

The Role of the Office of Bailiff:
The Need for Reform

Joel H. Gindill

University of Durham:
Department of Law

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This paper will examine and scrutinise the need for reform of the Office of Bailiff within the Island of Jersey. It will be shown that within the modern political context, the current functions of the Bailiff represent a risk to the continuing good governance of the Island, both from internal and external sources. As the most senior Islander, the Bailiff holds significant notions of traditional values and respect. Governmental reforms have not kept pace with the changing wider political context in which they operate; with the growth of Human Rights and its impacts upon modern government, the powers of the Bailiff are increasingly becoming unsustainable. Significantly the duality within the Office of Bailiff clearly flaunts the lack of separation of powers due to an entrenchment at the centre of the Insular Authority. A conflict of interests within the office represents a danger of potential abuse. Reform is now a necessity.

The Historical development of Jersey governance and law shall be used to analyse foundations upon which the Office of Bailiff is built, creating a launch pad upon which arguments for reform will be based. The doctrine of Separation of Powers shall be shown to create a powerful tool for reform. By exploring it's applicability to Jersey, the benefits and criticisms of the doctrine shall be analysed. Although the doctrine cannot be used as the sole argument for reform, it constitutes a powerful base. Indeed, the wider debate concerning reform of the Lord Chancellor relies heavily upon the doctrine. This debate shall be investigated and applied to the Office of Bailiff.

This paper shall investigate the impacts of the European Convention of Human Rights upon Jersey law. It will highlight the far-reaching nature of the Convention and the

influence upon constitutional structures. The strict requirement for judicial independence and impartiality will be analysed, along with the potential breach caused by the duality in the Bailiff's functions. The threat of reform imposed from an outside power will be investigated by exploring the Royal Prerogative, emphasising Jersey's inability to resist outside political pressures. Furthermore, the impacts of the Human Rights (Jersey) Law 2000 shall be examined, evaluating the impact of the new constitutional relationship between the Royal Court and the States Assembly upon the Bailiff. Focusing specifically on the roles of the Bailiff, a clear conflict of interests shall be shown to exist. Open to potential abuse, the lack of any democratic basis shall be shown as a further reason promoting reform. In doing so, this study shall evaluate the arguments used by supporters of the Bailiff as a means to explore the debate more extensively. Reform proposals, although intriguing are, however, outside the scope of this paper and will not be discussed.

An urgent need for the reform of the Bailiff will be concluded. This will be highlighted by evaluating the most important and powerful aspects of the debate, forming a clear, consistent and powerful argument for reform.

Chapter 1

The Context in Which the Office of Bailiff Operates

A. Historical Development of Island Governance: the Bailiff at the Centre of an Inherent Conflict.

The current role of the bailiff can only be fully appreciated and understood once placed within the constitutional context in which it operates. Jersey's unique constitutional status has set the tone for 'conflict amongst Crowns Appointees and the local people' throughout the history of the Island¹. Overall, Jersey can be considered to have a 'quasi-independent' status, whose relationship is with the Crown, rather than Parliament². Consequently, the Island does not form part of the United Kingdom³; the inability of Island residents to vote in UK elections (no representation without taxation) is clear conformation⁴.

Although self-governance, achieved by the early Nineteenth Century, enabled the States to create legislation and organise finances, the requirement of 'final ratification' still gave the Crown a controlling interest⁵. Changes in the Bailiff's role mirrored this complex arrangement. Securing his position both as Chief Magistrate and Civil Head of Island Governance resulted in extensive sharing of human resources between the legislature and the Judiciary⁶. Institutional interdependence and a lack of any substantial form of

¹ Bailhache-(1999)-p2

² Le Rendu-(2004)-p40

³ X v. United Kingdom

⁴ X v. United Kingdom

⁵ Kelleher-(1994)-p16

⁶ Kelleher-(1994)

separation of powers can, therefore, be seen as entrenched from the origins of Island Governance⁷.

During the centuries much has changed. Extensive sharing of human resources between the States and Royal Court has reduced significantly⁸. A trend towards increased legitimacy set by the '1771...detachment of the States from the Court, and an increased role of the executive as an "Insular Government"⁹ has led to a 'provincial parliament or a local legislature'¹⁰. Such developments and changes, however, cannot be seen as a direct result of the initiative of the States themselves, but as a result of external factors. As Le Rendu comments, 'large scale constitutional change has been rare, and tended to be precipitated by outside events'¹¹. Numerous small-scale reforms and modernisations over the centuries has left the Island's constitution having a 'medieval core with a democratic overlay'¹², leading to a number of inherent anomalies, such as the committee structure of the States¹³. Forming an important aspect of the Insular Government, this structure leaves the States without a clearly defined centre of government allowing the Bailiff to have significant presence within the Assembly¹⁴, an issue which the reforms of 2005 aim to address through the creation of the Chief Minister's Department¹⁵.

⁷Le Herissier-(1972)

⁸Bailhache-(1999)-p4

⁹Le Herissier-(1972)-p29

¹⁰Bailhache-(1999)-p4

¹¹Le Rendu-(2004)-p32

¹²Le Rendu-(2004)-p32

¹³Le Rendu-(2004)

¹⁴Clothier-(2000)

¹⁵Chief Minister's Department-(2005)

Underlying and inherent conflicts within the Island's constitution is the basis upon which reform of Bailiff must be set against. Although Jersey's unique legal system is based upon many sources, creating confusion and uncertainty when tracing customs and practices¹⁶, one major benefit is an inherent flexibility, allowing 'changes and adaptations...to be made'¹⁷. Such flexibility, however, does present a number of dangers. This is the case with the Royal Prerogative; uncertainty as to the extent that it allows the Crown to legislate on behalf of the Island¹⁸ in 'the absence of strong local dissatisfaction'¹⁹, has been used on numerous occasions as a means of 'exhorting the States to do what the electors did not want'²⁰. These conflicts must be understood when addressing the need for reform.

B. Development of the Office to the Current Day: Bridging the Branches of the Government

The Office of Bailiff was in existence before 1204²¹, but only developed into a form recognisable today after the separation from the post of Governor²². The office has often been at the centre of constitutional development²³, usually a result of conflict with the Governor²⁴. Throughout the centuries the Bailiff has been seen as a competing source of power to that of the Crown, represented in the Island by the Governor. The term 'Baillii' itself translates to guardian; the Bailiff was therefore placed in a position from the outset

¹⁶ Binnington-(1997)

¹⁷ Royal Commission -(1973)-p411-para,1362

¹⁸ Royal Commission -(1973)-p413-para,1370

¹⁹ Le Quesne-(1992)-p35

²⁰ Le Quesne-(1992)-p46

²¹ Bailhache-(1999)

²² Le Herissier-(1972)

²³ Bailhache-(1999), Le Rendu-(2004)

²⁴ Le Herissier-(1972)

as the ‘preserver of the people and laws’ of the Island²⁵. The view of the Bailiff as the ‘protector of the Islands privileges and interests’²⁶, has lead to an ‘increased role and involvement in Government’²⁷. As a result, from an early stage in the history of the Island, the Bailiff’s role bridged all three branches of government; the Legislature, Executive and Judiciary.

