

Review of the Roles of the Crown Officers

Submission by Paul Le Claire

“A love of tradition and reform are not mutually exclusive.” Bailiff’s speech to the Assize d’Heritage 2008

The Bailiff continued:

“The independence of the Court from political interference is one of the pillars of democracy. What may be worth restating, however, is that every [litigant] has a legal right to be tried by a court which is impartial and free from the appearance of bias.”

Bailiff

1. For the purpose of this submission the term Bailiff is used also to denote Deputy Bailiff and Lieutenant Bailiff. The role of the Bailiff of Jersey is many faceted but the two main elements of what has been described as the dual role, are those of President of the States and President of the Royal Court or Chief Justice. To an extent flowing from these two areas of responsibility are the Bailiff’s other functions of President of the Court of Appeal, Deputy Governor in the absence of the Lieutenant Governor, President of the College of Electors, member of the Emergencies Council and the various ceremonial duties he performs.
2. The general view in democratic societies is that there should be a separation of powers in respect of legislative, judicial and executive functions. This is not always completely achieved, as even in democracies such as the UK and the USA there are overlaps. Nevertheless, in order for there to be confidence in government institutions and the courts, there is a need not only for there to be independence but for the system to be transparent.

Human Rights (Jersey) Law 2000¹

3. In most cases the concern would be for the independence of the judiciary, for the courts to be free from interference from government. This need is now more compelling since the coming into force of the Human Rights (Jersey) Law 2000. Under article 4 of the Human Rights Law, the Royal Court is obliged to interpret legislation in a way that is compliant with the rights embodied in the European Convention on Human Rights. If it is not possible to do that, under article 5 the Royal Court may make a “declaration of incompatibility”, in effect telling the States that they should look again at the offending legislation and consider amending it.

¹ See article by Andrew Le Sueur in Bailhache (ed) A Celebration of Autonomy 1204-2004 Jersey and Guernsey Law Review at page 141-148

4. This could mean that the Royal Court would be scrutinising legislation. The Bailiff being both the Chief Justice of the Royal Court and a member of the States would therefore be put in an invidious position if the Royal Court declared that a Law was incompatible, and there may also be the suggestion that with the Bailiff as head of the judiciary as well as a member of the States who enacted the offending legislation, the Royal Court may be inhibited from making declarations of incompatibility which it should make.

McGonnell

5. In the Guernsey case of McGonnell² the Deputy Bailiff presided over the passing of legislation in respect of compulsory purchase, and subsequently presided over the Royal Court, when an application was brought under that same legislation. This was held by the European Court of Human Rights to be a breach of article 6 of the Convention because this could cast doubt over the impartiality of the judge. Since that case both Guernsey and Jersey have adopted the practice of the Bailiff sitting as a judge in any case where the Deputy Bailiff was presiding over the States when the legislation was passed and *vice versa* in an effort to prevent the mischief found in the McGonnell case. This is clearly far from ideal, and is a problem which would disappear if the role of the Bailiff and Deputy Bailiff in the States were to be curtailed.

Censorship of Propositions

6. There have been occasions when States members, including me, have put forward propositions, only to have these amended, censored or ruled out of order by the Bailiff in his role as President or speaker of the States. This has happened in the context of matters which were potentially critical of the Courts and the judiciary, ultimately only being permitted without further delay by the Bailiff in an amended proposition P62/2009³. (That proposition related to my involvement in respect of a children case⁴. My criticisms of the Court were vindicated in the Serious Case Review in respect of those children at paragraphs 8.14-8.18, 9.3 and 10 of the recommendations. Further concerns are highlighted subsequently in my submission). States members (who have been duly elected by the people of Jersey) have consequently felt frustration when thus denied the right to debate an issue by virtue of a decision of an un-elected Crown appointee. As former Senator Ted Vibert highlighted some 5 years ago that “The right to approve the content of questions and personal statements is a subtle power that controls a certain amount of what a member can say in the House. It will be argued that this vetting process is to ensure that there is no breach of Standing Orders but this power is discretionary and open to question” I would contend that

² (2000) 30 EHRR 289, para 51

³ See email exchange at Appendix 1

⁴ The quotation to which objection was taken was “*The system (including the Court) failed the children in the essential period 1999-2000 and thereafter. It then took some 9 years for the children to be taken into care by which time the children had suffered years of abuse and neglect.*” (emphasis added).

there have been occasions in my own experience, where this power has been misapplied. Others have made the same point, the other Deputy and three Senators, one being myself when I was the holder of that office some years ago.

