and Lawpeople and the Administration of the Lower Courts' (1981) 9 *International Journal of Sociology of Law* 87.
99 I. Innes, 'Lay Justice—Finding and Training the Right People' (1990) 169 SCOLAG 150–2.
100 Above n. 74 at 36.
101 *Counsel Magazine*, August 2004, 20.

appeared that this was limited, somewhat ad hoc, and against a feeling by some that the value of training was not significant given, as one Jurat stated at the time, that 'Jurats are judges of fact and there is little that can be done in that direction'. Against this view is the extensive training that is felt to be beneficial to be given to magistrates in England and Wales and also the multitude of courses provided by the JSB and others on a variety of specific matters such as how to approach and evaluate the evidence of children as witnesses, issues that may arise involving ethnic minorities, including the need for equal treatment, or matters connected with sentencing with which Jurats are directly involved. All such training hopefully would improve a court's ability to arrive at 'correct' decisions and no doubt would be of benefit in both Bailiwicks.

In more recent times, the training of Jurats in Jersey has received greater emphasis and, in a document that was made available for the purpose of this paper, the first two objectives of such training are stated to be:

1. To ensure Jurats are effective and well informed so that they are able to make a full contribution to decisions of the Royal Court
2. To ensure Jurats are fully conversant with the workings of the Royal Court, including a working knowledge of administrative procedures and protocols.

Important to achieving such objectives is what may be described as a Jersey Jurats' manual[102] (the second edition of which was issued in April 2008) and which is aimed in particular at recently appointed Jurats. The hard copy of this manual is held in the Jurats' Room, and every Jurat in Jersey is issued with it on a CD for their personal use.

In Guernsey, there is currently no formal training given to Jurats although they do attend seminars on an ad hoc basis and, while there is a Jurats' manual, the current version is said to be out of date but is in the process of being revised.

While recent developments in the training of Jurats are to be welcomed, it would be desirable for there to be greater transparency in the training that is undertaken by the Jurats (and indeed the judges) not least given the importance of public confidence in the legal systems of each Bailiwick and the fact that external scrutiny and discussion tends to improve and spur on the process. Further, given that continual professional development is seen in many professions as not merely desirable but a mandatory requirement, this should be no less important for those involved in the administration of justice in the Channel Islands. A Serious Case Review in Jersey (inquiring into multi-agency failings that led to a particular child suffering harm) has

102 Unfortunately, it was not felt to be appropriate for this manual to be made available for closer outside scrutiny for the purpose of this paper.

more recently reinforced such a view.[103] One of its recommendations is that there is specialist training for the judiciary so as 'to increase awareness of the respective roles in safeguarding the welfare of children and young people and to improve decision making'.

V. Maintaining Boundaries in the Decision-Making Process: Jersey and Guernsey

In Alderney and Sark the lay participants are both judges of law and fact and so the precise demarcation between the two areas is less of an issue. In Jersey and Guernsey, the statement that the Jurats are the judges of fact and the Bailiff (or his substitute) is the sole judge of law, while true, oversimplifies the position in many important respects. Sometimes it is difficult to separate out exactly what is law and what is fact, not least because some issues incorporate both law and fact. In both Jersey and Guernsey, for example, the Court of Appeal has ruled that the question of admissibility of evidence, including ancillary findings of fact, was all a matter of law of which the Bailiff or any of his substitutes was the sole judge.[104] In contrast, issues of law of a foreign jurisdiction will be issues of fact for the Jurats to determine.[105] A question of procedure, however, will be one of law in Jersey and Guernsey[106] and, presumably, it is a matter of procedural convention that has led to the Jurats in both Jersey and Guernsey refraining from asking directly questions of advocates or witnesses except through the Bailiff (or his substitute) or, alternatively, directly but only with the judge's prior permission.[107]

Perhaps of greater importance, however, is understanding the process by which the Jurats arrive at their adjudication and the role played by the professional judge, including any boundaries that are observed between that judge and the Jurats. Certainly in Jersey, and despite the apparent simplicity of the 1948 Law, it has been extremely difficult to work out the correct procedures that should be adopted. It was, for example, not until the 1972 case of *AG* v *Paisnel*[108] that it was thought appropriate to sum up to the Jurats in open court (as with a jury) a procedure which by 1997[109] became accepted as the better course to adopt. In the case of *AG* v *Bale*[110] there was further confusion about whether or not it was right for the Jurats to be involved