Today, as Bailhache describes, the functions and responsibilities of the role are most easily divided into four sections; Presidency of the Royal Court, Presidency of the States, ancillary functions deriving from Presidency of the Court and ancillary functions deriving from the Presidency of the States²⁸. Judicial functions deriving from the presidency of the Royal Court are that of Chief Magistrate²⁹ and *ex-officio* President of the Court of Appeal³⁰. As President of the States the Bailiff must act as a presiding officer³¹, similar to that of Speaker of the House³². Nevertheless, the Bailiff’s role is greater than that of any speaker, not only through his right to vote, but also as he is regularly consulted in legislative matters, both individually and within States sittings³³.

Jersey maintains its strong links with the UK and the Crown through the Office of Bailiff as a Crown Appointed Officer. As president of the States, the Bailiff is the ‘Chief

²⁵ Working Party on Public Entertainment-(2002)-p2

²⁶ Bailhache-(1999)-p3

²⁷ Le Herissier-(1972)-p25

²⁸ Bailhache-(1999)

²⁹ Royal Court (Jersey) Law 1948

³⁰ Court of Appeal (Jersey) Law 1961

³¹ States of Jersey Law 1966

³² The rules and procedures, challenged in Syvret v Bailhache

³³ Le Rendu-(2004)

Islander'³⁴; he therefore acts as a direct link to the UK government³⁵. There appears to be an inherent conflict in 'bridging the divide'³⁶; the Bailiff is a Crown Officer, but also the guardian of the Island's privileges and freedoms. Bailhache further highlights this role as key to the smooth operation of government, acting as a central authority within the committee structure³⁷. Although an important function, it is unclear how this role will be affected by introduction of ministerial government. Nevertheless, it seems likely that the Chief Minister will be increasingly called upon to represent the Island overseas³⁸, making it likely that the need for the Bailiff within the States will be greatly reduced, a point echoed and promoted by the Clothier report³⁹.

³⁴ Bailhache-(1999)-p8

³⁵ Le Rendu-(2004)-p33

³⁶ Bailhache-(1999)-p5

³⁷ Bailhache- (1999)-p8

³⁸ Le Rendu-(2004)

³⁹ Clothier-(2000)

Chapter 2

Important Issues for Reform: Separation of Powers, Human Rights and the Lord

Chancellor

A. Separation of Powers: Theoretical Rhetoric or Sound Legal Principle?

As a theoretical doctrine, separation of powers is founded upon on the traditional notion that no one person should hold responsibilities in more than one branch of government. The concept argues that if more than one of these functions are fused, ‘the life and liberty of the subject would be exposed to arbitrary control’⁴⁰. Although many highlight the separation of powers as a justified legal principle which many modern governments are based upon⁴¹, others argue that reference to the doctrine, in an abstract sense at least, is neither helpful nor relevant to the reality of governance⁴². It seems clear that in practice, as Barendt argues, whatever its theoretical defects, the doctrine can be ‘given teeth by constitutional courts’, showing that in other jurisdictions, the doctrine is not as ‘vacuous as its English critics allege’⁴³. Indeed, in other systems such as the United States, the doctrine forms a corner stone of domestic constitutions⁴⁴. As Steyn highlights, in all democracies the doctrine exists to some strength or another⁴⁵ and is particularly important when focusing upon the Judiciary⁴⁶.

In the UK institutional interdependence exists in both the resources and powers of each branch of government. Interestingly the doctrine itself has evolved into one that allows

⁴⁰ Montesquieu, found in Fenwick and Phillipson-(2003)-p103

⁴¹ Windlesham-(2005)

⁴² Le Sueur-(forthcoming)

⁴³ Barendt-(1995)-p611

⁴⁴ Stevens-(1999)

⁴⁵ Steyn-(2002)

⁴⁶ Lightman-(2001)

flexibility and gives effect to the practical operation of governance within the UK. As Bamforth highlights, the power of each institution is interdependent upon the other⁴⁷, a responsible government is one whose executive and legislature co-mingle. This modern approach of partial separation of powers uses interdependence as a means to create checks upon each branch, 'ensuring that power is not concentrated in the hands of one'⁴⁸ via a means of 'political culture'⁴⁹. This is an ingenious development in a concept becoming estranged from political modernity and has allowed the doctrine to be applied to the reality of UK governance effectively⁵⁰.

Despite the large amount of support for this amended principle⁵¹, many still argue that 'in modern Britain the concept is cloudy', remaining a constitutional rhetoric⁵². Calls for a clear and coherent separation of powers provided by law have increased. The Lord Chancellor himself has stated that judicial independence is 'too important to be left any longer unspecified, un-codified and unwritten'⁵³. Such a response is appropriate, public confidence in a legitimate judiciary is essential⁵⁴ to the 'continuance of its own authority'⁵⁵. Although the separation of powers and independence of the judiciary can be argued as two distinct features⁵⁶, whereby independence does not necessarily cease to exist without any separation of powers, this does not detract from the need of a clearly defined doctrine. Public confidence is essential and is endangered without a clear

⁴⁷ Bamforth-(2000)

⁴⁸ Barendt-(1995)-p605-608

⁴⁹ Stevens-(1999)-p366

⁵⁰ Fenwick and Phillipson-(2003), Dawn-(2003)

⁵¹ Stone-Sweet-(2003), Beatty-(1994)

⁵² Stevens-(1995)-p366

⁵³ Quoted in Fleming-(2003)-p5

⁵⁴ Steyn-(2002)

⁵⁵ Lord Lester of Herne Hill and Oliver-(1997)-p223

⁵⁶ Stevens-(1995)

separation of powers. As a result, the doctrine is particularly relevant when referring to constitutional reforms, both in the UK⁵⁷ and Jersey.

The lack of any clearly defined separation of powers within Jersey reflects the position within the UK⁵⁸. To some extent Jersey's dependency provides some form of protection.

As Le Rendu explains:

‘Judicial oversight is [provided] by the Judicial committee of the privy council, legislative and executive oversight [is provided] by the Crown in Council and the Home Office.’⁵⁹

Nevertheless, at best this represents a weak guarantee of protection, and by no means a comparison to a formal separation of powers. Furthermore, this argument relies on the basis that these bodies are actively enforcing a notion of separation of powers by being proactive in their duties, a fact that cannot be guaranteed at all times.

One regularly used argument against the necessity of the doctrine in Jersey is that ‘elaborate constitutional structures’, as expected in larger states such as the UK, are not required in small communities such as Jersey⁶⁰. In some respects this is a valid point which does make some practical sense. In small jurisdictions, resources both human and financial may be stretched by complex structures⁶¹ while also creating unnecessary bureaucracy. Such a point was considered by Clothier, who dismissed such claims when

⁵⁷ Barendt-(1995)

⁵⁸ Le Sueur-(forthcoming)

⁵⁹ Le Rendu-(2004)-p32

⁶⁰ Bailhache-(1999)-p16.

⁶¹ Latimer House Guidelines, as found in Bailhache-(1993)-p16.

focusing on the specific role of the Bailiff both in-terms of the role's importance and also the small scale of changes required⁶².

A further criticism of the application of the doctrine to Jersey, acknowledged by Clothier, is an over delicacy and lack of consideration for the 'modern judicial temperament for independence'⁶³. Although it is clear that those forming the Judiciary, particularly in the Island, have a deep rooted respect and belief in an independent and impartial Judiciary, these criticisms do not affect the application of the doctrine. The doctrine would provide an important safeguard against the potential for abuse existing within the current structure of Island governance. Although the concept cannot be the only basis upon which reform is based, it is an important and powerful tool forming a constitutional asset upon which many other arguments rely.