7. There will be those whose position is such that they have greater privileges as States Members, notably those at the head of P and R and consequently the Council of Ministers. I imagine they will feel that everything is fine. I do not agree. The experience I had with the previous Bailiff has not been repeated since the current Bailiff has taken office. I make no criticism of either holder of the office. These matters are subject to the different personalities involved. However, these differences and different interpretations should not result in the experiences that I and others have had. The lack of separation of powers and the lack of a code of conduct allow these things to happen and they will continue to happen in the future if the role of the Bailiff remains un-changed.

8. The situation is further compounded when any recourse which may be had in respect of such a decision is unclear and, it would appear, only be to the Royal Court, which is also presided over by the Bailiff. This again does not sit well in a human rights context, the fear being that the Royal Court might not be impartial or not appear to be impartial. Whether or not this is in fact the case, the public's perception is important and members of a democratic society need to have the reassurance that their courts are impartial. There is actually no reason why this task of censoring the content of some propositions is necessary at all, and no reason why it should be a task performed by the Bailiff. I have seen the Greffier, as presiding officer, on many occasions ruling whether or not an oral question is within standing orders. There is therefore no reason why this ad hoc arrangement should not be more permanent and the Greffier, or a specially appointed or elected Speaker take on this role all the time.

Code of Conduct

9. In respect of the exercise of any control over the submission of propositions, there is no code of conduct clarifying how the Bailiff, as President of the States should respond to complaints on such matters. By contrast there is a detailed code of conduct for members of the Jersey judiciary⁵. Clause 9 of that code states that: "*Members of the judiciary shall not join any political organisation, association or body, nor one which, by reason of its nature or purpose, could conflict with judicial independence or impartiality*". The States of Jersey, is surely a political body and by article 2(1) and the definition section to the States of Jersey Law 2005, the Bailiff is a member.

⁵ See Appendix 2

Therefore, are not the Bailiff and Deputy Bailiff breaching the code regulating their roles as judges?

10. And if this is the case, what should they do about it? Clause 19 of the same code provides the answer: “If any member of the judiciary is in doubt whether his or her conduct might be contrary to any provisions of this Code, he or she should consult the Bailiff so as to secure a ruling in advance in relation to that proposed conduct.” Another difficult position for the Bailiff to find himself in, as judge in his own cause.

Role of the Bailiff in the States

11. The Bailiff’s role in the States is a relic of the past. Historically, the Bailiff and the jurats, who formed the Royal Court, were a legislative as well as a judicial body. In 1771 the Royal Court was deprived of its ancient right to legislate, and became merely a Court of Justice. The power to enact laws was solely entrusted to the States, which consisted of the rectors, the constables and the jurats. This was not ideal because the jurats were also part of the Royal Court. Although there was pressure to remove the rectors and the jurats from the States as early as 1773, in fact it was not until 1948 that the jurats were replaced by senators in the States.

12. The Bailiff’s role within the States was reduced following the passing of the States of Jersey Law 2005 when his casting vote in the chamber was removed and also his power of dissent. The Bailiff’s role now, during sittings of the States, largely consists of that of Speaker. This is a task which can be delegated to either the Deputy Bailiff or frequently, the Greffier. The Greffier has chaired the sitting when there have been significant debates, such as the decision whether or not to compulsorily purchase land at Plémont. It would make sense for these tasks to be undertaken by the States Greffier or a specifically elected or appointed Speaker to chair the sittings of the States and to ensure that standing orders are adhered to. It does not have to be the Bailiff who does this.

Role of the Bailiff in Court

13. The Bailiff, as Chief Justice, has a very significant role to play within the judicial system. There is increasing pressure on the Royal Court in respect of both civil and criminal matters, and frequently long delays in getting matters listed due to the unavailability of the judiciary generally and the Bailiff in

particular. The Bailiff and Deputy Bailiff are well trained lawyers and judges and, importantly, versed in Jersey customary law. By taking them away from the Royal Court to sit in the States it is a waste of a valuable resource. When there are too few Jersey judges available to sit in cases Commissioners are appointed from outside. The recent fiasco which was the Michel case, a case where the behaviour of an outside Commissioner cost the States hundreds of thousands of pounds in appeals to the Court of Appeal and Privy Council, may well have been avoided if local judiciary had been available to sit in the case being familiar with the Jersey system involving Jurats.

Role of the Bailiff in ceremonial matters

14. The Bailiff is a figurehead for Jersey. As such it is entirely appropriate that he should represent the island and attend official functions, including ceremonial activities within the States, but not be involved in any matter which may call into question the independence of the States or the judiciary.

