

**Written submission of Nicholas Le Cornu to the independent review of the current roles of the Bailiff, the Attorney General and the Solicitor General pursuant to the decision of the States of Jersey on 4th February 2009.**

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Jersey still lives under the gaze of the Ancien Régime and many institutions of government bear its imprint, but none more so than the Crown Officers.

Democracy and modernity have forced change, renovating certain old institutions to modern needs, abolishing others and creating completely new ones. For all those changes, Jersey remains controlled by a political class that uses ancient institutions to entrench its rule and act as a rampart against democratic participation. The Crown Officers and the Royal Court are institutions at the centre of that power. They represent the last unreformed institution of the Ancien Régime constitution.

The absolutism of generations of Bailiffs was checked in the late eighteenth century through the gradual inclusion of social elites into government. In response to popular protest, the British government took it upon itself to limit the authority of the Bailiff and establish the separation of the States from the Royal Court in 1771. Yet the power of Bailiffs continued precisely because they had an active role in all branches of government, be it judiciary, legislature or executive. That remains the case today.

The States was embellished with further democratic features in the subsequent centuries. The constitution now rests with structures devised after the cathartic experience of occupation during the Second World War. Whilst introducing universal suffrage, the reorganisation of the States incorporated obstacles to the feared “democratic moment” of a general election and left unreformed the position of the Bailiff.

Jersey modernised in the second half of the twentieth century and established advanced infrastructure including the basics of a welfare state. A vast qualitative change from farming and tourism economy to sophisticated international finance center has put pressure on existing institutions to perform in ways they were not designed. Whilst having a prosperous economy and cosmopolitan society, in the sphere of the constitution and politics the island remains backward.

The Panel should be made aware of the deep political malaise that exists in Jersey. Electoral abstention of around 65 to 75 per cent, depending on the district, is to the complete satisfaction of the political class. The desertion of voters, particularly in the popular social groups, results from recognition that power is exercised by others and not in their interests. The consequent withdrawal into “apathy” is a still voiceless wish for better political things.

While it is to be hoped that the Panel will propose progressive reforms to the roles of the Crown Officers, there is no certainty that these can be implemented. Sadly, a more likely outcome is that nothing will change and that the status quo prevails.

The Crown Officers do not see any need for change in their roles and are quite content with existing structures. Their resistance to change is guaranteed.

It is generally overlooked that the Clothier Report of 2000 eloquently set out the issues of contention surrounding the position of Bailiff. Ten years later those issues remain unaddressed and stand as testimony to the glacial thaw that is the pace of constitutional change in Jersey.

The primary reason why there will be no reform of the Crown Officers is the inability of the States, as presently constituted, to reform itself. The Clothier Report was implemented only to the extent of a new administrative and bureaucratic structure in the form of Ministerial government. The democratic reforms that were to accompany this centralisation and act as its counterweight were abandoned. With the States unable to reform itself, the only body that could force change upon the Crown Officers is impotent. In a system insulated from popular pressure the political will to obstruct reform remains unchallenged. Democratic renewal lacks leadership.

### **Mildewed tradition**

The Panel is to be thanked for making selective submissions publicly available in advance as this enables comment and reflection upon the opinion of others.

Defence of the status quo, that there should be no alteration in the role of the Crown Officers, rests on two propositions. The first is that the existing structures function perfectly well. This is summed up in the aphorism “if it ain’t broke, don’t fix it”. Such a contention is simple willful blindness to the many obvious flaws and contradictions. Secondly, there is an appeal to an immutable past – that “we meddle with tradition at our peril”. The Ancien Régime legacy imbues the position of Bailiff with near monarchical metaphysical existence. There is no question that power can mesmerise the powerless and the result is deference.

It has been noted elsewhere by commentators that the Jerseyman is critical of government, but deferential to authority. Many submissions go out of their way to make clear their comments are not intended to give offence to any individual incumbent Crown Officer, past or present.