103 See Jersey Child Protection Committee website at www.gov.je. The author of the overview report was James Blewett and it is dated February 2010.
104 *Lundy* v *AG* 1996 JLR 193; *Tilley* v *AG*, Guernsey Court of Appeal, 27 November 1973, unreported.
105 *In Re Imacu Ltd* 1989 JLR 17.
106 Article 15(1A) of the Royal Court (Jersey) Law 1948.
107 The author has not witnessed in Jersey a Jurat speaking directly to an advocate or witness, but in Guernsey, occasionally, it does occur: *R* v *Millman* 1995 GLJ 29 at 31B–D.
108 1972 JJ 2201.
109 *Snooks* v *Attorney General* 1997 JLR 253.
110 1983 JJ 7.

and present in court while the admissibility of evidence was determined, the decision that they should be eventually being reversed 13 years later in *Lundy*.[111] Further, the question raised (and side-stepped) by the Court of Appeal in *Snooks* as to whether or not the judge could retire with the Jurats in criminal proceedings was eventually determined in 1998 in favour of such a practice continuing but with additional guidance having to be handed down.[112] Of course, this is not to say that the position in Guernsey was a great deal clearer during the same period. The Guernsey Court of Appeal in *R* v *Heywood*[113] and *R* v *Tilley*[114] permitted appeals against conviction (the latter in respect of murder) and had to rule upon the need for the Jurats to be 'directed by the Bailiff no less fully than jurymen'. Perhaps surprisingly, such a strict approach was not so mirrored in the subsequent Jersey Court of Appeal in *Snooks*.[115]

Reviewing the various cases, it is interesting that comparisons are frequently made between the Bailiff/Jurat system with the roles played by a judge and jury, or lay magistrates and their clerk or legal adviser. In fact, the closest equivalent in England and Wales to the Bailiff/Jurat system is the appellate procedure from the Magistrates' Court to the Crown Court. On such appeals the Circuit Judge (Recorder or High Court Judge) sits with between two and four lay justices (magistrates) to hear appeals against conviction or sentence.[116]

> The justices are themselves judges of the Crown Court when it exercises its appellate role, and must take a full part in all decisions. However, in matters of law, they must take a ruling from the presiding judge in the same way as a jury. The judge retires with the lay justices, and they reach a decision on the facts within the framework of the law as explained by the judge.[117]

The problems that are evident from local case law do suggest that further research and subsequent statutory guidance might be of benefit. Certainly, the current Guernsey position, which has been highlighted above, is to be welcomed because The Royal Court (Reform) (Guernsey) Law 2008 has brought reform and a measure of clarity to part of the administration of justice and, in particular, to the way in which decisions are reached in civil cases.

The Jersey Royal Court case of *Eden* v *Whittingham*[118] perhaps exemplifies the role of the judge and Jurats in its purest form in

111 *Lundy* v *Attorney General* 1996 JLR 193.
112 *Ibid. AG* v *Young & Williams* 1998 JLR 111.
113 Unreported, 31 January 1972.
114 Unreported, 27 November 1973.
115 1997 JLR 253.
116 Section 74(1) of the Supreme Court Act 1981.
117 Consultation paper in respect of legislation to remove lay justices (Lord Chancellor's Department, October 1998).
118 [2005] JRC 166.

Jersey. It was a case where the Deputy Bailiff sat through the civil trial but retired for fear of any risk of bias just before the Jurats commenced their deliberations. A fresh judge frankly 'knowing nothing of the case' therefore had to sit and familiarize himself with the matter in dispute by reference to the transcripts. A perusal of the judgment makes clear throughout that it recites the view of the Jurats on issues of fact and as to which witnesses ought to be preferred. When it came to the law, however, the judge makes clear the question that he has been asked and his judgment on that issue of law. In conclusion, 'the view of the Jurats' is expressed that the 'plaintiffs have failed to prove their case'. It is patent in this case that the role of judge and Jurats was steadfastly respected, albeit in very unusual circumstances.