Conclusion

15. In 1998, the Bailiff at the time, Sir Philip Bailhache, attended a Joint Colloquium on Parliamentary Supremacy and Judicial Independence. He chaired a working group on the parliamentary law-making process. One of the recommendations of that working group was:

“That, generally, there should be no contact in the law-making process or otherwise between the executive or parliamentarians with the judiciary unless with the approval of the head of the jurisdiction.”⁶

As head of the jurisdiction, to ensure Jersey’s position as a democratic state with an open and transparent judiciary and executive protecting the rights of its citizens, shouldn’t the Bailiff be ensuring the very best practice here?

Attorney-General and Solicitor-General

16. The Crown Officers, the Attorney-General and Solicitor-General, are appointed by the Queen, although their appointment is recommended after an open selection process. I believe that the appointments to such positions including the Bailiff and Deputy Bailiff should be made by people within Jersey and not outside, through an accountable judicial appointments body. Jurats are, for example, elected by the States and local lawyers and in fact, Jurats wield arguably more influence over cases than the Judge. There is therefore an existing precedent for the reform that I propose in respect of a local judicial appointments body.

⁶ Parliamentary Supremacy and Judicial Independence: A Commonwealth Approach, John Hatchard and Peter Slinn Cavendish Publishing Ltd at p140

17. There are difficulties with the Law Officers sitting in the States to advise the government and also advising Ministers from within the Law Officers' Department. The following are examples of these difficulties:
- a. It is the Attorney-General who brings prosecutions and who would prosecute a Minister if such action were necessary, *but*
 - b. It is the Attorney-General or members of his staff who advises Ministers who are being prosecuted.
 - c. The Attorney-General has sanctioned the disclosure of documents within certain cases, *but*
 - d. It is the Attorney-General who advises and acts for Ministers when their departments are sued for negligence, for example, by children not adequately protected by Ministers, in cases of public health, planning and all other areas subject to litigation and as such makes the decisions as to what documents should be disclosed.
 - e. The Jersey Child Protection Committee, when undertaking serious case reviews, potentially criticising Ministers, receives advice from the Law Officers' Department.
 - f. The Attorney-General advises the States. He also advises the Crown on matters of Jersey law. Should the States and the Crown be in conflict his position is an invidious one.
 - g. The Attorney-General acts as *Partie Publique* in criminal proceedings when presenting his "conclusions" to the Court. It has been suggested⁷ that in such circumstances the Attorney-General has a broad duty to represent all appropriate interests *including the interests of the offender's children*. This is clearly an impossible suggestion given the range of conflicting interests. The prosecution cannot represent the interests of parties directly affected by its recommendations. In fact, the role of *Partie Publique* is overlapped by the Law Officers who are not always in a position to state authoritatively what is in the public interest.
18. The Law Officers advise Ministers, and as such, when scrutiny panels also require legal advice, they have, in the past, had to go to the private sector for advice. It would seem that such an approach would be advisable in all cases where the Law Officers find themselves in effect advising both sides of a matter. Justice must not only be done, but must be seen to be done. No matter how conscientious individual Law Officers are in dealing with these difficult areas, for the public to have confidence that they are acting in good faith, a transparent system showing their independence is necessary.
19. The Law Officers, and as far as I am aware, their staff, are not members of the Law Society and are therefore not bound by the Law Society Code of Conduct or the Law Society (Jersey) Law 2005. I am unaware of what Code of Conduct (if any) they are governed by. Given the frequent conflicts of

⁷ *De Gouveia v Att Gen* [2009] JCA 098 and *Miscellany* [2009] 13 J&GLR 246

interests that appear to occur, it would clearly be beneficial for the whole of the Law Officers' Department to be governed by a publicised and enforceable Code of Conduct.

Conclusion

20. Arguably the dual role of the Attorney-General and Solicitor-General in advising both sides to many potential legal actions is far more serious than even the dual role of the Bailiff, particularly when protecting the human rights of the people of Jersey. In order to provide transparency and independence, there need to be changes to the way the Law Officers work. Whether this is to be by the use of outside lawyers, or separate legal departments will be a matter of practicality. The status quo however, cannot remain if Jersey is to uphold the human rights of its citizens.