Those that urge caution before altering the constitution often use the metaphor of the brick wall, from which even the removal of a single brick could dislodge the entire edifice. It should be noted that brick walls are constructed in such a way that a brick can be removed easily; indeed large holes can be knocked in them,

without fear of collapse. Were a wall to fall down by virtue of removing one brick, it is indicative that the entire wall was rotten anyway. Of greater concern than this apocalyptic vision, is the practical realisation that change in one place, exposes the deficiencies or unworkable nature of remaining structures, which in turn necessitate further attention. It should come as no surprise that an unweeded garden, after centuries of neglect, may indeed require more than gentle pruning.

It may sound paradoxical that for things to remain the same, things must change. Whilst the existing order has proved itself capable of evolutionary change, it has done so to ensure continuity and stability, not to advance democratic ends. With that in mind, there is a danger any reforms proposed by the Panel may be used as another way to preserve the status quo.

### **The political apolitical judiciary**

Many submissions contend that they have never encountered a Crown Officer acting politically. It is argued here that under the tenure of the former Bailiff there was considerable politicisation of the office. Three examples will suffice. Firstly, during discussion of the Clothier reforms the former Bailiff made an intervention in favour of maintaining the existing role of the office and timed it just ahead of the States debate, including a press conference at which all questions from the media were refused. Secondly, the former Bailiff initiated, led and produced a report, regarding the feasibility of independence for Jersey. The issue of independence is highly contentious and political. Further, contention arose over the Bailiff's speech on Liberation day in 2008.

Democratic considerations require a civic head to be accountable for overt political acts, which the Chief Minister is, but the position of Bailiff is not. These examples are not cited to assert the weaknesses of an individual incumbent. They reveal some of the inherent contradictions in the multiple roles of Bailiff.

### **The Bailiff – The tripartite role – Civic Head, Senior Judge, President of the States**

#### **The Civic Head**

This is certainly an anomalous role given that we now have a Chief Minister. Quite unintentionally a "Dual Power" situation has been created. The potential areas of conflict are not difficult to envisage, but as yet are not sufficiently developed to generate actual conflict. In the future this will change, particularly if there is a Chief Minister whose ambition extends to a place at the annual Davos summit.

In other polities the Chief Minister would enjoy the prestige of being the First Person of the island without rival. Elected as a people's representative and then chosen, albeit by the less than democratic electoral college of the States, the Chief Minister carries greater democratic legitimacy than an appointed judge.

### **The Senior Judge**

The duties of a senior judge are onerous and the time of the person that occupies the position should be taken up exclusively with legal matters. Affairs of state and politics are not appropriate areas in which a judge should participate.

Jersey's senior judge should continue to bear the title of Bailiff as a courtesy; in this respect tradition does no harm to modern needs.

### **The President of the States**

This is the role that gives greatest offence to the concept of the separation of powers. The Bailiff once was both law maker and judge of those same laws. What exists today is an Ancien Régime legacy and compromise. Once the passing of legislation was no longer the prerogative of one man and became an affair of the propertied elite, in the form of Rectors, Parish Constables and Jurats, the modern States was born. As an aside, it might be noted, the removal of the Jurats in 1948 from the States was in part because they were so closely involved in the Royal Court and that their judicial role conflicted with their position in the legislative assembly.

Certain submissions have dismissed the concept of the separation of powers as mere political theory, practically irrelevant to a small community, where established institutions have proved their value. Slow, conventional growth is preferred to deliberate invention, the product of a theory.

The Founding Fathers of the United States recognised that Liberty was best protected by creating institutions of government with limited powers. No individual held all power and between institutions there was an essential element of tension. The legislature, judiciary and executive would, as far as possible, remain separate in terms of personnel. It is recognized that the British system, along with that of many other democratic countries, is a fusion of executive and legislature but with an independent judiciary. Nevertheless, the overlap of functions in multiple office holding generates conflicts and contradictions, both theoretical and practical.

Modern jurisprudence considers that judges with legislative and executive functions forfeit the appearance of independence and impartiality. It is no coincidence, given the historical legacy and common peculiarity of structure across the Channel Islands, that challenges on this point should have arisen in the Guernsey case of McGonnell and that of the Barclay case concerning Sark's

Seneschal as judge, unelected member and president of Chief Pleas. Jersey's situation is not unique and will be open to similar challenge in the future, unless action is taken. Legal argument will be made to judicially distinguish these cases and avow that the principles enunciated have no relevance to Jersey. They are in fact a shot across the bows; a warning. What is occurring is the inescapable logic of universal democratic values and Human Rights considerations undermining the credibility of pre-democratic constitutional arrangements.

