



Jersey Law Course 2011-12

Jersey Legal System & Constitutional Law

The Institute is an independent, not-for-profit legal education and research body, established in 2008. It provides a focus for the study of the laws of the Channel Islands and their legal heritage and, more broadly, the challenges facing small jurisdictions and mixed legal systems. The Institute runs the Jersey Law Course (leading to the professional examinations for aspiring advocates and solicitors of the Royal Court) and offers tuition to students enrolled on the University of London LLB through the International Programmes. It also organises lunchtime lectures on aspects of Jersey law for the general public and continuing professional development events and conferences for the legal profession. More information is available at www.lawinstitute.ac.je.

This publication is one of a series of guides to those areas of law covered by the syllabus for the Jersey Law Course. Each subject is taught by a team consisting of a visiting academic working closely with members of the Jersey legal profession. The guides have been formally approved for this purpose by the Board of Examiners established under the Advocates and Solicitors (Jersey) Law 1997. They are written as an educational aid rather than a comprehensive statement of the law. People referring to this guide for purposes other than study should bear this in mind. The authors, the Institute, and the Board of Examiners accept no liability for any loss that may arise from reliance on any of the guides.

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0. Preface

Preface

This study guide is written for students taking the Jersey Law Course in 2011-2012.

It is also made available to legal practitioners and members of the public via the Institute of Law's website. Anybody using this guide is warned that it is written for educational purposes only. Nothing in the guide constitutes legal advice and users should not rely on anything said in the guide for any purpose other than gaining a general understanding of the areas of law it covers. While the Institute of Law, the authors and the Board of Examiners have taken reasonable care to ensure the accuracy of the guide, they accept no responsibility for any loss that may be incurred by anybody using this guide.

Official syllabus

The syllabus for the Jersey Legal System and Constitutional Law module and an official bibliography is issued by the Bailiff and published on www.jerseylaw.je:

A. Jersey Legal System

1. Customary Law

Authority of the Ancienne Coutume and Coutume Reformée in Jersey. Extent and limit of that authority.

Principal commentators on the Ancienne Coutume cited in Jersey (Terrien and Le Rouillé d'Alençon): Date and standing in Jersey of their commentaries.

Date of compilation of Coutume Reformée. Principal commentators cited in Jersey (d'Aviron, Berault, Godefroy, Basnage, Pesnelle, Routier, Houard and Flaust): Date and standing in Jersey of their commentaries.

2. Civil Law

Status of civil law within the "pays de droit coutumier". Civil law followed in matters not regulated by the customary law, e.g. contract. Principal writers on civil law or civil law derived systems cited in Jersey (Domat, Pothier): Date and standing in Jersey of their works.

3. Local Authorities

Poingdestre, Le Geyt, Commissioners Reports of 1847 and 1861, Le Gros: Date and standing in Jersey of their works.

The Jersey court system and the status of decisions of the Royal Court, the Court of Appeal and the Privy Council.

4. Other Systems of law to which the Jersey Courts may have regard

Status of foreign law in areas where it is relevant (only followed in the absence of local law to the contrary: persuasive but not binding).

France (the Code Civil and modern French writers); the areas of law in which the Jersey courts have regard to modern French law.

The United Kingdom; the areas of law in which the Jersey courts have regard to English law.

Note: This part of the paper is not on substantive law. The purpose of the paper is simply to ensure that candidates know the sources of Jersey customary law and the general areas of law in which they would be referred to.

B. Constitutional Law

1. The relationship between Jersey and the United Kingdom including the extent and limitations of Jersey's legislative autonomy and the powers of the Crown and the United Kingdom Parliament to legislate for Jersey, the restraints upon the exercise of those powers and the mode of implementing any such legislation; and including the scope and extent to which the Island is able to participate in international affairs and make international agreements; and how treaties become binding on the island and the effect of treaties in domestic law.
2. The different forms of Jersey domestic legislation, i.e. Laws, Regulations, Orders and Triennial Regulations; how they are adopted and become effective.
3. The nature of the Island's relationship with the European Union including the terms of Protocol 3 and the applicability of Regulations and Directives of the European Council.
4. The States: a general understanding of the system of government in Jersey, including the powers and functions of Ministers and limitations on such powers, and the manner in which the States may take decisions. Candidates will not be examined on individual standing orders issued under the States of Jersey Law 2005, but are required to understand generally the powers of Scrutiny Panels and other Committees set up by the States.
5. The Parish: an understanding of the role of the Parish and Constable.

6. Crown and Public Officers: an understanding of the role of the Lt. Governor, Bailiff, Deputy Bailiff, Attorney General, the Solicitor General, the Viscount and the Judicial Greffier.

Bibliography

This bibliography is given as an indicative reading list of material candidates may find useful. It is not a complete reading list and candidates should approach it accordingly.

A. Jersey Legal System

The Origin and Development of Jersey Law - An Outline Guide by S C Nicolle Q.C

Report of the Commissioners on the Civil Law (1861) pp. (ii) to (iv)

B. Constitutional Law

Texts

Bois: *A Constitutional History of Jersey* - Sections 2, 3, 5, 8, 9, 10 and 11.

Report of the Commissioners on the Civil Law (1861) pp. (iv) to (viii)

Submission of the States of Jersey to the Royal Commission.

Report of the Law Officers of the Crown (1967) attached as Appendix A to Report of Special Committee of the States on all matters relating to the Government's application to join the European Economic Community.

Report of the 1973 Royal Commission on the Constitution (Volume I, part xi, pp. 407 to 415, 442 to 446, 452 to 457).

Essay entitled "The Protocol, the Bailiwick and The Jersey Cow" by Richard Plender Q.C (available from the Law Officers' Department). [This is a reference to an essay in R Plender (ed), *Legal history and comparative law: essays in honour of Albert Kiralfy* (London 1990), which is available in the Law Library. Students enrolled on the Jersey Law Course will also find a copy of the essay on the virtual learning environment.]

Alastair Sutton, 'Jersey's Changing Constitutional Relationship with Europe' in *A Celebration of Autonomy 1204-2004: 800 Years of Channel Islands' Law* (Jersey 2005)

Jeffrey Jowell QC 'The UK's Power Over Jersey's Domestic Affairs' in *A Celebration of Autonomy 1204-2004: 800 Years of Channel Islands' Law* (Jersey 2005)

R.G. Le Hérissier, *The Development of the Government of Jersey 1771-1972* (Jersey 1974)

Framework Agreement between the UK and Jersey (May 2007).

Statutes

European Communities (Jersey) Law 1973, as amended.

European Economic Area (Jersey) Law 1995.

Articles 26 and 158 and Protocol No. 3 of the 1972 Act of Accession of the United Kingdom to the EEC.

European Communities Legislation (Implementation) (Jersey) Law 1996.

States of Jersey Law 2005: Articles 2, 3, 4, 5, 15, 16, 17, 18, 19, 20-23, 26-29, 31, 41 and 42.

Subordinate Legislation (Jersey) Law 1960

A. JERSEY LEGAL SYSTEM

1. Introduction

- 1.1. This study guide will follow the syllabus, and in generally the same order, as set out in Part 0, above. But it is important to note that this is a *study guide*, and not a *textbook*. The purpose is to give the reader an exposition of the relevant law relating to the matters covered in the syllabus, *without* going into all the detail of points of difficulty that arise. This means that the style is shorter, and more terse, than a textbook would be, and fewer references are given to other materials than would be the case in a textbook.

Getting started on sources of Jersey law

- 1.2. The 'Jersey Legal System' part of this module is designed to guide you through the main sources which a practitioner may need to use to research questions of Jersey law. The focus is not on substantive law but on understanding the various legal sources relevant to practice in Jersey. The note in the official syllabus speaks of the purpose being "simply to ensure that candidates know the sources of *Jersey customary law*" but it is clear from the topics set out in the syllabus and past examination papers that the aim needs to be to understand the significance of a much wider range of sources.
- 1.3. In a judgment of the Chancery Division of the High Court of England and Wales in 1980, Goulding J had this to say about the accessibility of the law of Jersey:¹
- "The law of Jersey, as is well known, is derived from the ancient customary law of Normandy, as modified by subsequent legislation, both insular and imperial. Like the common law of England, the original customary law of Jersey has been developed not only by statutory enactments, but also by a long process of exposition, and of adaptation to the changing needs of society. However, whereas the present state of English law, so far as not codified by statute, is abundantly explained by a wealth of reported and fully reasoned decisions of appellate courts and in a great number of authoritative textbooks, the written materials for the ascertainment of modern Jersey law are comparatively meagre, and textbooks are very few. The reasons for decisions in the Royal Court are often expressed concisely and without lengthy discussion of principle. Accordingly, important parts of the law still reside in the breasts of the judges and legal practitioners of the island, and it is not always possible to find a persuasive answer to a legal problem by mere study of published material".
- 1.4. Since Goulding J made these comments, a great deal of progress has been made providing a range of resources that places Jersey among the leaders of small jurisdictions anywhere in the world in terms of accessibility to primary sources of law and commentary on it:

¹ *Re A Debtor (Order In Aid No. 1 of 1979) Ex parte Viscount of the Royal Court of Jersey* [1981] Ch. 384, 393.

- a comprehensive, searchable database of legislation is available on www.jerseylaw.je
- unreported and reported decisions going back more than 20 years are also available on that website
- the website contains a growing number of digitised versions of texts on customary law
- the system of law reporting started in 1950 has continued to develop, with the introduction of the *Jersey Law Reports* in 1986
- commentary by practitioners and academics is available in the *Jersey and Guernsey Law Review*, launched as the *Jersey Law Review* in 1997
- study guides to eight areas of law have been produced by the Institute of Law.

1.5. All this said, it needs to be acknowledged at the outset that there are several features of Jersey's legal system that make legal research more difficult than it may be in larger jurisdictions.

Legal practice in a very small jurisdiction

1.6. First, there is a limited amount of litigation in a small jurisdiction – and in any given year, only a small proportion of judgments will contain any really significant developments of principle or interpretation. Jersey practitioners will therefore quite often find that there is no clear authority in Jersey sources directly on the point in issue. What should be done in such circumstances? One approach is to go back to first principles: lawyers in a small jurisdiction, perhaps more so than their counterparts in larger ones, need to be able to develop legal answers based on reason rather than merely following a precedent or a precise rule. Another approach is to look for inspiration from the laws of other jurisdictions. Great caution is however needed. There may be a temptation on the part of novice lawyers to reach for answers in a jurisdiction they are familiar with (for most, England and Wales) and assume that is a good fit with Jersey law when it may not be.

Jersey: a mixed legal system

1.7. A second challenge arises from the fact that Jersey is one of the relatively few “mixed jurisdictions” around the world. Others include: Guernsey, Scotland, Malta, Cyprus, Sri Lanka, South Africa, Israel, Quebec, the Philippines, Puerto Rico and (in the USA) Louisiana. These mixed jurisdictions have many differences between each other but what makes them “mixed” is that they cannot easily be put into either of the two main groups of the world's Western legal systems—the civil systems (derived from Roman law and prevalent throughout continental Europe and Latin America) and common law system (derived from English judge-made law and exported throughout the British empire).

- 1.8. In Jersey, each field of law has its own particular “mix”. In some areas of law, such as *propriété foncière* (derived from Norman customary law) or corporate law (derived from English law), it is clear which sources should be used in the absence of local legislation or case law. In others, such as contract law, it is more difficult, where the influences on Jersey jurisprudence have proved to be a mixture of the *ius commune* (principally Roman law), French and English law. This mixture of sources is sometimes perceived to cause difficulties.² Thus the Jersey Law Commission in its *Report on the Law of Contract*³ describes how the law of Jersey is based on the customary law of the ancient Duchy of Normandy. But where the Norman Coutume was lacking, the general practice was to look to mainstream civil law as expounded by notable French jurists such as Pothier, who wrote in the 18th century on the Coutume d’Orleans. More recently, however, and in particular since the middle of the 20th century, there has been a tendency for the courts of Jersey to look at English common law authorities in matters of contract law, whilst nevertheless continuing to draw on Norman and civil law sources. The Law Commission comments that this approach has resulted in an undesirable degree of confusion and uncertainty.

“Ancient” customary law

- 1.9. A third challenge for the novice Jersey legal practitioner is that part of the “mix” is customary law. The Jersey Law Commission’s Consultation Paper on contract law identified some difficulties arising from continued reliance on customary law.⁴ One was that “... access to the early Norman texts is restricted to a small collection housed in the public library, a small collection held in the library of the Jersey Law Society and a small number held privately by local practitioners. There are no modern text books on Norman customary law”.⁵ The position in relation to basic access to texts has in fact improved since 2002. Facsimile editions of *Le Grand Coutumier* and some of the commentators’ works are now readily available in paperback format at modest cost from print-on-demand online book sellers.⁶ Most of the texts that any practitioner is likely to need are also available in digital format on www.jerseylaw.je (with a programme in place to scan still more books). The collection of works on customary law held in the Jersey Law Library and the Public Library are in process of being

² These difficulties will be examined in more detail in the Study Guide on Jersey Contract Law.

³ Topic Report No.10 (2004) <http://www.lawcomm.gov.je/report10.pdf>.

⁴ Consultation Paper No.5 (2002) <http://www.lawcomm.gov.je/Contract.htm>.

⁵ *op cit*, para 12(i).

⁶ Such as www.abebbooks.co.uk.

catalogued.⁷ And in 2009, an English translation of *Le Grand Coutumier* was published in Jersey.⁸

- 1.10. Another difficulty pointed to by the Law Commission is the difficulty of applying ancient concepts. Writing specifically about the law of contract, the Law Commission suggested that a system of law which originated in medieval Normandy and which, because of the advent of the French Civil Code, has remained frozen in time save for the small number of Jersey cases which have developed it, is arguably ill-suited to the needs of the commercial world of the 21st century. In addition, in areas where the law of contract overlaps other areas of law, such as that of trusts, there is the obvious difficulty of applying principles of the law of contract that derive from a jurisdiction to which the concept of a trust was unfamiliar. The particular nature of Jersey contract law is the subject matter of a different module from the present one. A general word of caution is however needed: the “ancient concepts” that the Law Commission says are present in Jersey law are not *merely* because of their age necessarily defective or inappropriate to modern times. Common law systems, such as England and Wales, are equally based on “ancient” legal rules. It is salutary to remember that Magna Carta – which remains one of the most revered statements of constitutional legal principle around the world – came into being at approximately the same time as *Le Grand Coutumier*; so too with many rules of the common law. And, of course, many of the concepts that underpin the civilian codes across Europe and Latin America have their roots in “ancient” Roman law. The need to develop and adapt older legal rules to suit modern times is one that Jersey shares with common law systems around the world: as we shall see in Chapter 2, this is done by judicial innovation and interventions by legislation (the same basic techniques used in common law systems).

Language

- 1.11. A fourth challenge in starting to study and use Jersey law is (for many candidates) language. Change in language was a feature of Norman customary law from its earliest times. The oldest known written statements of customary law, best known in Jersey by their French titles – the *Très-ancien Coutumier* and (a generation later) the *Grand Coutumier de Normandie* – were originally in Latin, but were rapidly translated into medieval French to make them more widely accessible to the people who needed to use them.

⁷ Go to <http://talisprism.gov.je/TalisPrism/>. In the pull-down menu, it is possible to search separately for works held in the Law Library in Law House and in the main public library.

⁸ J.A. Everard, *Le Grand Coutumier de Normandie: the Laws and Customs by which the Duchy of Normandy is Ruled* (Jersey: Jersey and Guernsey Law Review, 2009).

- 1.12. In Jersey, the changes in official and social language are well known. One *ecrivain* gives a glimpse of professional life in St Helier in the 1870s:

"... all conversation between members of the legal profession was carried on in Jersey French, the Norman patois of the island, an exception being made by the Avocats, who spoke French to the best of their ability. Members of the French Bar who visited our court were amused at times by the peculiar expressions and legal phrases they heard."⁹

As Hanson notes, by 2001 fewer than 18 per cent of people living in Jersey could speak French either as their first or second language.¹⁰

- 1.13. Today, French and English remain official languages of the law in Jersey, though the former has been giving way to the latter since the 1950s. A Jersey legal practitioner requires French (not Jersey French) to read the following:

- The foundational texts of customary law - the *Très-ancien Coutumier* and the *Grand Coutumier de Normandie* (though with a recent English translation of the latter now available)
- The works of the 16th-18th century commentators on the foundational texts
- 19th and 20th century academic scholarship on the foundational texts and commentators is almost all in French
- the great majority of legislation adopted by the States Assembly before the 1940s was in French; while many of these Laws and subordinate legislation have been repealed or replaced with enactments in the English language, there remains a body of legislation (some of it dealing with matters of practical importance) in French; when this legislation is amended, it is done in French
- almost all judgments of the Royal Court prior to 1950 are in French; French judgments continued to be handed down until the early 1960s
- the *Tables des Décisions*, issued between 1885-1963, are in French: these provide indices to unreported Royal Court judgments during this period (the *Table des Decisions for the period 1964 to 1978 is printed in English*)
- *contrats* for the sale of immovable property passed before the Royal Court were in French until October 2006;

⁹ 'Reminiscences of Mr G.Q. Larbalestier' (1851-1933), in H.E. le Vasseur dit Durell, *The Men Whom I Have Known* (Occasional Publications No. VIII, The Jersey Society in London, 1933).

¹⁰ T. Hanson, 'The Language of the Law: the Importance Of French' (2005) 9 *Jersey Law Review*.

although new contracts are now required to be in English, practising lawyers are likely to have to read previous *contrats* in French for many years to come

- insofar as modern French law is source of inspiration for the development of Jersey law, primary and secondary texts are in French
- the advocates' and *ecrivains*' oaths are in French.

Key events in legal history

- 1.14. Before going further it may be helpful to set out a chronology of Jersey legal and constitutional developments. We return to most of these events later in the study guide.

Normandy and the Separation

- 911 The French Crown cedes the nucleus of what becomes mainland Normandy to the Northmen (the Normans), from which time Norman law (almost entirely customary) applied until the French Revolution in 1789 (and to the present day, in the case of the Channel Islands). The Dukes of Normandy were vassals of the Kings of France, but by 1066 the power of the Dukedom was such that the Duke was sovereign of Normandy in all but name. Normandy grew into one of the most fully developed feudal societies in Europe.
- 933 Channel Islands annexed to Normandy
- 1066 William (the 7th of 14 Dukes of Normandy) conquers England. Normandy (including the Channel Islands) was not integrated into England but continues as a separate political entity.
- 1204 "The Separation": in the early 13th century the forces of King Philip of France rapidly seized control of Normandy. After less than three centuries, the 'nation' of Normandy came to an end as the political and military power of the Dukes drained away. For almost two decades (during which time Gorey castle was built) there was doubt about the long-term future of the island. The landowners of Jersey—the most important of whom owned lands in the island and on mainland France—had a stark choice between pledging their allegiance to Philip and continuing to support King John of England. Some, including many of the largest, chose the former course so forfeiting their land in the Island to the Crown; as a consequence of the disappearance of Norman overlords, numerous native Jersey landholders gained a "newly elevated social, political and legal status" of becoming tenants of chief, holding land directly of the Crown, with relatively light feudal obligations.¹¹ After some

¹¹ See further J. Everard and J. Holt, *Jersey 1204: The Forging of an Island Community* (2004), p 185.

270 years of Norman rule, Jersey now looked to the English Crown.

Ancienne Coutume de Normandie

- 1200/30 The *Très-ancien Coutumier* published initially in Latin and then in French
- 1245/58 The *Grand Coutumier de Normandie* (*Summa of Maucael*) compiled.
- 1249-1341 *Quo Warranto Proceedings*: Instituted by the Edward I (and continued by Edward II and Edward III) to end individual customs and laws of the Channel Islands – if the Islanders could not justify the terms of the customs, the Crown would enforce its own laws. Each time the Islanders claimed that the law of Jersey was that of Normandy contained in the *Summa of Maucael*. Following argument that the proceedings could not apply as they had been instated by English statute (which had no effect in Jersey), a parliamentary commission reviewed the Island's laws and this culminated in 1341 with the grant of certain rights and privileges to the Islanders by Edward III
- 1259 Besnier suggests that the proceedings demonstrate the strength of Islanders' attachment to the Norman customary law and also show the transformation of Jersey from a residue of the duchy of Normandy to an autonomous community.
- 1309 King Henry III of England acknowledges the loss of Normandy in the Treaty of Paris made with Louis IV of France.
- Justices from England arrived in Jersey and challenged the Islanders to show their right to elect 12 jurats who "arrogate to themselves the functions of the King's judges". The Islanders answered that they had this right since time immemorial; and that the Island was governed by the Law of Normandy, subject to local customs.
- 1315 *Charte aux Normands/Charter of the Normans*: granted by Louis X - stated that Norman causes of action would be heard in Normandy and that no appeal would lie to the King's court - conferred jurisdictional autonomy on Normandy.
- Included in Le Rouillé's edition of the *Grand Coutumier*
- Cited in *Vaudin v Hamon*¹² as the source of the 40 year prescription period for claims relating to immovable property
- 1386/1515 Various *Styles de Procéder* (procedural works) are

¹² [1974] AC 569

published.

1390/1450 The *Glose* is published, a paraphrase of the *Grand Coutumier de Normandie*.

1500s Commentaries on the customary law are published by the 16th century commentators Le Rouillé and Terrien.

Coutume Reformée

1583 The *Coutume Reformée* (official redaction) published.

1599 to 1678 Commentaries on the customary law are published by the 16th and 17th century commentators d'Aviron, Bérault, Godefroy and Basnage.

1700s Commentaries on the customary law are published by the 18th century commentators Pesnelle, Routier, Flaust and Houard.

Civil Law

1689 Domat publishes his *Les loix civiles dans leur ordre naturel* (also known as the *Traité des Loix Civiles*) on Roman/civil law.

1699/1772 Pothier publishes various works, including *Traité des Obligations*.

1789 The French Revolution

1804 France gets a unified system of law (the *Code Civil*) which fully replaced the customary law in Normandy. Until then, France was divided into *pays de droit écrit* (regions of written law in the south of France) and *pays de droit coutumier* (regions of customary law in the North of France, including Normandy). Pothier's works formed the basis of much of the *Code Civil*.

Jersey commentators

1609/1691 Poingdestre writes his (i) *Lois et Coutumes de l'Isle de Jersey*, (ii) *Commentaires sur l'Ancienne Coutume*, (iii) *Remarques et Animaduersions sur la Coutume Reformée* and (iv) *Commentaries sur les Canons de James I*

1635/1716 Le Geyt writes his (i) *Constitution, Lois et Usages*, and (ii) *Privilèges, Loix et Coustumes*.

1771 Code of 1771, legislative power of Royal Court removed

1789 Hemery and Dumaresq; Pipon and Durell publish *A Statement of the Mode of Proceeding, and of going to Trial, in the Royal Court of Jersey*

1847 Report of the Royal Commissioners on criminal law

1856	Le Quesne publishes <i>A Constitutional History of Jersey</i> .
1861	Report of the Royal Commissioners on civil law
1881	De Gruchy publishes <i>L'Ancienne Coutume de Normandie</i> .
1943	Le Gros publishes <i>Le Droit Coutumier de l'Île de Jersey</i> .
1948	Constitutional reforms to composition of States Assembly and the Royal Court
1969	Bois publishes <i>A Constitutional History of Jersey</i> .
1973	The United Kingdom joins the European Economic Community.
2005	States of Jersey Law 2005 brings fundamental change to the governance of Jersey, including the introduction of ministerial government.
2006	Human Rights (Jersey) Law 2000 comes into force, enabling reliance on the rights and freedoms contained in the European Convention on Human Rights before the Jersey courts
2009	Institute of Law's Jersey Law Course launched

Background: the courts of Jersey

The jurisdiction of the Jersey courts is studied in greater depth in the Jersey Civil and Criminal Procedure module. Detailed, technical understanding of the court system is not part of the Jersey Legal System and Constitutional Law module, but a basic knowledge is necessary as background to the sources of law in Jersey.

Jersey has a Royal Court, a Court of Appeal, a Magistrate's Court, a Petty Debts Court, a Youth Court and a Youth Appeal Court. In addition, the Judicial Committee of the Privy Council hears appeals from the Court of Appeal. Also, matters arising within Jersey may form the subject of applications to the European Court of Human Rights and the European Court of Justice.

The Royal Court is the oldest of the Island's courts, and the only one which is not the creature of statute. The permanent members of the Royal Court are the Bailiff and Deputy Bailiff (judges of law) and twelve Jurats (judges of fact). Ad hoc judges of law (Commissioners) may be appointed by the Bailiff. The Royal Court sits either as the Inferior Number (consisting of a Judge and two Jurats) or the Superior Number (also known as the "Full Court") (consisting of a presiding Judge and not less than five Jurats).

The Court of Appeal was created by the Court of Appeal (Jersey) Law 1961. It has civil and criminal jurisdiction and hears appeals from the Royal Court.

The Magistrate's Court is a court of summary jurisdiction, created by the *Loi (1853) sur la Cour pour la repression des moindres délits*. It was known for many years as the Police Court, but changed its name in 1996. Appeals from the Magistrate's Court go before the Royal Court.

The Petty Debts Court was established by the *Loi (1853) sur la Cour pour le recouvrement de menus dettes* (subsequently repealed and replaced). It deals with actions for small debts, actions for eviction of tenants whose tenancy has come to an end, and certain actions between spouses. Appeals from the Petty Debts Court go before the Royal Court.