The Future, in part, identified by the Crown Officers, themselves

21. The Island is moving to adopt an international identity and with that will come the necessity to safeguard the rights and privileges of the citizens of Jersey through the office of an elected and accountable office holder. There is now a need for an elected head of the Island, either as a maturing Chief Minister's role or that of a President, within a republic. For us to have equal standing amongst nations, these privileges cannot be safeguarded by an appointed office holder, this is fundamental in any future rights to self determination. The historical offices appointed by the Crown can no longer guarantee that the rights and privileges islanders have enjoyed can be safeguarded. This is highlighted on bullet point 76. of the Second Interim Report of The Constitution Review Group's report presented to the States Of Jersey on the 27th of June 2008 by the Council of Ministers. The membership of which was chaired by the then Bailiff Sir Philip Bailhache and the then H.M. Attorney General William Bailhache who concluded that ;

“In those circumstances it would arguably be of greater importance to avoid any perceptions however misconceived, that the independence of the judiciary might be compromised by making provision for an elected or appointed speaker other than the Bailiff.”

22. The days of the Bailiff having a representational role and at the same time being the guardian of the island's constitutional privileges should end. They must make way for a written constitution guaranteeing rights that an appointee who can be replaced or dismissed can no longer guarantee.

23. I have attached the following question that I put in the States which highlights a further peculiarity within this Crown Peculiar⁸. This is that of a

⁸ Appendix 3

Crown Appointee giving guidance and another advice to elected political office holders, in determining what the constitutional desires are of the Government of Jersey in external relations, which in this case includes Her Majesty's Government.

24. In relation to appeals to the Crown; would the States ever wish to be in a position where it would call upon the Privy Council to decide upon a matter that it had already decided upon? I would suggest that the Crown will never be asked to decide. So why should the Queen's appointees be placed in a position to facilitate that if they truly are the guardians of our island's constitutional privileges?

Appendix 1

From: "Michael De La Haye (States Greffe)" <
Date: 20 April 2009 16:12:41 BST
To: Paul Le Claire <
Cc: Lisa Hart <
>, Angela Rayson <
Subject: RE: Proposition re X Children

No, it's too late for today, will be sent out tomorrow. Thanks, we will change the reference.

-----Original Message-----

From: Paul Le Claire
Sent: 20 April 2009 16:10
To: Michael De La Haye (States Greffe)
Cc: Lisa Hart; Angela Rayson
Subject: Re: Proposition re X Children

Ok Michael I have read and understand the concern of the Bailiff.

I am prepared in the interest of getting this lodged as soon as possible to remove the reference as requested, although I can justify why I have said that in the report and why I hold that opinion.

So is this lodged today please?

Kind regards

Paul

On 20 Apr 2009, at 15:10, Michael De La Haye (States Greffe) wrote:

Sorry for the confusion about going to see the Bailiff or not! In the end he only had one query before approving the proposition and on reflection he didn't think it was necessary to ask you to come. His query related only to the words "(including the Court)" in the following paragraph - <<Family X - placement in the United Kingdom (Le Claire).doc>>

The system (including the Court) failed the children in the essential period 1999-2000 and thereafter.

Although he was not involved in the court proceedings in the late 1990s the Bailiff has considered the judgements and considers that you (1)

either need to justify in the Report your assertion that the Court failed them by explaining why you have this view or (2) simply delete the words "(including the Court)". The latter option is probably easiest.

Subject to the above, the proposition is approved and can be lodged. Please let me know how you wish to amend your Report to address the Bailiff's point. Many thanks

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Appendix 2

Code of Conduct for Members of the Judiciary of Jersey

“WHEREAS the Jersey Judicial Association was established on 12th July 2004 and is composed of all those exercising judicial functions in the Island of Jersey;

AND WHEREAS the Bailiff and Jurats of the Royal Court have from time immemorial set standards of judicial probity for the Island’s judiciary governed foremost by conscience and a faithful regard to their Oaths of Office, they now acknowledge that it is desirable to lay such standards down in writing;

NOW, therefore, the Jersey Judicial Association has, with the approval of the Bailiff, adopted the following Code of Ethics and Conduct for all members of the judiciary in Jersey”.

