

Event: **Public Hearing**
Review of the Roles of the Crown Officers

Date: **8th June 2010**

Review **Lord Carswell, Chairman**
Panel:

Mrs M-L Backhurst
Mr G Crill
Dr S Mountford
Mr I Strang

Witnesses: **Sir Philip Bailhache**

Lord Carswell (Chairman): I welcome you formally to the sitting of the Review Panel set up by the States and thank you on behalf of the Panel for attending to give us the benefit of your long experience in Crown Office. We have had a lot of very varied submissions to us from all quarters, varied both in size and style and content, from complete no change to complete all change and everywhere in between but we particularly value a contribution of somebody who has really been through the system for so long and in so many roles, and we are grateful to you for your written submission and we have also read of course your 1999 paper published in the *Jersey Law Review*. There are so many facets of this review that possibly if we went into everything with you we would take a very, very long time, so we might pick and choose some of the items, if we may, but if there any particular points, which you feel you would especially like to emphasise, well please do so, so that we have the benefit of what you want to say. If I may start myself by a pure question of information as to how the process works for Jersey legislation with the Privy Council, how does the system actually operate?

Sir Philip Bailhache: Do you mean in terms of the practical operation of the link with the Privy Council office?

Lord Carswell: Yes.

Sir Philip Bailhache: Well, I may be out of date but when I was Attorney General it was a fairly straightforward process. Once the States had adopted a Draft Law, or an Act as it was called, the Greffier of the States would send the Draft Act to the clerk to the Privy Council and the Law Officers would, I think automatically or perhaps they were requested by the Greffier, would give their opinion on the Draft Law. That opinion would go to the Lieutenant Governor and from the Lieutenant Governor up to the Home Office or now to the Ministry of Justice,

and that would inform the consideration by the Secretary of State as to what his view should be in relation to the Draft Law and then on it would go to the Privy Council.

Lord Carswell: Historically, I understand, the Privy Council used to correct the homework but that is many generations ago. What hand do they actually take in it, in your experience?

Sir Philip Bailhache: It depends what you mean by the Privy Council, I suppose. We are going back a little while to when I was a Law Officer, the Home Office was the department of state involved but I am sure the same process is followed in the Ministry of Justice. The communications would really take place between the officials in the Home Office and, in those days, the Attorney General or somebody in the Attorney General's chambers, and if there were any points of difficulty or some explanation that needed to be given that was how they would be explained and resolved.

Lord Carswell: What were the issues that they had to deal with in approving Jersey legislation?

Sir Philip Bailhache: All manner of things, I think the emphasis has changed in the last 20 years. When I was a Law Officer I think the approach was much more avuncular, the Home Office took the role of a benevolent *pater familias* who was making sure that the laws, which had been produced by the Island were fit for purpose and so on, and a lot of very constructive advice would come through as to how the Bill should be drafted and so on. The difficulties that I recall were mainly in terms of penalties, if the States wanted to include a maximum penalty which was greater than the maximum penalty for an equivalent offence in England then the Home Office would want to ... had to see some justification for that but it did happen.

Lord Carswell: Is this in pursuit of the principle that they were ensuring that peace, order and good government were applied in Jersey?

Sir Philip Bailhache: I do not think they really thought of it in those terms precisely but I suppose that lay at the root of it probably.

Lord Carswell: That is the old colonial phrase for it that went into their constitutions.

Sir Philip Bailhache: Yes.

Lord Carswell: Thank you, that is just a matter of pure information. I think the most difficult and most contentious question if we may go straight into it, is the position of the Bailiff in the Assembly and we have your view very clearly and I am interested in your discussion with Montesquieu and the object of the separation of powers. As a matter of practicality, to what extent did you find that it impinged upon your ability to devote the necessary time to the Royal Court part?

Sir Philip Bailhache: When I was in office I used to say that about two-thirds of my time was devoted to judicial work and about one-third of my time was devoted to parliamentary work and general administration. I think that that proportion has probably shifted slightly as a result of the current practice of the States to sit for many more days than has been the practice in the last few years.

Lord Carswell: Yes, we are getting some flavour from the respondents or some of them anyway. Well, there are the 2 factors here, one group of views is that the Bailiff is by far the

best person to preside in the States, has the authority the knowledge and the experience and the obvious force in that. The other is, a Bailiff is the most highly qualified lawyer, it is a rather less than useful way of putting his time to good use to preside in the States, which could be done by somebody else rather than devoting his time to judicial work. What would be your own distilled experience about that?

Sir Philip Bailhache: I think the answer to that really depends upon the weight that you attribute to the importance of presiding over the States, and my own view was that it was quite an important matter. To ensure that the Parliamentary Assembly operated effectively and efficiently was quite an important matter. I think so far as presiding over the court is concerned it is clearly important that the Bailiff should do that as much as possible but there are plenty of other people who can preside over the Royal Court if needs be, and indeed that does happen at the moment.

Lord Carswell: Did you have to adjourn sittings to any great extent in order to go and preside in the sittings of the court?

Sir Philip Bailhache: No.

Lord Carswell: Other cases, were there in your time cases which really required the Bailiff himself, every jurisdiction has them from time to time, whether the complexity or sensitivity or something, did you find any difficulty in dealing with those with the other calls on your time from the States or elsewhere?

Sir Philip Bailhache: No, I do not think so. I mean, I think I have been of the view a long time ago that if a case was going to take a very long time, more than a fortnight, it was not

one that I could really take on because the other duties of the office were such that one could not do justice to a long case if one was going to be expected to be in the court for a long time. One of my predecessors, Sir Frank Ereaut, presided over what was then the longest trial that ever took place in Jersey. Now it has been overtaken by many other cases but this was a case involving break-ins at jewellery shops which lasted for 5 weeks and I think he found that a strain but he did it, but I do not think that in these days a Bailiff could contemplate that kind of presiding over a trial of that length.