More typically, however, judgments of the Royal Court of Jersey (and also in Guernsey until the 2008 reforms) are expressed as the court as a whole and irrespective as to the precise role of the judge and Jurats in the formation of that judgment. Strictly speaking, the Bailiff's view is irrelevant on matters within the exclusive jurisdiction of the Jurats. It is tempting to draw from this the conclusion that the issues in the case have been resolved by a rather free discussion between judge and Jurats with the view of achieving what has been described in Guernsey as a 'common mind'.[119] Commissioner Bailhache (formerly Bailiff and Deputy Bailiff of Jersey) provided to the writer the following insight into the process in civil cases in Jersey:

> The practice of judges probably varies, but the legal division of responsibility is clear. The presiding judge always retires with the Jurats to consider whatever is in question because the presiding judge is a reserve judge of fact. I do not know what others do, but my custom is to sum up the law, if necessary, to the Jurats and set out for them what are the factual issues upon which they have to make a decision. Where a discretion is to be exercised, the background law is first rehearsed, and then there is a discussion. I hold back, certainly at the start, from expressing firm views on any factual issues, but it is true to say that very often the discussion results in a consensus emerging.

The danger of such approach, however, lies in the potential for the views of the Jurats to be influenced by those of the judge when their respective roles are intended to be very different. Clearly, given that the Bailiff or his substitute has a casting vote where there is disagreement, such discussions have justification but it does lead to potential tension between the respective roles of judge and Jurat to the extent at least that the judge is never called upon to exercise his reserve role. In fact, the occasions upon which a judge in Jersey has had to exercise

119 See *In the Matter of the H Trust* 2007–08 GLR 118 at 121, applying *In re W's 1966 Settlement* (1998) 25 GLJ 46.

his/her reserve function as to issues of fact are extremely rare[120] while in Guernsey no known instance can be recalled or has yet been reported. Such cases of a split decision, however, do provide important markers to the effect that the Jurats are performing their functions with welcome vitality. Nonetheless, there must be a danger of the judge influencing the decision-making process upon issues of fact, the quantum of damages or sentence simply by their active participation, and this is even more likely in cases involving Jurats who are inexperienced and recently appointed. In Guernsey at least, the 2008 reforms are largely to be welcomed because they appear to have reinforced the boundaries as to the respective roles of judge and Jurats.

Although not necessarily because of any fear that the Jurats might be unduly influenced, Commissioner Page QC does urge that the judge should be cautious of usurping the role of the Jurats, even while the case is being heard:

> The presiding Judge in Jersey, as it seems to me, is obliged to exercise a much greater degree of caution about making observations—in the course of a trial—on the cogency or otherwise of evidence or submissions relevant to contentious issues of fact than is his English counterpart. It is, of course, always possible to make such observations if they do no more than reflect the views of the Jurats, but the scope for the impromptu remark designed to give an indication to counsel of the court's current view of some aspect of, say, the evidence on a particular fact, for the purpose of moving the trial along, is considerably more circumscribed than it is where a single judge is the tribunal of fact as well as law.

In *In re Sinel*[121] any suggestion that the judge could influence the Jurats when making their decision was rejected, albeit in the context of an allegation of bias rather than any detailed analysis of the decision-making process itself:

> It is well known in Jersey that there have been in recent years a number of cases in which the sitting Jurats have insisted on deciding civil cases in a way contrary to that advised by the sitting judge. The real position is that the Jurats are jealous of their situation as the sole judges of fact, and are true to their oaths of office in insisting on deciding the facts of cases in accordance with their individual judgments.

More recently, in the case of *Michel* v *AG*[122] it was held by the Jersey Court of Appeal that:

120 For an example of a civil case where the Jurats did disagree and the judge had to exercise his reserve function see the planning review case of *Trump Holdings Ltd* v *Planning & Environment Committee* 2004 JLR 16 at paras. 109–13. See also *De La Haye* v *Le Corre* 1982 JJ 7, being a case of adultery. In respect of criminal cases where Jurats could not agree on sentence see *AG* v *Perron*, Royal Ct, 10 November 1989, unreported; overruled by *Sheldon* v *AG* 1996 JLR Note 19; *AG* v *Artiss* [2003] JRC 088 and see also *AG* v *Dickenson* [2002] JRC 201.

121 2000 JLR 18.

122 2007 JLR Note 54.

> . . . the judge had a casting vote and would therefore become part of the fact-finding tribunal if the two Jurats could not agree, the Judge's inappropriate remarks in the present case were not relevant to the question of whether there was a real possibility of bias on the part of the tribunal, as the Jurats reached a unanimous verdict and he therefore played no role in the determination of the applicants' guilt. In such circumstances, the judge's attitude would not be relevant unless he allowed it materially to influence the Jurats, which was not suggested.

In fact, even in the Privy Council in the *Michel* case (where the appeal succeeded) the Board was 'not entirely persuaded . . . that the Jurats were not well able to reach their own conclusions on the merits or otherwise of the defence' and despite the 'patent disbelief' of the judge.[123] Indeed, in that case there were positive indications that the Jurats had not followed the clear and inappropriate lead of the judge as to what findings ought to have been reached.