Binding nature of judgments

1.15. The jurisdiction of England and Wales has the foundational concept of *stare decisis*, which means to stand beside what has previously been decided. In *The State of Qatar*,¹³ the strict application of the concept of *stare decisis* to Jersey law was considered and rejected by the Royal Court. While the court recognised that almost all legal systems acknowledge the persuasive force of judicial precedent, the English doctrine of precedent was perhaps unique in its inflexible application. The court gave three reasons for its rejection of the doctrine:

- i. the original source of Jersey law was Norman customary law;
- ii. the mass of case law underpinning the English concept of *stare decisis* did not exist in Jersey, so there was no basis for applying the English concept; and
- iii. the jurisprudence of Jersey has more in common with France, where a court has more freedom to interpret the law in accordance with the contemporary situation of society.

The court went on to say that this conclusion was not as revolutionary as it might seem. Nearly all legal systems acknowledge the persuasive force of judicial precedent and Jersey is no exception. The importance of judicial precedent has increased not only with the availability of law reports, but also with the creation of the Court of Appeal in 1961. A hierarchical structure of courts requires deference to be shown by lower courts to the decisions of higher courts (in the case of the Privy Council, when it is sitting as a court of appeal from Jersey). But this is not to say that decisions will be followed slavishly: a lower court may decide not to follow a decision of a higher court if there had been legislative changes or compelling changes of circumstances in the meantime.

1.16. Subject to the above observations, precedent operates as follows:

- i. The Inferior Number of the Royal Court is not bound by its own decisions on points of law, but will not depart from an earlier decision unless persuaded that the earlier decision was wrongly decided (*Attorney-General v Hall*).¹⁴ If convinced that its own previous decision is

¹³ 1999 JLR 118

¹⁴ 1995 JLR 102.

- wrong, the Royal Court is entitled to depart from a previous decision.¹⁵
- ii. Prior to 1948, the Jurats were judges of law as well as fact. Accordingly, decisions of the Superior Number were binding on the Inferior Number.
 - iii. The Court of Appeal is not bound by the decisions of the Royal Court and can rule that an earlier decision of the Royal Court was wrongly decided (*Attorney-General's Reference No. 1 of 1990*).¹⁶ However, it will not depart from an earlier decision of the Royal Court which has stood unchallenged for a period of time and on which people may have relied, unless persuaded that it was plainly contrary to earlier authority or the cause of practical injustice (*In re Barker*).¹⁷
 - iv. All Island courts are bound by decisions of the Privy Council sitting as a court of appeal on a Jersey case, but not as court of appeal in relation to another jurisdiction, although such decisions may be persuasive (*Hall v Attorney-General*).¹⁸
 - v. In relation to decisions of the House of Lords (up to 30 September 2009) and (from 1 October 2009) the UK Supreme Court on a matter of common law:
 - in an area where Jersey customary and English common law coincide, it is highly persuasive (but never authoritative) given the common membership of the Judicial Committee of the Privy Council and House of Lords/UK Supreme Court;
 - in an area where Jersey law follows English law, it will be virtually binding (*TA Picot (CI) Ltd v Michel, Crill and Hamon (Crills)*)¹⁹; and
 - a decision of the House of Lords/UK Supreme Court on the interpretation of statutory law which is framed in similar term in Jersey is not necessarily binding (*State of Qatar*)²⁰; and *Krohn GmbH v Varna Shipyard* 1997 JLR 194.

Judgments of the Jersey courts and law reporting

- 1.17. Before 1885 it was often difficult to find decisions because the records of the Royal Court were not easily accessible except to practitioners who were aware that a particular decision had

¹⁵ *Knight v Thackeray's Ltd* 1997 JLR 279; *AG v Weston* (1979) JJ 141.

¹⁶ 1991 JLR 346.

¹⁷ 1985-86 JLR 120.

¹⁸ 1996 JLR 129.

¹⁹ 1995 JLR N-3.

²⁰ 1998 JLR 118.

been handed down. Conscientious lawyers kept their own records of judgments, often bound in large volumes labelled *Précédents* or *Livre de Précédents*, consisting of handwritten notes and clippings from the Island's newspapers of the time. Examples of these are held in the rare books collection of the Public Library or the Institute of Law Library.

- 1.18. Nineteenth century reports of decisions of the Judicial Committee of the Privy Council on appeal from the Royal Court are to be found in the later of the six volumes of the *Ordres du Conseil et pieces analogues enregistrés a Jersey* (considered below).

Tables des Décisions

- 1.19. Improvements were introduced in 1885, when the *Tables des Décisions de la Cour Royale de Jersey* began to be published. These indices of judgments were compiled by the Greffier. In all, ten volumes were published ending in 1978. Care is needed in using the indices as relevant cases may appear under different headings, according to the preference of the Greffier of the day: for example, in searching for cases on wills it is prudent to look under the headings 'Successions' as well as 'Testaments'. It is important to understand that the entries in the *Tables des Decisions* are no more than the briefest summaries of judgments—far shorter than the headnote to a modern-day report. To find the full text of the judgment on which an entry in the *Table* is based, it is necessary to go to the Jersey Archive in Clarence Road, St Helier.

Jugements motivés

- 1.20. Up to 1950, decisions of the court were in French in the form of *jugements motivés* (judgments in the French style, without detailed reasons of the sort found in English common law reports). *Jugements motivés* were prepared by the Greffier under the supervision of the judge, rather than written by the judge himself. In *jugements motivés* the name of the defendant is given first (rather than the plaintiff). Judgments start with a recitation of the procedural history of the case. The facts are then set out. There follows a summary of the reasons of the court for holding as it did.
- 1.21. In *Attorney General v Weston*, the Royal Court (Crill, Deputy Bailiff) considered the character of the *jugement motivé*:²¹
"Up to 1961, but less frequently than before 1950, when the Lieutenant Bailiff, Mr C.T. Le Quesne KC introduced the English type of reasoned judgments, the Royal Court gave a 'jugement motivé' without detailed reasons. In the course of such judgments the Royal Court sometimes indicated the principles upon which it acted, prefacing its findings on the facts by a passage which usually began 'Considérant que par la loi et coutume de cette ile ...' and then expounding those laws and

²¹ 1979 JJ 141

customs before applying them to the facts as found. A judgment which confined itself to a finding on the facts alone could not be said to establish any principles, still less to rule on any submissions of law that might have been made. Such a judgment cannot be cited as an authority, for example in matters of procedure, merely because one particular method was adopted without argument".

Recording of criminal proceedings

- 1.22. In relation to criminal matters, the Jersey Court of Appeal has noted that "There were virtually no reasoned judgments in criminal cases until the second half of the 20th century. The criminal cases were recorded separately in manuscript in the Court rolls, the *Poursuites Criminelles* (Royal Court) *Cause Criminelles* (Police Court) from 1797 and in French. The focus of these records is on describing the conduct being prosecuted, and the result, not the reason".²²

- 1.23. In another Jersey Court of Appeal judgment, a fuller description appears:

"Criminal proceedings in the Royal Court have been recorded separately from other proceedings since 1797. These records of criminal proceedings, which have never been published, are called *Poursuites Criminelles*. From the institution of the Police Court in 1854, there are also the *Causes Criminelles* (likewise unpublished) recording proceedings in that court. The records in the *Poursuites Criminelles* vary somewhat in form, but for every case they give a summary of the behaviour of the defendant which was alleged to be criminal and, either preceding or following this summary, a characterization of the behaviour in legal terms. The earliest case cited to us from the *Poursuites Criminelles*—that of *Att. Gen. v. Sathern* – is an example of a following characterization (2 P.C. at 73-74):

'Shaw Sathern ... saisi de fait par le Centenier Picot de la paroisse de St. Helier et présenté en Justice par le Connétable de ladite paroisse, sur l'information ... lundi le 19e jour du même mois ledit Sathern avoir demandé audit Sieur Le Geyt une letter adressée à Daniel Bryan ... ledit Shaw Sathern étant accusé par le Procureur General du Roi d'être un Faussaire et d'avoir commis le crime de faux....'

The case of *Att. Gen. v. Dumaresq* is an example of a preceding characterization (7 P.C. at 167):

'Thomas Dumaresq et Pierre Coutancaux ... sous accusation de s'être rendus coupables ... des crimes de faux, de vol, d'escroquerie et d'abus de confiance, savoir, le dit Thomas Dumaresq en contrefaisant ou fabriquant sous des noms supposés ou fictifs plusieurs traités ou lettres de change....'

These records go on to recite the successive stages of the proceedings, concluding with the verdict and sentence. In a

²² *Raj Arjandas Bhojwani v Attorney General* [2009] JCA 115A, para 48.

few cases they contain pleas entered by defendants on points of law and the decision of the court thereon. They do not contain any account of the evidence.”²³

Introduction of English-style judgments

- 1.24. As the quotation from *Weston* (above) indicates, in 1950 Le Quesne began to give judgments in the ‘English style’. He was a leading figure at the London Bar and had taken part in reforms to the system of law reporting in that jurisdiction in the run-up to the Second World War. Returning to Jersey after the Occupation as Lieutenant Bailiff, he was intent on modernising the format of judgments in the Island. For a decade until the early 1960s some judges continued to give *jugements motivés* while others gave English-style judgments.

Law reporting

- 1.25. The change in style of judgment was accompanied by the introduction of law reporting. First came a series of 11 volumes entitled *Jersey Judgments* published by the Royal Court from 1950 to 1984. Covering the Royal Court and the Court of Appeal of Jersey, they “are concerned with matters of lasting legal importance which have been selected from the court records for additional editing, research and indexing”. All the cases between 1950 and 1973 are published in volume 1, in four parts, which runs to 2532 pages. From 1977 to 1984, each volume published covered a single year. As well as tables of case names and legislation considered, there is an index to subject matter and words and phrases. Giving judgment in *State of Qatar*, the Royal Court noted that even with the advent of the *Jersey Judgments*

“the quality of the reporting was variable. It was not until 1985 with the inauguration of the *Jersey Law Reports* that a professional system of Law Reports identifying the *rationes decidendi* can be said to have been established. There is no basis in this jurisdiction upon which a system of rigid precedent could be founded”.²⁴

- 1.26. From 1986 onwards reported decisions appear in the *Jersey Law Reports* published by Law Reports International of Oxford on behalf of the Royal Court of Jersey. A revised Cumulative Index is published covering both the *Jersey Judgments* and the *Jersey Law Reports*.
- 1.27. Since 1999, the Jersey Legal Information Board has published online versions of the *Jersey Law Reports* along with unreported judgments of the Royal Court and Jersey Court of Appeal on www.jerseylaw.je. Cases in the *Jersey Judgments* are being added to the site.

²³ *Foster v Attorney General* 1992 JLR 6, 17.

²⁴ 1999/90.

- 1.28. Where *English* case law is relied upon before the courts in Jersey, "Practitioners should note that, where a case has been reported in the official *Law Reports*, the Royal Court and the Court of Appeal will expect it to be cited from that source. Other series of reports should be used only when a case is not reported in the official *Law Reports*".
- 1.29. It is now common practice for the Royal Court and Court of Appeal to hand down written judgments without, as in former years, reading them out aloud in court.²⁵

Publication of legislation

- 1.30. Legislation relating to Jersey has been published in various forms over the centuries. Today, the publicly available database of legislation in force and legislation as enacted on www.jerseylaw.je provides a convenient way to locate legislation. The Official Publications (Jersey) Law 1960 makes provision for publication of the 'Jersey Gazette' in 'an English language newspaper circulating in Jersey' and lays down requirements regarding publicity to be given to enactments.
- 1.31. Several references will be made in this study guide to the 1771 *Code of Laws for the Island of Jersey* and it is convenient here to say something about the background to this piece of legislation. Although entitled a 'code', a more accurate description would be a collection: the volume published in 1771 contains a variety of different forms of legislation, some in English, some in French. *Balleine's History of Jersey* explains:
"... for the first time in island history, the laws of Jersey were collected in a printed code 'that everyone may know how to regulate his conduct and be no more obliged to live in dread of becoming liable to punishments for disobeying laws it was impossible to have knowledge of. This was approved by the Privy Council and published in 1771. Known as 'the Code' it was frequently quoted in subsequent years, and when, in 1950, amid strong opposition, the Social Security Scheme was introduced, it was repeatedly invoked".²⁶
- 1.32. The constitutional importance of the Code is that it brought to an end the *legislative* power of the Royal Court; hence forth, the legislature was the States Assembly.
- 1.33. Philippe Falle produced a "nouvelle édition" of the Code in 1860, which reproduced the original text with minor corrections and it contains an index prepared by Abraham Mourant the purpose of which was "signaller au public les Lois tombées en désuétude et celles qui subsistent encour". The Code has been amended on over 21 occasions since it was enacted. The Code as currently in force can be found on www.jerseylaw.je.

²⁵ See Practice Direction RC10/01.

²⁶ M. Syvret and J. Stevens, *Balleine's History of Jersey* (1981) p 192.

- 1.34. Jersey legislation may be in French or English. In 1947, the Home Office *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands* observed that “as regards the form of legislation ..., it was very unusual 25 years ago for an enactment to be submitted in English. This was done only when an English statute was being enacted in Jersey with modifications. It has now become the usual practice to submit new legislation in English. There are, however, certain laws such as that relating to property in relation to which the earlier legislation in the French language makes it difficult to frame amendments in the English language”.²⁷ This continues to be the case.

Researching Jersey legislation (not examinable in detail)

- 1.35. From time to time it may however be necessary to use paper-based research methods and this section provides an overview of these. Printed editions of Jersey legislation have been published from the mid-19th century onwards. Candidates are not required to know paragraphs 1.35-1.40 in detail; this information included in the study guide as a source of reference.
- 1.36. In 1845, the States published a two volume collection entitled *Lois et Reglements des Etats de Jersey qui ont Reçu la sanction Royale, depuis 1771*. Legislation is set out in chronological order and ends in 1882. As well as legislation adopted by the States it includes some Orders in Council (including several that are judicial rather than legislative in character - reports on individual petitions received by the Privy Council).
- 1.37. *Ordres du Conseil et pieces analogues enregistrés a Jersey* were published in six volumes between 1897 and 1906. Volume 1 in the series covers the earliest records, from the period 1536-1678. A committee established by the States oversaw the considerable research required to compile the collection. The orders are variously in Latin, French and English. Some concern matters of government; others are of a legislative character; many relate to petitions to the Privy Council by individuals; of most relevance to modern-day practitioners are the reports of the advice tendered to Her Majesty by the Judicial Committee of the Privy Council in appeals from the Royal Court.
- 1.38. Between 1897 and 1917, the Société Jersaise published a series compiling historic legislation entitled *Actes des Etats de L’Ile de Jersey* under the editorship of J.A. Messervy. Volume 1 covers the period 1524-1596; the final volume ends in 1800.
- 1.39. Between 1878 and 1939, the States published in six volumes *Lois et reglements passe par les Etats de Jersey revetus de la sanction Royale et non compris dans le Code de 1771* [Laws and regulations passed by the States of Jersey which have received Royal assent, not included in the 1771 Code]. This is also known

²⁷ Cmd 7074, pp 15-16.

as the *Recueil de Lois de Jersey*. The series stopped at the start of the Occupation.

- 1.40. The official publication of legislation in bound format commenced again in 1969. Volume 1 of the new series of *Recueil de Lois* is a combined republication of "Tomes I, II and III" of the first series which started in 1878. As the Preface to volume 1 explains: "Provisions which have been repealed are omitted, as also is legislation which is spent but which has not been expressly repealed. Provisions which have been amended are printed in their amended form, the new text being placed between square brackets". In 1979 the format became loose-leaf.
- 1.41. *Regulations and Orders* of the States of Jersey were published in bound volumes from 1939 onwards.
- 1.42. A major change in the publication of Laws and subordinate legislation was made by the Law Revision (Jersey) Law 2003. This Law conferred power on the Law Revision Board, consisting of two politicians nominated by the States, the Attorney General, the Greffier of the States and the Law Draftsman, and the Law Revision Manager, if any, to prepare and publish a revised edition of laws in force in the island. The revised edition so published and brought into force is the sole authentic edition of the laws of Jersey. the Board is given wide powers to omit private laws, spent or temporary laws, and laws conferring private pensions or gratuities; and in the laws which are included, to rearrange the legislation, add short titles, consolidate or split laws, add tables of contents add otr alter headings and indeed carry out a wide number of exercises which would not be available on what is known as a consolidation process in other jurisdictions.

Approaches to statutory interpretation in Jersey

- 1.43. Interpreting legislation in Jersey presents a number of challenges. Drafting styles have varied greatly over the past century. As noted above, there has been a dramatic shift from use of French to use of English language, though French continues to be used in some contexts. Moreover, as noted above, the style of the courts' judgments have changed in the past 50 years. The quality of legislative scrutiny, and the infrequency of detailed textual amendments to proposed legislation during States' debates, provide a different constitutional context for interpretation than that found in many other parliamentary democracies.
- 1.44. Where legislation is in the English style, the Jersey courts generally follow approaches similar to those of the courts in England and Wales. The leading works, *Bennion on Statutory Interpretation*, *Maxwell on Interpretation of Statutes* and *Cross on Statutory Interpretation*, are often referred to in judgments. It should not, however, be thought that the Jersey courts will in every situation slavishly adopt an interpretation of Jersey legislation based on English courts' interpretation of similar English legislation. As the Jersey Court of Appeal has

made clear, English authorities are at best persuasive: in *Public Services Committee v Maynard*, Southwell JA noted "In so far as Jersey statutes contain the same wording as the equivalent English statutes, English decisions on statutory interpretation may be persuasive authority as to the meaning the Jersey statutes".²⁸

- 1.45. It has been said that in some contexts the circumstances of Jersey may require a different approach to that adopted in England. For example, in relation to the interpretation of provisions of the Island Planning (Jersey) Law 1964 Southwell JA in a dissenting judgment in *Janvrin Holdings Ltd v Attorney General* suggested:

"The question is one of statutory interpretation of provisions of the 1964 Law, a Jersey statute having effect in Jersey under Jersey law. In relevant respects the 1964 Law is in the same or similar terms to English statutes. However, it is not necessarily the case that this Jersey statute is to be interpreted in precisely the same way as the equivalent English statutes, in the different circumstances of the small Island of Jersey and its small community. 'Development' which would be of no real significance in the United Kingdom may be significant in the smaller confines of Jersey. Much of the argument, both written and oral, before this court involved a minute examination of English case law, often not directly in point, and certainly not directed to the circumstances or the law of Jersey. Too much of the argument was not directed to the words used in the statute, but to observations of judges in England and Wales which were not always necessary for the decision they had to reach".²⁹
- 1.46. The courts have on occasion had regard to the terms of the *projet de Loi* as an aid to interpretation. For example, in *Attorney General v Warren and others*³⁰ the Royal Court referred to the report in the *projet de Loi* which preceded the Criminal Offences (Jersey) Law 2009. *Projets de loi* are to be found on the Assembly of the States of Jersey website www.statesassembly.gov.je. The Jersey courts have not, however, been called upon to consider whether to follow the English practice sanctioned in *Pepper v Hart* of using references to ministerial explanations of legislation in "Hansard" as aids to interpretation of ambiguous legislation.
- 1.47. The Interpretation (Jersey) Law 1954, which aims at "promoting brevity and uniformity in enactments", sets out a number of general rules governing the construction of legislation.
- 1.48. The Human Rights (Jersey) Law 2000, Art 4 places on all Jersey courts and tribunals an interpretive duty in the following

²⁸ 1996 JLR 343, 357.

²⁹ 2001 JLR 637.

³⁰ [2009] JRC 166.

terms: "So far as it is possible to do so, principal legislation and subordinate legislation must be read and given effect in a way that is compatible with Convention rights".³¹ This is in similar terms to s 4 of the Human Rights Act 1998 (UK).

³¹ See e.g. *In the Matter of the Representation of Mickhael* [2010] JRC 166A.

2. Customary law

Introduction

- 2.1. The northern and western parts of Medieval Europe—modern-day France, Spain, Germany, Scandinavia and Russia—were a patchwork of territorial areas in which the main source of law were customs, usages and practices which had become relatively fixed and settled. From an early period, customs were compiled into written forms by legal practitioners, judges and scholars. In France, the *pays du droit coutumier* (those provinces in which customary law prevailed) was distinguished from the *pays du droit écrit* to the south (where Roman law dominated).
- 2.2. For Jersey, as for Guernsey, it is the customary law of Normandy that is of special significance. That is not to say, however, that the customary law of other areas of France are irrelevant. Some of the great commentators on Norman customary law—scholar-practitioners whose work has a lasting importance in Jersey—were also familiar with the customs of Paris, Orleans, Brittany and other areas. From time to time, the Jersey courts have looked beyond Normandy too.³² The focus, however, is on Norman custom, as applied in the Island.

Some historical context

- 2.3. It is helpful for a modern legal practitioner to have an appreciation of the historical context from which Norman customary law grew. As a political entity, Normandy was relatively short-lived in European history (there were 14 dukes, of which William the Conqueror was the seventh) and Jersey's integration within Normandy was even shorter. Jersey was under Norman rule for only 273 years, ending in 1204. Many of developments and refinements to Norman customary law occurred *after* that date. The linkages between Jersey's legal roots and those of Normandy are not, therefore, entirely straightforward.
- 2.4. The customs of Normandy developed to regulate a feudal society. The structures of feudalism which existed across much of Europe from c 900 to c 1300 differed in form; and indeed there may have been differences between Normandy and Jersey. As Lord Coutanche noted, feudalism is "a state of society which, with the passage of time, it is becoming increasingly hard to visualise".³³ Historians continue to debate the extent to which Normandy was "fully feudalised". The

³² See e.g. *Rockhampton Apartments Ltd v Gale* 2007 JLR 27, [15] (Royal Court) and 2007 JLR 332 (Jersey Court of Appeal): the Royal Court "had been entitled to look to Pothier's *Coutumes d'Orléans* for guidance as to the meaning and extent of voisinage, as there had been no explanation in Jersey or Norman sources and Pothier was already a well-respected writer in Jersey (albeit in respect of different areas of law)" (headnote).

³³ Preface to G.F.B. de Gruchy, *Medieval Land Tenures in Jersey* (1957).

essential characteristic was that a person's role in society was closely tied to the land he "held"; and holding land brought with it not only rights but duties. Much Norman custom was therefore concerned with issues of land tenure and succession. It dealt only lightly with what we now regard as the law of contract (legal relations that developed with the rise of capitalism). As we will see, it also had relatively little to say on the subject of criminal law.

Defining customary law

- 2.5. A key issue in the legal system of Jersey is that of the continuing relevance or otherwise of customary law (and of commentators on those sources).³⁴
- 2.6. Lord Hope of Craighead provided a definition of customary law in *Snell v Beadle*:

"The word 'custom' may be used in a variety of senses in the legal context. Broadly speaking, custom may be said to be the product of generally accepted usage and practice. It has no formal sanction or authority behind it other than the general consensus of opinion within the community. As Routier, *Principes Généraux du Droit Civil et Coutumier de la Province de Normandie* at 1 (1742) puts it: "La coutume n'est autre chose qu'un droit non écrit, qui s'est introduit par un tacite consentement du Souverain & du peuple, pour avoir été observée pendant un temps considérable."³⁵
- 2.7. CS Le Gros in his « recueil de maximes » states : « La coutume est le plus forte, la meilleure de toutes les lois, car elle est l'expression des besoins d'un peuple. Son nom indique des usages auxquels une pratique continue a, par la succession des temps, donné force de loi » and « L'usage est le meilleur interprète des lois ».³⁶
- 2.8. Implicit in these definitions are some ways in which customary law differs from common law. In particular, the role of the judge is different. Common law rules are binding *because* they are stated by the judge: the rules have legitimacy because the British constitution recognises judicial authority as source of law-making. By contrast, in customary law, it is the role of the judge to look at *evidence* as to what is "generally accepted usage and practice". In other words, legitimacy originates from

³⁴ A helpful guide is *The Origin and Development of Jersey Law. An Outline Guide* by S.G. Nicolle QC. Alphabetical lists of the French, English and other legal textbooks and periodicals considered by the Jersey courts in reaching their decisions are available at www.jerseylaw.je/Judgments/JerseyLawReports/TextsCited/

³⁵ 2001 JLR 118 at paras 17-18 (also reported at [2001] 2 AC 304). Routier's phrase loosely translated to English: Customary law is nothing but unwritten law, based on tacit consent between the Sovereign and the people, which has been followed for a considerable period of time.

³⁶ CS Le Gros, *Traité du Droit Coutumier de L'Isle de Jersey* (1943) pp 455-463.

long usage and acceptance of a rule rather than merely because the Royal Court states a rule.

- 2.9. Some rules of customary law have crystalized to such an extent—through repeated acceptance by the Royal Court and in the way people conduct their affairs—that everyone accepts them as binding without discussion. Where, however, there is doubt or dispute as to the existence or scope of a rule of customary law, the Jersey judges' role differs from their counterparts in England in that: (i) the Royal Court is not strictly bound by its own previous decisions;³⁷ (ii) the Royal Court will look at factual evidence of "usage and practice"; and (iii) will draw on a much broader range of documentary evidence to inform the decision as to what the custom is.

Practical research into customary law

- 2.10. Given the continuing importance of customary law across many areas of law in the modern Jersey legal system, legal practitioners must be able to understand not only the general character of customary law but the practical methods used to establish the existence and scope of relevant customary rules. Where, then, are Jersey customary law rules to be found?