Lord Carswell: Do you think that is a lack; that the Bailiff is really ruled out by other requirements from doing that?

Sir Philip Bailhache: Well, I would be surprised but you would know much better than me if Lord Chief Justices of other small jurisdictions would devote long periods of time to presiding over a particular case.

Lord Carswell: Yes that is a difficulty, I think Lord Judge finds that he cannot take part in particularly long cases; particularly difficult ones yes but not extended ones. Then of course he has got a great deal of resources, judicial resources to draw on. You have got the benefit of a Deputy Bailiff and Commissioners who are all people of judicial ability.

Sir Philip Bailhache: That is a very fluid resource; I mean it is a resource, which ultimately draws upon the strength of the English Bar.

Lord Carswell: Yes, or the other end of this is the ... well it is the perception and the Article 6 issue as to whether a Bailiff would be regarded by the well informed bystander or reasonable bystander as carrying, shall we say, baggage, from the fact that he has presided in the

States. Did you, in fact, have occasion to recuse yourself because of any connection, parliamentary or States Assembly connection with particular cases?

Sir Philip Bailhache: No. I qualify that only to say that there were a small number of occasions, I mean less than 5, when I might have asked counsel whether they were content that I should preside, and have drawn attention to some particular involvement in the States or elsewhere but very, very rarely, and I think less likely to happen now that we are all so much more sensitive to the Article 6 problem following the McGonnell case. The Greffier of the States I am sure will have told you that he keeps a very accurate record of who is presiding at what time in the States?

Lord Carswell: Yes.

Sir Philip Bailhache: So that those who organise the sittings of the Royal Court have the ability to call upon a source of information which tells them whether any particular judge might be regarded as too involved or too close to a particular matter. So, in practice it does not really cause a problem at all.

Lord Carswell: It is not always possible to see the difficulties coming in these questions of perceived bias, that is one of the difficulties. It is not always possible to know what legislation will become part of the issue at the start.

Sir Philip Bailhache: No, that is true but I think ... I mean that is a problem that a judge faces not just in relation to legislation and the dual role. I had occasion to give consideration to a challenge to my presiding in a criminal case very recently, where it was said that I had seen things or done things which were just not the case at all but there was in the mind of

this particular defendant a conviction that I had been involved 25 years ago with his family in a way in which I in fact was not. So, these things can come out of the woodwork, it is perfectly true but in terms of legislation they are much more predictable I think, than in terms of the one I have just described.

Lord Carswell: You have been through various cases, some I need not go back over them, there were the pre-McGonnell ones in which several very distinguished judges held that there was not a problem because the Bailiff had had nothing to do with the subject matter of the particular legislation. Then McGonnell and the Commission seemed to throw considerable amount of doubt on that and the Commission really came to the conclusion that the 2 roles were incompatible and that it was an automatic breach of Article 6. I am putting that rather crudely. Then the court itself resolved the thing on another issue altogether and did not pronounce on the general issue either way for or against, though John Laws specifically put in what I call a dissenting concurrence, in which he said that he was not prepared to go along with the Commission but the rest of them did not say anything. Then you get Pabla Ky, which turned on a Back-Bencher who had had no part in the progress of the legislation, and the views expressed by Lord Justice Pill, Etherton and a third member in the Court of Appeal in the Barclay case, which are opinions *vale unde(?)*, but of experienced lawyers looking at it. One wonders just what would be likely to happen if the issue were raised by a litigant who wanted to challenge a decision and took it to Strasbourg now. You feel that it is reasonably fire proof?

Sir Philip Bailhache: I am not competent to make a judgment of that kind, I have not done the detailed research into the recent jurisprudence of the Court of Human Rights but I would certainly very much like to appear as counsel for the United Kingdom in opposing any challenge to the Bailiff's role. I think the great problem with the recent cases, in particular the

Barclay cases in Sark, is that when the argument is taking place tangentially ... I mean, not even the Seneschal himself was represented before the Court of Appeal, so that a counter argument to the Barclays was being put forward by the Ministry of Justice, which is singularly unenthusiastic about the role of the Bailiff in any event, and they would not be the advocates that I would choose to put forward my case if I were arguing the matter head on. I think that if the matter went to Strasbourg, I think there is a very good chance that the current role of the Bailiffs of Jersey and Guernsey would be regarded as not in breach of Article 6. A lot of the stuff before the Commission in McGonnell resulted from, I think, a rather unwise statement from the Bailiff of the day, which said that he was in charge of the entire administration of Guernsey, and rather over-egged the responsibilities, which the Bailiff in Guernsey had at that time. Now, the position in Jersey never was like that and has changed markedly since 2005. The reality is that the Bailiff has no political role at all. His role in the States is quasi judicial and you either like it or you do not like it, but you asked me, My Lord, earlier on whether I wanted to say anything, I wonder if I might take this opportunity just to interject.

Lord Carswell: Please do.