B. Human Rights Implications: Article 6 of the European Convention on Human Rights and the Human Rights Jersey Law (2000)

i- Article 6: The Meaning of Fair and Impartial Tribunal

The European Convention of Human Rights Article 6 requires an 'independent and impartial tribunal established by law'. The convention is clear on its demands in this respect:

'Regard must be had to the manner of appointment of its members and their terms of office, the existence of guarantees against outside pressures and...whether the

⁶² Clothier-(2000)

⁶³ Clothier-(2000)-p37-para,8.5

body presents an appearance of independence.The court must be impartial from an objective viewpoint'⁶⁴

In practice this has been strictly interpreted and applied. As Matthews comments, all that is needed are circumstances 'casting doubt' on impartiality, or creating a legitimate fear that the court may be influenced by previous actions⁶⁵. The courts operate, therefore, under the principle that 'justice must be seen to be done'⁶⁶. It is clear, however, that when using the convention in the context of reform, one must not assume that the convention requires any particular form of arrangements to be present⁶⁷.

The most significant case in relation to the role of the Bailiff is ECHR ruling of McGonnell⁶⁸. It was found that the role of the Bailiff of Guernsey was sufficiently 'capable of casting doubt on his impartiality'⁶⁹ when acting in a judicial capacity, on the appeal of a particular piece of legislation, which when adopted, the Bailiff presided over the States deliberation. The Royal Court of Guernsey, therefore, was held not to be an independent and impartial tribunal. There has been both support and dissent of this judgment. The decision caters for those who support a discourse valuing a strict separation of powers such as Thomas Jefferson, 'who argued that concentrating such functions in the same hands "is precisely the definition of despotic government"'⁷⁰. Although it may be going further than necessary referring to the Island Government as dictatorial, it does show that the court 'considers any direct involvement in the passage of

⁶⁴ Findlay v UK-para,72

⁶⁵ Matthews-(2000)

⁶⁶ Powell-(2002)-p10

⁶⁷ Le Sueur-(forthcoming), conformed by McGonnell-(2000)

⁶⁸ McGonnell-(2000)

⁶⁹ McGonnell-(2000)-para,57

⁷⁰ Pannick-(1999)-p1

legislation, or executive rules [as potentially casting doubt] on judicial impartiality'⁷¹. Those supporting the decision believe that when applied to the Jersey, McGonnel holds significant implications; by requiring the Bailiff not to adjudicate over any legislation which he presided over States when adopted. In practice many argue that this requires the Deputy Bailiff to sit in any case where the Bailiff was involved in the legislative matter (and *visa versa*)⁷². This is an important acknowledgement of the potential conflict of interests that may arise through the duality of the Bailiff's role.

Bailhache distinguishes this case and argues that it cannot be applied to Jersey's constitution⁷³. There are a number of unusual procedural aspects unique to Guernsey planning law that may have influenced the Strasbourg ruling. Additionally, administrative responsibilities of the Guernsey Bailiff are more considerable than those of the Jersey Bailiff. These differences when combined, Bailhache argues, imputes the impartiality of the Guernsey Bailiff far more than would be the case under Jersey procedures. Such distinctions are however, insignificant to the overall similarities of the two roles between the Islands⁷⁴. The central issue within McGonnel was the fact that the Bailiff was adjudicating on a matter in which he was previously involved. This is an issue which is easily applicable to the Jersey Bailiff, and therefore, any such arguments could not be used as a means to prevent criticism and reform of the Office in Jersey.

⁷¹ Matthews-(2000)-p2,

⁷² Stevens-(1999), Le Sueur (forthcoming)

⁷³ Bailhache-(1999)

⁷⁴ Matthews-(2000)-p1

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

‘Although Article 6 guarantees two distinct features of the tribunal [both] independence *and* impartiality, this decision appears to run them together’⁷⁵.

In the particular circumstances, McGonnel’s objection was to an objective bias whereby the act of simply presiding over the States deliberation when the development plan was adopted was sufficient to cast doubt on the Bailiff’s independence⁷⁶. In a case of subjective or actual bias, independence and impartiality are treated as two distinct features. As the Bailiff neither spoke nor voted, the court inappropriately merged two distinct features guaranteed within Article 6⁷⁷. It is clear, however, that the court considered the mere fact that the Bailiff presided over that States debate, when passing the instrument that he later had to interpret, was sufficient to cause a breach of Article 6. Therefore, the ‘implication of [such] reasoning is that speaking or voting would have been more of a concern that presiding’⁷⁸. Nevertheless, it seems that although criticism of the case exists, the validity of the decision as a whole is not affected. Mathews comments:

‘It appears to mean that where the Bailiff...presides over the adoption by the States of particular legislation, that person must not take part in any judicial proceedings on that legislation.’⁷⁹

⁷⁵ Mathews-(2000)-p2

⁷⁶ Cornes-(2000)

⁷⁷ Mathews-(2000)-p3

⁷⁸ Cornes-(2000)-p171

⁷⁹ Mathews-(2000)-p3

A similar case to McGonnel is Procola v Luxembourg⁸⁰ where the decision of a Judicial Committee of Luxembourg's Conseil d'Etat was held in breach of Article 6(1) due to the fact that a number of members gave a pre-legislative opinion on an instrument subject to the judicial matter. The Message emanating from both this decision and McGonnel is that direct involvement with the subject matter prior to the judicial ruling will lead to a lack of impartiality, and therefore breach Article 6⁸¹.

Cornes criticises the courts reasoning within these two decisions due to the fact that simply because a person performs two different functions in respect to one particular matter, this should not cast doubt on the structural impartiality of the whole institution. Indeed, it would be incorrect to assume that judges have no view on a particular piece of legislation under normal circumstances. Cornes argues the more important issue is 'what the nature of the view was [and how] was it expressed'⁸²; actual impartiality. Although logically watertight, Cornes' view, however, seems somewhat immaterial. The authorities of McGonnel and Procola have firmly entrenched a Strasbourg methodology requiring both objective and subjective impartiality. As a result, it seems clear that McGonnel cannot be dismissed so lightly.

Two contrary decisions to McGonnel, which Bailhache argues may be used as a persuasive authority to dismiss the ECHR⁸³ jurisprudence are the Jersey Court of Appeal

⁸⁰ (1996)

⁸¹ Cornes-(2000)

⁸² Cornes-(2000)-p168-169

⁸³ Bailhache-(1999)

cases Bordeaux Vineries⁸⁴ and Eves v Le Main⁸⁵. In Bordeaux, the court held that the Bailiff could carry out responsibilities in both branches of the government due to the fact that his ‘special position means he is not responsible for the decisions of the States, [and therefore does] not have any interests...in the [outcome of those] decisions’⁸⁶. This view was replicated in Eves, by Collins JA, highlighting that ‘this ground alone is insufficient to argue that the Bailiff should not have presided over the hearing’⁸⁷. These cases cannot be used as a means to dismiss a potentially adverse Strasbourg ruling due to the strict requirements of Article 6. An additional case Bailhache relies upon is the ‘leading English authority on the appearance of bias’⁸⁸, R v Gough, where Lord Goff of Chiveley created a far more easily satisfied test for impartiality than used by Strasbourg; that of ‘a real danger of bias’⁸⁹. Contrary to the argument put forward by Bailhache, Gough can be distinguished and dismissed on a number of counts. Firstly being prior to the Human Rights Act the court did not have to give a strict effect to Strasbourg jurisprudence via statutory interpretation⁹⁰; and secondly, the case concerned the impartiality of the Jury and not the Judiciary, which is arguably less stringent⁹¹. These cases suggest, therefore, that no persuasive arguments exist as a means to counteract any Strasbourg claims of impartiality within the Office of Bailiff.