Step 1: recognition in modern legal sources: case law and legislation

- 2.11. As we have seen, rules of customary law may be referred to in relatively recent case law or recognised in legislation. These sources are a good starting point insofar as they may provide relatively up-to-date confirmation of a rule of customary law. They may, however, give only thin pickings: these modern sources are not comprehensive for the obvious reason that a rule of customary law may not have been the subject of litigation.

Step 2: Factual evidence

- 2.12. Factual evidence may in some cases be central to the process of establishing custom because customary law "may be said to be the product of generally accepted usage and practice". Being able to point one's finger at a provision in an ancient Norman text will count for little or nothing if the provision does not relate to what actually happens in Jersey. Where there is controversy about the existence or scope of a rule of customary law, a court seeking to resolve the dispute will therefore be interested in factual evidence of past and current practice.
- 2.13. Thus in *Moran v Deputy Registrar for the Parish of St Helier*, the Royal Court considered evidence from the parties based on their rival analysis of practice in recording births on 19th century baptismal records held in the Jersey Archive. The Bailiff stated in that case

"It sometimes happens that the more obvious a proposition may be, the less easy it is to find authority for it. In my

³⁷ See Chapter 1.

judgment, there is no doubt that at customary law an illegitimate child takes the surname of his or her mother by operation of law. It may be that there is no express authority for that conclusion, but nearly all the available evidence points in that direction".³⁸

- 2.14. Another illustration of how the Royal Court looks to factual evidence deals with the criteria for appointment of chefs de police in the honorary police system. (Note: subsequent legislation now governs the matter, so this is merely an example of the court's technique, not the current law). In *Connétable of St Helier v Gray and Attorney General* the Connétable wished to appoint a centenier as chef de police other than the first respondent, who had the longest record of honorary service.³⁹ The first respondent contended that by long custom and usage, the centenier with such record was entitled to enjoy the position of chef de police and that the representor had no discretion in the matter. The second respondent submitted that whilst this used to be the customary law position, custom had changed since the 1950s and that the Connétable did have the power to choose a chef de police. It was held that, over many centuries, the senior centenier had deputised for the Connétable in the event of his illness, absence or death, both in respect of the Connétable's role in the States and in the parish generally. Whilst the Connétable was and remains the chief of police of his particular parish, the senior centenier became known as the "chef de police". The representation of the Procureur Général du Roi re Chef de Police de St Helier demonstrated that it was the aggregate of all forms of honorary service that determined seniority and, further, that the senior centenier was entitled to exercise this role as of right. However, during the latter part of the 20th century, the role of chef de police had increased in importance following the general delegation by the Connétable of the day to day policing of the parish to such officer. Accordingly, it was in the public interest for the chef de police to be appointed upon merit rather than merely upon length of service. Save for the parish of St Clement, the 1946 judgment had, to varying degrees, not been followed in practice. Such a change in usage represented a change in custom. (Routier, *Principes Généraux du Droit Civil et Coutumier de Normandie* and Le Geyt, *Constitution, Lois et Usages* were considered.) Accordingly, under customary law, the senior centenier had no right to be appointed chef de police and the Connétable was able to choose a centenier as he saw fit.

Step 3: Norman law texts

- 2.15. Consideration of the texts of Norman customary law (on which the customary law of Jersey draws) and the 'commentators'

³⁸ *Moran and Kemp v Deputy Registrar for the Parish of St Helier* [2007] JRC 151; 2007 JLR Note 50, para 26.

³⁹ *Connétable of St Helier v Gray and Attorney General* 2004 JLR 360.

(French and Jersey) on those texts is another central part of practical legal research process. To use these sources of Norman law effectively, it is necessary to understand the sequence of their historical development and their relationship with one and other. Much of what follows in the chapter is designed to help with this.

- 2.16. The texts which form the written evidence of custom, usage and practice give rise to difficulties of various kinds. Some were compiled in manuscript several generations before the printing press was invented. Early printed versions sometimes relied on manuscripts that were incomplete, inaccurate or unclear. Translations from the Latin originals into French introduced errors. Even the old typefaces and printing conventions of the 16th-18th centuries present challenges to the modern-day legal practitioner.⁴⁰ It was only in the late 19th and early 20th centuries that scholars used rigorous methods to piece together reliable versions of the medieval texts.
- 2.17. It is suggested that the most authoritative version of the *Grand Coutumier* is now the 2010 Everard edition. This has the advantage (for most readers in Jersey) of an English translation, but from the point of view of its reliability what is significant is that it introduces a number of corrections to the 1881 edition by de Gruchy, on which Jersey practitioners had previously often relied.

Step 4: Guidance from other sources

- 2.18. If modern case law, factual evidence and the texts of Norman law provide no clear answer, research will need to be broadened. The Royal Court has held that “Where the customary law of Jersey on a particular topic has not yet been declared by judicial decision, this court will often look to some other source for guidance. In some areas, the court looks first to sources such as *Pothier*, in others it looks first to the law of England. But in neither case is it bound to follow the source to which it first looks”.⁴¹

How customary law changes: the judicial role

- 2.19. It would be absurd for Jersey in the 21st century to be governed entirely by rules unchanged since they were written down in medieval France. Indeed, aspects of Norman custom and feudal structures—such as the place of women in society and its antipathy to illegitimate children—are repugnant to 21st century eyes. Thankfully, custom is not “frozen in aspic”. How, then, is customary law developed? One method examined in the next section) is through legislative intervention. Another (discussed in this section) is through judicial consideration by the Royal Court and on appeal. As the Royal Court has stated

⁴⁰ Helpfully explored by Guernsey Advocate Gordon Dawes in his Introduction to a facsimile edition of work by the 16th century commentator Terrien, published by the Guernsey Bar in 2010.

⁴¹ *Cannon v Nicol* 2006 JLR 299, para 109.

“The court’s duty is to declare the law of Jersey and it must do so for a community of the 21st century. It is not bound to adopt a rule or principle laid down several centuries ago if it is clearly inappropriate for modern times”.⁴²

- 2.20. That said, circumstances may be such that the Royal Court will resist invitations from counsel to develop customary law and instead prefer to take the view that “these are matters for resolution democratically through the legislature rather than by decision of this court. If there is to be change in the customary law, it is a matter for the States”.⁴³
- 2.21. The Royal Court has held with “no hesitation” that it no longer has a general or residual power to create new customary law criminal offence. In the case, a woman had been charged with “the act of effecting a public mischief” (by falsely reporting a crime to the police). The Court held “ however beneficial and indeed necessary such a power may have been in the days when Parliament met seldom, or at least only at long intervals, it is now the province of the legislature and not of the judiciary to create new criminal offences”.⁴⁴
- 2.22. Where judicial development of customary law, takes place, such development should be considered in the first instance by the Royal Court, rather than by the Court of Appeal without the Royal Court’s assistance.⁴⁵

How customary law changes: legislation

- 2.23. As we have noted, customary law may be developed by judicial decision. It may also be modified or abolished by legislation. In thinking about legislation, recall that the Royal Court had legislative powers until this power was abolished by the Code of 1771.
- 2.24. Over many decades, the States Assembly has passed legislation which affects customary law. In the hierarchy of laws in the Jersey legal system, rules of customary law may be expressly *abolished* by legislation. This may take the form of a complete abolition of a rule. The following table sets out some relatively recent examples of rules of customary law that have been abolished.

“Any rule of customary law, that a contract passed before	Customary Law Amendment (No 2) (Jersey) Law 1984
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⁴² *Cannon v Nicol* 2006 JLR 299, para 109 (the issue was whether the principle that a partnership of unspecified duration cannot be terminated “at an unseasonable time” is appropriate for modern times).

⁴³ *In The Matter of a Procureur du Bien Public of St Peter* 2008 JLR 163 (Royal Court holding that it would be contrary to customary law to permit a procureur to bien public to be elected to serve when he was no longer resident in the parish). See e.g. *Sim v Thomas*, Royal Court, 2001/160 (for States, not the court, to abolish claims for breach of promise of marriage).

⁴⁴ *Attorney General v Thwaites* 1978 JJ 179.

⁴⁵ *Yates v Reg’s Skips Ltd* [2008] JCA007B, para 33.

the Royal Court for the transfer of immovable property may be annulled, at the instance of the heirs or devisees, as the case may be, of the transferor, if he or she dies within 40 days of the passing of the contract, is abolished".	
"The dower, known as Norman Customary Dower, is abolished."	Bankruptcy (Désastre) (Jersey) Law 1990, Art 46
"Any customary rule of law providing for a <i>désastre maritime</i> and for the order of payment of debts in such a <i>désastre</i> is abolished."	Bankruptcy (Désastre) (Jersey) Law 1990, Art 47
In customary law, the age of majority was 20 years	Age of Majority (Jersey) Law 1999 reduces this to 18 years
the <i>année de jouissance</i> -the right of an executor to have the income arising during the administration of a moveable estate for a year and a day	Wills and Successions (Jersey) Law 1993, Art 12
"The rule under customary law that all gifts to a concubine are null is hereby abolished."	Wills and Successions (Jersey) Law 1993, Art 13
"The right under customary law of the principal heir to interpose and demand possession of the movable estate from the executor of a deceased person's will on depositing with the executor the full amount of the bequests made under the will, together with the debts and other charges of the administration, is hereby abolished."	Wills and Successions (Jersey) Law 1993, Art 14
'Notwithstanding any enactment or customary Law to the contrary, no person being a rate payer in the parish of St. Helier shall be disqualified for being elected to, or being the holder of, any honorary office in the parish of St. Helier, by reason only of the fact that the person does	Parish of St Helier (Qualifications for Office)(Jersey) Law 1976

not reside therein.'	
Customary law did not permit a cause of action for/against a person to survive the person's death against/for the benefit of the person's estate	Customary Law Amendment (Jersey) Law 1948 reversed this situation

- 2.25. As a further example, it can be noted that in 2003 the States Assembly resolved, in principle, "that the customary law obligation of children to contribute to the support of parents who are genuinely no longer able to care for themselves should be removed for the purposes of assessing Parish Welfare".⁴⁶ A new system for Income Support in place of Parish Welfare was introduced in 2005.
- 2.26. Reform may stop short of actually abolishing a rule of customary law and instead provide for a new rule in legislation "notwithstanding any rule of customary law to the contrary".⁴⁷
- 2.27. As a general proposition, it may be said that where a rule in legislation differs from one in customary law, the former prevails. This principle follows from the fact that in a parliamentary democracy, primary legislation trumps customary and judge-made common law rules. A belt-and-braces approach was taken by the draftsman in framing the Emergency Powers and Planning (Jersey) Law 1990 by providing that "For the avoidance of doubt, it is declared that if, in the implementation of this Law and any Order made thereunder, any conflict arises between any rule of customary law and this Law or any such Order, then the provisions of this Law or any such Order shall prevail" (Art 13).
- 2.28. Legislation must *clearly* abolish or amend customary law, as is shown by a case in which the Royal Court was called upon to consider whether there was a rule of customary law that a child born to unmarried parents takes the surname of the mother by operation of law (so preventing unmarried parents registering their child with the father's family name). The Bailiff stated that "It would need clear words in the statute to override a provision of customary law, and to confer a right upon a parent to register a child under a different surname from that which the law has given. A rule of customary law cannot be abrogated by a side-wind of that kind".⁴⁸

⁴⁶ A. Belhomme, "A Child's Legal Responsibility to Contribute towards the Welfare of its Parents" (2003) Jersey Law Rev.

⁴⁷ See e.g. Customary Law (Choses Publiques)(Jersey) Law 1993, which amended customary law to enable the granting of permits for the exclusive possession and use of certain areas of land to which the public of Jersey has access; Rehabilitation of Offenders (Jersey) Law 2001, Art 7(2).

⁴⁸ *Moran and Kemp v Deputy Registrar for the Parish of St Helier* [2007] JRC 151 2007 JLR Note 50, para 28. (The rule in question was subsequently

2.29. When a new legislative scheme is created, it may make specific provision for the *preservation* of customary law rules, as the following illustrations show.

- Limited Partnerships (Jersey) Law 1994, Art 40 provides “The rules of customary law applicable to partnerships (*contrats de société*) shall apply to limited partnerships except in so far as they are inconsistent with the express provisions of this Law”.
- Honorary Police (Jersey) Regulations 2005 state “These Regulations do not affect the operation of any rule of customary law that is not inconsistent with them” (reg 10).
- Supply of Goods and Services (Jersey) Law 2009 provides that “Nothing in this Law shall affect any enactment, or rule of customary law, concerning capacity to contract or to transfer or acquire property” (Art 12).
- Police Procedures and Criminal Evidence (Jersey) Law 2003 refers to rules of customary law relating to restrictions on reporting of committal and other criminal proceedings (without stating what they are).⁴⁹
- Foundations (Jersey) Law 2009, Art 9(2) provides that “If a person has the right to apply to have a foundation wound up and dissolved, details of the right must be specified in its charter”—but goes on to say that this rule “does not apply to, and is without prejudice to, any right arising under an enactment or by customary law”.

2.30. Where legislation amends customary law, that does not lead to the rule in question losing its character as customary law and becoming statutory. For example, Art 12 of the Sexual Offences (Jersey) Law 2007 headed “Amendment of law relating to *sodomie*” made extensive changes to the customary crime of *sodomie* by decriminalising the act in some contexts, where it takes place between consenting adults. The Jersey Court of Appeal subsequently held that *sodomie* remains a customary law offence and has not become a statutory offence as a result of the provisions of Art 12.⁵⁰

The Ancienne Coutume de Normandie

2.31. The *Ancienne Coutume de Normandie* (the former custom) refers to the customary law of Normandy prior to the appearance of the *Coutume Reformée* in 1583. The major texts are:

changed by legislation – see now Marriage and Civil Status (Jersey) Law 2001, Art 59A).

⁴⁹ Art 105(9) states “Paragraph (1) shall be in addition to, and not in derogation from, any other enactment or rule of customary law with respect to the publication of reports of proceedings of any court”.

⁵⁰ *Benyoucef v Attorney General* 2008 JLR Note 48.

- i. the *Très-ancien Coutumier* (circa 1200-1230)
 - ii. the *Grand Coutumier de Normandie* (in French) or *Summa de Legibus* (Latin version), also known in Jersey as the *Summa of Maucael* (or Mankael – the name is variously spelt)(circa 1235-1258)
 - iii. the *Styles de Procéder* (various publications, from circa 1386-1515)
 - iv. the *Glose* (circa late 1300s to mid 1400s)
- 2.32. Customary law is a body of law based on oral tradition, which evolved by repeated practice and was sanctioned by usage (reflected in the Norman maxim “*une fois n’est pas coutume*”). It is a flexible body of law and even within Normandy there were significant differences between geographical areas. Even after the arrival of written texts, it is likely that the oral evolution continued to be of relevance. For example, in Jersey both the Assizes and the Quo Warranto proceedings, which post-date the *Très-ancien Coutumier* and the *Grand Coutumier de Normandie*, relied on oral evidence from witnesses to establish the law of Jersey.
- 2.33. Only the *Coutume Reformée* was produced by royal authority and accordingly was an official redaction. Each of the various texts evidencing the *Ancienne Coutume* was a mere *coutumier* (an unofficial compilation put together by a private individual). Accordingly it did not have the force of law, but was merely illustrative of what the law was at the time and the customary law could and did continue to develop. Once a customary law was redacted by royal authority in the form of the *Coutume Reformée*, it could no longer be amended other than by legislative authority and so ceased to develop through usage. In the case of Jersey law, the customary law was never redacted by royal authority and, accordingly, to this day remains capable of development through judicial decision.⁵¹

i. The Très-ancien Coutumier

- 2.34. The author is unknown. The work consists of two treatises (substantive law and procedure), each in French and Latin. According to Besnier⁵², the Latin version of the first treatise dates around 1199-1204, the Latin version of the second treatise dates around 1218-1223, the French versions were probably both dated around 1230. A modern version of the

⁵¹ See *Snell v Beadle* 2001 JLR 118.

⁵² Robert Besnier was a French legal historian, working in the Faculty of Law at Caen in the early 20th century. His *La Coutume de Normandie: Histoire externe* (Paris 1935) provides an excellent introduction to the development of Norman Law and is available on the www.jerseylaw.je website.

French text was compiled in the early 20th century by the French scholar E.J. Tardiff and remains in print.⁵³

- 2.35. Besnier viewed it not as an official court text, but the work of private scholars or court officials—a form of practitioner’s manual, possibly originating from Bayeux or Evereux. Tardif⁵⁴ thought it was an official redaction, but this is now thought to be incorrect: “*jusqu’au 16ième siècle, nul ne touchera à ce monument classique de la science juridique des Normands*”.
- 2.36. This work is of particular relevance in determining the law of Normandy at the time of the separation of Jersey—although there is evidence that Norman customary law had crystallised into a body of law by 1048, the *Très-ancien Coutumier*, written at the time of the Separation, represents the best evidence of Norman law prior to the Separation of the Channel Islands from mainland Normandy. This remains the only “pure” text if one takes the view that only pre-1204 Norman law can be legitimately considered as a source of Jersey’s customary law. The *Commissioners’ Report* of 1847 agreed, stating that whatever the law was at the time of the separation is still the law today, unless it has been changed by Charter, local legislation or Statute or Order of the Privy Council. This supposed that in theory if a law did not exist at that time then it could not exist now, unless introduced by one of those four means.
- 2.37. According to Kelleher,⁵⁵ while one can take the point that it is important to be able to trace a modern law (which is not based on legislation etc) through to its pre-1204 origins, the views of the Commissioners’ Report over-simplify the position because they fail to account for the fact that customary law is subject to continual evolution. Despite its description in *Qatar v Al Thanī*⁵⁶ as the “original source of Jersey law”, there is no evidence that it was used in Jersey at the time of its publication, which contrasts with the *Grand Coutumier de Normandie*, where there is some evidence of local use.

ii. The *Grand Coutumier de Normandie*

- 2.38. The *Grand Coutumier de Normandie* sets out law and practice in the form of 125 articles. The text was originally compiled in Latin (*Summa de Legibus*) and was rendered into French (*Le Grand Coutumier de Normandie*) soon after its compilation and circulated in manuscript form (some of them lavishly illustrated in colour) until the first printed version in 1483. Some chapters may have been added later and Besnier questions the quality of these additions. Everard in the introduction to her modern

⁵³ E.J. Tardif, *Coutumiers de Normandie: Textes Critiques—Le Très Ancien Coutumier de Normandie, Textes Français et Normand* (Rouen and Paris 1903).

⁵⁴ Ernest Joseph Tardif (1855-1922).

⁵⁵ “The Sources of Jersey Contract Law” (1999) 3 JLR 1.

⁵⁶ 1999 JLR 118

English translation argues that “on the grounds of its content, style and arrangement, it is probable that the first compiler was an individual legal practitioner or scholar, rather than it being in any sense an official work”. She suggests that he “was probably an ecclesiastic, educated in Paris or Orléans in Roman and canon law, but also a legal practitioner very familiar with the procedure in the secular courts”.⁵⁷

- 2.39. Tardif commented that it was more than just a record: the (anonymous) author had tried to codify the customs of the *Coutume*: it should therefore be accorded the status of a code. According to Besnier, “*la Summa a coul   dans un moule savant les formes coutumi  res de la pratique normande*”. [The *Summa* put Norman custom into a scholarly framework] It was viewed as an authoritative source. Although the work contains some references to substantive law (particularly on land tenure and succession), its main focus is on procedure. As Everard explains, “it is not a code of substantive law, or even a treatise on it, but a statement of procedural law, both statutory and customary, that is intended to be comprehensive, so far as the author, in his conventional modesty, is able to make it”.⁵⁸ She argues that it is to be understood as “a practical guide for plaintiffs and defendants appearing in the lay courts in civil or criminal actions”. As legal doctrine and procedure evolved, the *Grand Coutumier de Normandie* was annotated or commented on rather than re-written (until the creation of the *Coutume Reform  e* in the 16th century).
- 2.40. In Jersey, the *Grand Coutumier de Normandie* is considered to be the principal authority as to the ancient customary laws of Normandy (the Report of the Civil Law Commissioners, 1861). There is no doubt as to the great significance of this work in Jersey, notwithstanding that it was written some 40 years after the Separation. There is evidence that the Latin text was used in Jersey and referred to as the *Summa de Maucael* (after its possible author: or ‘Mansel’ as the Jersey commentator Poingdestre renders it) in the early 14th century. Poingdestre notes that in the Quo Warranto Proceedings of the early to mid-1300s, Islanders were unanimous in their view that (subject to minor variations) the *Grand Coutumier* represented the law of Jersey.
- 2.41. The *Grand Coutumier* has been published in various formats over the years—from the original Latin manuscripts (of which 24 are known to remain in existence) to a recent translation into English.
 - Until the late 19th century, Jersey practitioners often relied on the text as set out by Le Rouill  , *Le Grand Coustumier du Pays et duch   de Normandie* (Rouen, 1st edn 1534, 2nd edn 1539)—a work that also includes

⁵⁷ J.A. Everard, *The Laws and Customs by Which the Duchy of Normandy is Ruled: Le Grand Coutumier de Normandie* (Jersey 2009) p xxv.

⁵⁸ Everard, op cit, p xxviii.

commentary. Le Rouillé's text was copied from a late manuscript version that contained many interpolations and errors. Tardif lamented that '*Il est regrettable que le choix du premier éditeur soit tombé sur un des textes les plus defectueux du coutumier latin*'. [It is regrettable that the first commentator used one of the most defective texts of the Latin coutumier.]

- In 1881, Jurat William Laurence de Gruchy produced a '*Réimpression, éditée avec de légères annotations*' of the *Grand Coutumier*, based on the text contained in Le Rouillé's 1539 edition: the double column format sets out the Latin and French side-by-side (see W.L. de Gruchy, *L'Ancienne Coutume de Normandie* (Jersey: Charles Le Feuvre, 1881 — still in print).
- In 2009, an English translation of the Latin text was published, based on de Gruchy's 1881 text with corrections suggested by subsequent work on the original manuscripts by Tardif: J.A. Everard, *Le Grand Coutumier de Normandie: the Laws and Customs by which the Duchy of Normandy is Ruled* (Jersey: Jersey and Guernsey Law Review, 2009).

2.42. The continuing relevance of the *Grand Coutumier* to modern practitioners can be illustrated by a recent judgment of the Royal Court. In *Jersey Financial Services Commission v A.P.Black (Jersey) Ltd and others*, the JFSC applied to the court for an order under Art 20(7) of the Collective Investment Funds (Jersey) Law 1988. A preliminary issue of law was what (if any) is the prescription period applied to the proceedings. The court had to decide whether the action was founded on "tort". In considering this question, the court referred to Chapter 51 of the *Grand Coutumier* of and noted that under the heading "De Tort Faict" one finds:

"Tort faict est oultrage qui est faict à aulcun, de quoy tous les contends naissent ainsi comme les ruyseaulx naissent de la fonteine. Tout contends est engendré de tort qui a esté faict à la personne d'aulcun, ou à sa possession".

Injury is the action for harm inflicted on someone that is undue in law, from which individual claims are born, like the streams that flow from a spring. All claims arise from injury inflicted on someone, in his person or in his property ; whence certain claims are called personal, certain impersonal. This is reflected in the distinction drawn in the older authorities between *tort personnelle* and *tort matérielle*

The court went on to say that "Some light is shed on the word 'oultrage' by examining the Latin text of the *Grand Coutumier*, also printed in the de Gruchy edition. The heading is 'De injuria' and the opening words of the chapter are 'Injuria est actio laeso jure indebite alicui irrogata' ...". The court concluded that the CIF Law was founded on tort and that it was therefore subject to a prescription period of three years pursuant to Art

2(1) of the Law Reform (Miscellaneous Provisions) (Jersey) Law 1960.⁵⁹

iii. The Styles de Procéder

- 2.43. The *Nouveau Style* and the *Style of 1515* are contained in Le Rouillé's 1539 edition of the *Grand Coutumier*, which was used by De Gruchy as the basis for his book of 1881. Le Geyt was not impressed by the *Styles*, which were published up to 300 years after the Separation. Nevertheless, both Le Geyt and Poingdestre referred to the *Styles* frequently. It is possible Le Geyt viewed them in the same way as he viewed the works of Terrien: they could be followed on doubtful or problematic matters, but should not be cited as law.
- 2.44. A number of procedural works go to make up the *Styles*:
- *L'Ancien Style* — circa 1386-1390
According to Besnier, this contained much information of the greatest value, not only in respect of procedure but also in respect of substantive law. It makes it possible to trace the development of customary law from the time of the *Très-ancien Coutumier* and *Grand Coutumier* through to 1390. It was replaced by the *Nouveau Style* (see below).
 - *Les Instructions et Enseignements* - circa 1386-1390
Besnier describes this as a handbook written for the instruction of a judge.
 - *Le Nouveau Style de Procéder* - circa 1457-1462
This was circulated in printed form; it can be found in Le Rouillé's works on the *Grand Coutumier de Normandie*.
 - *Le Style de 1515*
This was Promulgated by the Parlement of Rouen (a court) in 1515; it can be found in Le Rouillé's works on the *Grand Coutumier de Normandie*.

iv. The Glose

- 2.45. This is a paraphrase of the *Grand Coutumier*, written in either Caux or Vexin. It identifies provisions no longer in force and also explains some difficult passages in the light of the then current law. It was used until the 16th Century, when Terrien's commentaries appeared. It was referred to by both Poingdestre and Le Geyt, the latter commenting that "no one has dared as yet to give judgment in conflict with the Glose". The *Glose* was a source of some principles of importance in the customary law of Jersey, for example the law on tiers in wills of immoveable property. According to Besnier, it was probably written after the *L'Ancien Style* and before *Le Nouveau Style*.