Sir Philip Bailhache: Because one of the reasons why I asked to come and see the Panel was that I wanted to urge the Panel to take a holistic view of the Bailiff's role. You cannot just pluck out the Presidency of the States and say, you know: "This is clearly a problem, the simple solution is to say the Bailiff should not preside over the States." The effect of plucking the Bailiff out of the States, in terms of the Island's constitution, in terms of the respect with which the office of Bailiff is imbued, I would even go so far as to say, the general stability of the Bailiwick, I think would be adversely affected if that were to happen and I hope that the Panel, unlike the previous committee which looked at the matter, will take a holistic view and

look at the broader issue. In particular, the protection of the Island's constitutional privileges, and I perhaps feel quite strongly about this because there are not many people who have been sort of close to the wheel, as it were, and seen the working of the protection of the Island's privileges in practice. The recent dispute following the proposal by Her Majesty's Government to change the Common Travel Area in England is a prime example of the benefits which having a Bailiff protecting the Island's constitutional privileges can bring to the Island. I am sure the Panel is aware of the history: in a nutshell Her Majesty's Government decided that they wanted to strengthen, as they put it, the borders particularly against the Republic of Ireland and a Bill was brought forward before the House of Commons, which would have empowered the Secretary of State by decree of some kind to require that any person coming either from the Republic of Ireland or from any of the Crown Dependencies would have to show his passport or her passport in order to get access to the United Kingdom. There was absolutely no reason why the Crown Dependencies had to be brought into this picture. The Crown Dependencies were the sop to be offered up to the Irish in order to make it appear that the United Kingdom was not seeking to offend the Government of the Republic of Ireland. There was no problem with the borders between the Crown Dependencies and the United Kingdom. The problem lay between Ireland and the U.K. (United Kingdom) but we were to be lumped in with the Irish and placed in the same position, effectively as foreign nationals. Now, the law went through the House of Commons, then it got to the House of Lords and it was only when it got to the House of Lords that the Constitutional Committee decided to inquire into it and proper scrutiny was given to it, and the Chief Ministers of the 3 Crown Dependencies were asked for their views. I cannot remember whether it came through The Official Channel or whether the Chief Minister sought my views, and I do not want in any way to breach any confidences, but I think in the context of this Panel's deliberations it is very important for me to say that the Chief Minister's correspondence, both with the Home Office and with Lord Goodlad I think, who was chairing

the select committee in question, was very much informed by the input from the Crown Officers, from the Bailiff of the day and from the Attorney General, and but for that input the recognition that excluding Islanders from the United Kingdom by making them produce their passports if required to do so, was a serious breach of a long-standing constitutional privilege. There was no reason why the Chief Minister's Department should have recognised that this was a breach of a constitutional privilege, No one there is a lawyer, many of them have worked in the Island only for a very short time, and the fact that the process went through the Crown Officers and through the Bailiff's Chambers was the only reason why this particular point was picked up. Now if the...I am sorry this is rather a long soliloquy, I am sorry for that. The reason why I say all this is that if the Bailiff's role in the States is reviewed then it will follow that the channel of communication through the Bailiff's Chambers for official correspondence will cease, and the Bailiff will no longer be in a position readily to fulfil his constitutional duty, which is to protect the privileges of the Islanders. One says that power without responsibility is the prerogative of the harlot, responsibility without power is equally dangerous, and if you put the Bailiff in the position of having the responsibility of defending the Island's constitutional privileges but you do not allow him to do so in any practical way then that seems to me to be a very unfortunate state of affairs.

Lord Carswell: But would that be the result if the Bailiff ceased to be day-to-day President of the States but were still entrusted with the responsibility as guardian of the constitution and civic head, would it follow that he would drop out of the loop there in such circumstances?

Sir Philip Bailhache: I expressed this view in my 1999 article and I just cannot see how, if the Bailiff is no longer the President of the States and effectively is a Chief Justice, how he can play a part in the public administration in the way which follows naturally if he is the

President of the States. I mean, why should the Chief Minister send his correspondence to the Chief Justice?

Lord Carswell: Yes, that assumes that the Bailiff's only real function would be as Chief Justice, in which case I think your conclusion has got perfectly good force, but is that the necessary situation? Because the Bailiff has such a multiplicity of functions historically, all of which are there still in some form attenuated or not, that to remove one of those functions, which all descend from the original all powerful situation of the Bailiff, would that necessarily so undermine his position that he no longer could be the force he was?

Sir Philip Bailhache: I think it would. I do not see how the Bailiff could retain his authority as the Island's chief citizen if he were not the President of the States. It was put to me some years ago that the solution to this problem was that the Bailiff should remain the President of the States but that there should be a Vice President of the States who would perform the day-to-day work of presiding over the Assembly and all that kind of thing and that seems to me to be death by a thousand cuts. It may take a little longer for the process to fall apart but fall apart it will.

Lord Carswell: We have certainly been warned by some of our respondents about the consequences of unravelling anything in the constitution, which has grown the way, or developed the way in which the Jersey Constitution has and we are very much aware of that fact. We have had more than one person suggesting something on the lines of what you have just mentioned, that the Bailiff might retain the nominal Presidency of the States and have a delegate in some form, a Vice President or a nominated delegate or somebody doing the day-to-day work but with the Bailiff still being there for formal occasions and in cases of

emergency through some crisis, which required the experience and authority of the Bailiff, he would then be free to come in. Would that be workable, do you think?

Sir Philip Bailhache: I think that the practicality would be that the Bailiff would preside on Liberation Day and on no other occasion. One speaks about occasions of great crisis or emergency and so forth but since 2005 the Bailiff has no longer been the President or Chairman of the Emergencies Council. The Chief Minister is the Chairman of the Emergencies Council and any crisis I think would be dealt with in the context of that Council rather than in the context of the States. The States I suppose might have to pass some legislation but there is no reason why that should be particularly controversial against the background of some crisis.

Lord Carswell: I was thinking more of constitutional issues. If there were proposals from London, which might radically affect the position of Jersey as a Crown Dependency, or proposals within Jersey, which might radically affect it also. That is the sort of occasion that I was wondering, in the abstract, as to whether ...