A different aspect to which Article 6 also applies is to the manner of judicial appointments. The leading authority in this area is Starrs v Ruxton, in which the

⁸⁴ (1993)

⁸⁵ (1999)

⁸⁶ Le Quesne JA, found in Bailhache-(1993)-p13

⁸⁷ (1999)-p8

⁸⁸ Bailhache-(1999)-p13

⁸⁹ Bing-(1998)-p148

⁹⁰ Bing-(1998)

⁹¹ Quinn-(2004)

appointment methods of temporary Scottish Sheriffs, were deemed not to be independent and impartial due to a lack of a security of tenure. As Lord Reid comments, the importance of security of tenure is well recognised...[a lack of which] could give rise to a reasonable perception of dependence upon the Executive'⁹². When applied to the appointment process of the Bailiff⁹³, similar questions may also be raised. Le Rendu highlights:

‘As the Crown Officers hold their office at Her Majesty’s pleasure, they can be dismissed for offences other than gross misconduct, and moreover, there is no democratic veto on the use of this power’⁹⁴.

What raises a potential breach of Article 6 is that the Bailiff could be dismissed at will without any effective safeguards⁹⁵. Although this is unlikely due to the fact that political controversy would ensue, the potential exists. As Lord Reid highlighted, the adequacy of the judicial independence cannot be tested on the assumption that the Executive will always act with appropriate restraint⁹⁶. It seems likely, therefore that the current appointment process would be held as a breach of Article 6, even taking into account the fact that the ‘power [of dismissal] is rarely invoked’⁹⁷.

ii- Application of the ECHR to Jersey

The key issue when discussing the impact of the European Convention on Human Rights

⁹² Lord Reid in Stars v Ruxton, -para,33-46

⁹³ For a detailed examination of the appointment process, see below.

⁹⁴ Le Rendu-(2004)-p35

⁹⁵ Anderson-(2000), White-(2001)

⁹⁶ Lord Reid in Stars v Ruxton, -para,39

⁹⁷ Le Rendu-(2004)-p35

is how far could reforms be enforced upon the Island against its will by an outside power?

The most significant tool in which reforms potentially could be enforced is through the use of the Royal Prerogative. Historically the Royal Prerogative has always been shrouded in political controversy, however in recent years, the increasing number of international agreements affecting the Channel Islands has directly called into the question the true extent to which the Royal Prerogative may be used. As the Royal Commission highlighted, this is a difficult and complex area, compounded by ‘developments in the international field’⁹⁸. Confusion as to the true extent of such a significant power is a testament to the uncertain context in which international agreements and particularly the ECHR operate.

It must be remembered that incorporation of the ECHR into Jersey’s domestic law was achieved through the Human Rights (Jersey) Law 2000 (‘the 2000 Law’) and not the Human Rights Act 1998 which applied only to England, Scotland and Wales⁹⁹. The convention was, however, enforceable prior to the enactment of the 2000 Law under Article 63 of the Convention, similar to the situation within the UK. It is clear that ‘the specific constitutional status of Jersey is recognised in...the ECHR¹⁰⁰. As with the UK there is no means that the ECHR would be able to enforce reforms upon the Island

⁹⁸ Royal Commission-(1973)-p415-para,1379

⁹⁹ s.22(6) HRA, McGoldrick-(2001)

¹⁰⁰ X v. United Kingdom-p104

without co-operation from Island authorities themselves¹⁰¹, therefore, the convention does not represent any risks to the Island directly.

The only avenue for reforms to be enforced against the will of the Island is that of the Royal Prerogative. As Plender highlights the ‘the Crown has ultimate responsibility for the good governance of the Islands’¹⁰². Although the Island has been granted a great deal of autonomy¹⁰³, the UK Government is ultimately responsible for the Islands international relations¹⁰⁴. Although a lack of certainty exists as to the extent to which the Crown may use the prerogative, it is clear that in times of sever Island-wide public disorder or in circumstances of a complete breakdown in the administration of justice, the prerogative may be justifiably invoked by the UK Government, to impose reform from the outside in an aim to ensure good governance¹⁰⁵, a view also expressed by Jersey’s Attorney-General¹⁰⁶. Whether there are other circumstances where intervention via the Prerogative would be justified, the Royal Commission considered it ‘so hypothetical as not worth perusing’¹⁰⁷. In any event, it seems clear that a Strasbourg ruling against the Office of Bailiff and the resulting breach of Article 6 would not constitute public disorder or the breakdown of administration of justice, and therefore, would not create a sufficiently serious situation as to require the use of the Royal Prerogative¹⁰⁸.

¹⁰¹ Windlesham-(2005)

¹⁰² Plender-(1990)-p194

¹⁰³ Le Rendu-(2004)-p55. Le Rendu argues that this independence is essential for the stability of the finance industry within Jersey.

¹⁰⁴ Plender-(1990)

¹⁰⁵ Le Rendu-(2004)

¹⁰⁶ Sir W. Balhache, statements within the States proceedings: 14/5/02

¹⁰⁷ Royal Commission-(1973)-p454-para,1502

¹⁰⁸ Royal Commission-(1973)-p457-para,1513

There is an alternative method that the UK could use to force the Island Government to initiate reforms itself rather than reforms being forced upon them. Via the means of exerting severe political pressure on the Insular Authority, the UK could achieve Island reforms. As Le Rendu highlights, the Island Government has always ‘sought to avoid either being a burden or an embarrassment to the UK’¹⁰⁹ due to the fact that it would not serve in the best interests of the Island. If Jersey did become an embarrassment, the UK would be likely to use a wide variety of political means to stop the cause of discomfort¹¹⁰. Indeed, as Le Rendu comments, ‘Jersey’s ability to resist an ultimatum from the UK is limited’¹¹¹. One such example can be seen over the Islands homosexuality laws during the early 1990’s which brought political pressure to the UK government’s doorstep from the ECHR. In this particular instance, Jersey was given autonomy to rectify its position, and did so dutifully as to avoid conflict¹¹². A similar scenario may also arise over the Office of Bailiff.

iii- The Impacts of the Human Rights (Jersey) Law 2000

The 2000 law incorporated convention rights into Jersey domestic law. In doing so, commentators such as Le Sueur argue that it has created a ‘new constitutional relationship between the Royal Court and the States’¹¹³, impacting upon the way in which law and politics within the Island interact. Le Sueur argues, this is achieved through Article 4 and 5 by placing an obligation on Royal Courts to interpret legislation compatibly with convention rights, and permitting the court to make a declaration of

¹⁰⁹ Le Rendu-(2004)-p69

¹¹⁰ Le Herissier-(1972)

¹¹¹ Le Rendu-(2004)-p68

¹¹² Le Rendu-(2004). An issue recently resurface and currently undergoing further States debate.

¹¹³ Le Sueur-(forthcoming)-p2

incompatibility as to a specific piece of legislation. Article 4 impacts the relationship between the Legislature and Judiciary by requiring the court not to simply implement the will of the states, but to ‘scrutinise legislation for its compliance with Human Rights’¹¹⁴. As President of the Royal Court, Article 4 may bring the Bailiff into conflict with the States, particularly when judicial interpretation is required¹¹⁵. The potential impact of this more onerous obligation may be gleaned when investigating the impacts of the HRA upon the UK constitution. Beloff illustrates:

‘[In the UK, the convention was used] as an aid for construction of ambiguous primary and secondary legislation, to resolve uncertainty or to fill gaps and buttress the principles of the common law as a measuring rod to judge its efficiency’¹¹⁶.