⁵⁹ [2002] JLR 443.

Principal 16th century commentators on the *Ancienne Coutume de Normandie*

- 2.46. The value of the commentators on these works varies, depending on the availability of the works to Jersey practitioners and the scope of their work. The commentators tend to adopt a similar approach. They state the relevant article of the *coutume*, containing a statement of law, and comment on it. The commentary may include cases and reference to other writers, particularly Roman law writers or *ius commune* writers.

Le Rouillé

- 2.47. Guillaume Rouillé of Alençon (also known as Le Rouillé) was the author of *Le Grand Coutumier de Normandie et de la Glose*, first produced in 1534 in heavy blackletter type that is difficult to the modern eye, with a second edition in 1539. He was the Lieutenant-General for the King in Maine and Normandy. The second edition of his work:

- sets out the text of the *Grand Coutumier* article by article;
- provides commentary on each article;
- includes many references and comparisons to canon and Roman/civil law; and
- includes various other materials, such as a treatise on consanguinity and affinity by Johan André, the Latin version of the *Grand Coutumier* (the *Summa de Legibus*) and the *styles de procéder*.

Although Besnier was at times critical of Le Rouillé's work, Nicolle states that in Jersey Le Rouillé is considered to be one of the two most important commentators on the *Ancienne Coutume* (the other is Guillaume Terrien):

- Le Rouillé is cited by Le Geyt;
- his was the text of the *Grand Coutumier* to which the Royal Commissioners of 1847 (on criminal law) and 1861 (on civil law) were referred, the 1861 Commissioners noting that the second edition of his work was the version of the *Grand Coutumier* ordinarily used in Jersey;
- when De Gruchy produced his 1881 edition of the *Ancienne Coutume*, he used the second edition of Le Rouillé's work; and
- he was cited in *Snell v Beadle*.⁶⁰

⁶⁰ 2001 JLR 118.

Terrien

- 2.48. Guillaume Terrien was the author of the *Commentaires du droit civil, tant public que privé, observé au pays et Duché de Normandie*, [Commentaries on the Civil Law, both public and private, observed in the Land and Duchy of Normandy] published posthumously in 1574, with a second edition in 1578 (with only minor corrections) and a third in 1654 (again, with only a few minor changes to earlier editions—and intriguingly, after the *Coutume Reformée*). He was the Lieutenant-Bailiff of Dieppe.⁶¹ His work sought to synthesise earlier works on Norman law as well his own commentary on the *Grand Coutumier*, the *Nouveau Style*, the *Style de 1515*, the judgments of the Parlement du Rouen and the Royal Ordinances (rarely the *Glos*, which had fallen into disuse). Besnier notes that Terrien's interpretation of the Styles and the *Grand Coutumier* differ (for example, in relation to mode of proof). His was the last substantial work prior to the Code Civil and without doubt paved the way for the writers on the *Coutume Reformée*.
- 2.49. Terrien's approach was to arrange extracts from the *Grand Coutumier* along with what Dawes describes as "Norman procedural law, judgments and Royal Ordinances"⁶² into sixteen *livres* or subject areas (typical for Roman law texts) and to provide a commentary by way of annotation. According to Dawes, "Terrien's original contribution is to be found in his selection and arrangement of primary materials as much as in his commentary and footnotes".⁶³ Thomas Le Marchant, a 17th century Guernsey commentator, describes the work thus:
- "... it should be noted that the body of the *Coutumier* is composed in three principal parts; the first is the text of the coutume, the second the commentaries of Terrien thereon, and third, the additions of an anonymous author, a scholarly man and a good jurist, by way of a gloss on the text and the commentary; and that the author of the additions(s) was someone other than Terrien".⁶⁴
- 2.50. The Royal Commissioners of 1847 (on criminal law) were scathing in their assessment of the usefulness of his work as authority for Jersey law. However, many others have disagreed with that view:
- the Royal Commissioners of 1861 (on civil law) were more supportive, noting that his work held a

⁶¹ A fuller account of the life and work of Terrien may be found in an introduction by Advocate Gordon Dawes to a facsimile edition of this work, published in 2010 by the Guernsey Bar.

⁶² Op cit, p 27.

⁶³ Op cit, p 21. Dawes's introduction includes valuable practical guidance to modern practitioners who find the need to read Terrien.

⁶⁴ Translation from the original French by Dawes, op cit, p 23.

“conspicuous place” amongst those cited in Jersey as evidencing Normandy law;

- the 17th century Jersey commentator Poingdestre said he by far preferred him to Bérault and Godefroy (although he should be read with “*choix et circumspection*”). Poingdestre was inclined to be critical of other commentators, but he was reviewing Terrien after the *Coutume Reformée* had been published and the law had moved on);
- Le Geyt referred to him (along with Bérault, Godefroy and Basnage) as the most cited in Jersey (along with Bérault and Godefroy) as Jersey’s writers on custom and used Terrien’s works in his own commentaries;
- the status of his work as authority on the law of Normandy and Jersey has similarly been confirmed in the decisions of the Privy Council: *Vaudin v Hamon*⁶⁵ (“a commentator of great authority on the civil law of the Duchy of Normandy”); *La Cloche v La Cloche*⁶⁶ (“the best evidence of the old custom of the Channel Islands”); *Dyson v Godfray*⁶⁷ (“an authority with respect to Normandy and Jersey Law”); *Baudains v Richardson*⁶⁸ (“the ruling of the court is ... supported by the high authority of Terrien...”); *Amy v Amy*⁶⁹ (Terrien’s works together with those of Basnage and Pothier was described as authority for the “established law most closely allied to the law of Jersey”); and *Maynard v Public Services Committee*⁷⁰ (cited in relation to ignorance in respect to prescription periods).

Accordingly, the status of his works in Jersey is beyond doubt particularly as he was writing on the old customary law, rather than the *Coutume Reformée*.

The Coutume Reformée

- 2.51. In 1453, Charles VII of France issued the *Ordonnance of Montils-les-Tours*, which ordered that all French customary laws, including those of Normandy, be redacted. In 1577 Letters Patent appointed four Royal Commissioners to review the law and the *Coutume Reformée* was eventually produced in 1583 and approved by the sovereign in 1585. The delay is said to be due to the concern of the Normans that their law would be interfered with and their pride in the *Grand Coutumier*. However, writers such as Terrien had highlighted the obsolete

⁶⁵ [1974] AC 569.

⁶⁶ 1870 LR PC125.

⁶⁷ (1884) 9 App Cas. 726.

⁶⁸ [1906] AC 169.

⁶⁹ 1968 JJ 981.

⁷⁰ 1996 JLR 343.

character of certain aspects of the *Grand Coutumier*, as well as jurisprudential developments.

- 2.52. Normandy was the last region to redact its laws pursuant to the 1453 Order. In 1577, the authorities in Normandy required a call to action: Henry III sent a letter patent demanding that work be done, saying it "... was very necessary, because the customs, usages and procedure of that place were only to be found written in very ancient books, composed of barely intelligible language and words, being for the most part obsolete and little or not at all understood by the inhabitants of the land".⁷¹ In 1666, further articles were added.
- 2.53. As the *Coutume Reformée* was produced by royal authority, it had the status of an official redaction. Most of the local customs of Normandy (other than Caux) were included and, because the Island did not develop its own independent laws to any great extent during the period from the Separation to the publication of the *Coutume Reformée*, much of it was assimilated into the customary law of Jersey. While many provisions of the *Ancienne Coutume* found their way into the *Coutume Reformée*, including some more recent developments that had not been previously recorded, the redactors also drew on other influences, in particular the *ius commune*.
- 2.54. The 17th century Jersey commentator Poingdestre considered that the *Coutume Reformée* should be taken as an authority only to the extent that it was in accordance with the *Ancienne Coutume* and the *ius commune* – otherwise he was of the view it did not represent the law of Jersey. In *Remarques et Animadversions sur la Coutume Reformée*,⁷² Poingdestre demonstrated which areas represented Jersey law and which did not (half and half). He was not sure that the law of Jersey should follow the *Coutume Reformée*, but was prepared to admit that some customary law contained in the *Ancienne Coutume* had been abrogated by contrary usage. He stated he was attempting to steer a course between the absurdities of the old and the novelties of the new. In particular, Poingdestre considered that the parts of the *Coutume Reformée* stemming from French Royal Ordinances should be ignored, unless for example, they complied with Roman law (which "all the world follows in the area of contract") or other fields where there was no customary law. From a practical point of view, the *Grand Coutumier* was not a comprehensive code of law and some matters were barely touched upon or not dealt with at all. By comparison, the *Coutume Reformée* was accessible, represented the modern law on concepts from which Jersey law was derived and contained those parts of Norman law drawn from the *ius commune* which it was accepted applied in certain areas (e.g. contract).

⁷¹ Translation from the original French by Dawes, op cit, p 33.

⁷² Manuscript as yet unpublished.

- 2.55. In modern times, Richard Southwell QC comments that the *Coutume Reformée* should not be considered as authoritative as the *Ancienne Coutume*.⁷³ Such a view is supported by a certain historical logic: by the time the *Coutume Reformée* was promulgated in 1583, Jersey had been a legal jurisdiction formally separate from Normandy for 379 years and the King of France who sanctioned the reformed custom was not sovereign in Jersey. As noted below, following this logic the approach to customary law in Guernsey was to pull up the drawbridge to developments in France after 1583. See para 5.23, below. In Jersey, however, the practice of law was different. As Nicolle demonstrates, in Jersey there 'was a heavy reliance on the *Coutume Reformée* and its commentators, resulting in the assimilation of many of its provisions and thus of much of the post-separation law of Normandy'.⁷⁴ One reason for this is likely to have been the relative scarcity of local legal authority.

It may be the right approach is to look, in the absence of any local decisions of the courts or evidence of local custom, first to the *Ancienne Coutume* and if there is nothing conclusive there on the point, then to examine the *Coutume Reformée*. Not for nothing are the names of all these commentators on the ceiling of the Royal Court when one looks up for inspiration!

- 2.56. The Privy Council gave a qualified acceptance of the *Coutume Reformée* in *La Cloche v La Cloche*⁷⁵: it could be looked upon as evidence of the old law, unless it could be shown that the relevant provision had been introduced by legislative or similar authority.
- 2.57. The Civil Law Commissioners recognised that while some Jersey practitioners held that the *Coutume Reformée* was not authority in Jersey, the constant reference to it and its commentators (particularly Basnage) had led to the gradual introduction of more foreign matter, so that what was now practically received as the common law of Jersey might be described as consisting of the ancient Norman law with subsequent accretions, some of which were the developments of earlier customs and other interpretations of French law. They concluded that the *Coutume Reformée* was part of Jersey law by virtue of its assimilation over the centuries.

16th and 17th century Commentators on the *Coutume Reformée*

- 2.58. Commentators on the *Coutume Reformée* are relevant to all areas of Jersey law, except where Jersey legislation or case law has deviated from the Norman law and where the jurisprudence of another jurisdiction has influenced the development of Jersey law, such as English law in relation to crime and tort.

⁷³ "The Sources of Jersey Law" (1997) 1 JL Rev 221.

⁷⁴ S Nicolle, *The Origin and Development of Jersey Law: an outline guide*, 5th edn, para 11.13

⁷⁵ 1870 L.R.P.C.125

- 2.59. Two publications are of particular significance in Jersey.
- 2.60. *Commentaires sur la Coutume de Normandie* (1648 and 1776) by Bérault, Godefroy and d’Aviron. This has been referred to as the “Amalgame” as the work of three commentators are brought together within a two-volume publication. The works of the individuals had appeared some years earlier.
- 2.61. Oeuvres de Basnage (see below).

The “Amalgame”

- 2.62. The relative authority of the three authors of the “Amalgame” has been the subject of discussion over the centuries. Poingdestre was somewhat dismissive of the work of Bérault and Godefroy, stating that he far preferred Terrien to them on the basis that they appeared to know little of the Grand *Coutumier* or the *Glos*. However, Le Geyt referred to Bérault, Godefroy and Basnage (along with Terrien) as the authors who are at that time the most cited in the Island. Writing in the 20th century, Nicolle identifies d’Aviron, Bérault, Godefroy and Basnage as the four commentators on the *Coutume Reformée* during the 16th and 17th centuries who achieved prominence in Jersey. She notes that Godefroy’s commentary is not generally regarded as being of the same quality as those of Bérault or Basnage, but nonetheless has established itself as authority in Jersey.
- 2.63. Jacques Bathelier d’Aviron, an advocate of the court of Evreux, produced his commentary in 1599, titled *Les Coustumes du pays et duché de Normandie*, consisting of a short series of commentaries on each article of the *Coutume Reformée*. This was cited in *Snell v Beadle*⁷⁶ (requirement for an element of fraud) and *Le Feuvre v Matthew*⁷⁷ (servitudes).
- 2.64. Josias Bérault, an advocate of the Parlement de Rouen and a French jurist, produced the first edition of his commentary, *La Coutume Reformée du pays et duché de Normandie*, in 1612. The fourth edition appeared in 1632, just before his death (Besnier comments that subsequent editions are not therefore so reliable). His aim was to give an understanding of the law of Normandy in the context of the decrees of the Parlement de Rouen and to interpret the Coutume. Besnier preferred him to others such as Godefroy, stating that his language was clear, his reasoning precise and his references neat. His work was cited in *Godfray v Godfray*,⁷⁸ *Rahman v Chase Bank* (*donner et retenir ne vaut*);⁷⁹ *Snell v Beadle*.⁸⁰

⁷⁶ 2001 JLR 118

⁷⁷ 1973 JJ 2461

⁷⁸ (1865) 16 ER 120.

⁷⁹ 1991 JLR 103.

⁸⁰ 2001 JLR 118.

- 2.65. Jacques Godefroy produced his commentary, *Commentaires sur la Coutume Reformée*, in 1626/1628. It provides an article by article discussion of the *Coutume Reformée* and was cited in *In re States of Jersey*,⁸¹ *Rahman v Chase Bank*;⁸² *Snell v Beadle*.⁸³

Basnage

- 2.66. Henri Basnage was an important member of this group of commentators. Indeed, according to Dawes' assessment, he "was the most widely respected of the Norman legal authors" and "his works truly achieved 'national' recognition".⁸⁴ He was the son of a famous advocate and an advocate himself. He produced his commentary, titled *Commentaires sue la Coutume de Normandie*, in 1678. The fourth edition (1778) is most often cited in Jersey and provides article by article analysis. His other principal work is *Traité des hypothèques* (1687), also cited in the Jersey case law. Besnier considered Basnage's work to be the most well-known and characteristic work of the 17th century, although he was not as significant as Pothier. However, Besnier was also critical in that Basnage's work was not always focussed, was dominated by Roman law to the exclusion of the *Coutume* and often failed to reach clear conclusions. He was well-respected by his contemporaries and by the Civil Law Commissioners.
- 2.67. The *Commentaires* is cited in many judgments of the Jersey courts, of which the following are some illustrations.
- *Benest v Pipon*⁸⁵ (possession to acquire title by prescription)
 - *Amy v Amy*⁸⁶ (in relation to *rapport à la masse*, said to be one of the authorities which together with certain others such as Pothier and Terrien were described as the "established law most closely allied to the law of Jersey")
 - *Kwanza v Sogeo*⁸⁷ (vice caché)
 - *Evans (née Allen) v Le Feuvre*⁸⁸ (descent of immoveables as paternal or maternal *propre* dependent on ascertaining person last holding it as *acquêt*)

⁸¹ 1853 PC 185.

⁸² 1991 JLR 103.

⁸³ 2001 JLR 118.

⁸⁴ Dawes, op cit, p 35.

⁸⁵ (1829) 1 Knapp 60.

⁸⁶ 1968 JJ 981.

⁸⁷ 1981 JJ 59.

⁸⁸ 1987-88 JLR 696.

- *Abdel Rahman v Chase Bank (CI) Trust Co Ltd*⁸⁹ (whether maxim "*donner et retenir ne vaut*" part of modern customary law)
- *In the matter of the Estate of the late Mrs Dorothy Agnes Tarrant (née Baggaley)*⁹⁰ (the issue was whether a will of movable estate signed by the testatrix in the presence of two witnesses, dated, but signed by only one witness, is a valid testamentary document)
- *In the Estate of Ruellan*⁹¹ (rectification of a will)
- In the matter of the will of *Futter*⁹² (validity of a will)
- *Snell v Beadle*⁹³

18th century commentators on the Coutume Reformée

- 2.68. Pesnelle, Routier, Flaust and Houard are the four commentators on the *Coutume Reformée* during the 18th century who achieved prominence in Jersey.⁹⁴
- 2.69. Pesnelle produced his commentary, *Coutume de Normandie*, in 1704, which against each article of the *Coutume Reformée* helpfully summarised the commentaries of other commentators such as Terrien, Bérault, Basnage and Godefroy. Subsequent editions published until 1771. Besnier thought Pesnelle had produced a clear and intelligent résumé: he had used a traditional format but with a new, simplified feel. The work is cited in *Re Barker*⁹⁵ (duty of an *attourné* in a *dégrèvement*) and *Snell v Beadle*⁹⁶ (the element of fraud required for *déception d'outre moitié*).
- 2.70. Charles Routier first published his *Principes Généraux du Droit Civil et Coutumier de la Province de Normandie* in 1742, subsequently in 1748 (with a section on contracts and obligations). This has been described as "a comparatively brief (664 pages) and accessible text of Norman law".⁹⁷ It includes a valuable section on principles of interpretation under customary law. Besnier states that Routier deals with the *droit civil* and the *droit coutumier* in a different way from Pesnelle/Terrien, by using the natural order of the *Coutume*. He describes the work as clear and precise, but criticises the inclusion of discussions of irrelevant French law. Houard

⁸⁹ 1991 JLR 103.

⁹⁰ unreported 1999/136.

⁹¹ 2001 JLR 286.

⁹² 2000 JLR 344.

⁹³ 2001 JLR 118.

⁹⁴ See Nicolle, *op cit*, p §.

⁹⁵ 1985-86 JLR120

⁹⁶ 2001 JLR 118

⁹⁷ Dawes, *op cit*, p 38.

considered it to be the best introduction to the study of law, although improvements could be made. It is cited in *Rahman v Chase Bank*⁹⁸ and *Snell v Beadle*⁹⁹ (where the Privy Council referred to his definition of customary law).

- 2.71. Jean-Baptiste Flaust produced his *Explication de la Coutume et de la jurisprudence de Normandie dans un ordre simple et facile* in 1781. His stated intention was to make the *Coutume* more accessible for young people aspiring to the bar and to advocates. Besnier noted that Flaust was the only writer to deal correctly with the law of the Norman family. Flaust is cited in numerous cases, including for example, *Amy v Amy*¹⁰⁰ (regarding succession, where he was said to be one of the authorities which together were described as the “established law most closely allied to the law of Jersey”).
- 2.72. David Houard was a jurist, historian and advocate of the Parlement de Rouen. He also edited the works of the 15th century English lawyer Littleton. He produced a number of works, the most frequently cited in Jersey is the *Dictionnaire de Droit Normand*, published in four volumes in 1780-82. He also wrote a comparison of English and French law in 1776. Houard believed that the 18th Century Coutume was best explained by its historical origins and that English and French law originated from the same base, but had diverged in the 13th century. Houard is cited in *West v Lazard*¹⁰¹ (held to be surer guide to the meaning of *dol* than the post civil code French authors); *In the matter of Z*¹⁰² (role of father re: custody of child); *Snell v Beadle*¹⁰³ (distinction between *dol réel* and *dol personnel*); *Colesberg Hotel v Alton Hotel*.¹⁰⁴

Maxims

- 2.73. Rules of customary law have often been reduced to ‘maxims’ – that is to say, pithy propositions of law. Le Gros provides a ‘Recueil de maximes’.¹⁰⁵ Judges and commentators have, however, issued warnings about reliance on maxims. The Royal Court has warned that “Maxims are at best dangerous”.¹⁰⁶ Matthews and Nicolle are highly critical of the maxim “En fait de meubles, possession vaut titre” (included by Le Gros) which they dismiss as a late 18th century invention and not one that

⁹⁸ 1991 JLR 103

⁹⁹ 2001 JLR 118

¹⁰⁰ 1968 JJ 981

¹⁰¹ 1993 JLR 165

¹⁰² 1968 JJ 981

¹⁰³ 2001 JLR 118.

¹⁰⁴ 2003 JLR 47

¹⁰⁵ CS Le Gros, *Traité du Droit Coutumier de L’Ise de Jersey* (1943) pp 455-463.

¹⁰⁶ *Wood v Establishment Committee* 1989 JRL 236; cited with approval in *Mendonca v Le Boutillier* 1997 JLR 142, 146.

should be regarded as part of the law of Jersey.¹⁰⁷ Caution is therefore needed before relying too heavily on a maxim.

¹⁰⁷ P Matthews and S Nicolle, *Jersey Law of Property* (1991) pp 24-25.

3. Civil (Roman) law

Meaning of the *ius commune*

3.1. *Ius commune* means “common law”, or a law which is common to a number of different localities (as opposed to customary law, which is specific to a locality). In France (including Normandy), the *ius commune* generally became equated with Roman law (although it was in fact a complex synthesis of a number of sources, of which Roman law was the most important). Routier provided a set of rules for the interpretation of the *coutume*, which amongst other things provided that:

- where a *coutume* did not cover the matters in issue, recourse was to be had to usage in the province;
- if usage did not cover the point, recourse was to be had to neighbouring *coutumes* (hence local reference to works such as Pothier’s *Coutume d’Orléans*), or to the general spirit of the *coutumes* of France; or
- finally to the rationale of Roman law

but none of these could be considered as having the authority of law.¹⁰⁸

Relevance of the *ius commune*

3.2. The *Coutume Reformée* and the *Ancienne Coutume* before it had very little to say on certain areas of law, notably contract law. For their contract law, the Normans looked to the *ius commune*. This practice of looking outside the *coutume* was not unusual. It is clear from the writings of Poingdestre and Le Geyt that, in matters of contract law, Jersey (following Norman practice) looked to the *ius commune*. In practice this has meant looking to the works of Pothier. Thus in *Benest v Pipon*¹⁰⁹ it was stated: “The Roman law relative to prescription has been adopted into the law of Normandy, which prevails in Jersey.”

3.3. There are, however, different views on the general relevance of the *ius commune*. Houard’s view was that the application of the *ius commune* was to be kept within strict limits. It had historically only been applied in areas of law initially in the jurisdiction of the Ecclesiastical courts, including wills, marriages and intestate succession. Roman law was of relevance to matters such as prescription, wills, gifts and things deemed movable or immovable. Poingdestre’s view was that the *ius commune* was the law which all civilised nations used for matters which the local custom did not regulate. He saw customary law as individual exceptions to the otherwise generally applicable *ius commune*.¹¹⁰ Domat suggested that the

¹⁰⁸ *Droit Civil et Coutumier de Normandie*.

¹⁰⁹ (1829) 1 Knapp. 60.

¹¹⁰ Poingdestre, *Lois et Coutumes*.

justification for the adoption of Roman law was founded in *équité* and natural law.¹¹¹ The *ius commune* performed two different roles:

- in the *pays de droit écrit* (regions of written law based on Roman law), the *ius commune* had the same force as customary law in the *pays de droit coutumier*; and
- in all localities, whether *pays de droit écrit* or *pays de droit coutumier*, the *ius commune* served as a form of justice and equity and had authority as such over the human reason.

- 3.4. In the 17th century in Jersey, Poingdestre shared Domat's enthusiasm for this second aspect of the *ius commune*, stating that, although Jersey's customary law was the oldest in the world, if it were found to be contrary to principles of equity and Roman law it ought not to pass for customary law any longer. Le Geyt suggested that much customary law derived from the *ius commune*. He stated that in his writings that he followed *le génie de l'Isle* (the "spirit of the Island") and particularly the writers on civil law, rather than the common law of England.
- 3.5. Le Geyt was more pragmatic, as he discussed the law as it was practised, not as he thought it should be practised. As there was relatively little written law in Jersey, practitioners used the customary law of the adjoining province of Normandy as being most in accordance with that of Jersey. Whilst this resulted occasionally in the introduction of authority which originally was of no application in Jersey, he went on to propose that long usage creates law. Le Geyt also took "the most recent commentators" on the *Coutume Reformée* as being more reliable than local precedent, due to the poor quality of the latter.
- 3.6. When presenting evidence to the Royal Commission of 1861, Sir Robert Pipon Marett was clear that the source of Jersey's law was not the English common law, but rather Norman law with some borrowing from the *ius commune*.
- 3.7. It is clear that, in some spheres, the *ius commune* continued to exercise a strong influence in Jersey. Thus *In re Barker*,¹¹² when interpreting provisions in the *Loi (1880) sur la propriété foncière* relating to deemed renunciation by a debtor of his property, the Court of Appeal noted that Jersey lawyers in the 1800s and in particular draftsmen such as Sir Robert Marett, were under the influence of Roman/civilian notions in this respect. Accordingly it was right to consider the *ius commune* when considering the provisions on deemed renunciation. And in *Mendonca v Le Boutillier*¹¹³ it was stated that Jersey is a

¹¹¹ *Loix Civiles*.

¹¹² 1985-86 JLR 120.