Sir Philip Bailhache: Yes well I think, My Lord, you have to really be a bit more concrete, if I may say so, because most of these kind of issues involving constitutional issues where the role of the Bailiff or the role of the Crown Officers is in question, have led in the past to the Bailiff withdrawing from the States and letting the Greffier take the Chair because he would not want to be seen to be in a position where his own position was under debate. I suppose that you do not have that particularly in mind but it is difficult to see how, I cannot think in my time as Bailiff, I cannot think of any example of a case where I would have wanted to preside for that kind of reason.

Lord Carswell: I think I have been monopolising enough please come in, Ian.

Mr. I. Strang: Do you think there is a danger at the other end in if the European Court should decide that there is a breach of Article 6(1), do you think there is a danger to Jersey's reputation in that situation, or do you think it is okay just to wait and see?

Sir Philip Bailhache: Well, if it were an open and shut case and Jersey was simply closing its eyes to the obvious, then I suppose there might be some reputational damage. If the matter is arguable and it seems to me that it is eminently arguable, I cannot think that there would be any reputational damage from taking a principled stance and losing before a court.

Mr. G. Crill: Could you just explain the relationship between the Bailiff and the Attorney General in as far as the protection of the constitutional safeguards are concerned?

Sir Philip Bailhache: The Attorney General is the legal adviser to the Chief Minister and to Ministers and it is clearly his responsibility to give legal advice, which includes constitutional advice as the occasion arises. I take the view that the Bailiff's function in terms of the constitution and constitutional privileges is rather more sort of overarching and will only come up for consideration rarely, in the context of the kind of thing like the Borders Bill, which I described.

Mr. G. Crill: But did that ... you say that came through either official channels or the Chief Minister and involved the Attorney General and the Bailiff in the response?

Sir Philip Bailhache: Yes.

Mr. G. Crill: But is that a sort of informal arrangement, or co-operation between the Bailiff and the Attorney General to make a clear sphere of responsibility or delineation?

Sir Philip Bailhache: I do not know, I think it is probably fair to say that for quite a long time where any difficult constitutional issue has arisen a Bailiff will have conferred with the Attorney General and probably with the Deputy Bailiff as well. These are difficult issues and one tends in those circumstances to draw in as much expertise as one can.

Mr. G. Crill: The Clothier recommendations of course suggested the removal of the Bailiff from the Presidency and the States chose to maintain the status quo. Has the status quo in fact been maintained, apart from the amendments the of 2005 law in the day-to-day relationship really between the Bailiff and the Assembly?

Sir Philip Bailhache: Yes I think so, and I only hesitate in order to give you a full answer to your question because the introduction of ministerial government has had an impact on the relationship and the Executive rather than the Legislature but those are very subtle changes and they are I think still working their way through.

Mr. G. Crill: Is that mainly through the official channels?

Sir Philip Bailhache: Both through the official channels and in relation to communications, which come informally through civil servants.

Mr. G. Crill: So there has been generally a removal of the Bailiff from the day-to-day machinery of government, not removal, slight distancing shall we say?

Sir Philip Bailhache: That is probably fair comment, the States of Jersey Law or one of the regulations made under it conferred a particular responsibility on the Chief Minister for External Relations and that was something which was not there before, and so that is an area where both the Bailiff and the Chief Minister have responsibilities and there are understandings between them, written memorandums of understanding and so forth, which govern the way in which these things work in practice now.

Mr. G. Crill: As the role of the Chief Minister becomes more mature, shall we say, do you see a corresponding reduction in the involvement of the Bailiff in those relationships with Whitehall?

Sir Philip Bailhache: Perhaps. I think much would depend upon the character and personality of the Chief Minister. I personally always had very good relations with the 2 Chief Ministers with whom I served and we had mutual understandings, which were acceptable so far as I was concerned, but there are changes working their way through the system I think at the moment.

Mrs. M.-L. Backhurst: Am I correct in thinking, Sir Philip, that you are now in a unique position of being a Deputy of the States and also having been Bailiff as well. You are the only person now.

Sir Philip Bailhache: There is probably nobody else like me at all.

Mrs. M.-L. Backhurst: Yes, so you have seen it now from both sides and it has been suggested to us that the Bailiff, and maybe this was in the past and maybe not quite so much, is presiding in the States necessarily, however much you might try otherwise or think,

to be apolitical, nevertheless has to be partial, has to choose who can speak, has to agree to how propositions are worded and all sorts of things like that so that there is a very distinct political influence that they simply cannot avoid. Would you agree with that?

Sir Philip Bailhache: No. So far as calling Members to speak is concerned the practice is that the Member's eye is caught, his name or her name is written down on a list and the Bailiff goes through the list in the order in which the Members have caught his eye. So, it is not a question of a Bailiff saying: "I am not going to call Deputy X because I do not like the look of his face." Any Member is entitled to speak and many Members do.

Mrs. M.-L. Backhurst: So it is simply to keep order in the States rather than to favour one over another?

Sir Philip Bailhache: Absolutely.

Mrs. M.-L. Backhurst: Thank you. There is one statement in the Clothier report that I would like to read out to you, if I might. I wonder if you would agree with it or not: "It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States. A Speaker is the servant of an Assembly, not its master and can be removed from office if unsatisfactory. The Bailiff, appointed by the Queen's Letters Patent to a high and ancient office, should not hold a post subservient to the States." Would you agree with that?