The island authorities stress their improved regulation of finance through more stringent laws and concepts of good governance. Changing and higher standards, if applicable to finance, can equally be expected of government structures.

The States is quite mature enough to elect its own President, "Speaker" or chairman, should it so wish. The Greffier and Deputy Greffier have performed the function for some time in a fashion that shows the position can be performed by someone with the requisite experience, tempered with gravitas and courtesy. That said, the post holder must be democratically accountable and for the Assembly to be able to appoint and remove its chairman at will.

### **The appointment (and removal) of Crown Officers – the need for transparency and accountability**

The constitutional theory is that the appointment of a Crown officer is the prerogative of the Crown. Democratic considerations demand that there is an open recruitment process. It should be transparent and accountable rather than opaque, otherwise the cynics will insist the choice is made through "the old boy network"; a decision reached, reputedly like so many Establishment decisions, "behind closed doors".

Behind the obfuscation of "the Crown" is the reality of the British state. The people of Jersey are quite capable of arranging their own appointments, judicial and civic, without the assistance of an external authority.

The decision making process respecting appointment must be clear and accountable. There should be an established potential career path, with the clear caveat that promotion up the "ladder of accession" is subject to merit. It should be known who is consulted locally, including the Lieutenant Governor, as well as how the Privy Councillor responsible reaches his decision. The process of removal from office must also be clarified. What is done and what should be done must be explicit.

By virtue of being a judge, the Bailiff of necessity requires legal qualifications and experience, confining the pool of suitable applicants for the post to the Jersey legal profession, comprising several hundred persons. This restricts the eligibility

to be civic leader to a select social group and excludes all other professionals and occupations from such ambition.

## **The Attorney General**

### **Contradiction in role as advisor to Ministers and Scrutiny**

Those on Scrutiny complain that they are unable to obtain legal advice from the Attorney General in situations where he has already given advice to Ministers on the same subject. The AG applies the strict rules of client-lawyer relationship and exclusivity of an opinion. This leaves Scrutiny with no choice but to seek external advice from lawyers and barristers in private practice, often at considerable expense. Elaboration of this point is best left to those with practical experience of the Scrutiny process.

### **Head of the Honorary Police**

The Honorary police should be accountable, but not to the Attorney General. Instead that duty could be performed by the Minister of Home Affairs. The States of Jersey Police Force disciplines itself and the Chief of Police is accountable to the Home Affairs Minister. Both might in due course be made accountable to a Police Authority once established.

### **A Ministry of Justice**

The Jersey judiciary and the Royal Court, together with the many judicial functions and departments should be rationalized and subsumed under a newly created Ministry of Justice with a Minister of Justice.

### **The composition of the Panel**

Reference has been made above to the requirements of modern jurisprudence, the appearance of bias and the need for impartiality. In that context, it is appropriate to comment on the composition of this inquiry panel.

When any group such as the Police or MPs investigate themselves the question of partiality arises. Much the same applies with regard to professionals. Even though a lawyer myself, one cannot but notice that the panel is composed of four of its five members having close connections to the legal profession.

It is important to encourage under-represented sections of the community to apply for appointments to various bodies as this serves to enhance the appearance of impartiality. In this instance, the over-representation of lawyers, especially with a Jersey bias, must be in danger of stifling the inquiry.

Some explanation could usefully be made as to why the inquiry panel is so narrowly constituted, especially since the subject matter is of such importance to the whole population of Jersey.

## **Conclusion**

Even if no reform is achieved immediately, it will come. The present situation with its conflicts and contradictions is untenable; not that this has ever worried Jersey's political class before. This current enquiry will certainly serve constitutional historians as they read the many submissions to inform themselves as to contemporary practice and debate. In this contribution they will hopefully discover a vision of Jersey government that is enlightened, modern and participatory. Whether that vision is ever realised has yet to be seen. It is time to stop defending institutions that once served a purpose but now require reform. Democratic renewal is long overdue, and not just in the role of the Crown Officers. The agency for that reform remains uncertain.