¹¹³ 1997 JLR 142.

customary law jurisdiction and it takes its authority in matters of contract from Roman law.

Domat and Pothier

- 3.8. Given that the *ius commune* formed part of Jersey's legal system, French writers on the *ius commune* were influential in Jersey. The two most important influences in Jersey were Jean Domat (1625-1696) and Robert-Joseph Pothier (1699-1772).

Domat

- 3.9. Domat's influence in respect of the *ius commune* was particularly important in Jersey. His greatest work was *Les loix civiles dans leur ordre naturel* (otherwise known as *Traité des Loix Civiles*), published in 1689. The purpose of the work was to publish Roman law in its "natural" order and make the *ius commune* more accessible. Domat was a proponent of "Natural Law", that is the philosophy that certain laws reflected certain immovable principles of *équité* which occurred naturally in all mankind. It was this view which produced Domat's analysis of the two different roles of the *ius commune* (above). Cases in which Domat has been cited include:

- *Scarfe v Walton*,¹¹⁴
- *Kwanza v Sogeo*,¹¹⁵ in relation to implied warranties; and
- *Boyd v Pickersgill & Le Cornu*,¹¹⁶ in relation to prescription.

Domat was *not* followed in *Viscount v Woodman*¹¹⁷ in relation to preferred creditors, as he was contrary to local authority.

Pothier

- 3.10. Pothier was a writer on both customary and civil law, and serves as authority in both fields. His major works include: (i) *Pandects of Justinian* (1748); (ii) *Coutume d'Orléans*; and (iii) *Traité des Obligations* (1761). In those areas where customary law systems traditionally had little to say, e.g. contract, and drew on the *ius commune*, recourse may be had to his non-customary civilian influenced works, e.g. the *Coutume d'Orléans*. In relation to contract law, Pothier's *Traité des Obligations* has come to be the most influential work in Jersey. Pothier's work was well received beyond France, including in the United Kingdom and the United States and his was the last serious expression of French law prior to the French revolution. In one 19th century English decision, the court went as far as to say that his status in contract law was as high as can be had, next to a decision of a court of justice in England. Pothier's works served as the basis for many of the provisions of the

¹¹⁴ 1964 JJ 387.

¹¹⁵ 1983 JJ 105

¹¹⁶ 1999 JLR 284

¹¹⁷ 1972 JJ 2085

Code Civil, and he has frequently been described as the father of the *Code Civil*. Kelleher notes that Pothier has been cited in some fifty per cent of all contract cases before the Jersey courts since 1950. Examples include:

- *Selby v Romeril*,¹¹⁸ where it was stated “it is true that Pothier has often been treated by this court as the surest guide to the Jersey law of contract”, although the court went on to say that Jersey law was not to be seen as “set in the aspic” of the 18th Century.
- *Amy v Amy*,¹¹⁹ where Pothier was said to be one of the authorities which together were described as the “established law most closely allied to the law of Jersey”.

However, in *Re Estate of Father Amy*¹²⁰ the Royal Court held that it was not *bound* to follow Pothier:

- the phrase “surest guide” simply means that there is predisposition to follow that source;
- the Court has a discretion whether to follow the “surest guide” or look to another source;
- in contract law, whilst Jersey law followed Pothier and the *Code Civil* in some areas, it followed English laws in others (e.g. damages, remoteness of loss).

Continuing controversy

3.11. Although, as described above, the influence of Roman law on several areas of Jersey law is not in doubt, it should not be thought that its application is uncontroversial. In *Snell v Beadle* the Privy Council were called on to interpret the Jersey customary law doctrine of *déception d'outre moitié*. Lord Hope and the judgment of the majority examined Justinian Codes, Lord Hope stating that “the origins of customary law lie in the Roman law”.¹²¹ However, writing in the *Jersey Law Review*, Richard Southwell QC argues

“This strong reliance by the majority in the Privy Council on Roman law as a direct guide to the interpretation of Jersey customary law is something of a new departure. It might be said to be contrary to the unanimous view of the Judicial Committee in the appeal from Guernsey in *Vaudin v Hamon* in the judgment delivered by Lord Wilberforce.”¹²²

He goes on to quote the first sentence of Lord Wilberforce’s judgment:

¹¹⁸ 1996 JLR 210. For an example of reliance upon Pothier, see *O’Brien v Marett* [2008] JCA 178.

¹¹⁹ 1968 JJ 981

¹²⁰ 2000 JLR 80.

¹²¹ [2001] 2 AC 304; 2001 JLR 118, paras 21-22, 30-32, 49.

¹²² “Citation from other Legal Systems” (2004) 8 *Jersey Law Review*.

“While it might be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable in different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle”.¹²³

Southwell concludes by saying “It seems to me that there is a real need for consensus on, and perhaps brief codification of, the limits to which citation of other systems of law can be carried. Otherwise the expensive burdens on advocates, and hence on their clients, may be excessive, and the uncertainties in Jersey law too great.”¹²⁴

¹²³ [1974] AC 569, 582.

¹²⁴ See also G Dawes, “Citation form other Legal Systems: a Reply” (2004) 8 *Jersey Law Review*.

4. Local authorities

Introduction

- 4.1. So far, consideration has mainly been given to sources of law and commentary thereon from outside the Island. Jersey does, however, have a rich (if still small) local legal literature that is referred to in the judgments of the Jersey courts.
- 4.2. The 17th century writers Poingdestre and Le Geyt are particularly important sources for determining Jersey customary law. It was observed *In re Esteem Settlement*¹²⁵ that “in the absence of Jersey judicial authority, the greatest weight was to be attached to writers on the law of Jersey, i.e. Poingdestre (when writing of Jersey law rather than Norman law) and Le Geyt.” This view is echoed by the Civil Law Commissioners.

Jean Poingdestre (1609-1691)

- 4.3. He was educated at Cambridge and Oxford (where he was a noted Greek scholar) and served as Lieutenant Bailiff of Jersey and a Jurat. A contemporary observed, “His great fault is his very passionate temper”; a posthumous assessment stressed “Nobody knew our history, our institutions, the privileges we enjoy or the laws which govern us, better than him”.¹²⁶
- 4.4. His principal legal works, none of them formally published during his lifetime, were:
 - *Lois et Coutumes de l’Isle de Jersey* (published by the Jersey Law Society in 1928)
 - *Commentaries sur l’Ancienne Coutume* (published by the Jersey Law Society in 1907)
 - *Remarques et Animaduersions sur la Coutume Reformée* (circa 1680; due to be published).
- 4.5. The first of these works deals largely with civil law. It was cited in *Public Services Committee v Maynard*,¹²⁷ in relation to the effect of ignorance on prescription, and in *In re Esteem Trust*,¹²⁸ where the court felt that it should follow Poingdestre on the rules applicable to a Pauline action rather than seek to import more modern French developments.
- 4.6. In his *Commentaires sur l’Ancienne Coutume*, Poingdestre’s aim was to set out as much of the customary laws of Normandy, the *Glose* and the *Style* as was in force in Jersey, adding thereto the regulations of the Privy Council and the ordinances of English Sovereigns. After explaining those local customs which were not found in the *Coutumier* and accounting for

¹²⁵ 2002 JLR 53,213 and 243

¹²⁶ Dawes, op cit, p 47.

¹²⁷ 1995 JLR 65

¹²⁸ 2002 JLR 53, 213 and 243

matters which had been abrogated by usage in Jersey, he proceeded to analyse the *Grand Coutumier* chapter by chapter, explaining which parts remained in force, which did not, and which had been modified in Jersey. Poingdestre notes that his work is not comprehensive, but that in his view the omissions were minor and of little importance. Dawes suggests that “Poingdestre was very conscious of the fact that Terrien contained materials from a great many sources, a number of which were, for him, in no sense authoritative in Jersey. Poingdestre was more concerned with pure Norman custom rather than the later, and often non-Norman, legal accretion”.¹²⁹

- 4.7. The *Commentaires* were cited in *Scarfe v Walton*¹³⁰ in relation to the doctrine of *erreur*, the court preferring to consider a work of this type, rather than decisions of the English courts which both counsel had almost exclusively referred to in their submissions.
- 4.8. The *Remarques et Animaduersions sur la Coutume Reformée* are a continuation of his *Commentaires sur l'Ancienne Coutume* on the *Grand Coutumier*. His purpose was to identify which parts of the *Coutume Reformée* and the older custom should be followed in Jersey. Poingdestre recognised that some of the *Grand Coutumier* had become inequitable or abrogated by contrary usage, but that some parts of the *Coutume Reformée* were novel or deficient in the context of Jersey law. He provides a useful guide as to which parts of the *Coutume Reformée* should be followed in Jersey. In *Re Esteem Settlement*¹³¹ it was suggested that a previous decision of the court in *Albright* was wrong in preferring Le Geyt to Poingdestre on the particular point on prescription before that court. The Court noted that in his *Remarques et Animaduersions sur la Coutume Reformée*, Poingdestre was writing about the *Coutume Reformée* and not the law of Jersey. While it is true that Poingdestre was endeavouring to point out which parts were applicable in Jersey, in relation to the particular provision before the Court it was not clear whether Poingdestre was saying it formed part of Jersey law. The Court referred to his *Lois et Coutumes*, which it noted was specifically written on the law of Jersey and which contained a detailed section on prescription, noting that he did not in that work suggest that the particular law in question (30 year prescription) was part of Jersey law.

Commentaires sur les Canons de James I

- 4.9. These were established in 1623 and remained in substantially the same form until 1949. The Canons were the result of the juxtaposition of King James I and a Calvinist Jersey, brought in by a power struggle between the Calvinist Governor and the

¹²⁹ Dawes, op cit, p 47.

¹³⁰ 1964 JJ 387

¹³¹ 2002 JLR 53,213 and 243

local Presbyterian clergy. Kelleher¹³² suggests that Poingdestre wrote about four of the Canons because they touched upon key aspects of his life: the law of Jersey and his own ministry. His commentaries attack the changes made by the Canons (to the law of succession in particular) on the basis that they are a wrongful interference with the laws of Jersey, as drawn from Normandy, the *ius commune* and Roman law.

Philippe Le Geyt (1635-1716)

- 4.10. Le Geyt was a contemporary of Poingdestre. He was educated at Saumur, Caen and Paris and held office as Greffier (1660-1670), a Jurat (1670-1711) and Lieutenant Bailiff (1676-1695, replacing Poingdestre). His principal works are
- Manuscrits sur la Constitution, les Lois, & les Usages de Jersey (not published until circa 1850) and
 - *Privilèges, Loix et Coutumes* (not published until the 20th century). This consists of three separate works: (i) *Privilèges*; (ii) *Loix et Coutumes*; and (iii) *Essay pour des Reglemens Politiques*. The *Privilèges* sets out the privileges of Jersey as conferred by various charters. The *Loix et Coutumes* contain the customary law of the day in relation to a number of matters, both civil and criminal and the *Reglemens Politiques* summarise the regulations passed by the Court and/or the States.
- 4.11. In *Godefroy v Godefroy*,¹³³ Le Geyt was stated as being “as high an authority as can be produced on the local law of Jersey”. In *Re Vautier*,¹³⁴ it was opined that, although Basnage had thought that a will which is not signed by the testator could nonetheless be valid in relation to moveable estate, Le Geyt was of the opposite view and the court followed Le Geyt’s view as representing the law of Jersey.

Charles Sydney Le Gros (1867-1947)

- 4.12. Le Gros, a farmer’s son from Trinity, was an Advocate of the Royal Court; he served as Viscount and Lieutenant Bailiff. His principal work was the *Traité du Droit Coutumier*, published in 1943.¹³⁵ This is the most modern textbook on Jersey customary law; written in French, it includes a collection of customary law maxims and a glossary of customary law terms. The work deals with customary and statutory law (for example, the *Loi (1880) sur la propriété foncière*). It deals almost exclusively with civil and statutory rather than criminal law. Le Gros’

¹³² J. Kelleher, “Jean Poingdestre’s Commentaires sur les Canons de James 1” (2006) 10 Jersey Law Review.

¹³³ 1865 16 ER 120

¹³⁴ 2000 JLR 315

¹³⁵ Republished by the Jersey and Guernsey Law Review in 2007, with notes by T Hanson and J-M Renouf which “provide a brief update on the law in various areas and refer to those cases before the courts and articles in the Jersey Law Review where Le Gros has been cited”.

work is cited frequently before the Courts (although it is to be noted that in *Snell v Beadle*¹³⁶ errors were found):

- *In re Harbours & Airport Committee*¹³⁷ it was held that the notion that *doleance* is solely a personal attack on the honour and integrity of the judge was a misconception derived from the *Code Civil*. The understanding of Le Gros that the process is used as a device for judicial review was adopted.
- *Warwick v Callahan*¹³⁸ — the court relied on *inter alia* Le Gros in finding that it had the power to treat the case as a *cause de brièveté*.
- *Le Cornu v CI Heat Pump Bureau*¹³⁹ — the court agreed with Le Gros that remedies against a debtor must generally be exhausted before a claim is made against a guarantor.
- *Colesberg Hotel Ltd v Alton Hotel Ltd*¹⁴⁰ — the court referred to Le Gros regarding the law of servitudes.
- *In re Delaney*¹⁴¹ the Court referred to Le Gros in relation to *cession*, in particular the fact that it releases the debtor from his debts.

Commissions of 1847 and 1861

- 4.13. Although hardly “local authorities” the reports of the two 19th Commissions can conveniently be considered here. The reports contain transcripts of oral testimony from local lawyers. In the year 1847, and again in 1861, Commissioners were appointed to enquire into the Criminal Law of Jersey and the Civil, Municipal and Ecclesiastical Laws of the Island. In their reports, the Commissioners identified two principal sources of Jersey law, namely customary law and legislation.
- 4.14. The Commissioners Report of 1847 on Criminal Law is valuable within limits (given the difficulty of Commissioners to adjust to a different jurisdiction) for its account of criminal law and procedure and its inclusion of old Royal Charters. The Report has sometimes been criticised for failing to fully understand the Jersey context. In particular, the Commissioners regarded Norman law as irrelevant post-1204 and were consequently very critical of Terrien. The evidence presented showed that Jersey criminal law was based on Norman law which was undeveloped, but that in practice English authorities were mainly relied on in Jersey. The Commissioners recommended the introduction of a penal code. This was drafted but never adopted, probably

¹³⁶ 2001 JLR 118

¹³⁷ 1967 JJ 737

¹³⁸ 1991 JLR N4

¹³⁹ 1991 JLR 197

¹⁴⁰ 2003 JLR 176 (CA); 2003 JLR 47 (RC)

¹⁴¹ 1996 JLR 96

because this was period of greatest constitutional tension between Jersey and Westminster.¹⁴²

- 4.15. The Jersey Court of Appeal has recently stressed the importance of the Commissioners' report, from which the court quoted extensively. In *De La Haye v Attorney General*, Sumption JA said

"we consider that the First Report of the Commissioners is instructive as to the position in 1847 and that the criminal law lessons implicit in the Report should not be overlooked or forgotten. Courts will be required to clarify the criminal law but in so doing such clarification is not usurping the role of the legislature."¹⁴³

- 4.16. The Commissioners Report of 1861 on Civil Law is not comprehensive, since it does not cover contract or tort. It nevertheless gives a valuable account of civil law at the time. In *Cooper v President of Public Health Committee*¹⁴⁴ it was stated that the evidence of witnesses (not all of whom were lawyers) should be treated with caution, but the conclusions of Commissioners on points of law must be accepted as correct unless cogent evidence to contrary can be produced.

Other local writers relied upon by the Jersey courts

- 4.17. The Jersey courts frequently make reference to articles appearing in the *Jersey and Guernsey Law Review* and to other work of living authors.

¹⁴² G. Le Quesne, "An Abortive Penal Code" (2002) 6 JL Rev.

¹⁴³ *De La Haye v Attorney General* 2010 JLR 218, para 78.

¹⁴⁴ 1966 JJ 685

5. Other systems of law to which the Jersey courts may have regard

Introduction

- 5.1. This chapter considers the relevance of the laws of: France; England and Wales; Guernsey; and other jurisdictions.
- 5.2. Jersey is a small jurisdiction, without the volume of court decisions to be found in larger jurisdictions. It is hardly surprising, therefore, that the Jersey courts have shown a willingness look outside the Island to examine how other legal systems have attempted to solve novel legal issues, in the absence of Jersey authority in Jersey.
- 5.3. The two legal systems to which the Jersey courts most often turn are France and England and Wales, although reference is sometimes made to Scots law. Thus in *Cannon v Nicol and Nicol*,¹⁴⁵ it was noted that where the customary law of Jersey on a particular topic has not yet been declared by judicial decision, the Court will often look to some other source for guidance, but it is not bound to follow the source to which it first looks. The Court's duty is to declare the law of Jersey and it must do so for a community of the 21st century. It is not bound to adopt a rule or principle laid down several centuries ago if it is clearly inappropriate for modern times.

French law

- 5.4. According to Le Geyt, French law has historically served as a model for Jersey. Upon the coming into force of the *Code Civil* in 1804, customary law in Normandy and the rest of France came to an official end. Given the parallel development of Jersey and Norman customary law until that time, the extent to which the provisions of the *Code Civil*, and developments in French law since then have relevance when considering Jersey law is key.
- 5.5. A starting point is to examine the extent to which the *Code Civil* represented a significant change to what had been the law in mainland Normandy at the time that it came into force. Although the *Code Civil* did introduce changes, it has been described as more reactionary than revolutionary. Much of the *Code Civil* was based on the writings of the likes of Pothier and Domat. The *Code Civil* had an early influence on Jersey law, for example parts of the *Loi (1880) sur la propriété foncière*. To that extent, an enquiry into developments in the French law in such areas is of interest (albeit not binding) in Jersey. It was noted in the Civil Law Commissioners Report that the education of Jersey lawyers in France helped to impart a modern French complexion to the jurisprudence of the Island. Much of the

¹⁴⁵ 2006 JLR 299

Code Civil has now changed due to subsequent intervention by the French legislature. However, much remains in its original form, which (at least in parts) reflected the customary law in Normandy and elsewhere or the influence of writers such as Pothier who had, and continue to have, much influence on parts of Jersey law.¹⁴⁶

- 5.6. For some, however, the use of *Code Civil* at all is controversial and not always desirable. Thus in *Maynard v Public Services Commission*¹⁴⁷ Southwell JA sounded a warning that:

"... care has to be taken in referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy, development was naturally affected by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much of the pre-existing laws of the French provinces, but with some material changes. After the Napoleonic Codes came into existence, French law developed independently of developments in Jersey and Guernsey, under the direction or influence of French statutes, French jurisprudential writers and the case law of the French courts. Accordingly, no great weight can be placed on French law as it exists today in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system."

- 5.7. The Privy Council observed in *Vaudin v Hamon*¹⁴⁸ that the similarity between Roman law (at various periods), various *coutumes*, the *Code Civil*, Jersey and Guernsey law was of too general a sense to be of much assistance in that particular case. Similarly, in *Snell v Beadle*,¹⁴⁹ the Privy Council was prepared to look to Roman and Scots law on the point at issue, but expressed reservations about relying on modern French law. In *Colesberg Hotel (1972) Ltd v Alton Hotel Ltd*¹⁵⁰ the Court of Appeal held that Jersey land law has only a distant connection with Roman law and is different in many respects from French law before the Revolution and from present-day French law based on the Napoleonic codes.¹⁵¹
- 5.8. Others believe that it is only natural for Channel Island lawyers, where there is no local statute, to turn to the *Code Civil* and decisions of the French courts, at least where the relevant

¹⁴⁶ See, for example, *O'Brien v Marett* [2008] JCA 178.

¹⁴⁷ 1996 JLR 343

¹⁴⁸ [1974] AC 569

¹⁴⁹ 2001 JLR 118

¹⁵⁰ 2003 JLR 47

¹⁵¹ It was also noted that Jersey law has entirely different origins from English land law, and remains different in many material respects from the English land law of today.

provision of the *Code Civil* can be traced back to the Norman law pre-1804 or to the writings of the likes of Pothier. Thus Kelleher suggests that the warning sounded in *Maynard v Public Services Commission* (1996) could similarly (and perhaps more cogently) be sounded about relying on English law. In *Selby v Romeril*¹⁵² it was observed that, despite the value of Pothier's works, the law could not be considered to be "frozen in the aspic of the 18th century". In that case the court considered and adopted the *Code Civil* requirements for the formation of a contract. And in *Kwanza v Sogeo*,¹⁵³ in relation to *vices caches*, the Court thought that the provisions of the *Code Civil*, rather than the law of England, was the surer guide to the discovery of the law of Jersey.

- 5.9. Dawes¹⁵⁴ argues that jurisprudence has moved on since *Vaudin v Hamon*¹⁵⁵ and English courts are nowadays much more willing to consider continental European Law. He believes that the court in that case did not give sufficient credit to the *Code Civil* as the legitimate successor to *inter alia* Norman law. Cases such as *Vaudin v Hamon*¹⁵⁶, *La Cloche v La Cloche*¹⁵⁷ and *Snell v Beadle*¹⁵⁸ overlook the fact that it is not a question of forensically proving the source of any given provision of the *Code Civil*, let alone that it is a direct successor of a provision of Norman law (and the *Grand Coutume* at that). The relationship between Channel Islands law and the *Code Civil* is much more subtle, whereby the *Code Civil* maintains the *esprit* of customary law to a much greater extent than English law, and thereby derives its right to be consulted and cited by local lawyers.
- 5.10. Nicolle suggests that the continuous grafting of post-separation developments in Norman law into the Jersey legal system, where they took root and flourished, was a recognised feature of Jersey's legal development from an early date and should continue to be the case. The *Code Civil* and cases decided under it are relevant to Jersey in three ways:
- i. where the provisions of the *Code Civil* are derived from pre-existing law which would have been followed in Jersey, they may be of assistance when interpreting or applying the pre-existing law (*Selby v Romeril*¹⁵⁹);

¹⁵² 1996 JLR 210.

¹⁵³ (1981) JJ 59.

¹⁵⁴ "From Custom to Code - The Usefulness of the *Code Civil* in Contemporary Guernsey Jurisprudence" (2004) 8 *Jersey Law Review*.

¹⁵⁵ [1974] AC 569

¹⁵⁶ [1974] AC 569

¹⁵⁷ 1870 LR PC 125

¹⁵⁸ 2001 JLR 118

¹⁵⁹ 1996 JLR 210.

- ii. to the extent that the *Code Civil* was used as the basis for Jersey legislation, e.g. the *Loi (1880) sur la propriété foncière*, they may be of assistance in interpreting such legislation (*De Quetteville v Hamon*¹⁶⁰); and
 - iii. as a result of the continued assimilation of French law into Jersey law, which is perhaps not surprising that practitioners for a long time largely studied law in France.
- 5.11. There are a number of areas of law where Jersey courts may have regard to French law, including contract, *propriété foncière* and succession. French commentators such as d'Argentré, Merlin, Rondonneau and Dalloz have been cited by the commentators in relation to Jersey law and have since continued to be cited in Jersey.

English law

- 5.12. A recent Jersey Court of Appeal judgment ends with the following general observation by Sumption JA:
- “We would add a more general observation about the value of English case law as persuasive authority in Jersey. There are areas, such as the law of real property or inheritance laws, where Jersey has developed a distinctive body of legal principle, derived from sources (generally Norman customary law) which are quite independent of the English common law. In these areas, it is generally neither necessary nor useful to refer to English cases. But in the criminal law and large areas of the civil law, the problems which the courts encounter are of relatively modern origin and are much the same as those with which the English courts grapple daily. Since 1847, the court system in Jersey has become more elaborate and the volume of civil and criminal litigation has grown exponentially. But the Commissioners’ observations about the advantages of resort to English law are as pertinent today as they were then. In a relatively small jurisdiction, there will be many issues which arise too rarely for the courts to have generated a coherent body of indigenous legal principle. In the interests of legal certainty, it is undesirable for the courts to reinvent the legal wheel each time that an issue of principle arises which is not covered by existing Jersey authority when there is a substantial and coherent body of case law available from a jurisdiction with which Jersey has close historical links, with which, on most issues, it shares common social and moral values and a common legal culture, and from which it derives most of its criminal statutes”.¹⁶¹

¹⁶⁰ 1893.

¹⁶¹ *De La Haye v Attorney General* 2010 JLR 218, para 79. On the “Commissioners” see Chapter 4 above.

Nonetheless, the mistake should not be made that the criminal law of Jersey is the same as that of England and Wales. A good example of this lies in the offence of fraud, which is known to the common law of Jersey as an offence which might be charged as a stand alone offence but was not similarly known to the common law of England. In *Foster v Attorney General*¹⁶² the Court of Appeal considered an objection that this offence was unknown to the law of Jersey and rejected it.