On a number of occasions such activities by the UK courts have brought the Judiciary under direct attack both from the government and the media¹¹⁷. The potential, therefore, exists for similar conflicts to arise under the 2000 Law within Jersey, which due to the duality of the Bailiff’s position, such conflicts are potentially far more significant.

There is, however, a potential counter claim to such a line of reasoning. One could argue that the Bailiff would not be placed in conflict with the States, but used as a valuable resource when drafting legislation due to the fact that Judicial interpretation and scrutiny is ‘not a substitute for the process of democratic government but [must be used as] a compliment’¹¹⁸. Le Sueur highlights the growth of institutional dialog within the UK as a

¹¹⁴ Le Sueur-(forthcoming)-p7

¹¹⁵ Le Sueur-(forthcoming)

¹¹⁶ Beloff-(2002)-p1

¹¹⁷ Bradley-(2003)

¹¹⁸ Beloff-(2002)-p6

means to avoid declarations of incompatibility¹¹⁹. As ‘defender of the Islands rights and privileges’¹²⁰, such a technique could be utilised within the Jersey constitution to avoid conflict between the Bailiff and the States. Nevertheless, although risks of incompatibility are low, due to checks by both States Departments and the Attorney-General¹²¹, Le Sueur continues to question the logic of such an assumption, suggesting that the Attorney-General would be in a better position to be consulted and utilised by the states, discounting the use of the Bailiff on grounds of legitimacy:

‘Traditionally, courts explain their views...only through judgments and not through statements outside the courtroom. From his position as Presiding Officer it would be inappropriate for the Bailiff...to influence debate by restarting or amplifying view expressed in the Royal Court.’¹²²

This is a subtle, but particularly powerful argument, working also in the opposing direction when the Bailiff acts in a Judicial capacity¹²³.

Such a line of reasoning is criticised by Bailhache, citing the fact that a Human Rights challenge is no different from more traditional types of challenges, therefore claiming that no special arrangements or changes are required. Bailhache is mistaken in dismissing the significance of the Human Rights so readily. The significance of a Human Rights challenge is not the challenge itself, but from the new constitutional relationship created by the 2000 law. This new relationship, by placing greater obligations on the Royal

¹¹⁹ Le Sueur-(forthcoming)

¹²⁰ Bailhache-(1999)-p3

¹²¹ Bailhache-(1999)

¹²² Le Sueur-(forthcoming)-p9

¹²³ Matthews-(2000), Le Sueur-(forthcoming)

Court, inherently brings the Bailiff into potential conflict with the States, therefore requiring reform.

C. The Office of the Lord Chancellor and the Debate for Reform

The debate over reform of Bailiff has often referred to, and used, arguments arising out of the debate concerning the office of the Lord Chancellor ('LC'). Many of the arguments used to propose reform can be applied to both offices, and as a result, can be used as a valuable tool to promote reform within Jersey.

Bradney refers to the role of the LC standing as a thorn in the application of the separation of powers to the UK:

'Certain questions persist which relate not to the quality of work of the Lord Chancellor, but to an inherent dysfunction [in the concept].'¹²⁴

Although debate concerning the LC existed prior to McGonnel, since the judgement, calls for reform have grown significantly. As Stevens comments, McGonnel 'could not fail to raise questions about the traditional executive, legislative, and judicial functions of the LC'¹²⁵. This view, supported both by commentators¹²⁶ and the media¹²⁷ has culminated in the Constitutional Reform Act 2005, significantly altering the powers of the LC¹²⁸.

¹²⁴ Bradney, in Dickinson & Carmichael-(1999)-p156

¹²⁵ Stevens-(1999)-p365

¹²⁶ Fenwick and Phillipson-(2003), Lord Bingham of Cornhill-(2002)

¹²⁷ Hocking and Tucker-(1999)

¹²⁸ Windlesham-(2005)

i- Similarities and Differences of the Office of Lord Chancellor to the Role of Bailiff

To assess the validity of the debate over the Office of LC to the Bailiff, one must assess the similarities and differences between the two offices. The LC sits in the cabinet of the UK government as well as acting as a Judge and speaker in the House of Lords ('HOL'). The LC therefore straddles all three branches of government much like the Bailiff¹²⁹. Indeed, as Pannick highlights, McGonnel can be applied to the LC 'when sitting as a member of the Appellate Committee of the HOL'¹³⁰, and as a result, issues of separation of powers are clearly relevant to both offices. Furthermore, as a historical position, general development of the role has allowed the LC to be firmly entrenched within the constitutional makeup of the U.K¹³¹, much like the Office of Bailiff.

Disagreement exists as to whether the powers of the LC are greater or less than those of the Bailiff. Clothier is of the opinion that the Bailiff has far more extensive decision-making powers than that of the LC¹³² as does Le Rendu¹³³, whereas Bailhache claims the powers of the Bailiff 'appear less objectionable (in the context of the McGonnel decision)¹³⁴. Although a complex and difficult issue, Lightman warns of the risks of dismissing the LC's decision-making ability too readily:

'[The LC acts] as general council to the Prime Minister: very close, available, trusted and powerful.'¹³⁵

¹²⁹ Le Rendu-(2004)

¹³⁰ Pannick-(1999)-p1

¹³¹ Windlesham-(2005,2006)

¹³² Clothier-(2000)

¹³³ Le Rendu-(2004)

¹³⁴ Bailhache-(1999)-p14

¹³⁵ Lightman-(2001)-p1

It is apparent that the powers of the Bailiff and LC are comparable¹³⁶ and therefore, many of the arguments utilised to promote reform can be directly applied to that of Bailiff¹³⁷.

ii- Arguments for Reform of the Office of Lord Chancellor

There is a great deal of disagreement as to what exact roles that makes the LC's position unsustainable; those proposing reform claim that it is long over due. Many highlight the main cause of conflict as the LC's power to appoint and act within the Judiciary¹³⁸. Others however, cite the LC's 'executive responsibilities [particularly] the involvement in constitutional reforms'¹³⁹. Most arguments are based essentially on the doctrine of separation of powers:

'The practice of the LC...is not consistent with even the weakest principle of separation of powers or the most tolerant interpretations of the constitutional principles of judicial independence or rule of law.'¹⁴⁰

Critics highlight the 'lack of awareness, existence and content of conventions'¹⁴¹ governing the LC as a major cause for concern, particularly due to a continuing trend of increased political involvement¹⁴². An underlying concern for Judicial independence is evident throughout the debate:

'The proposition that a cabinet minister must be head of our judiciary...is no longer sustainable on either constitutional or pragmatic grounds'¹⁴³.

¹³⁶ Stevens-(1999), Cornes-(2000)

¹³⁷ Clothier Report-(2000)

¹³⁸ Lightman-(2001)

¹³⁹ Bowley-(2001)-p1858

¹⁴⁰ Steyn-(2002)-p388

¹⁴¹ Oliver-(2003)-p336

¹⁴² Bowley-(2001)

¹⁴³ Lightman-(2001)-p1

In defence of the current system, as Bradney illustrates, one can firstly highlight the fact that the LC only has a formal right to sit as a Judge, and secondly claim that the duality of the role is vital to act as a check on the powers of the Executive and Judiciary, ‘administering an important boundary between’ the two¹⁴⁴. Historically, those holding the position of LC have always ‘shown a grate range of interest in their work as judges’¹⁴⁵, but also importantly, have been ‘pivotal figures in several aspects of public life extending beyond the law and administration of justice’¹⁴⁶. The LC’s right to sit as a Judge, formal or not, is significant due to the ability to use that right.