Sir Philip Bailhache: No, I do not agree with it really. It is very nicely expressed as one would expect from an author with Sir Cecil's distinction. But it seems to me that it fails to acknowledge the history and the reality of the situation. The Bailiff is in a sense the servant of the Assembly, because if the Bailiff lost the support or lost the confidence of elected

Members, he simply could not remain in office. Now, this might be an unusual state of affairs for somebody who is also the Chief Justice of the Island, but it certainly is the case. Not long before I retired from office, a Deputy brought a motion of no confidence in me. I had no doubt at all that if that motion had been carried my resignation would have been on its way to the Queen.

Mrs. M.-L. Backhurst: I notice also that (this is a list I think provided by the present Bailiff, I hope it is not out of date) people are saying that being President of the States means purely being Speaker, but in fact there are 20, at least, roles within that.

One of which, for example, is Deputy Governor of the Island. It seems to me that it would not be terribly clear who would do that if the Bailiff were not to be President of the States. I just wonder, obviously, if there was to be a Speaker and it was somebody elected from the number, it is unlikely that that person would be then Deputy Governor. I do not know. What do you think about that?

Sir Philip Bailhache: I think many countries have different arrangements or many independent territories have different arrangements for a person to depute for the Governor when he is out of the Island. In most cases it is the Chief Justice who deputes for the Governor. So I would not have regarded that so much as a Speaker role.

Mrs. M.-L. Backhurst: As President of the States, the Bailiff attends certain ceremonial occasions. We had an example given to us, I think it was the Bailiff and the Chief Minister who went to Bad Wurzach and the question was, was the Bailiff representing the people or was the Chief Minister and who would take precedence? The question was just asked: "Surely just the Chief Minister should have gone and the Bailiff did not need to go."

Sir Philip Bailhache: That is a matter for discussion between the Chief Minister and the Bailiff. If the Chief Minister had said to me: "I really want to go to Bad Wurzach on my own. Would you mind not coming?" I would have said: "Of course."

Mrs. M.-L. Backhurst: But you would not expect a Chief Justice necessarily to go on something like that, but a Bailiff might.

Sir Philip Bailhache: No, of course, no, a Chief Justice certainly would not go to Bad Wurzach.

Mrs. M.-L. Backhurst: Indeed, thank you.

Sir Philip Bailhache: I do not think a Chief Justice would speak on Liberation Day either. That is a nicer point.

Lord Carswell: No, I think it is unlikely.

Mrs. M.-L. Backhurst: Liberation Day, obviously, has only been in the last 65 years. It is quite a recent innovation. Maybe one ought to look at other ceremonial functions rather than that particular one. That is one that seems to have just grown, as it were.

Lord Carswell: Does the Bailiff lay a wreath on Remembrance Day?

Sir Philip Bailhache: Yes.

Lord Carswell: Whereas a Chief Justice would not normally do so. At home the Lord Lieutenant would do it.

Sir Philip Bailhache: There are 3 people now who ... there are more than 3 obviously, but 3 principal people who lay wreathes on Remembrance Sunday. The Governor goes first, because outside the Court and the States he takes precedence, the Bailiff, because he is the civic head of the Island, and the Chief Minister. I do not find any problem with that. It seems to work very nicely.

Mrs. M.-L. Backhurst: You would not see the Speaker stepping into that role?

Lord Carswell: No. The Speaker does not lay one in London, to my recollection. The Prime Minister does. There are so many formats, it is hard to generalise. I have the point anyway.

Dr. S. Mountford: Can I ask you a question, Sir Philip? It is surrounding power and authority. I am prompted to ask this by your comment under Section 7 of your submission where you talk about your interpretation of Montesquieu's approach to the separation of powers. You say: "It was the power of the judiciary to keep the Executive in check that appealed to him." Can I ask you a question? Is there something implicit in the Bailiff's role in Jersey that is almost saying that the Bailiff has to stop the elected representatives becoming too powerful and that is the importance of the role in the States?

Sir Philip Bailhache: No, I do not think so. I should not really take any credit for the reference to Montesquieu. I plagiarised some work by Lord Hoffman, so I would like to make that confession. I think what is being said here is really that it is the rule of law that is important and the ability of the judiciary to keep the Executive within the law that is important.

I do not think the Bailiff's role in the States has much to do with keeping Members in check. Members do what they want to do. The only role of the Bailiff in the States is to preserve order and to make sure that Members obey the Standing Orders which they themselves have drawn up.

Mr. G. Crill: Sorry, just on from that, do you think that the presidency of the States would impede in any way your position as President of Court from protecting the judicial independence if it was under threat from Legislature, for example, on sentencing?

Sir Philip Bailhache: I do not think so. It has not been the experience in the past. In theory, I suppose, you might say that a person who presides over a court dealing with an administrative appeal, who knows very well the identity of the Minister whose decision is being attacked, would find it difficult to deal with that. In point of fact, none of us does. I have presided over countless administrative appeals. Some appeals have succeeded, some have not. But the identity of the respondent has never been a concern, as far as I am concerned.

Lord Carswell: Suppose a Deputy took it into his head to start criticising a judicial decision, either the Bailiff's, Deputy Bailiff's or a Commissioner's decision? They should not do that, but would you have any difficulty in ruling them out of order? Would you find it invidious?

Sir Philip Bailhache: It never occurred.

Lord Carswell: Lucky you.

Sir Philip Bailhache: I suppose in theory, I do not think I would find any difficulty in ruling a Member out of order, unless possibly it was my own decision. That might give rise to a difficulty, but it never has done.