- 5.13. Aside from France, the other legal system which has had the greatest influence in Jersey (particularly more recently) is English law. The reasons are fairly obvious. Jersey is a British Island with strong ties to England, as the Jersey Court of Appeal highlights in the passage above. Moreover, Jersey lawyers almost invariably nowadays start their legal education by studying English law and many qualify as legal professionals in England and Wales before they do so in Jersey. Most practitioners in Jersey speak and read English, not French, as their mother tongue. The Jersey Court of Appeal is composed predominantly of English lawyers; as is the final court of appeal, the Privy Council. Much of the legislation adopted by the States Assembly draws substantially from English statutes. The library resources of Jersey law firms, and indeed the Jersey Law Library, tend to point to London rather than Paris.
- 5.14. While acknowledging all of these linkages between Jersey and England it also needs constantly to be borne in mind by the Jersey practitioner that Jersey is a distinct legal jurisdiction. As the Jersey Court of Appeal in *De La Haye* suggests, there are clear practical benefits in a small jurisdiction being able to tap into the jurisprudential thinking of a larger jurisdiction where a higher volume of appellate judgments can help develop the law and fill gaps. But *unthinking* reliance on English precedents, English legal terminology (for example, "mortgage" and "easement") and English legal concepts should be avoided. Generally, it is appropriate that the legal and statutory context underlying the English precedent is fully understood before any transposition of that decision to Jersey can be safely undertaken.
- 5.15. In the 17th century, the Jersey commentator Le Geyt thought that the common law of England was sufficiently different from Jersey customary law that restraint should be exercised in referring to English common law, and writers on civil law were to be preferred. However, even Le Geyt referred to English common law and commentators such as Dalton and Coke in relation to criminal law.
- 5.16. The Privy Council, which until the latter part of the 20th century was the only court of appeal from the Royal Court, was by and large careful not to import English law gratuitously into the Jersey system. In *Thornton v Robin*,¹⁶³ it was noted that if

¹⁶² 1992 JLR 6

¹⁶³ (1837) 1 Moo. P.C. 439, 12 ER 881.

the Privy Council were to reverse a decision without being able clearly to show that such decision was contrary to the Norman law, the respondent would be denied a right to which he was entitled by Jersey law and there would be a suspicion that the Privy Council wished to shape Jersey law in accordance with English notions of justice. That position has been eroded in more recent years, however, so that the English common law has come to have much influence in relation to some areas of Jersey law.

- 5.17. It is important to remember that English authorities are only persuasive, not binding, on the Jersey courts. The Jersey courts may exercise their own judgement as to the weight to be accorded by a particular English case. Thus in *Attorney General v Thwaites*, the Royal Court considered a much-criticised English authority which had not been overruled, commenting that the case “has been battered almost beyond recognition and if, which we accept, it is not quite dead, it is only because, so it seems to us, it has been left to die in peace”.¹⁶⁴
- 5.18. A problem that arises not infrequently is that English common law governing a subject has been replaced in England by an Act of Parliament (which has not been extended to Jersey). In such situations, especially if there has been an appreciable passage of time during which the common law of England has ceased to be developed, the Jersey courts will usually want to exercise caution in following English law.¹⁶⁵

Guernsey law

- 5.19. The law of Guernsey will be of the highest persuasive authority in Jersey unless some reason to the contrary appears.¹⁶⁶ Three main justifications may be advanced for this proposition. One is that the two Bailiwicks share similar (though not identical—see below) roots in Norman customary law.
- 5.20. Second, as one Guernsey advocate puts it: “The Bailiwicks of Jersey and Guernsey have led a parallel existence over the centuries. They have responded to their near identical position in the world in similar, if not identical ways, and it is appropriate to consider the other’s answer, without in any sense being bound by it”.¹⁶⁷
- 5.21. Third, in relation to appellate decisions:
“While a decision of the Guernsey Court of Appeal is not, of course, binding upon [the Jersey Royal Court], there is no doubt that in appropriate cases, it should be regarded as of highly persuasive authority. The judges of the Guernsey Court of Appeal are broadly speaking the same judges who constitute

¹⁶⁴ *Attorney General v Thwaites* 1978 JJ 179, 191,

¹⁶⁵ See e.g. *Mendonca v Le Boutillier* 1997 JLR 142.

¹⁶⁶ *Le Cocq v Attorney General* 1991 JLR 169.

¹⁶⁷ G Dawes, *Citation form other Legal Systems: a Reply* (2004) 8 *Jersey Law Review*.

the Jersey Court of Appeal. If the law of Guernsey has developed in a particular area along similar lines to the law in this Bailiwick, the pronouncements of the Guernsey Court of Appeal should clearly be carefully considered.”¹⁶⁸

- 5.22. The Jersey courts may look to decisions of the Guernsey Courts where both jurisdictions have adopted English common law.¹⁶⁹
- 5.23. Jersey lawyers researching Guernsey law in relation to customary law need to be aware of an important divergence of approach in the two Bailiwicks. In 1583, the Bailiff and Jurats of Guernsey sought in a systematic way to state the law of Guernsey by reference to which parts of Terrien’s commentary on the *Grand Coutumier* formed Guernsey law. This *L’Approbation des Loix* was adopted by Order in Council. The Guernsey Bar website explains:

“... Guernsey law was defined and enshrined in the legal strait jacket of an Order in Council which took as its defining reference point a body of law only recently superseded [by the *Coutume Reformée*] to a very great extent in its jurisdiction of origin. The effect was stultifying, at least for a time. Jersey went through no equivalent experience and looked (and continues to look) much more freely than Guernsey law at the *Coutume Reformée* and the commentators which followed Terrien, commenting of course on the new *Coutume*, as opposed to the old. Guernsey law continued, and continues, to work from Terrien, the *Grand Coutume* and *L’Approbation*.”¹⁷⁰
- 5.24. Online resources can be found at www.guernseylegalresources.gg. In addition note:
- 5.25. The Guernsey legal system has been slower than Jersey in introducing a system of law reports. The *Guernsey Law Reports* are now, like the *Jersey Law Reports*, published by Law Reports International. There are plans to publish Guernsey judgments retrospectively back to 2000. Some Guernsey appeals to the Privy Council will (like those of Jersey) be found in the *Law Reports* published by the Incorporated Council of Law Reporting.
- 5.26. An introduction and account of the principal areas of law is provided by Gordon Dawes, *Laws of Guernsey* (Hart Publishing 2003).
- 5.27. The *Guernsey Law Journal* was published between 1985 and 2000. From 2007, the *Jersey Law Review* became the *Jersey and Guernsey Law Review*.

¹⁶⁸ *Knight v Thackeray’s Limited* 1997 JLR 279.

¹⁶⁹ *Knight v Thackeray’s Limited* 1997 JLR 279; see further J Morgan, “Judicial Law Making In The Channel Islands” (1997) 1 *Jersey Law Review*.

¹⁷⁰ www.guernseybar.com (last accessed 8 May 2011).

Commonwealth and other law

5.28. The Jersey courts may look to the law of other Commonwealth countries, which will be persuasive, the weight being increased if the law is similar to that of Jersey.¹⁷¹ But in *Foster v Attorney-General*¹⁷² the Jersey Court of Appeal rejected the invocation of South African, Scottish and Canadian law in matters of criminal law. Had this been a civil law case, the court may have been readier to find a link. Le Quesne JA cited in his judgement at page 30 salutary warnings from judgments of the Privy Council. In *La Cloche v La Cloche*¹⁷³ Lord Westbury said :

“ In determining the abstract question raised by this appeal, their Lordships have felt anxious to form their decision entirely on the proper evidence of the law and custom of Jersey, without being influenced by considerations of convenience, or by analogies derived from the laws or customs of other countries. ”

And in *Vaudin v Hamon*¹⁷⁴, on appeal from the courts of Guernsey, Lord Wilberforce said, at p 581:

“If an argument based on analogy is to have any force, it must first be shown that the system of law to which appeal is made in general, and moreover the particular relevant portion of it, is similar to that which is being considered and then that the former has been interpreted in a manner which should call for a similar interpretation in the latter.

While it might be true, in a very general sense, that there is some basic similarity between Roman law, at various periods, the various customary laws applicable to different parts of France, the Civil Napoleonic Code, the law applicable in Jersey and that which governs in Guernsey, this similarity is of a too general and approximate character to be of much assistance in a particular case: it covers, quite clearly, large differences in matters not only of detail but of principle.”

¹⁷¹ *Housing Committee v Phantesie Investments Ltd* (1985-6) JLR 130; *Mesch v Housing Committee* (1990) JLR 269.

¹⁷² 1992 JLR 6.

¹⁷³ L.R. 3P.C. at 136.

¹⁷⁴ 1974 AC 569.

6. Overview of the influence of different sources of law in relation to areas of law in Jersey

Introduction

- 6.1. This chapter examines briefly how the “mix” of different sources of law operates in several different areas of law. Candidates should remember that the focus is on legal method—understanding the nature of the mix—rather than the detail of the substantive law.

Criminal law

- 6.2. It is clear that English law has for centuries exercised some influence upon the development of criminal law in Jersey. The Commissioners of 1847 noted that the common practice was to refer to English legal reports and precedents as authorities. English authorities were used for help in the definition of offences. There was a particular need for this given the imprecision of the local criminal law and the almost complete absence of statutory definition. One reason for this state affairs is explained by the Jersey Court of Appeal:¹⁷⁵

“The *Ancienne Coutume* itself says very little about crime apart from a list of “querelles criminaux,” which was reproduced by the Commissioners in their first Report (*op. cit.*, at xv) It appears to us that the Commissioners were fully justified in their conclusion (*op. cit.*, at xxii) that “the criminal law cannot be extracted from [the Grand Coutumier] in a definite form.”

- 6.3. In the 1930s in *Renouf v Attorney-General*¹⁷⁶ the Privy Council concluded that in light of the modern practice of the Royal Court, which had in many cases regarded English law as a guide in laying down the modern criminal law of Jersey, the criminal law in Jersey rested almost entirely on the English model. This reliance on English law can occur even if the relevant English law was derived from English statute (*Attorney-General v Makarios*¹⁷⁷ and *Ruban v Attorney-General*¹⁷⁸), although this should be taken to refer only where the relevant law has already established itself in Jersey, rather than implying that the Jersey courts can knowingly import English statute law to make new law. The Jersey Court of Appeal has recently endorsed the view that English law should be followed in Jersey criminal law.¹⁷⁹ It is considered that this must refer primarily to those English precedents which are not based upon or

¹⁷⁵ *Foster v Attorney General* 1992 JLR 6, 15.

¹⁷⁶ [1936] AC 445.

¹⁷⁷ 1987-99 JLR 220.

¹⁷⁸ 1979 JJ 85.

¹⁷⁹ *De La Haye v Attorney General* 2010 JLR 218, para 79, discussed above.

influenced by English statutory provisions which are not replicated here (see para 6.5 below)

- 6.4. This does not however mean that the Jersey courts will or should always follow the English law on all aspects of criminal matters. In *Carpenter v Constable of St Helier*¹⁸⁰ it was noted that English law should only be consulted if Jersey law was not clear. In *Clarkin v Attorney General*¹⁸¹ it was stated that a decision of the House of Lords must be regarded as highly persuasive, but English decisions do not bind a Jersey court and it is open to a Jersey court, if it thinks appropriate, to decide that principles set out in such an English decision do not represent the law of Jersey. (The court went on to choose between conflicting English authorities, rather than reject English authority altogether.) In *Le Cocq v Attorney-General*¹⁸² the Court was referred to a number of English authorities, but in the Court's view these were of limited assistance as they were dealing with Jersey statutes and Jersey procedure.
- 6.5. English law will also be of limited value where the legal question before the court relates to the existence or scope of criminal offences under customary law. In *Bhojwani v Attorney General*, Beloff JA in the Jersey Court of Appeal said: "The exercise where the offence is created by statute is one of interpretation of the statutory language. The exercise where the offence is one of customary law is necessarily distinct. Here a range of sources may be consulted: jurisprudence; commentary; the opinions of those learned in the law; precedents of charges".¹⁸³ Having examined various sources, the Court of Appeal held that there was no customary law offence of bribery in Jersey law.
- 6.6. In *Foster v Attorney General* the question of law before the Jersey Court of Appeal was whether there as a customary offence of fraud in Jersey. The court explained¹⁸⁴

"There is no doubt that the first step must be to see what are the ingredients of the offence of fraud under the common law of Jersey. In the present case, this must mean examining the local precedents and trying to infer from them some rule about the essential ingredients of the offence. If the result of this process is unclear or out of date, we may look elsewhere."
- 6.7. In *Drew v Attorney-General*¹⁸⁵ there was held to be no obligation to follow English sentencing guidelines.

¹⁸⁰ 1972 JJ 2107.

¹⁸¹ 1991 JLR 213.

¹⁸² 1991 JLR 169.

¹⁸³ [2009]JCA 115A; 2010 JLR 78 para 46.

¹⁸⁴ *Foster v Attorney General* 1992 JLR 6, 26.

¹⁸⁵ 1994 JLR 1

Contract law

- 6.8. While the 1960s and 1970s saw sporadic reliance upon English principles, according to Nicolle there are now only a few specialist areas of contract law where it could be said with confidence that English law would be followed (for example, building disputes where the RIBA contract has been used, following *Selby v Romeril*).¹⁸⁶
- 6.9. In 1997, the Royal Court stated “Jersey is a customary law jurisdiction. It takes its authority in the matter of contract from Roman law”.¹⁸⁷
- 6.10. Cases where English law has been rejected include:
- *Channel Hotels & Properties Ltd v Rice*¹⁸⁸—the Court specifically declined to apply the English doctrine of negligent misrepresentation;
 - *Treanor v Viscount*¹⁸⁹— the Court’s preference for Jersey, Norman or French over English authority was explicit;
 - *Wood v Wholesale Electrincs (Jersey) Ltd*,¹⁹⁰ *Dempster v City Garages Ltd* and *La Motte Garages Ltd v Morgan*¹⁹¹— French contract law preferred to English law;
 - *Steelux Holdings Ltd v Edmonstone*¹⁹²— the Court was critical of the fact that both Counsel had chosen to cite English authority and stated that “while English law and Jersey law may often arrive at the same conclusion in relation to the effect of a false or fraudulent misrepresentation upon a contract, the process of reasoning, and the route by which the journey is taken, are sometimes different”. The Court went on to analyse the issues in terms reflecting modern French jurisprudence.
 - *Incat Equatorial Guinea Limited and others v Luba Freeport Limited and others* 2010 JRC 083A where the Court was critical of the reference to Chitty on Contracts save in construction cases where the language of a particular contract might have been similar to that used in a contract which had been before the English courts.
- 6.11. Statutory intervention in the field of contract law has added a further ingredient to the “mix”. Detailed consideration of the Supply of Goods and Services (Jersey) Law 2009 and subordinate legislation, the Consumer Safety (Jersey) Law 2006 and the Distance Selling (Jersey) Law 2007 all fall outside this

¹⁸⁶ 1996 JLR 210

¹⁸⁷ *Mendonca v Le Boutillier* 1997 JLR 142, 146.

¹⁸⁸ 1977 JJ 111

¹⁸⁹ 1969 JJ 1243

¹⁹⁰ 1976 J.J 415

¹⁹¹ 1993 JLR 93

¹⁹² 2005 JLR 152

module. It is for present purposes sufficient to note that this legislation brings about significant changes to customary law relating to the contracts to which that legislation applies. It is modelled on English legislation, which in turn has been strongly influenced by European Union law. In interpreting provisions of this legislation, the Jersey courts can be expected to have regard to interpretations given by the English courts.

- 6.12. The Jersey law of contract has been subject to a consultation paper (2002) and report (2004) by the Law Commission and to an international conference (2010).¹⁹³ There are those who would support the maintenance of the status quo and encourage the Jersey courts to apply the Jersey law of contract as expounded by the earlier writers on Norman law and jurists such as Pothier, but developing the law by analogy with concepts drawn from English and French law as required. This would maintain the traditional judicial flexibility and permit the Jersey courts to develop the law of contract. Alternatively, there are supporters of the idea of a code for Jersey contract law. At one time, the Law Commission proposed a code based on the Indian Contract Act 1872, adapted to include aspects Jersey law. Since the Law Commission proposal, which was not well received at the time, expert groups in Europe have carried out work to formulate a pan-European contract code, which might be another model. The debate is very much a live one.¹⁹⁴

Tort

- 6.13. Although the influence of English tort came late to the Island, there is no doubt that it now has great influence on the Jersey law, particularly in the area of tortious negligence.¹⁹⁵ In *Jersey Financial Services Commission v A P Black (Jersey) Ltd*¹⁹⁶ it was concluded that the constituent elements of a Jersey tort action are similar to those of an English tort action; in this case the French law of tort as incorporated into Jersey law was insufficiently wide to encompass an action under the CIF Law.
- 6.14. In the area of land law it may be that the courts will fall back on customary law, as they did in *Searley v Dawson* (concerning

¹⁹³ "Channel Island Contract Law at the Crossroads". Papers from the conference will be published in the *Jersey and Guernsey Law Review*.

¹⁹⁴ See T. Hanson, "Jersey's Contract Law: A Question of Identity" (2005) *Jersey Law Review*; T. Hanson, "Comparative Law in Action: The Jersey Law of Contract" (2005) 16 *Stellenbosch Law Review* 194.

¹⁹⁵ See eg *Arya Holdings Ltd v Minorities Finance Ltd* (1993) JLR N3.

¹⁹⁶ 2002 JLR 294 (RC); 2002 JLR 443 (CA)

voisinage—the right of support between properties)¹⁹⁷ and *Yates v Reg's Skips Ltd*.¹⁹⁸

Public Law

- 6.15. English law has had a considerable influence in over administrative law in the modern era. However, there can be instances where it is not appropriate to follow English law. One such situation is where Jersey legislation creates a right of appeal on the ground that the decision is “was unreasonable in all the circumstances” (a phrase used in numerous enactments). Detailed consideration of the scope of such appeals falls outside the scope of this module except to note that it differs considerably from the approach of the English courts in judicial review claims involving *Wednesbury* unreasonableness or irrationality.¹⁹⁹

Conflict of Laws

- 6.16. The conflict of laws is one area in which Jersey has, in the absence of clear rules of its own, traditionally looked to English law for guidance,²⁰⁰ although there can be differences in the detail, for example, on the age of dependency. The harmonisation of the conflict of law rules within the European Union means that modern English law of conflicts is based on European law (which has no application in Jersey). Therefore, the references will be best made to English law prior to the adoption of the Rome Convention applicable to contractual obligations and the Brussels Convention on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters and subsequent regulations.²⁰¹

Other areas of law

- 6.17. In respect of both trusts and charities English law and writers are frequently cited. In intestate succession, rights of inheritance and formal validity, English law remains largely irrelevant. However, in matters of testate succession (mental capacity to make a will, duress, undue influence etc) English law is regularly cited for guidance.

¹⁹⁷ Note also the decisions of the Court in *Channel Hotels & Properties Ltd v Rice* (1977) and *Steelux Holdings Ltd v Edmonstone* (2005), discussed above, where the Court has specifically declined to following English law on negligent and fraudulent misrepresentation. (See above references)

¹⁹⁸ [2007] JRC 237; 2007 JLR N [65]; [2008] JCA 077B. See, further, R. MacLeod, “*Voisinage* and nuisance” (2009) 13 *Jersey and Guernsey Law Review* 274.

¹⁹⁹ See N. Langlois, “The test for administrative appeals: unreasonable or just plain wrong?” [2008] JGLRev.

²⁰⁰ *Official Solicitor v Clore* (1984) JJ 81.

²⁰¹ The most useful reference is likely to be Dicey & Morris Conflict of Laws 10th edition 1980

Laws based on equivalent Statutes

- 6.18. An example of a Jersey law many provisions of which are based on legislation in England is the Companies (Jersey) Law 1991. Where a Jersey statute is based upon an English statute:
- i. the Jersey courts will have close regard to English cases decided under that statute;²⁰²
 - ii. if the Jersey statute is different from the English statute in some way, it will be assumed that the difference is deliberate and intended to have significant effect;²⁰³
 - iii. the Jersey courts will not import the provisions of any statute amending such English statute if such amendments have not also been made in Jersey;²⁰⁴ and
 - iv. to the extent an English statute codifies but does not change the English common law in an area where the English common law and Jersey customary law were considered similar, the Jersey courts may have regard to such statute.²⁰⁵

For the general principles of statutory interpretation, Jersey courts follow English law.²⁰⁶

²⁰² *Attorney-General v Contractors Plant Service Ltd* (1967) JJ 785.

²⁰³ *Attorney-General v Jones* (1976) JJ 399

²⁰⁴ *Veizer v Bellego* (1996) JLR 105 (but see Guernsey Court of Appeal decision in *Morton v Paint* (1996) 21 GLJ 61 - occupier's liability).

²⁰⁵ *Mendonca v. Le Boutillier* 1997 JLR 142. Despite *Attorney-General v Makarios* 1987-99 JLR 220, provisions in English statutes cannot be adopted by reference to relevant case law.

²⁰⁶ See above.

B. CONSTITUTIONAL LAW

7. Relationship between Jersey and the United Kingdom

- 7.1. The constitutional relationship between the Channel Islands and the United Kingdom is the outcome of historical events and like all unwritten constitutions, it can evolve.²⁰⁷ Of course, the use of the term “unwritten” does not mean that there are no documentary sources indicating the nature of the relationship, nor that there is significant agreement and consensus about many of its features. Of note, for example, is the *Framework for developing the international identity of Jersey*, agreed between the Chief Minister and the Secretary of State for Constitutional Affairs in 2007.²⁰⁸ That said, as a matter of constitutional practice, the terms can be contentious. Horner notes that the Islands (i) are not treated as part of the metropolitan territory under the British constitution and (ii) do not enjoy central democratic representation. He suggests that as the Islands show a number of analogies with colonial possessions, the relationship between the Islands and the United Kingdom should be classified at the constitutional level as “quasi-colonial.”²⁰⁹ Others have described the relationship as one of dependency. There are two key issues:
- i. In relation to domestic affairs, can the UK legislate for Jersey against its will?
 - ii. How far can the UK speak for and bind Jersey in respect of international affairs?
- 7.2. Jersey originally formed part of the Duchy of Normandy. England and Normandy were separated in 1204 and Jersey chose to remain loyal to the English Crown. The Crown continued to rule Jersey as if it were Duke of Normandy, observing the laws and customs of the Island. It also confirmed a number of privileges and liberties which were later confirmed by the charters of successive sovereigns, which secured for Jersey its own judiciary and freedom from process of English courts.²¹⁰ There were other important privileges, particularly in

²⁰⁷ For a recent review of some aspects of the constitutional relationship, see the House of Commons Justice Committee’s Eight Report of Session 2009-2010, *Crown Dependencies*.

²⁰⁸ See Appendix 1, below. It is also available at <http://www.gov.je/SiteCollectionDocuments/Government%20and%20administration/R%20InternationalIdentityFramework%2020070502.pdf>

²⁰⁹ S.A. Horner, *The Isle of Man and the Channel Islands: A study of their status under constitutional, international and European law* (EUI working paper, 1984)

²¹⁰ The Report of the Civil Law Commissioners of 1861 summarised the chief privileges granted or confined to the Channel Islands by Royal Charter as: (i) a local judicature for each of the Islands consisting of a Bailiff, appointed by the Crown, and 12 Jurats, elected from the native Islands, with jurisdiction (subject to certain reservations and exceptions) in all cases civil and criminal arising within the Island; (ii) exemption of the Islanders from taxation without

the trading sphere. This has remained the essence of the relationship between Jersey and the present Monarch of the UK.²¹¹ The authority of the Judicial Committee of the Privy Council in Jersey derives from the prerogatives of the sovereign, as the source of all justice, to rule on appeals from the judges in her realm. It is clear from this history that the link between the United Kingdom and Jersey is the Crown.

Royal Charters

- 7.3. Although there is little detail available, it seems clear that the Constitutions of King John did exist and indicated the basis on which the Island retained its customary law after 1204. As Professor J C Holt said in his address at the 1204-2004 Conference " they survive in a succinct form in a return to a royal writ of September 11th 1248 addressed to drew de Barentin, Warden of the isles of Jersey and Guernsey, enquiring into the customs of the islands and the laws laid down by King John.²¹² The first surviving Royal Charter, published by Edward III in 1341, resulted from a series of quo warranto proceedings instigated by his predecessors, Edward I and Edward II. These proceedings came about as a result of the retention by the English Crown of the Channel Islands, following the loss of continental Normandy, and the need (as stated above) for England to install an alternative system of administration in the Islands to replace the Dukes of Normandy. Essentially, the English Monarch was looking to take more direct control of the islands and bring them into line with the laws then in force in England. In 1229 quo warranto proceedings were instituted in Jersey. Magistrates from England were sent to the Island to inquire into the laws and customs of the islanders and, more importantly, to require the Islanders to justify their customs and the right for the custom in question to exist, on pain of it being removed. These proceedings took place intermittently over a protracted period. In 1299, the King ordered the Islanders to reduce their customs to writing and to remit them to his justices to bring back to England for examination. Nothing came of this procedure. Again, in 1309, the then Monarch, Edward II, sent another mission to the Channel

their own consent; and (iii) the right of importing into England duty free all articles of the growth, produce and manufacture of the Islands.