Nevertheless, it is difficult to assess the risk of a judge being able to influence the Jurats either during the course of the trial or when they retire to discuss the case without empirical research. The comment of the Court of Appeal in the *Sinel* case that 'it is well known' that the Jurats will not be influenced is, with respect, not one that can be sensibly tested at this juncture and, with the exception of isolated instances,[124] essentially relies upon anecdotal reports. Hopefully one day such research might be commissioned, but there is already sufficient material in other jurisdictions that does support the concern expressed in this paper.[125]

> Studies have been conducted in several jurisdictions which employ hybrid tribunals [i.e. lay and professional adjudicators sitting together] and the prevailing view is that the professional member typically wields a more powerful influence than the lay participants, in spite of the numerical advantage of the latter . . . in terms of interventions in the course of the proceedings and in terms of influence on decisions on both sentencing and guilt, the contribution of the lay members was clearly more limited in practice than the theory of equal participation would suggest. A similar pattern was detected by the authors of a research study into the role of lay members of social security appeal tribunals in England.[126]

It is somewhat surprising, therefore, that in England and Wales, there was the removal in 2004[127] of many of the automatic exclusions as to

123 *Michel* v *AG* [2009] UKPC 40 at para. 25.
124 Above n. 121. And note further *Michel* v *AG* [2009] UKPC 40, where the Jurats did appear to reject certain inappropriate observations of the judge.
125 Consider, e.g., the position in Sweden where lay judges similarly sit with a professional judge but have an equal voting right with the professional judge. Professor Christian Diesen of Stockholm University states in *Lay Judges in Sweden* that Swedish lay judges behave very passively during the deliberation process and that verdicts in which the lay majority outvotes the professional judge are very rare. Consensus is almost always achieved.
126 Doran and Glenn, above n. 74 at para. 4.27.
127 Criminal Justice Act 2003.

who may serve on a jury, thereby permitting in principle judges, lawyers and police officers to serve. There have, however, been a number of successful appeals against resulting convictions[128] and there is notably also a case pending before the European Court of Human Rights on the point.[129]

VI. Proposed Reform

Irrespective of developments in England and Wales or wider afield, for the reasons outlined above, it is the contention of this paper that the casting vote of a judge in Jersey and Guernsey should be abolished and that where Jurats are involved, the Guernsey model (involving three Jurats) should be adopted by the Inferior Number of the Royal Court of Jersey.[130] Discussions between judge and Jurats in both Jersey and Guernsey ought therefore to be carefully managed and kept to a minimum consistent with their respective roles. An increase in the total number of Jurats in Jersey (as exists in Guernsey) would obviously be a corollary of such a reform.

The abolition of the judge's casting vote is justified not only by reference to limiting the extent to which the judge becomes involved in the Jurats' adjudicative process, but also by the inappropriate requirement in both Jersey and Guernsey that the casting vote (as its title implies) has to be exercised so as to achieve a majority. Where the Jurats are faced with two options such as guilt or innocence, a casting vote by the judge may not pose a problem but where there are a number of options in a given scenario, for example in respect of the level of damages or sentence, it cannot be right that the judge is obliged to give a decision simply to make up a majority and irrespective as to whether or not he agrees with any of the views of the Jurats involved. In *Sheldon* v *AG*[131] this principle appears to have been accepted when it was held that where the Jurats were evenly divided on sentence, there was no convention requiring the Bailiff to choose the most lenient option and that his casting vote must be exercised 'judicially' and 'in accordance with his own view'. Unfortunately, the case did not explore, and is therefore not an authority upon, the position where the Bailiff was unable to agree with *any* of the views of the Jurats. By way of example, consider the position of a defendant being sentenced before the Inferior Number of the Royal Court of Jersey where the offence justified a sentence of imprisonment within the

128 E.g., *R* v *Green* (police officer was a member of the jury); *R* v *Williamson* [2007] UKHL 37 (senior Crown Prosecutor sat on the jury).

129 *Hanif & Khan* v *UK* [2009] ECHR 1426.

130 This might also entail some physical alterations to the existing Jersey 'No. 2 Court' and also the court known as 'The Old Library'.