The second claim, however, has been used far more readily. Lord Irvin expands upon the potential conflicts that arise between the Judiciary and Executive:

‘In the latter two years of the last Government, there was unprecedented antagonism between Judiciary and Government over judicial review of ministerial decisions.’¹⁴⁷

There are undoubtedly a number of benefits that the LC can bring in such circumstances. The LC has a ‘high judicial reputation’ carrying out a number of both judicial and political functions, the most significant of which is the ability to act as a ‘buffer’; a direct result of the bridging of functions within the role¹⁴⁸.

Bradney calls into question logic of this ‘buffer’ discourse, highlighting a number of important issues:

¹⁴⁴ Bradney, in Dickinson & Carmichael-(1999)-p156

¹⁴⁵ Bradney, in Dickinson & Carmichael-(1999)-p156

¹⁴⁶ Windlesham-(2005)-p808

¹⁴⁷ An extract of a lecture given by Lord Irvine in Durham, found in Bradley-(2003)-p406

¹⁴⁸ Steyn-(1997)-p90

‘[Separation of powers] vaunts the separateness of the judiciary, values its otherness in society, and thus finds the LC’s triple allegiance...an anathema’¹⁴⁹.

The LC’s participation as a Cabinet Minister makes him unable to protect the independence of the judiciary due to the fact that he will ‘always act as a spokesman for the government in the furtherance of a party political agenda’, and is, therefore, unable to act as the Judiciary’s ‘representative’¹⁵⁰. These views have been taken onboard by the Constitutional Reform Act 2005, shown clearly by inclusion of s3, the guarantee of judicial independence, highlighted by significantly altering the powers of the LC by removing the power to sit in either Houses of Parliament and the creation of the Judicial Appointments Commission¹⁵¹.

How do these arguments impact the debate for reform of the Bailiff? Importantly, it adds further weight to the argument against any supposed benefits of the duality within the role. It is clear that judicial impartiality is now recognised as an essential part of democratic society¹⁵². It is clear that the majority of commentators support the removal of the duality of the LC’s functions, allowing the position, as head of the Judiciary, to be secured without claims of a lack of impartiality¹⁵³. As Read highlights, such reforms would ‘revive the historic tradition, submerged in the last century by the pressure of executive duties’¹⁵⁴. Such a proposition has been widely accepted by Jersey constitutional commentators when applied to the Bailiff¹⁵⁵.

¹⁴⁹ Bradney, in Dickinson & Carmichael-(1999)-p156-157

¹⁵⁰ Steyn-(1997)-p91

¹⁵¹ Windlesham-(2005,2006)

¹⁵² Stevens-(1999)

¹⁵³ Bowley-(2001)

¹⁵⁴ Read-(2003)-p1034

¹⁵⁵ Clothier-(2000)

Chapter 3

Further Arguments for Reform

A. Conflict of Interests

There are a number of ways in which the Bailiff's powers can be shown to create a conflict of interests. The fusion of powers within the role is against good democratic principle, leading to potential abuse.

i- Fusion of Powers: Against Good Democratic Principle

To many, the role of the Bailiff represents the 'ultimate expression of the archaic nature of the constitution'¹⁵⁶. This is illustrated by Le Herissier in the historical context of how the current power base of the office was gained:

'The Bailiff was able to play such a dominant part in Insular Government because of his involvement in the Legislative, Executive and Judicial spheres of Government. Most importantly, his role in the States demanded the exercise of what now would be regarded as political power.'¹⁵⁷

Particularly in the judicial context, this fusion of powers compromises both the Bailiff's position and questions his independence¹⁵⁸. Historically the office has been immersed in conflict; either between the States or the Governor¹⁵⁹. Although this conflict has now subdued and the professionalism of the Judiciary can no longer be questioned¹⁶⁰, the Bailiff's role still represents 'a potential threat to the managing of Jersey's dependency'

¹⁵⁶ Le Rendu-(2004)-p35

¹⁵⁷ Le Herissier-(1972)-p75

¹⁵⁸ Le Rendu-(2004)

¹⁵⁹ Le Herissier-(1972)

¹⁶⁰ Le Herissier-(1972)

from outside and internal sources¹⁶¹. This view was taken by the Guernsey Labour Group, who ‘considered wrong in principle that one person should have these dual functions’¹⁶², a view replicated within the Clothier report¹⁶³.

There have been a number of reports and investigations into the administration of the Island carried out by the express will of the UK government¹⁶⁴; the 1861 and 1973 Reports of the Royal Commission, and the 1947 Report of the Privy Council. Of these reports, only the Royal Commission of 1973 acknowledged the duality of the role as ‘contrary to good democratic principle’, nevertheless, proceeded not to recommend any changes based on an ‘overall good’ argument, agreeing with the 1947 Privy Council Report, that no ‘undue influence is exerted’ by the fusion of powers¹⁶⁵.

There are a number of criticisms that can be directed at these reports. As Le Rendu highlights, the 1947 and 1973 reports are both based on the assumption that the Island does not contain the necessary human resources for the Office to be split of its dual roles, nor could the workload be capable of sustaining two posts¹⁶⁶. These assumptions do not hold water in the current legal climate of the Island. The expansion of the Offshore Finance Sector has lead to a dramatic increase in legal activity and expertise available within the Island; the appointment of Deputy Bailiff is a direct manifestation of increased demands placed upon the Office¹⁶⁷.

¹⁶¹ Le Rendu-(2004)-p38

¹⁶² Royal Commission-(1973)-p437-para,1447

¹⁶³ Clothier-(2000)

¹⁶⁴ The Clothier Report was requested and funded by the Insular Government.

¹⁶⁵ Royal Commission-(1973)-p461-para,1527

¹⁶⁶ Le Rendu-(2004)

¹⁶⁷ Le Rendu-(2004)

Further criticism of the reports can be directed at their impartiality. Support and faith in the judicial process must be seen as key when discussing the role of the Bailiff. Although these reports highlighted the duality of the role, they failed to acknowledge the potential risks to the continuance of the judicial system as a result of the fusion of powers. Such an omission is hardly surprising. As Le Rendu highlights, caution must be used when referring directly to the findings of the reports:

‘Both the Committee as well as any Royal Commission are effectively selected by the government of the day which gives the UK Government the ability to select, not only which issues go before the Committee, but also who adjudicates on the matter.’¹⁶⁸

As a result, findings although based on evidence, may not give a full and accurate representation of the situation. The fusion of powers within the role is against good democratic principle. As Hanson illustrates, ‘it is essential for the legislature to keep pace with the changing needs and expectations’ of the Jersey people; it must facilitate not hinder the judicial process¹⁶⁹. The validity of the reports have been seriously affected in the current political and legislative climates. In the modern legal context it is essential ‘to protect the integrity of the judicial process, [by] securing the legitimacy of the courts in the eyes of the public and of particularly...litigants’¹⁷⁰ shown by the increasing trend for judges to declare interests ‘however remote’¹⁷¹.

¹⁶⁸ Le Rendu-(2004)-p102

¹⁶⁹ Hanson-(2002)-p1

¹⁷⁰ Dawn-(2003)-p332

¹⁷¹ Pannick-(1999)-p1

ii- Open to Potential Abuse

A further important argument for reform is that the role is open to potential abuse. The personalities of those holding office has often had a significant impact upon the scope and nature of the role¹⁷². This fluidity, ‘dependant on interpretation of the role within the executive’¹⁷³ demands more powerful checks to ensure abuse cannot occur.