²¹¹ Further detail is given in Bois, *A Constitutional History of Jersey* and by T. Thornton, "Jersey's royal charters of liberties" (2009) 13 *Jersey and Guernsey Law Review* 186. The Charters continue to have contemporary significance, providing the background to the relationship between the Crown and Jersey. Charter rights were relied upon by the Chief Minister in response to the House of Lords Constitution Committee's inquiry into the Common Travel Area. See *Part 3 of the Borders, Citizenship and Immigration Bill*, 7th Report of 2008-09 (HL 54), Appendix 3. <http://www.publications.parliament.uk/pa/ld200809/ldselect/ldconst/54/5406.htm>

²¹² See also J. Everard and J.C. Holt, *Jersey 1204 - The Forging of an Island Community* in (see *A Celebration of Autonomy* (published by the Jersey Law Review))

Islands. Its purpose was ostensibly two fold, namely to deal with any complaints which the Islanders had which might concern the English Crown, and to investigate where the law of England was being usurped. It was considered that the latter purpose was the overriding reason for the procedure. The Islanders were summoned before itinerant magistrates, to declare, *inter alia*, what law they followed. They stated that they followed the customary law of Normandy, save where the Island had developed its own customs, and they produced a schedule of the differences. Edward II instituted yet further quo warranto proceedings. He required the Islanders to produce proof of the existence of a royal concession that they were not required to follow English Law. The hope, of course, was that no such evidence could be produced. Further, the Islanders were accused of having usurped their own customs in favour of those set down by a Norman author, Maucael, long after Jersey's separation from Normandy. The responses of the Islanders to the 1309 quo warranto proceedings are recorded in the rolls of the assizes for that year. It was stated that the Islanders followed the book Maucael (*Summa de Maucael*), known in Normandy as the Ancienne Coutume because it contained the law of Normandy. The main privileges claimed in the quo warranto proceedings were:

- to be governed by the law of Normandy and local customary law as opposed to the law of England;
- that the Island's jurats should try all matters concerning Islanders within the Island itself;
- that no pleas relating to Jersey men should be adjourned outside the Island to an English court;
- that the Islanders should be quit of all tallages and contributions (taxes) to the English Crown;
- that the Islanders should only be required to do homage to the English King when he visited the Island.

No immediate action was taken by the English throne in response to the 1309 quo warranto proceedings, but in 1331, yet further proceedings were instituted. The Islanders complained that the English Crown had no right to institute such proceedings in Jersey, and the case was referred back to the King's Bench in London, where it was heard in 1333. At the hearing in London, the representatives of the Island reiterated that they followed the *Summa de Maucael* because Jersey had once formed part of the Duchy of Normandy. Further, the quo warranto proceedings which had been instituted on numerous occasions in Jersey, could not in fact apply to the Island, because they were a creation of a recent English statute, such statute which could only be applied to subjects of the English Crown. Jersey men were only subject to the King in his capacity as the Duke of Normandy, not as English monarch. As a result of this hearing, the King relented and ordered an examination by a Parliamentary Commission, which resulted, eventually, in Edward III's Royal Charter of 1341.

7.4. Edward III's Royal Charter of 1341 was the first of eleven Royal Charters which confirmed the liberties and immunities of Channel Islanders and defined the relationship of the Channel Islands with England. It is important to note that none of the Charters gave Islanders the immunity from taxation to the extent which the Islanders claimed they were entitled in the pleas entered in the quo warranto proceedings. Most of the Royal Charters merely reaffirmed the contents of a previous Charter. The Charters and the topics covered therein are set out here:

- (i) Edward III Charter of 1341: confirmed all the privileges and liberties of the Islanders.
- (ii) Richard II Charter of 1378: confirmed the Charter of Edward III.
- (iii) Richard II Charter of 1394: confirmed the freedom of Islanders from import duties in English ports.
- (iv) Henry IV Charter of 1400: privileges of the Islanders confirmed in general terms.
- (v) Henry V Charter of 1413/14: as above.
- (vi) Henry VI Charters of 1414 and 1442: as above.
- (vii) Edward IV Charter of 1468: confirmed the Charter of Richard II that no Islander is to pay tax to the English King for English purposes,
- (viii) Edward IV Charter of 1470: special charter for the recompense of Islanders in relation to the battle fought to regain Jersey and Mont Orgeil from the French.
- (ix) Henry VII Charter of 1485: confirmed the Charter of Edward IV of 1470.
- (x) Henry VIII Charter of 1509/10: confirmed the charter of Henry VII in 1485.

As noted previously, none of the Charters gave immunity from taxation to the extent that had been claimed by Islanders in the quo warranto proceedings. Further, none of the Charters exempted the Islanders from being taxed by the Crown for public purposes within the Island. Moreover, by an Order in Council of 1495, Henry VII ordered, *inter alia*, that neither captains nor jurats were to levy any taxes on the Islanders without the cognisance and commandment of the King. This appeared to be a statement that the power to impose taxes rested with the Crown which retained sole authority to order taxation be levied within the Island. An example of such a levy occurred in the 16th century, when the Islanders were ordered by the Crown to raise money to maintain an English garrison in Jersey.

7.5. The final Royal Charter to deal with the rights and privileges of the Channel Islanders was that of Elisabeth I in 1562. This Charter rehearsed the rights set out in earlier Charters and added others. Its main provisions were that there should be no excise duties imposed on the Islanders regarding goods

imported to English ports, no taxes to be paid directly to the Monarch, the jurisdiction of the Royal Court was confirmed, as was the fact that Islanders were not to be cited in writs issued out of the English courts, but that all matters concerning Jerseymen were to be heard within the Island. However, the Charter included a special reservation of the Royal prerogative which stated that the rights and privileges set out in the Charter were subject to the unimpaired and supreme royal power in respect of allegiance by the Island to the Crown and in respect of all privileges, revenues and tributes due to the Monarch. Thus, this Charter, in line with all previous Charters, did not surrender the right of the Monarch regarding taxation issues in the Island. Further, it should be noted that none of the Charters gave up any right of the Crown to legislate for Jersey, such right having been absolute at the time of the unification of the English and Norman Crowns, following the invasion of 1066, and which did not appear to have been diminished in any way since.

- 7.6. But, despite the retention by the English Crown of the power to legislate for the Island, the trend over the centuries was that the Royal Court made laws which would apply locally, as did the States (which evolved as a body during the 15th and 16th centuries to assist in non-judicial business). Following the Code of 1771, the law making powers in the Island were removed from the Royal Court and vested in the States alone. The conclusion to be drawn, therefore, is that appears to be a gap between who theoretically retains the power to legislate for Jersey (the Crown) and the body which in practice legislates for the Island (the States). Despite the theoretical position, it is apparent that a constitutional relationship developed over the centuries by which the law making function, at least in matters relating to the Island itself, vested in the States. The obvious question is, therefore: in view of the fact that the English Crown, through the Charters, did not appear to have given up any right to legislate or impose taxation, to what extent could the Crown or the United Kingdom - for it is important to retain the possible differences between the two - still legislate for Jersey? The possible answers to this question are explored in this chapter.

Westminster Parliament

- 7.7. Jersey is a dependency of the Crown and falls within Her Majesty's dominions. The two basic principles of English constitutional law have historically been:
- i. the UK Parliament retained ultimate legislative authority in those parts of Her Majesty's dominions over which it had not renounced its sovereignty; and
 - ii. the sovereignty of Parliament was not dependent on the scope of the authority of the Crown in Council.

Whether either of these principles - not challenged in respect of territories like the Crown Dependencies - would ever have held good, one cannot know. Nevertheless, these propositions

were accepted by the States in its submission to the Kilbrandon Commission. However, this austere and extreme version of the UK Parliament's sovereignty is no longer accepted by all modern commentators.

- 7.8. Traditionally Jersey has enjoyed virtual autonomy in respect of its domestic affairs, but not in respect of its international affairs. This neat distinction has become more difficult to sustain, as international law has increasingly encroached on matters which were formerly considered domestic in nature, and as Jersey has taken on more of an international role. Almost all Jersey's domestic legislation is made by the States. Acts of Parliament do not normally extend to the Islands. The practice is for Jersey to pass its own legislation which often mirrors that of the UK, for example, data protection, proceeds of crime, terrorism, and so on. If an Act of Parliament is to apply to Jersey, the current practice is for the Act in question to be extended to Jersey (with the Island's agreement) by an Order in Council, pursuant to an enabling provision in the Act itself. The Kilbrandon view was that in theory it remains possible for an Act (in its terms or by necessary implication) to apply directly to Jersey, but, other than in respect of Acts concerned with universally British matters like succession to the throne or nationality, even those who hold to this view agree that this would only be done in an emergency. The Order in Council mechanism from the UK perspective is to reflect the Crown's theoretical power to legislate for the island, which in order to be consistent with UK parliamentary practice could only be exercised if there were a permissive extent clause contained in UK legislation. The mechanism of course also facilitates consultation between UK and insular authorities as to whether such legislation should be extended, when, and, if so, what, if any, modifications are desirable.

The Kilbrandon Report

- 7.9. Published in 1973, this represented the conclusions of a Royal Commission on the Constitution. It was appointed to hear evidence from interested parties and to report its conclusions and recommendations to the UK Parliament. It has been the subject of recent criticism in Jersey. The Report summarised the main features of the constitutional relationship between the UK, on the one hand, and Jersey, Guernsey and the Isle of Man, on the other hand, in the following terms:
- the Crown has ultimate responsibility for the good government of the Islands;
 - the Crown acts through the Privy Council on the recommendations of UK Ministers in their capacity as Privy Councillors;
 - the Privy Council's main business in connection with the Islands is to deal with legislative measures submitted by the States for ratification by Order in Council;

- the Home Secretary²¹³ is the Privy Councillor primarily concerned with the affairs of the Islands and he must ensure that any legislation submitted for ratification by Order in Council are properly scrutinised before Royal Assent is given;
- the Islands are not represented in the UK Parliament;
- Acts of the UK Parliament do not automatically extend to the Islands;
- by convention, the UK Parliament does not legislate for the Islands without their consent in matters of taxation or other matters of purely domestic concern; and
- the UK is responsible for the Islands' international relations and defence.

Jeffrey Jowell²¹⁴ suggests that Kilbrandon was wrong in supporting Parliament's paramount power to legislate for Jersey as there is no sound legal basis for it. He describes the Kilbrandon approach as one which "is woefully short on legal authority, devoid of analytical rigour, packed with speculation and imbued with colonial assumptions which have always been irrelevant to Jersey's status and are out of tune with the present times". He thus expresses doubt about the very premise upon which the claims for paramount powers are based, but even if they were once rightly founded he suggests that (i) the principle is limited by constitutional convention to the contrary (convention is established by precedent, is accepted by all parties as the *status quo* and is underpinned by a form of political morality); (ii) this convention may now have crystallised into substantive law; and (iii) the relationship should now be defined by reference to fundamental constitutional principles. Jowell also makes an interesting comparison between the Crown's supposed right to refuse to give assent to Jersey laws with the corresponding ability of the Crown to refuse to give assent to laws of the UK Parliament. This latter power has not been exercised since 1708 and there is now an established practice that consent will not be refused.

The ability of the United Kingdom to legislate on the domestic affairs of Jersey

i. Legislative power of the Crown

- 7.10. Prerogative Orders in Council are passed on the initiative of the Monarch acting through the Privy Council (to be contrasted with an Order in Council to sanction a Law passed by the States), and were one of the recognised sources of legislation

²¹³ Note that today the responsible minister is the Lord Chancellor and Secretary of State for Justice.

²¹⁴ "The UK's Power over Jersey's Domestic Affairs" in P. Bailhache (ed.), *A Celebration of Autonomy: 1204-2004. 800 Years of Channel Islands Law* (2005), p. 268.

in Jersey.²¹⁵ The Civil Law Commissioners stated that this form of legislation was “plainly derived from the supreme legislative power possessed originally by the Dukes of Normandy; and for a length of time it was the mode commonly pursued”. Following controversy in the 19th century, the sovereign no longer exercises the prerogative power to *legislate* for Jersey. It is very arguable that this no longer exists – as Lord Diplock said in *BBC v Johns*,²¹⁶ it is “350 years and a civil war too late for the Queen’s court to broaden the prerogative”.

- 7.11. Under an Order in Council of May 1679, all Orders, warrants or letters were not to be executed until they were presented to the Royal Court to be registered and published; if the Royal Court found such Orders, warrants or letters to infringe the ancient laws, charters and privileges of the Islands then it could suspend the registration, publication and execution thereof until ascertaining the Monarch’s pleasure. The right to suspend registration was omitted from an Order in Council later that year, but restated in the Code of 1771. Orders in Council now invariably provide for presentation to the Royal Court for registration and publication. The Civil Law Commissioners noted that, following a suspension of registration, if the Monarch should not give way there is no legal alternative but to register the Order. They also noted that if the Order on its terms required a particular official to register the Order, it would be a valid ground of objection because it would circumvent the right of the Royal Court to suspend registration until the Monarch’s pleasure be known (as in the *Prison Board case*).
- 7.12. There have been some instances where legislative changes have been sought to be introduced in Jersey by means of prerogative Order in Council without the consent of the States. In 1852 the Privy Council made three Orders relating to the creation of two new courts in the Islands (criminal and civil) and a new system of policing.²¹⁷ The Royal Court suspended registration and referred the matter to the States, who petitioned the Privy Council to recall the Orders so that the States could prepare its own legislation. Six Laws were subsequently passed by the States and sanctioned by the Privy Council although the terms of the Laws were not identical to those made under the original three Orders. The Privy Council stated that serious doubts existed as to whether legislating for such matters by prerogative Order in Council without the assent of the States was consistent with the constitutional rights of Jersey. The Privy Council also accepted that only by payment from insular sources could the proposed reforms become effective and that taxation sanctioned by Order in Council was unconstitutional unless the prior consent of the States had been obtained. The context may be relevant. As in England, in 19th century Jersey

²¹⁵ F de L Bois, *A Constitutional History of Jersey* (1970).

²¹⁶ [1965] Ch 32, 79.

²¹⁷ See *Re States of Jersey* (1852-53).

there was a strong reform movement and it was not unusual for reformers to bypass local authorities and go direct to the Privy Council (i.e. the Crown) and even the UK Parliament.

- 7.13. In 1853 a prerogative Order in Council which regulated the government of Victoria College was passed without consultation with the States. Registration of the Order was suspended and the States petitioned the Privy Council to rescind the same. A subsequent Order in Council was passed to rescind the earlier one, stated to be without prejudice to the ancient rights and prerogatives of the Crown in respect to the government of Jersey. A Law was subsequently passed by the States and submitted to the Privy Council for sanction, which did so but subject to certain alterations reserving certain controlling powers to the Crown. The new Order was again suspended and revoked. The Privy Council then invited the States to take into account the alterations proposed, and a revised Law was put before the Privy Council. The Privy Council proposed further amendment and the re-revised Law was sanctioned by the Privy Council. As on the previous occasion, this was something of a retreat by the States, but the convention that the States' assent was necessary in respect to proposed changes in the institutions or constitution of the Island was upheld.
- 7.14. In the *Prison Board Case* 1891, the Privy Council passed an Order in Council amending certain provisions in an earlier Order relating to the constitution of the Prison Board without the consent of the States. The Royal Court suspended its registration and the States petitioned the Privy Council to recall the amending Order, which it subsequently did. Once again the constitutional rights of both parties were left undefined. This case confirmed that the consent of the States was necessary to any change in the institutions or constitution of the Island. It is especially significant as the States' Representation embodied all the claims that they had put forward at various times during the 19th century. Their main claims (as noted by Le Herissier) were that:-
 - i. The Code of 1771 formed the fundamental constitution of the Island and it was "not competent to Her Majesty to legislate for the Island otherwise than in accordance with its provisions".
 - ii. It had never been, according to the rights and privileges of the Island, and was not then, by virtue of the Code, competent for the Crown to legislate for the Island without the assent of the States.
 - iii. The Order of June 1891 was a "substantive" legislative act and could become law in Jersey only with the assent of the States.
 - iv. Her Majesty had no power by Her Prerogative to create an office such as that of Chairman of the Prison Board, nor to alter the constitution of a statutory body such as the Board.

These claims were supported by the facts that:

- the States was an 'adult legislative Assembly' and that in the areas of government where it had usurped the Crown's power, it retained an initiating legislative authority;
- the position of the Monarch was that of a limited constitutional monarch; and
- all laws which were to apply to the Island needed the express consent of the States and, only in matters remaining strictly within the prerogative power, was this consent not necessary (e.g. in respect of succession to the throne or the prerogative of mercy).

The case of *Campbell v Hall*²¹⁸ was cited by Mr Haldane QC as authority for the proposition that, once the Crown has parted with the power of legislation to a legislative Assembly, either by paper charter, or by unwritten usage, it is not competent for the Crown to resume legislating and even the ordinary Courts will take notice of the illegality of any attempt of the Crown under such circumstances to legislate without the consent of the legislative Assembly.

7.15. In *The Daniel Case*²¹⁹ a French woman found guilty of a crime while insane was detained until such time as Her Majesty's pleasure might be known. A Royal Warrant (in this case a writ of pardon granted in exercise of the Royal Prerogative of Mercy) directed that Daniel be discharged from prison and sent out of the jurisdiction. Despite the protests of the Bailiff, the Warrant was complied with at the instance of the Lieutenant-Governor, following the advice of the Attorney-General (who advised that the Bailiff's objection was constitutionally unfounded). In protest, the States petitioned Her Majesty in Council, claiming that the Warrant should not have been executed until it had been registered in the Royal Court in accordance with the procedure prescribed by the Order of May 1679 and the Code of 1771. The Privy Council advised that the Warrant was of its own force immediately binding on the Island and was issued by the Crown in exercise of the prerogative of mercy and as such:

- i. was not within the meaning of the Order in Council of May 1679;
- ii. was of its own force immediately binding on the Island without further action; and
- iii. should not be subject to revision or hindrance.

It was suggested that, in future, any Warrant issued in Jersey in the exercise of the prerogative of mercy should be communicated to the Bailiff as well as to the Lieutenant-Governor for the sole purpose of giving notice of Her Majesty's pleasure.

²¹⁸ (1774)

²¹⁹ (1889)

- 7.16. In *Re Petition of the States of Guernsey*²²⁰ the States of Guernsey complained that a private arrangement had been made in 1851 between the then Home Secretary and a senior Royal Court officer, bringing about the amalgamation of two ancient Court offices. The Privy Council quashed this as an encroachment upon the ancient rights and privileges of the Island.
- 7.17. These cases significantly restricted the exercise of the Crown prerogative to pass legislation. First, they indicate that changes in the constitution and institutions of the Island ("internal affairs") could be effected by prerogative Order only with the consent of the States. Second, taxation could only be raised in the Island with the consent of the States. Richard Southwell QC has suggested that whether laws can be imposed on Jersey by Order in Council which is commanded to be registered in Jersey (without the concurrence of the States or the assent of the British Parliament) remains an undecided question, though the undelivered argument of Mr Haldane QC (later Lord Chancellor) in the *Prison Board* reference to the Privy Council remains the *locus classicus* for the view that the Crown has no such power.²²¹ In evidence to the Kilbrandon Commission, the States suggested that the power to legislate by prerogative Order in Council had long fallen into disuse and appeared to have been superseded. The Home Office accepted that legislation by prerogative Order in Council had been almost entirely superseded by the practice of extending Acts of UK Parliament to Jersey, but did not agree that prerogative Orders in Council had been superseded. Kilbrandon does not attempt to clearly define the scope of the Crown's prerogative, but it is implicit that he recognised that there was a distinction between the Crown's colonial power of good government²²² and the Crown Dependencies when he said: "There is room for difference of opinion on the circumstances in which it would be proper to exercise that power. Intervention would certainly be justifiable to preserve law and order in the event of grave internal disruption. Whether there are other circumstances in which it would be justified is a question which is so hypothetical as in our view to be not worth pursuing." Kilbrandon certainly recognised that the Crown was ultimately responsible for the affairs of Jersey.

ii. Legislative power of the UK Parliament over Jersey

- 7.18. If ever a constitutional crisis were to emerge, it is the Westminster Parliament which is in practice the most likely source from which a new law purporting to apply to Jersey

²²⁰ (1861)

²²¹ (2001) 5 Jersey Law Rev. 254

²²² See *Ibralebbe v the Queen* [1964] AC 900, 932 and *Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] 1 AC 733, 747. See also the House of Commons Justice Committee's Eight Report of Session 2009-2010, *Crown Dependencies*, para. 36 *et seq.*

would be promulgated. As previously noted, Acts of the UK Parliament (primary legislation) do not *prima facie* apply to Jersey unless expressed to do so (An Act of Parliament may also provide for matters to be dealt with by secondary/ subordinate legislation. Such secondary legislation derives its authority from the Act of Parliament itself and so, in accordance with the terms of an Act of Parliament, may be applicable in Jersey. The Order in Council of May 1679 provided *inter alia* that Acts of Parliament would be sent to the Royal Court to be registered and published before being executed. However, this Order was replaced with one December 1679²²³ which stated that registration was not necessary to make the act obligatory. This is confirmed in the Code of 1771. The Commissioners of 1861 observed:

- where the whole Act in terms includes Jersey, it is obligatory by its own force without registration, though registration is convenient for promulgation;
- where part only of the Act is applies to Jersey, only such part is law in Jersey, even if the Order of Council requiring registration of the Act is expressed in general terms; and
- where an Act is not applied to Jersey either by its terms or by necessary implication, but is applied to Jersey by means of Order in Council, it derives its force from that Order in Council (and the registration requirement arguably applies, although as above, if the Crown refuses to withdraw the order, the States will be bound to comply).

In *Ex parte Bristow*²²⁴ the Royal Court assumed (without hearing argument) that an Act of Parliament applying in *express terms* to Jersey does not require to be registered in order to have effect in Jersey. This may have been a matter of construction (the intent of Parliament, not its authority), and it is not clear therefore that a straightforward assumption of Parliamentary supremacy would be followed today.²²⁵ The English Attorney General in 1689 was of the opinion that registration was simply a mechanism to publicise that applicability. Orders accompanying Acts (directing their registration) now carry a reminder that registration is not “essential to its operation” but that the Islanders have notice of the Act and are bound thereby. Bois thought it unfair for someone to be bound to a law where they may be unable to find it and noted that the decision in *Bristow* was not given in relation to a penal statute. Sutton suggests that the right of the UK to intervene in Jersey’s domestic affairs is “arguably very narrowly defined and limited to (almost unimaginable) situations where public order had broken down”.²²⁶ It would seem that, as a matter of Jersey law,

²²³ See F de L Bois, *A Constitutional History of Jersey* (1970), Section 10.

²²⁴ (1960)

²²⁵ See *In the Matter of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010*, discussed in section 10 below.

²²⁶ “Jersey and Europe – Taking Stock” (2002) 6 *Jersey Law Review*.

registration of an Act of Parliament or an Order in Council is considered necessary – see Article 32 of the States of Jersey Law 2005.

- 7.19. Whether or not registration is necessary with regard to Acts of Parliament, it is necessary in respect of statutory instruments made under Acts of Parliament, unless there is special provision to the contrary.²²⁷ In practice secondary legislation is extended to Jersey only when necessary and then through the Order-in-Council mechanism, providing for consultation and amendment.
- 7.20. In evidence to the Kilbrandon Commission, the States suggested that it would be unconstitutional for the UK Parliament (other than with the consent of Jersey) to legislate for Jersey on domestic matters. The Home Office considered that the right of the UK Parliament to legislate for Jersey extended as a matter of strict law to every field of legislation, though the right was limited by constitutional usage in respect of taxation and other domestic matters. The Kilbrandon Report concluded that despite the existence of the constitutional convention pursuant to which the UK does not legislate for Jersey on matters of domestic concern, Parliament does have power to legislate for the Channel Islands without their consent on any matter in order to give effect to an international agreement. It was suggested that it could be argued that, if Parliament has power to legislate for the Islands at all, there are no circumstances in which it would be precluded from exercising this power. However, the paramount power of the UK was qualified by the proposition that such powers should not be exercised except on very rare occasions, which should be identified under the following headings:
 - i. defence;
 - ii. matters common to British people throughout the world (e.g. succession to the Throne);
 - iii. the interests of the Islands (as in international law, the British Islands are an entity and the UK would be held responsible internationally if the practices in Jersey were to overstep the limits of acceptability – the States had argued this was limited to where there was grave internal disruption, Kilbrandon left open whether it could extend beyond this);
 - iv. international responsibilities; and
 - v. protection of the UK's domestic interests (whilst these would be rare, it would be possible for practices to develop, particularly in the commercial field, which would be detrimental to the well-being of the British Islands as a whole).