Lord Carswell: This has sometimes been an issue raised incorrectly, but you cannot always stop Members of legislative assemblies getting going on things that they should not. I am more concerned about an issue which you touched on in your paper in 1999 about laws which might be impugned, not on Article 6 grounds or the court's sittings grounds, but on other grounds under the convention. The Court may be asked to declare a section or a whole Act contrary to the convention or incompatible. When these things happen, if it is not written down, it usually comes to quite a small segment. But if the Bailiff is hearing that and has been presiding at the time of the enactment of that legislation, which is supposed to have been certified and cleared as convention compliant, but that does not always work. Would that cause some problem?

Sir Philip Bailhache: I think that is the kind of case where one would make sure that a different judge presided over that challenge. That is why the record that the Greffier keeps of who is presiding at what time is valuable. It means that it is not too difficult to ensure that these kinds of conflicts do not arise.

Lord Carswell: Let us assume then the Bailiff had not presided in the enactment of that legislation and had checked that correctly and said: "That is all right" would the informed bystander, Lord Goff and person, consider: "Bailiff, he is on the side of the legislation. He has a large connection with that. I do not know that he is the man to decide it." You would say it would be unreasonable, I think.

Sir Philip Bailhache: I think I would. I think in this context one must not be too ready to find problems, too ready to find difficulties which make it impossible for a judge to sit. We have had authority for that proposition from the Court of Appeal in Jersey on a couple of occasions and it seems to me to be right. People cannot chose their judges and you have to be reasonable, I think, in reaching a decision as to whether the circumstances are such that some bystander might think you were too close to it. I am reminded, if I may just interject, I was reading a book by a diplomat recently and he was describing the differences between the training of the diplomatic service in England and the diplomatic service on the Continent. The English diplomats learn on the job and gain their experience as they go along. The Continental diplomats go to colleges, they are taught about international law, they are taught about the theory of all kind of international difficulties and so. It gave rise to the apocryphal story (probably apocryphal) of the French Diplomat and the English Diplomat discussing together a possible solution to one particular dispute they had. The Frenchman says to the English Diplomat: "I can see that your solution would work extremely well in practice. What worries me desperately is whether it would work in theory." **[Laughter]** I think that is something to be borne in mind in this context too. Theoretically, of course, there is an Article 6 problem, theoretically there is a perception problem, but those have to be looked at holistically in the context of the whole of the Island's history, the culture and so on. I personally think, as I said in my paper, that we have a good system and we should not meddle with it.

Mr. G. Crill: Could we take that a stage further perhaps, and say that the Jersey way used to be something which was almost said with pride as a way of finding practical solutions to just about every problem, but now it may be regarded with some satirical derision? Would that be ...?

Sir Philip Bailhache: I think that expression has probably been tinted by other situations. I think I would remain with my view that there may be theoretical problems with the dual role, but they are not practical problems.

Mr. G. Crill: With regard to the position of the Crown Officers and their very difficult positions as advisers to the States components, do you see that those are theoretical problems rather than practical problems?

Sir Philip Bailhache: Absolutely, yes. I think in any small community you cannot always make the assumption that your top officials are corrupt or liable to do the wrong thing. The so called conflict between the role of the Director of Public Prosecutions and the legal adviser to the States, of course, in theory could give rise to difficulties. But in practice any competent and sensitive Attorney General is going to make sure that those problems simply do not arise. The trouble with carving up these roles into lots of different roles as if we were a jurisdiction of 50 or 60 million people, means that when you do want somebody of calibre to take a particular decision, he is not necessarily there.

Lord Carswell: It is really a bit similar to a thing that has been concerning me a little bit about the Attorney General's role in being available to answer questions in the States. Now the States have an enormous luxury compared with many jurisdictions in having an Attorney General or Solicitor General so close by to be able to come. Did you find that was an unfruitful use of your time when you were a Law Officer?

Sir Philip Bailhache: When I was a Law Officer the States did not sit for as long as they do now, so that the imposition was not as great then as it is now. Of course some time is wasted, because you are sitting there and a lot of the time you are not in fact being asked

any questions at all. I found, and I suspect my successors have found, that you have an ability to switch off from what is going on around you and you manage to do some other work and some sixth sense tells you when a Deputy is about to ask you some googly that needs an immediate answer.

Lord Carswell: It maybe is not a question of fundamental principle, but one does wonder whether the States could find some means of running a procedure without needing advice so often or giving the Attorney General an opportunity to deal with it in a less time consuming manner.

Sir Philip Bailhache: Yes. I think increasingly the Law Officers now do absent themselves from the States and are said to be on-call. So that if a legal issue does crop up a message can be sent to the Attorney General's Chambers and the Attorney General is only 25 yards away and he can come in and give his advice.

Lord Carswell: It is a problem which is exclusive, really, to small assemblies, small communities, because in a large parliament with Ministers, legal advisers, officials in the box and all the panoply of assistance, they can get it in-house, they do not need to trouble the Attorney General. So the Attorney General in Westminster is not spending so very much time there as a rule. At times he is not very visible in the Lords, certainly. It may be a matter of housekeeping, possibly, more than principle.

Sir Philip Bailhache: Yes, I respectfully agree. I think probably an arrangement could be made so that the Attorney General did not attend on the States unless required to do so.

Mrs. M.-L. Backhurst: The Attorney General and Solicitor General are both Members of the States though and therefore have a right to speak, not to vote. If they were not present then they might be given that right, but they might not be able to carry it out. Would that be correct?

Sir Philip Bailhache: Well, I suppose if you do not exercise a right for a long time people will argue you do not need that right at all. But there is a convention that the Law Officers do not intervene in debates on political matters, they only intervene on matters which concern their functions or to give legal advice. So I do not think that would change matters very much if they were not to be there.

Mrs. M.-L. Backhurst: So if they were no longer Members of the States that would not be a problem?