A historical tradition exists of the Bailiff acting as a protector of the Islands privileges against numerous sources such as the Governor¹⁷⁴. Undeniably, ‘successive bailiffs have exercised wise leadership in...difficult times’¹⁷⁵. Countanche is an excellent example of in this respect, who ‘occupied a unique position of influence in the pre-war period and, at times, acted as de facto Prime Minister’¹⁷⁶. Nevertheless, although the current structure has been important in the development of Island Governance and brought with it many benefits, as Le Sueur argues, this does not detract from the need for reform. The potential for conflict and difficulties arising from the duality of the office within the modern socio-political context overrules any historical benefits it once had¹⁷⁷.

As the Bailiff has few checks on his powers, a clear potential for abuse exists¹⁷⁸. These checks, although offering insignificant safeguards, must be investigated to find the true extent to which they operate. The creation of the Court of Appeal, in a number respects acts as check upon the power of the Royal Court. Acting as a test for Royal Court

¹⁷² Bailhache-(1999)

¹⁷³ Le Rendu-(2004)-p37

¹⁷⁴ Le Herissier-(1972)

¹⁷⁵ Le Sueur-(forthcoming)-p2

¹⁷⁶ Le Herissier-(1972)-p79, Pocock-(1975)

¹⁷⁷ Le Sueur-(forthcoming)

¹⁷⁸ Le Rendu-(2004)

decisions, appeals no longer proceed straight to the Privy Council. Additionally by no longer being the only professional Judge in the Island, dangers for potential abuse have 'receded, if...not completely disappeared'¹⁷⁹.

Such a line of reasoning, however, only covers the Bailiff's power arising within the Judiciary and not within the States Assembly. In response, Le Rendu points to the committee structure within the States, arguing that this renders the Assembly immune from any executive pressures placed upon it due to a highly fragmented and complex nature¹⁸⁰. Le Herissier explains:

'The increasing complexity of policies meant that the operation of committees became more streamlined and specialised. The Bailiff could not exercise an undue influence over members by acting as a unique source of information and expertise.'¹⁸¹

Simply because the Bailiff is no longer used as a source of detailed information does not remove the ability to place undue influence upon individual States Members as a means of gaining control. This may be carried out via political pressure and persuasion arising from the importance and respect of the position. Furthermore, such checks do not act as a substitute for the formal kind, such as a written or clearly defined constitution; an important tool which Jersey unquestionably lacks¹⁸².

¹⁷⁹ Matthews-(2000)-p4

¹⁸⁰ Le Rendu-(2004)

¹⁸¹ Le Herissier-(1972)-p178

¹⁸² Le Herissier-(1972)

iii- A Lack of a Democratic Basis

A particular issue which relates to the Bailiff is a lack of any democratic base. In one respect this brings the benefit of non-politicalisation of the Office¹⁸³. Indeed, as the Clothier Report recognised, there is substantial support for the way in which the role is appointed¹⁸⁴. Nevertheless, there are a number of significant problems with the current appointment process.

The Bailiff, although formally appointed by the Crown, in practice the process is the 'responsibility of the retiring Bailiff who will consult a Consultative Panel chosen by the States'¹⁸⁵. The UK government then endorses the choice of the panel through the Home Office, as long as it is not considered to be contrary to the interests of the UK. This arrangement can be seen as giving the UK a controlling stake at the helm of Island governance. Although no significant issues have arisen in recent years, during times of tension or conflict with the UK, this process may create difficulties, particularly when considering the loyalties of those appointed¹⁸⁶. As Judges work within the public confidence¹⁸⁷ this could potentially create difficulties relating to the judicial functions of the Bailiff.

iv- Arguments Suggesting No Conflict of Interests

The most popular response to the conflict of interests debate is to claim that the Bailiff has no power or influence within the sitting of the States, taking no political

¹⁸³ Le Rendu-(2004)

¹⁸⁴ Clothier-(2000)

¹⁸⁵ Le Rendu-(2004)-p35

¹⁸⁶ Le Rendu-(2004)-p35

¹⁸⁷ Bamforth-(2000)

responsibilities assigned to States Members¹⁸⁸. Such an argument, however, is flawed on a number of levels. The nature and scope of the Bailiff's powers makes it impossible for him not to exercise any form of control or influence over the Assembly. As Speaker of the States, the Bailiff controls who is allowed to speak and put questions to the floor, effectively shaping the debate¹⁸⁹. This is a powerful argument against the duality of the role as it proposes a potential obstruction to the administration of Island governance. Indeed, when considering the historical context, the Bailiff 'tended to play a large part...in acting on behalf of the states'¹⁹⁰, having a negative impact upon the public confidence of the judiciary. Le Herissier highlights one typical example of this lack of confidence:

'In the courts it was the general opinion that the Jurats just looked at the Bailiff, the Bailiff looked back at them, they nodded and conviction followed.'¹⁹¹

This is a clear example of the power that the Bailiff commanded over the Jurats and other politicians during this period, showing the basis upon which the current role has developed.

B. Judicial Review

The growth of judicial review within the Island has been rapid in recent years¹⁹². This has led to an incoherent procedural structure¹⁹³ due to a reliance on 'improvisation, assumption and judicial creativity'¹⁹⁴. This is an unsatisfactory state of affairs, especially

¹⁸⁸ Bailhache-(1999)

¹⁸⁹ Clothier-(2000)

¹⁹⁰ Le Herissier-(1972)-p78

¹⁹¹ Le Herissier-(1972)-p79

¹⁹² Blake and Blom-Cooper-(1997)

¹⁹³ Robinson-(1999)

¹⁹⁴ Blake and Blom-Cooper-(1997)-p373

taking into consideration the importance of judicial review, allowing the courts to supervise decisions of the administrator¹⁹⁵. A need now exists for reform of the procedural aspects of judicial review, a need compounded by incorporation of ECHR into domestic law. Bradley illustrates the impacts of the HRA 1998 in the UK:

‘Far from minimising opportunities for Judicial Review, it did the reverse, requiring the judiciary where possible to give effect to Convention rights and authorising the...courts to assess whether legislation...is compliant’.¹⁹⁶

Bailhache claims that the growth of judicial review ‘does not involve a qualitative change in the Bailiffs functions’, highlighting the role of the Deputy Bailiff in presiding when any conflict of interests might arise from a previous decision¹⁹⁷. The issue of concern however, is the Bailiff’s role in the States, not previous decisions within the Royal Court. Bailhache also claims that due to the impartiality of the Office, the growth of judicial review will not have an impact¹⁹⁸. Such a view, however, seems naïve considering the fact that judges can only review constitutional issues due to their independence and distance from the legislature¹⁹⁹, a quality which cannot be said of the Bailiff despite claims of impartiality²⁰⁰; impartiality is not the same as independence.

¹⁹⁵ Thompson-(2005), Bamforth-(2000)

¹⁹⁶ Bradley-(2003)-p397

¹⁹⁷ Bailhache-(1999)-p15

¹⁹⁸ Bailhache-(1999)-p15

¹⁹⁹ Beatty-(1994)

²⁰⁰ Le Rendu-(2004)

Importantly, as Le Rendu comments, ‘reform [of the role of Bailiff] would also facilitate the development of Judicial review’ allowing a coherent procedural and administrative structure²⁰¹, the need of which is clear:

‘It is time to consider not only the formulation of a body of rules to deal with judicial review...but also the overhaul of the provisions regarding appeals’.²⁰²

It seems clear, therefore, that although judicial review does not create an immediate need for reform, reform itself would facilitate a number of benefits to judicial review.