1. Members of the judiciary shall uphold the integrity and independence of the judiciary and perform their duties with competence, diligence and dedication.
2. Members of the judiciary shall decide cases assigned to them within a reasonable time, according to the means and resources placed at their disposal by the Government of Jersey and to the volume of work assigned to them. They are to ensure that justice is done by giving each party a fair hearing according to law.
3. In order to be able competently to perform their respective judicial functions, members of the judiciary shall, within the limits of the means and resources that the Government of Jersey places at their disposal, keep themselves informed regarding developments in legal and judicial matters affecting their particular functions.
4. Members of the judiciary shall carry out their duties with dignity, courtesy and humanity. Furthermore, they are to ensure as far as practicable that good order and decorum are maintained in the courtroom where they preside and that every person conducts himself accordingly in court.
5. Members of the judiciary shall at all times show respect towards their colleagues, and particularly towards the judgments they pronounce.
6. Members of the judiciary have every right to administer their personal assets and property in the manner most beneficial to them. However, they shall not engage in any activity which is in its very nature incompatible with the office they hold.
7.
 - (a) Members of the judiciary shall not exercise any profession, business or trade which conflicts with their judicial obligations.
 - (b) Members of the judiciary shall not hold any office or post, even though of a temporary, voluntary or honorary nature, and may not perform any activity, which, in the opinion of the Bailiff, may compromise or prejudice their independence or the performance of their duties or functions.
8. Members of the judiciary have a right to their private life. However, in this context, members of the judiciary are to ensure that their conduct is consistent with their office and that it does not tarnish their personal integrity and dignity, which are indispensable for the performance of their duties.

9. Members of the judiciary shall not join any political organisation, association or body, nor one which, by reason of its nature or purpose, could conflict with judicial independence or impartiality; nor shall members of the judiciary participate, provide financial assistance or show support for any such organisation, association or body.
10. Members of the judiciary shall not, while out of court, discuss cases that are pending in court. Members of the judiciary should discourage persons from discussing, in their presence, cases that are sub judice.
11. Members of the judiciary shall carry out their duties according to the dictates of their conscience, objectively and without fear, favour or partiality, and in keeping with the laws and customs of the Island. They shall decide cases objectively and solely on their legal and factual merits.
12. Members of the judiciary shall conduct themselves, both in court and outside court, in such a manner as not to put in doubt their independence and impartiality or the independence and impartiality of the office which they hold.
13. Members of the judiciary shall not disclose to others the content of discussions between members of the court when reaching a decision in a case.
14. Members of the judiciary shall not give evidence as character witnesses for any person, particularly if the said person stands accused of a crime, unless compelled by law or in cases involving relatives, and in other cases after having consulted with and obtained the approval of the Bailiff. Official notepaper should not be used other than for official purposes.
15. Members of the judiciary shall not sit in a case where they have a financial or other interest or where the circumstances are such that a fair minded and informed observer, having considered the given facts, would conclude that there was a real possibility that the member was biased: in all other cases they are bound not to abstain from their duty to sit.
16. Members of the judiciary shall not accept any gifts, favour or benefit which might possibly influence them in the proper fulfilment of their judicial duties or which might give an impression of improper conduct.
17. Members of the judiciary shall not comment or grant interviews to the media or speak in public on matters which are sub judice. In general, members of the judiciary shall not seek publicity or the approval of the public or the media.
18. Members of the judiciary shall notify the Bailiff if they are convicted of any criminal offence, whether in the Island or elsewhere, other than an offence involving speeding or unlawful parking.
19. If any member of the judiciary is in doubt whether his or her conduct might be contrary to any provisions of this Code, he or she should consult the Bailiff so as to secure a ruling in advance in relation to that proposed conduct.

Appendix 3

STATES OF JERSEY

OFFICIAL REPORT

TUESDAY, 1st MAY 2007

Question Time
Written

1.4 DEPUTY P.V.F. LE CLAIRE OF ST. HELIER OF THE CHIEF MINISTER REGARDING THE FORMAL PROCESSES EXISTING BETWEEN JERSEY AND HER MAJESTY'S GOVERNMENT RELATING TO THE NEGOTIATION OF CONSTITUTIONAL MATTERS:

Question

Would the Chief Minister outline the formal processes which currently exist between the States of Jersey, HM Attorney General and Her Majesty's Government relating to negotiations on matters of jurisdiction, constitution or constitutional relationships?

Answer

I interpret 'matters of jurisdiction, constitution or constitutional relationships' to mean issues relating to the external relations of Jersey in respect of the United Kingdom or any other state.

Article 18 of the States of Jersey Law, 2005, states that a function of the Council of Ministers includes discussing and agreeing their common policy regarding external relations. Furthermore, the Article provides that a function of the Chief Minister includes conducting external relations in accordance with the common policy agreed by the Council of Ministers.

However, this responsibility is always carried out within the authority of the States of Jersey. For example, in implementing a policy agreed as part of the States Strategic Plan, or in following adoption of a proposition in the States, the advice of HM Attorney General and guidance of the Bailiff will be sought where appropriate.

Following the agreement of a policy position by the States or by Ministers, the process for communications with Her Majesty's Government is either directly via Ministerial correspondence or through official correspondence via the Bailiff's Chambers after discussion with HM Attorney General.

Paul Le Claire

26th March 2010