Sir Philip Bailhache: Well it would be, because the States would not be able to get legal advice. You cannot summon a non-Member to come and give you advice.

Mrs. M.-L. Backhurst: You can ask for legal advice and they do ask for legal advice from other lawyers as well. I mean, not the States, but ...

Sir Philip Bailhache: You have come back to the situation that Lord Carswell was describing in the House of Commons where you would send a note out to your legal adviser in the wings and the advice would come back, but you do not have a ministerial legal adviser standing up in the House of Commons saying what the law is.

Mr. I. Strang: Is there a problem there with the Scrutiny? The Attorney stands up and advises the States, but the Scrutiny Panel might want different advice or a different point covered, that would have to be done.

Sir Philip Bailhache: That has been occasionally a problem in the past and I am not sure there is any easy solution to it, because I think that some politicians tend to use legal advice as a means of scoring a political point. But legal advice ought to be legal advice. If it is legal advice for a Minister it will be the same legal advice for the Scrutiny Panel.

Mr. I. Strang: Yes, but legal advice sometimes has more than one interpretation.

Sir Philip Bailhache: Yes, but if it is one man giving the opinion, one hopes that it will be the same opinion on both occasions.

Mr. I. Strang: One would hope so.

Mrs. M.-L. Backhurst: How do you view the role of the Attorney General in relationship to the Honorary Police?

Sir Philip Bailhache: I think that if one wanted to remove functions from the Attorney General, the responsibility for the Honorary Police is one that could possibly be removed from him. I am not suggesting it should be done, but if one wanted to do that, that would be an area where some paring could take place. The Honorary Service is a splendid service. We used to have a political system which involved Honorary Service. The Honorary Service is now confined to the Parishes. I am a very great supporter of the honorary system. The ability of the honorary system to turn to the Attorney General when in trouble has been of

enormous benefit to the honorary system. If you take that away, I am not sure it is going to do the honorary system any good. So it depends whether you support the honorary system, I think.

Mrs. M.-L. Backhurst: Some people have suggested that if there is a police authority that might then fit more comfortably with that body than the Attorney General.

Sir Philip Bailhache: Well, it might. Each elected Centenier, in my experience, is a rugged individual. He is a bit like a barrister, if you like. You do not tell such people what to do, for they find it very difficult to be told what to do. In terms of policing, the fact that the Attorney General is the titular head of the Honorary Police brings a kind of consistency and a roundness to policing by the Honorary Officers, that I think would not be quite the same if it were to be done by a police authority which honorary officials would see as completely outside their system.

Lord Carswell: A police authority anyway is not concerned with all items that the Attorney General is concerned with as titular head. Disciplining, police authorities do not take that on board at all. That is a chief officer's job. In the absence of a chief officer in the Honorary Police somebody would have to be the disciplinary tribunal in the end. If it was not the Attorney, who would it be?

Sir Philip Bailhache: Well, it is difficult to find an answer to that. I suppose you could find a Jurat or 2 Jurats. You have a panel of Jurats who deal with appeals from the Attorney General. I think it is a difficult one. I did not find personally that the Honorary Police consumed an enormous amount of time when I was Attorney General. I suspect the same situation applies now.

Lord Carswell: The Honorary Police ... may be a very good idea on its ... not for me to say, but I do not think it would be the complete answer. We have had some discussion about the function of the Centeniers in charging and their level of skill and experience, which is obviously variable, and the possible delays involved in obtaining a Centenier to determine the charges. Did you have any difficulty in your time as Attorney General or has the office rather built up since then in any event?

Sir Philip Bailhache: I am sorry, did I have any difficulty ...?

Lord Carswell: Any difficulty in getting the Centeniers. The police have said that there are times when it is hard to get hold of a Centenier, for obvious reasons. Yet it is vital to get charging decisions made so that the person may be charged and or released for the moment. If that were done in-house by the Attorney General, who has a supervisory role, in any event, is it desirable to keep the Centeniers with that function?

Sir Philip Bailhache: The charging power of the Centeniers is tied up with their other functions with relation to Parish Hall Inquiries. I do not know to what extent you have been familiarised with the Parish Hall Inquiry system. There was an interesting article published in the Law Review, quite recently, which might be helpful if the Panel wanted to look at that. But I am surprised that there are difficulties in finding a Centenier to come along and charge an offender. I thought that, certainly in St. Helier, there was always a Centenier on duty and in the country Parishes they have duty weeks and you phone him up and if it was necessary he would come in.

Lord Carswell: To an outsider it does seem a little strange that prosecuting decisions should be made by somebody, however worthy a volunteer (I am saying nothing whatever against that) who is not a lawyer and is not experienced in prosecuting, except in the case of those who have been in post quite a long time.

Sir Philip Bailhache: To an outsider I think it probably does look unusual. I think I would emphasise that any serious decision in relation to a prosecution is not taken by a Centenier. It is taken by a lawyer in the Attorney General's chambers, who advises the Centenier what the appropriate action is. If a Centenier takes a wrong decision and a States police officer is displeased with that, then the States police officer can invite the Attorney General to review the matter and to direct the Centenier to prosecute.

Lord Carswell: In that case, is there any need for a Centenier at all? Are they the fifth wheel in the coach?

Sir Philip Bailhache: The bulk of decisions are not the subject of complaint. They are not the subject of legal advice. If a person should be charged with assault it is a matter of discretion, essentially. Generally there are guidelines that are laid down. Is that a matter which is going to fall within the parameters of your review?

Lord Carswell: It has been raised as part of the Attorney General's role and whether he should really take full charge of prosecuting and charging in all its stages, really, and that is where it came in. Otherwise I would have agreed with you that we do not want to trespass outside our terms of reference.