C. The Bailiff and Public Entertainment

An additional reason for reform is the Bailiff’s powers over public entertainment, which cannot take place without his permission²⁰³. The two main functions of this process are to protect public safety and ensure public decency²⁰⁴. Under the current system, although the Bailiff is assisted by an advisory panel, his decisions are his alone. A particular cause for concern in this relationship is the lack of formal working arrangements²⁰⁵. There are a number of other additional criticisms relating to the political suitability of the Bailiff’s functions. This has constitutional significance as the Bailiff may have to review the legality of one of his own decisions. Furthermore the potential also exists for such powers to be used arbitrarily²⁰⁶. Overall an air of general dissatisfaction with the current arrangements has been made clear, even by the current Bailiff²⁰⁷ and State Members.

²⁰¹ Le Rendu-(2004)-p38

²⁰² Robinson-(1999)-p4

²⁰³ Bailhache-(1999)

²⁰⁴ Working Party-(2002)

²⁰⁵ Working Party-(2002)

²⁰⁶ Working Party-(2002)

²⁰⁷ Bailhache-(1999)

D. Calls to Retain the Current System: Benefits of the Role

One popular argument put forward in support of the current system is to highlight the ability of the Bailiff to give constitutional advice to the Assembly during States sittings. Furthermore, it is also put forward that the Bailiff plays an important role as an interface between the Insular Authority and the UK. To a certain extent, this is a valid argument.

Bailhache elaborates:

‘In the absence of a cabinet or central executive committee charged with the responsibility for governmental relationships with the UK, the Bailiff is the universal joint which enables the machinery of government to operate. He is the conduit through which official correspondence between the Insular Authorities and the Home Office is conducted.’²⁰⁸

The fact that the Bailiff is a Crown Appointed Officer is directly responsible for this role²⁰⁹. By giving direct access to Whitehall, this enables the Bailiff to be placed in the advantageous position to speak on behalf of the Island²¹⁰.

The impact of the 2005 ministerial reforms within the States have yet to be seen, but it is likely that the Chief Minister will slowly take over the role of representing the Island overseas. Indeed, this was one of the major reasons for the creation of Chief Minister; leading overseas delegations and correspondence with foreign powers²¹¹. Although this may not necessarily affect the role of the Bailiff, as the Chief Minister becomes entrenched in the machinery of Government, a strong relationship will be built with

²⁰⁸ Bailhache-(1999)-p8 Conducted through the LC’s Department since 2000, reference to Home Office continues for means of simplicity.

²⁰⁹ Le Rendu-(2004)

²¹⁰ Bailhache-(1999)

²¹¹ Chief Minister’s Department-(2005)

Whitehall, resulting in the Office of Bailiff 'to look increasingly anachronistic'²¹². As a result, this argument cannot be used as an effective means of preventing reform.

Another important issue worthy of consideration is the importance of the role to the identity of the Island. Clothier pays particular attention to this fact, highlighting that it is the most ancient and respected of positions, and worthy of perseverance²¹³. As Le Sueur highlights, there exists a great deal of 'emotional attachment' to the role by which Jersey differentiates itself from the UK²¹⁴. Again, this is not a powerful argument against reform of the office; while the title must remain, the function needs to be modified²¹⁵. As with the debate over reforms to the Office of Lord Chancellor, such reforms would aid in 'enhancing the prestige of the title' by ensuring Judicial impartiality²¹⁶ through separation of powers²¹⁷.

²¹² Le Sueur-(forthcoming)-p3

²¹³ Clothier-(2000)

²¹⁴ Le Sueur-(forthcoming)-p2

²¹⁵ Clothier-(2000)

²¹⁶ Windlesham-(2005,2006)

²¹⁷ Read-(2003)-p1033

Conclusion

Overall it can be seen that there is an urgent need for significant reform of the Office of Bailiff. The doctrine of separation of powers has been shown as an important and powerful tool for reform. Analysis of the doctrine within the UK shows resilience to the changing political landscape, acknowledging institutional interdependence. It has been clearly shown that the doctrine is not simply a theoretical rhetoric but can be applied directly to Jersey's modern political landscape. As a powerful tool for reform, separation of powers can be used as a platform upon which further arguments are based. The doctrine, directly linked with a Human Rights discourse, is particularly relevant. Investigation into the meaning of a fair and impartial tribunal has shown, through the use of case law, a number of different aspects of the Bailiff's functions conflicting with Article 6 of the ECHR. The most significant issue, clearly flaunting the requirements of the ECHR, is the overlap between the legislature and Judiciary. It has been shown, therefore, that if a Human Rights action was brought to Strasbourg, the duality of the functions would be held in breach. Although analysis of the applicability of the Convention to Jersey law shows clearly that it could not directly impose reforms without the will of the Island government, an alternative means to which reforms could be imposed is through the use of the Royal Prerogative. Examination into the potential use of the Royal Prerogative, however, clearly shows that it could only be used against the will of the States in circumstances where there was a clear breakdown of the administration of justice, circumstances unlikely to be caused by a prejudicial Strasbourg ruling. Alternatively scrutiny of the dependency relationship highlights the fact that the UK could exert severe political pressure to the Island Government through a number of

means, effectively forcing the Island to co-operate with reforms, due to the inability of the States to resist UK ultimatums. It has also been shown, by considering the impacts of the Human Rights (Jersey) Law 2000, a new constitutional relationship between the Royal Court and the States has been created. This new relationship clearly makes the Bailiff's role within the States much more difficult to justify, due to an increased obligation placed upon the Royal Court.

Many aspects of the debate concerning the role of Lord Chancellor may be applied effectively to the system of governance within Jersey. It has been shown that the LC debate is fundamentally based on the doctrine of separation of powers, a discourse readily applicable to Jersey, giving further weight to reform of the Office of Bailiff. The supposed benefits of the duality of the LC's functions are fundamentally flawed. Although conflict resolution between the Judiciary and the Executive is a useful function of the LC, in the modern political context, such duality endangers the separateness of the Judiciary. The Constitutional Reform Act 2005, has taken into consideration a number of these issues.

A number of arguments have been used to show that the Bailiff's functions create a conflict of interests. These arguments have focused upon the fusion of powers as being against good democratic principle and open to potential abuse. The rationale behind the conclusions of the 1947 and 1973 Royal Commissions have been studied, highlighting a number of flaws, and identifying key changes in the legal and political landscape of the Island, rendering these reports redundant. Investigation into the history of the role has

shown that the personalities of past Bailiffs have had a massive impact upon the scale and significance of the role. These historical examples along with the lack of any formal checks on the Bailiff's power highlight the potential for abuse. The validity of retaining the current system has also been investigated. It has been shown that although the Bailiff provides constitutional advice and protection, the creation of the new ministerial system has impacted the validity of such claims. The growth of judicial review and the Bailiff's power over public entertainment give further weight to the argument for reform.

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

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Abbreviations

‘Clothier Report’- Report of the Review Panel on the Machinery of Government in Jersey, 2000

‘ECHR’- European Convention on Human Rights

‘HOL’- House of Lords

‘HRA’- Human Rights Act 1998

‘LC’- Lord Chancellor

‘The 2000 Law’- Human Rights (Jersey) Law 2000

‘UK’- United Kingdom