131 1996 JLR Note 19. The full judgment can be found in the unreported series, 2 December 1996.

range of two to four years. The Jurats may disagree: one deciding that three years is appropriate and the other believing that four years is merited. The judge might view the matter as meriting a sentence at the bottom end of the range of two years but, according to statute, would in fact only have a choice between the views of the Jurats, neither of which he agrees with. Unless further discussion were to solve the dilemma, or a decision made to rehear the matter before the Superior Number (involving a greater number of Jurats), the defendant would receive an extra year's imprisonment, being the least sentence available to the judge. Such a result might be dismissed as a theoretical possibility only but actually is the type of situation recorded as having occurred as long ago as 1847.[132] Clearly, a decision arrived at in this way cannot be fair and must risk a breach of the defendant's article 6 rights under the European Convention.

Even if abolition of the casting vote were deemed to be too radical an option, at the very least, the judge's decision must not be fettered by statute in the way that it currently is, and the judge should be left to arrive at his own independent view. In addition, there would remain a potential problem for the Royal Court of Guernsey to the extent that the Bailiff does not retire with the Jurats and is not therefore familiar with the discussion and reasoning of the Jurats on any particular point. If called upon to exercise a casting vote, it would appear difficult for him to reach a fully informed decision, this being one of the justifications for current Jersey practice.

With regard to Jurats that are also appointed to sit as a Lieutenant Bailiff, it is proposed that the exercise of such post of Lieutenant Bailiff should be reserved for ceremonial occasions only, unless the Jurat concerned happens also to be appropriately legally qualified. Even in the latter circumstance, however, the type of case that such a Lieutenant Bailiff should sit on perhaps also should be controlled by practice direction so as to match the complexity of the case to the legal expertise of the particular Lieutenant Bailiff concerned.

In respect of training, it would seem sensible for Jurats to receive training comparable to that received by lay magistrates in England and Wales and in addition to that which is already regarded as appropriate to better understand the peculiarities of local practice. Obviously, not all training that magistrates receive would be relevant for practice in the Channel Islands, but the Institute of Law recently created in Jersey might be in a good position to assist in adapting the English framework to local demands even in the absence of any other resource being made available.

132 See above at n. 26 the quotation from the 1847 Report of the Criminal Commissioners.

VII. Conclusion

Le Patourel has described the medieval Jurats as 'the custodians of local customary law'.[133] In more recent times, however, it is clear that the ascertainment of customary law on a particular point can be extremely difficult even for trained lawyers and then is usually subject to some debate. One can understand, therefore, why the reforms in Jersey, and those of 1950 and 1964[134] in Guernsey, now require the judges to determine and apply the law rather than the Jurats. While the appointment of lawyers from outside the Channel Islands to sit as judges in both the Royal Court and the Court of Appeal is an extremely useful resource, there is, however, the danger of the local law subtly changing as a result.[135] Le Patourel expresses the opinion that the cessation of regular judicial visits by English judges in the Islands after 1331 was significant because it meant that 'local law was left to develop, unhindered, in its own way'.[136] Some may argue, therefore, that our most senior and permanent judges, the Bailiff and Deputy Bailiff, should be deployed more often in our courts than in sitting in the States where their experience and knowledge of local law is arguably less called upon.[137]

The continuing advantages of having Jurats as lay members of the Royal Court, however, remain clear notwithstanding some of the concerns expressed above. There can be little doubt that the Jurat system works well in the Channel Islands and that the Jurats (who are essentially unpaid)[138] merit an enormous amount of praise for their honorary service. However, in an increasingly complex legal environment, with substantial demands upon time and resources, it is vital that the Jurats are trained appropriately and that the decision-making process of Bailiff and Jurats is transparent. Perhaps, also, if the public were made more aware of the invaluable role of the Jurats and efforts further made to encourage greater interest in seeking such office, the members of the electoral colleges would find an increasing number of people willing to come forward. In this way, a greater degree of diversity might be achieved.

133 See Le Patourel, above n. 4 at 111.
134 Royal Court (Powers of Bailiff and Jurats) Order 1964, article 1 (Guernsey).
135 See Hanson, above n. 97 at 215: 'Perhaps, the options open to the Channel Islands have now come full circle and, centuries after their separation from Normandy, they face once more the real prospect of being drawn ever closer to the law and procedures of England.'
136 See Le Patourel, above n. 4 at 105.
137 They act in effect as 'speaker'. An independent panel headed by Lord Carswell has recently been appointed to inquire into the role of the Bailiff and other Crown Officers.
138 In Jersey there are 'Jurat stamps' required for certain matters involving Jurats and the proceeds are divided equally amongst their number. In Guernsey they share certain fees from the Contract Court.