Sir Philip Bailhache: There are a small number of people who would like to see the demise of the honorary system, particularly the Honorary Police. I suspect you might have had submissions from one of those quarters in relation to charging. I was not aware, I must say, that the States Police had any anxieties about this or indeed that there were any major anxieties at all. It is one of those things which may seem a little bizarre to outside eyes, but it works well. It kind of supports the system of restorative justice, which is applied through the Parish Halls by the Centeniers and their ability to decide whether or not to charge or to place a young offender, particularly, on voluntary probation or give him a caution or let him off for a month and see how he behaves and so on. The myriad of different ways in which you can keep young people out of court is all very positive. To take that away, because you are a little bit worried that a Centenier might be an hour late to charge somebody seems to me to be disproportionate.

Lord Carswell: We certainly have had nothing but praise for the Parish Hall system. It is a positive system. It would not, I repeat would not, be our function to make any pronouncement upon the honorary system of police. Whether it is a good idea or a bad idea is certainly not for us.

Sir Philip Bailhache: It would be a quagmire, I am afraid.

Mrs. M.-L. Backhurst: There have been suggestions that a Ministry of Justice should be set up. Not necessarily ... maybe not a ministry, but a justice ... which might encompass all the Bailiff's Royal Court, as well as the Attorney General, but also might have separate ... now the Attorney General is now separated, the functions, into I think there is Director Criminal, Director Civil, so it has slightly changed matters in any case. But it was pointed out to us, for example, it is the Attorney General who goes to the States to get money for the funding and

that whether that funding process is open to scrutiny, because it is outside the Government, in a sense, and that if you made a Ministry of Justice that would then all be encompassed within it. You might then have a separate D.P.P. (Director of Public Prosecutions) within that system as well. Would you go along with any of those ideas or not?

Sir Philip Bailhache: I am not sure really that I am competent to express any view on that at the moment. My own experience was not a concern in terms of parliamentary scrutiny of the budget of the Bailiff, but finding anybody to show any interest in the budget of the Bailiff. We fell, because they could not think of anywhere else to put us, under the remit of the Chief Minister. Well, the Chief Minister was certainly not interested in fighting the corner of the Bailiff or the Attorney General. There might be something to be said for having a Minister who has responsibility for the budgetary requirements of the non-ministerial departments. But we fall in a kind of limbo at the moment.

Mrs. M.-L. Backhurst: You are not clearly completely independent of the judiciary, so it would be quite a tricky separation in some ways.

Lord Carswell: Who is responsible in practice for the staffing of the Royal Courts, down to the cleaning and painting and things like that? Is this part of the Bailiff's responsibility or does it fall to some other body?

Sir Philip Bailhache: The court administration is dealt with by the Judicial Greffier, who is accountable to the Bailiff and has the responsibility for providing clerks to the court and all that kind of thing. But the cleaning of the building and all that sort of stuff is done by the Public Services Department.

Lord Carswell: If it would not have been necessary to have a whole separate Department of Justice for that end of things, the administration is dealt with within by the Greffier?

Sir Philip Bailhache: Indeed. In attending commonwealth conferences over the years, I think, that many Chief Justices have been very jealous about the system in Jersey and the ability of a Chief Justice to control what is happening in his own sphere.

Lord Carswell: Yes. [Laughter]

Sir Philip Bailhache: Do not recommend any change to that, please.

Mr. G. Crill: The ladder of succession, you have supported as being one of the ways of retaining the knowledge and the strength of the constitutional protections and providing an incentive, if you like, to bring in the best candidates. The Latimer House principles recommended a system of judicial instruction for senior lawyers so that there would be another route for judicial appointment. We have now seen, of course, the appointment of Commissioners who have not had Crown Office experience. Do you see whether the retention, de facto retention if you like, of the ladder of succession is essential for the maintenance of constitutional strength of the legal advice to the government and the Crown or can that be separated out?

Sir Philip Bailhache: I think the point that I was trying to make was that many leading practitioners in the law firms might aspire to become a judge. Until it was possible to appoint a Commissioner, the only way in which you could do that was through appointment as a Law Officer. That had the spin off advantage of ensuring that your Law Officers were among the leading lawyers of their generation. The concern that I have about cutting off the ladder,

cutting the ladder in half, is that it is already very difficult to get people to apply for Crown Office. You must know that from your own experience. Lawyers earn considerably more in private practice than they do in the public sector. Quite a lot of persuasion is necessary to ensure the people are prepared to allow their names to go forward and quite often they are not. So, if you create an office of Attorney General or Solicitor General, which is less interesting and which has no connection with the upper offices of Deputy Bailiff and Bailiff, you are not likely to persuade leading lawyers from the private sector to apply to become Law Officers. You will then be appointing your Law Officers, as does happen in many small jurisdictions, not from the private sector, but from within the department itself. I am not sure that is in the interest of the Island.

Lord Carswell: The other half of that is did you find your experience as a Law Officer valuable when you became Deputy Bailiff and then Bailiff?

Sir Philip Bailhache: I certainly did, yes. The experience of working with Whitehall and seeing how the other system works was immensely valuable, yes.

Lord Carswell: Sir Philip, we are very grateful to you for coming and speaking to us and for the assistance you have given us with your written submission. We have had a considerable spectrum of opinions from people. We value them all. We have not finished yet. We have more people to hear and gather opinion before we start considering our conclusions. But we shall do that as soon as may be and prepare our report and then we shall present it to the States for their determination. Thank you very much for your part in it.

Sir Philip Bailhache: Thank you for hearing me. Very grateful.