²²⁷ e.g. under the (now repealed) Exchange Control Act 1947, and for TV licence fees.

iii. The conduct of international affairs and the relationship with the power to legislate

- 7.21. Jersey is not a part of the UK nor is it a colony; rather it is a dependency of the Crown. In international law, the UK is responsible for Jersey's international relations, although there have been some subtle changes in practice in the last ten years. Under English law, the making of Treaties and Conventions falls within the Crown prerogative. In practice, the power to make them has in the United Kingdom devolved upon Government Ministers. Plender notes the settled practice whereby the UK will consult Jersey before settling the territorial application of its international agreements and suggests that this may have matured into a constitutional convention. It follows that in relation to this type of treaty or convention, the UK (not Jersey) will be formally responsible for any breach of treaty obligations entered into on behalf of its Dependencies. Therefore it is important, if an international obligation is assumed by the United Kingdom on the Island's behalf, that domestic law or practical administrative arrangements are in place to ensure that Jersey will not unwittingly place the UK in breach of that obligation.
- 7.22. It is unclear to what extent the creation of a UK legal obligation confers legal power on the UK to take action in respect of Jersey's domestic affairs (and thereby override the general constitutional position). Kilbrandon certainly thought that the UK could legislate if necessary in the "wider interest". The alternative view is that the treaty making power is a power conferred upon the executive and given that the United Kingdom and Jersey operate a dualist system in relation to the impact of treaties and conventions such that the treaty does not become part of the domestic law unless and until the legislature legislates to achieve that, there is no logical basis upon which the use of an executive power could create a legislative jurisdiction which would otherwise be denied. It is clearly the case today that the States of Jersey is left to enact legislation to enable the UK international obligations to be met - see for example the Extradition (Jersey) Law 2004. The view of the Kilbrandon Commission was that in requesting an opt-out from, or the adoption of special terms, in relation to international obligations that have a domestic impact, Jersey must frame such a request so that it is "reasonable in all the circumstances" but this approach is outdated and does not reflect current practice. Today the UK government accepts that it will not bind Jersey to any international treaty or convention without consultation and there is a high degree of probability that the exercise of the prerogative in this respect would be susceptible to judicial review at the island's request if its views were disregarded - see, for example, *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*²²⁸, which demonstrates that the use of the prerogative

²²⁸ [2008] UKHL 61.

powers, in that case even for legislation, is susceptible to review by a court. Sutton argues that despite the formal constitutional responsibility of the UK, there are clear precedents (e.g. Hong Kong in GATT) for the UK allowing its territories a considerable measure of freedom to defend their (sometimes conflicting) interest in international bodies such as the EU, OECD and even the UN. However, it is doubtful that such freedom would extend to formal treaty making power. The high point for asserting that such a power existed would rest with the various Savings tax agreements made by the island directly with all EU member states individually in 2004 to give effect to the EU Savings Directive which agreements state expressly that the obligations are for the parties alone, and where there was no entrustment or formal permission given to Jersey by the United Kingdom to enter the agreements. In practice Jersey does have a limited international legal personality of its own e.g. representation in some Commonwealth bodies, direct negotiations with the OECD (in relation to harmful tax practices) and the conclusion of various tax information exchange agreements. Whether these obligations are strictly obligations of the UK, and not Jersey is an undecided, if academic, question. In practice it is open to Jersey to terminate such agreements.

- 7.23. Under public international law (Article 29 Vienna Convention on the Law of Treaties which opened for signature in 1969), "Unless a different intention appears from the treaty or is otherwise established a treaty is binding upon each party in respect of its entire territory". Thus, if a treaty has no territorial application clause, Jersey would automatically fall within the scope of any treaty made by the United Kingdom, which in international law is recognised as the sovereign state. In 1950 it had been recognised in a Foreign Office Circular No 0118 (the Bevin Declaration) that unless otherwise stated, treaties and international agreements entered into by Her Majesty's Government after that date would not automatically apply to the Channel Islands or the Isle of Man. This in effect recognised that the inclusion of Jersey as part of the metropolitan territory of the UK was inconsistent with Jersey's constitutional position and all foreign governments and international organisations were informed accordingly. Jersey would be included amongst the territories for whose international relations the UK was responsible, unless the contrary was expressly stated. Jersey was informed that the purpose of the 1950 Declaration was to make clear that Jersey was not bound to any treaties in respect of which it had not been consulted or which Jersey did not want to have applied to it; that adequate time for consultation would be given; and that if Jersey did not participate this would not prevent the UK from doing so. In 1966, however, following certain difficulties over the application to Jersey of certain international treaties, the Home Office sent a letter to Guernsey which stated that the 1950 Declaration had not changed the rule of international law under which a state was presumed to be entering into treaties not only for itself, but also for all territories for whose

international relations it was responsible, unless otherwise expressed or by necessary implication. The Home Office stated that, before concluding any treaties, the UK would always endeavour to discuss the implications as fully as possible with Guernsey. Although the letter was not sent to Jersey, there is no doubt that it was also intended to apply to Jersey. The 1966 Declaration was clearly more restrictive than the 1950 Declaration. How Jersey would have reacted to that it is unclear, but if that remained the position today, it is likely that it would not be found to be acceptable. The confusion seems to have centred around the position where treaties were silent as to their territorial application: before 1950 such treaties were not unusual, but perhaps one effect of the Bevin Declaration was that such clauses became more commonplace especially with a number of former dominions or colonies in the process of seeking independence and by 1966 it was becoming increasingly difficult for UK negotiators to negotiate them. Many States found unfair that a country should try to exclude its dominions. Provisions such as Article XII of the Genocide Convention 1948 had become unacceptable:

“Any Contracting Party may at any time, by notification to the Secretary General of the United Nations, extend the application of the present Convention to all or any of the territories of whose foreign relations that Contracting Party is responsible.”

Pursuant to Article 20(2) Vienna Convention of 1969 on the Law of Treaties, a territorial reservation may require, depending on the nature and purpose of the treaty and the number of signatories thereto, the consent of all the signatories to be effective.²²⁹

- 7.24. This remained a problem for many states with overseas territories. However, there is a well established practice that where a treaty does not clearly by its nature apply to all the territory of a party, yet is silent as to its territorial scope and lacks a territorial clause, a state may decide to which, if any, of its overseas territories the treaty will be extended, and can make its position clear either at the time of signature or on ratification. Jersey and the other Crown dependencies are not part of the UK's metropolitan territory and must be mentioned expressly either in the treaty or in an instrument of ratification if it is to extend to them. The UK has now a long established practice that where it ratifies a treaty, it does so on behalf of the United Kingdom of Great Britain and Northern Ireland and such (if any) of the Crown Dependencies and its overseas territories as wish the treaty to apply to them. This practice has been acquiesced in by other States and is regarded by the Secretary General as establishing a “different intention” for the purposes of Article 29 of the Vienna Convention.

²²⁹ Article 20(2) of the Vienna Convention.

- 7.25. The Kilbrandon Commission noted that there did not appear to be any evidence of any "great difficulties" experienced by Jersey over the application of treaties or the arrangements for consultation. The States of Jersey were concerned that the UK government was under more pressure to accede to treaties for itself and its overseas territories and, against the best intentions of the UK, this may lead to Jersey being bound in to treaties it did not want to be bound to. To deal with this concern, the States made two principal submissions:
- that Jersey should have the right, after appropriate consultation, to decide whether to be bound by a treaty relating to domestic matters and it would be made clear to the international community that signature by the UK did not in itself imply that Jersey was bound. This was essentially the 1950 position (the Home Office countered that in the current international climate, this would not be possible); and
 - that the UK would pass an Act of Parliament which would define more precisely the relationship between Jersey and the UK. Given the difference in principle between the States and UK view of the constitutional ability of the UK to legislate for Jersey, Kilbrandon considered this proposal doomed to failure.

The Home Office was only prepared to address the concerns of Jersey by strengthening the notification procedures in relation to proposals likely to lead to treaties and providing Jersey with an opportunity to express views during the negotiation stage. The Jersey Constitutional Association took a harder line than the States, stating that it had not been established that the UK Parliament was entitled to legislate for Jersey on any matter without the consent of Jersey and that Jersey had the right to accept or reject international treaties. Bodies such as the Jersey Democratic Movement and the TGWU were more supportive of the UK's ability to restrain Jersey's use of independent powers. Kilbrandon concluded that the UK Parliament does have the power to legislate for Jersey without its consent on any matter in order to give effect to an international agreement. That conclusion was not based on any legal principle as Jowell demonstrates, but rather was based on the notion of convenience.

- 7.26. The modern tendency towards addressing on an international level matters, which were previously a matter of domestic concern only, self evidently has important consequences for Jersey's constitutional relationship with the UK. One example is provided by the recent European Union taxation initiatives, pursuant to which jurisdictions such as Jersey made fundamental changes to their taxation regimes. There were difficulties over the Finance Law which was passed by the States in 1998, but not approved by the Privy Council until 2001. The Home Office was reluctant to put the Law forward for royal assent because it was seen as including harmful tax measures. However, after the threat of litigation, the Law was

presented to Her Majesty in Council and sanctioned. Thereafter the UK then made some changes to its own tax legislation which would allow it to tax UK companies for the profits of certain Controlled Foreign Companies as if such companies had been resident for tax purposes in the UK, but there is arguably nothing constitutionally objectionable in either the UK or the island making legislation which deals with their respective domestic tax systems.

Commentary

- 7.27. It would be naïve to expect the UK to put the interests of Jersey above those of the UK. Some would go so far as to suggest that this puts Jersey in such an awkward position in respect of international affairs that thought should be given to the possibility of independence,²³⁰ or at least that the methods of protection of the Jersey's interests should be reviewed. The relevance of this discussion is witnessed by the *Second Interim Report* of the Constitution Review Group,²³¹ where serious consideration is given to the practical aspects that would be involved for Jersey in seeking independence from the United Kingdom, or other incremental change in the constitutional relationship.

A post-Kilbrandon perspective

- 7.28. The modern view in Jersey would be that, rather than the UK having paramount power which it would exercise only rarely in the areas identified by Kilbrandon, Jersey agrees to the curtailment of its freedoms because it has been in its best interests to do so. In a statement to the States in 2002 the Attorney-General stated that there is no authority or constitutional principle in support of the traditional Kilbrandon view that Parliament has unlimited legal power of legislating for Jersey, limited by convention restraining (but not wholly excluding) its exercise in domestic affairs including taxation. The UK has no legal power to legislate for Jersey in domestic matters, because it would be acting contrary to constitutional principle and democratic principle/human rights (based on non-representation in UK parliament).
- 7.29. Jeffrey Jowell provides a strong critique of the Kilbrandon approach.²³² He notes that Kilbrandon was reporting in a post colonial age when the sovereignty of Parliament was the only firm constitutional rule. That approach can now be seen to be heavily dated when viewed in light of events such as:
- i. the UK's accession to the European Union;
 - ii. the great advance of judicial review;

²³⁰ J. Kelleher, "Jersey and the United Kingdom: A Choice of Destiny" (2004) 8 *Jersey Law Review*. See also, Sir Philip. Bailhache, "One or two steps from sovereignty" (2009) 13 *Jersey and Guernsey Law Review* 252

²³¹ (November, 2007).

²³² "The Scope of Guernsey's Autonomy - a brief rejoinder" (2001) 5 *Jersey Law Review*.

- iii. the recent judicial endorsements of common law constitutional rights; and
- iv. the direct application of the principles contained in the European Convention of Human Rights through the provisions of the Human Rights Act 1998.

He suggests that justifying the power of the UK over Jersey on the grounds of Parliamentary sovereignty alone is incorrect. The origins of that concept were based on the separation of powers between the Monarch (not elected) and Parliament (elected), justifying the supremacy of the latter over the former and, on this analysis, the doctrine of parliamentary supremacy does not justify the supremacy of the UK Parliament over the domestic affairs of Jersey. Democratic principle insists the will of the UK Parliament should not prevail over Jersey, as Jersey residents have no representation in the UK Parliament: this would also be a breach a fundamental principle of the European Convention on Human Rights. Jowell notes that the UK courts are now more likely to consider constitutional principle as overriding the words of the sovereign UK Parliament. Foundational requirements of a democracy (e.g. access to justice or freedom of expression) are explicitly recognised by the courts as common law principles which will be applied unless there is a clear duty to apply Parliament's words clearly spoken. Under the Human Rights Act 1998, judges are bound to abide by and enforce ECHR rights. They may not strike down Parliamentary legislation, but if a declaration of incompatibility is issued it is likely that Parliament will comply. Jowell's conclusion is that these developments "enliven the possibility that the courts would in future hold unconstitutional - in common law or under the European Convention - any imposition of the UK Parliament's will upon the Islands in domestic matters without their consent". In so far as the areas mentioned by Kilbrandon in respect of which the UK should be free to exercise its "paramount powers" are correct, they lie in the realm of the Crown and not Parliament. The UK's powers are restricted to those exercisable under the diminishing scope of the Royal prerogative. The classic prerogative of the Crown, according to Jowell, is to maintain the Queen's peace in times of grave emergency or the breakdown of law and order. Thus the scope of the power is limited to extreme situations. The Crown has a prerogative to make international treaties. In Kilbrandon's time, no prerogative power could be challenged in the courts. This is no longer the case and such power can be challenged like any other governmental power, if justiciable.²³³ While

²³³ In *Council for the Civil Service Unions v Minister for the Civil Service* [1985] AC 374 it was held that delegated prerogative power was subject to judicial review. It is likely that this extended to direct exercise, but prerogative powers such as those relating to the making of treaties are not justiciable, but this was on the basis that a court of law was not the place to decide whether a treaty should be concluded. This suggests a focus on the merits of the treaty rather than (relevant to Jersey) whether the exercise of the power to bind by treaty was lawful.

international law recognises the Crown's ability to bind its dominions as between sovereign states, Parliament must still transform the treaty into UK law and it is highly arguable today that this should remain subject to domestic constitutional limitations, that is, remain subject to Jersey's consent in relation to domestic matters. The logic of Jowell's approach received considerable judicial support in the Chagos Islands case (*Bancoult* above) in 2008.

- 7.30. The States of Jersey Law 2005 is the central piece of legislation dealing with the structure of government in Jersey and it was therefore considered that the opportunity should be taken to make a statement about Jersey's constitutional position. The preamble provides: "Whereas it is recognized that Jersey has autonomous capacity in domestic affairs; Whereas it is further recognized that there is an increasing need for Jersey to participate in matters of international affairs". While only preambles, this Law (as are all Laws) was approved by Her Majesty in Council and it may be therefore that a court would take the recognition by the Crown of the autonomy of the States in domestic matters to be important. The Crown's position with regard to the States also changed fundamentally as a result of the abolition of the Lieutenant-Governor's veto and the Bailiff's casting vote and right of dissent. It is an interesting question the extent to which these fundamental changes in the structure of government will be seen to promote democracy and, in turn, advance the cause of recognition of Jersey's right to determine its domestic affairs and participate in international affairs. Article 31 of the Law contains new provisions designed to ensure that the States has a greater control by enabling the States to signify their views on draft Orders in Council extending UK Acts or provisions of UK Acts to Jersey. If the Royal Court finds that the States have not signified their agreement when the matter is presented for registration, it will be required to refer the matter to the Chief Minister, who will refer it to the States.

Dispute Resolution

- 7.31. There is scope for disagreement between Jersey and the UK, if the UK is in a position to legislate for Jersey against its wishes. This is compounded by the increasing encroachment of international law on what was previously considered matters of domestic concern. A dispute may be resolved in the following ways:
- i. Consent obtained; in practice the Jersey's consent is always sought. According to Bois generally no legislation had been imposed in the face of States objections.
 - ii. Informal machinery, with consent secured on an informal basis.
-

- iii. Suspension of Orders: in relation to Prerogative Orders in Council and Statutory Instruments, not Acts of Parliament.
- iv. Courts: some would argue that UK courts are now much more likely to consider constitutional principle as overriding the words of the UK Parliament.²³⁴ In the event that the constitutional relationship came to be considered by a court, it is an open question as to whether the result would be the same if the matter finished up in the UK Supreme Court or the Privy Council.

²³⁴ See para. 6.25, above: (i) foundational requirements of a democracy are now explicitly recognised by the courts; (ii) judges (in both Jersey and the United Kingdom) are bound to abide by and enforce Convention rights; (iii) prerogative power can now be challenged like any other governmental power, if justiciable. Whilst the UK may bind itself to an international treaty, the legislature must still transform the treaty into UK law and according to Jowell this requirement should remain subject to domestic constitutional limitations and any action by Parliament should be subject to Jersey's consent.

8. Forms of Jersey domestic legislation

8.1. The legislative sources of law in Jersey are as follows:

- i. Laws;
- ii. Orders;
- iii. Permanent Regulations;
- iv. Triennial Regulations;
- v. Prerogative Orders in Council;
- vi. Acts of UK Parliament, and subordinate legislation thereunder; and
- vii. Royal charters, which set out the ancient rights of the Islanders.

8.2. In this section of the study guide, the first four are considered. It should be noted, however, that fundamental changes in the way in which the States operates were introduced pursuant to the States of Jersey Law 2005 (rendering some older accounts inaccurate). Key changes include:

- i. the committee based system of government was replaced by a ministerial system;
- ii. the Bailiff's casting vote and power of dissent and the Lieutenant-Governor's power of veto were removed;
- iii. there are new requirements relating to approval by the States of any Acts of UK Parliament or Prerogative Orders in Council; and
- iv. much of the detail was left to be dealt with by standing order.

8.3. It must also be noted that Bois was writing in 1972. Since that time, the practice has changed considerably in a number of respects, which will be detailed below. Nonetheless, Bois is a very useful and practical source of information as to the position at that time.

Laws

8.4. Laws are passed by the States, confirmed by Her Majesty in Council,²³⁵ and registered in the Royal Court. Pursuant to the March 1771 Order in Council, which sanctioned the Code of 1771:

- the only insular body entitled to enact legislation was the States;

²³⁵ Legislation passed by the States requires the approval of Her Majesty in Council, unless it is in the form of a Regulation or Order authorised by an Order in Council, or by States legislation previously so approved.

- the States could pass provisional laws and ordinances in force for up to three years; and
- any laws to remain in force for longer than three years required the sanction of an Order in Council.

Around 1800 it was determined that the States would require the sanction of an Order in Council to amend any law previously passed and sanctioned by Order in Council, otherwise the Islands would in reality have full and unfettered legislative authority. Exceptions are made in cases of emergency, for example, during WW2 when by Act of Parliament, the States were given the power to amend any enactment. Emergency powers have now been placed on a more modern statutory basis by the Emergency Powers and Planning (Jersey) Law 1990, which does certainly provide for wide ranging subordinate legislation in times of emergency to be adopted on a temporary basis without royal assent.

8.5. Historically the Privy Council refused to sanction the following Laws:

- i. a 1786 Law which would have prevented any action being brought on the strength of an anonymous accusation. Instead of refusing to sanction the Law the Privy Council declared that the Law was null and void.
- ii. a 1798 Law which required a man to leave Jersey if he refused to serve in the Militia.
- iii. an 1826 Law relating to the cutting of sea weed, which certain Islanders petitioned the Privy Council to refuse.

Equally historically, the Privy Council has sanctioned a Law subject to amendments or suspended a Law, e.g. an 1830 Law relating to oyster fishing (the Privy Council shortened the open season, although it was later extended again); and an 1831 Law in relation to banking (the operation of which was suspended by the Privy Council until the States had considered whether a better arrangement could be found).

8.6. Bois noted that advice on draft Laws is very often obtained before they are submitted to the States, and on occasions given after the Law is submitted to the Privy Council for sanction. If the Privy Council is not minded to sanction the Law in the form presented to them, there appear to be two outcomes in practice:

- the Law would be returned to the States for amendment before sanction is given;
- the Law would be sanctioned subject to an undertaking that certain amendments are made.

There is no convention requiring the sovereign to give her consent to insular legislation, but such consent would not be withheld lightly.²³⁶ Royal assent has only been refused where:

- i. the Island is attempting to legislate for a “reserved” matter (defence, the armed forces, foreign affairs, extradition, customs and excise, merchant shipping, fisheries, post office, copyright);
- ii. the proposed legislation would be contrary to an international treaty to which Jersey, as one of Her Majesty’s dominions, is a party;
- iii. the measure would be contrary to the essential interests of Her Majesty;
- iv. the measure would be contrary to minimum standards of British justice; or
- v. there are any other “compelling reasons”.

8.7. It is clear from number of Laws adopted by the States since the time of Bois that this summary is for the most part of historical interest only. The States have in fact passed much legislation in a number of these areas, examples of which are given below:

- In relation to defence, there is pending the Armed Forces Offences and Jurisdiction (Jersey) Law 200-, which will give effect appropriately to the Armed Forces Act 2005.
- In relation to foreign affairs, the States have passed the Taxation (Implementation)(Jersey) Law 2004 pursuant to which regulations may be made by the States to create domestic legislation to give effect to the island’s obligations under tax information exchange agreements with other countries.
- In relation to extradition, the States have passed the Extradition (Jersey) Law 2004. This legislation also contains an example of the States legislating to abolish, by implication, the prerogative right of appeal to the Privy Council in extradition matters, as Article 54 provides that decisions of the Magistrate or the Attorney General may only be questioned by an appeal brought under that Part of the Law.
- In Customs matters, the States passed the Customs & Excise (Jersey) Law 1999
- In relation to merchant shipping, the States have passed the Shipping (Jersey) Law 2002. This lengthy piece of legislation brought into domestic law a number of shipping conventions such as the International Convention on Salvage 1989 and repealed, insofar as the same applied to Jersey, the Merchant Shipping Act 1894,

²³⁶ See the House of Commons Justice Committee’s Eight Report of Session 2009-2010, *Crown Dependencies*, para. 51.

the Merchant Shipping (Liability of Shipowners and others) Act 1900, the Merchant Shipping Act 1906 and the Maritime Conventions Act 1922.

- In relation to fisheries, the position is more complex. The States have adopted the Sea Fisheries (Jersey) Law 1994, which gives the States wide regulation making powers in relation to fisheries, but by Article 8, those powers cannot be exercised without the concurrence of the Secretary of State. It is thought that this provision was inserted in order to ensure that the UK could be satisfied its international obligations could be met, but the provision has caused delay and thus difficulty in practice. It is perhaps unclear whether this provision sits comfortably with the extension to Jersey of the territorial sea by the Territorial Sea Act 1987 (Jersey) Order 1997.
- In relation to the Post Office, the island took over the operation of the post office by the Postal Services (Jersey) Order 1969 and the Post Office (Jersey) Law 1969 (now repealed by the Postal Services (Jersey) Law 2004).
- The Intellectual Property (Unregistered Rights) (Jersey) Law 201- was adopted by the States in December 2010.
- It may be relevant to note that the States also claim an extra territorial jurisdiction - see for example the Crime & Security (Jersey) Law 2003 Article 4(5). This would seem to suggest that the States assert, with royal assent, a full parliamentary jurisdiction.

8.8. There remains some doubt today as to the extent to which royal assent could be lawfully refused to Laws adopted by the States of Jersey. The experience in relation to the Finance Law of 1998 shows that though that law was inconsistent with the UK's approach to international tax policy, and might have been thought as contrary to the essential interests of the UK, nonetheless the Law was given assent after considerable pressure was brought to bear by the island authorities including the threat of litigation against the Secretary of State for judicial review in respect of his failure to put the Law forward for assent. It is clear that it is accepted (the Extradition Law is one such example) that the States may pass legislation to give effect to international obligations binding on the UK. This would seem to demonstrate the autonomy in domestic affairs (the passage of legislation) notwithstanding that the subject matter of the legislation was in fact international business.

8.9. On the other hand, it might be thought surprising if the Crown were to allow the United Kingdom to be in breach of an international obligation by giving assent to a piece of island legislation which was inconsistent with that obligation. This would seem to give the UK a particular interest in the human rights implications of any legislation adopted, not least because although the passage of the Human Rights (Jersey) Law 2000

has incorporated the effect of the Convention into domestic law, it is the UK which would be the party before the European Court of Human Rights in Strasbourg if a breach were to be asserted there on account of Jersey. The better view today might well be that the Crown would be justified in refusing assent if there were solid grounds for thinking that the proposed legislation would, if adopted, leave the UK in breach of an international obligation. This would probably trump the 1972 concept that the measure would fall short of "minimum standards of British justice" because the requirements of Article 6 of the European Convention on Human Rights would appear to cross that threshold comfortably. *R (on the application of Barclay and others) v Secretary of State for Justice and others*²³⁷ provides an illustration of the views of the English courts on a judicial review application in that jurisdiction which supports this line, although it has to be noted that neither the Guernsey nor the Sark authorities were parties to the proceedings and it may be that argument pursued in the Privy Council, assisted by the decisions of the insular courts under appeal, might lead the court to follow a slightly different course.

- 8.10. Under the Standing Orders of the States of Jersey 2006²³⁸ the following process is used:
- i. Proposition: A proposition for a new law is made in the form of a *Projet de Loi*. The proposition could be made by amongst others a Minister, any States member, a scrutiny panel and the Comité des Connétables. A copy goes to the Greffier and must be approved as being procedurally in order by the Bailiff.
 - ii. First reading: the title of the *Projet* is read aloud in the States. If proposed by an individual, it is referred to the relevant Minister for consideration, in which case that Minister must report back before the *Projet* is considered any further. The *Projet* is lodged au Greffe. Save in emergencies, there can be no debate on the *Projet* until at least 6 weeks have elapsed (depending on who lodged the *Projet*).
 - iii. Second reading: there are two stages: (i) a debate on the principle of the *Projet* (e.g. as indicated in the preamble) and, if the principle is approved (ii) a debate on the *Projet* on an Article by Article basis.
 - iv. Third reading: the States vote on whether to pass the *Projet* as amended during the second reading or not. Only minor errors and mistakes can be rectified at this stage. Following approval, the *Projet* is now an Act of the States (but not yet law).

²³⁷ 2008 EWCA Civ 1319.

²³⁸ The detail of the Standing Orders is not examinable.

- v. Submission to Her Majesty in Council: a copy of the Law as adopted by the States is submitted by the Law Officers to the Lieutenant Governor together with their opinion as to whether there is any reason why royal assent should not be given. The Explanatory Memorandum which accompanies that opinion sets out the purposes of the Law and analyses the international obligations of the UK on account of Jersey which might impact upon it. The Lieutenant Governor transmits that material to the Secretary of State for Justice as Her Majesty's Privy Councillor with responsibility for the affairs of Jersey and Guernsey. The Justice Secretary consults with other Ministers having responsibility in the UK for the policy area covered by the Law, and thereafter submits the Law to the Privy Council office in order that the Monarch, acting with the advice of her Privy Council, may approve it.²³⁹ The Order in Council approving the Law is then sent to the Lieutenant Governor for transmission to the Royal Court so that it can be registered.

The practice set out above reflects the constitutional position. Under the Order in Council of 1771, Laws passed by the States require to have royal assent. There is thus a report to the Crown (in the person of the Lieutenant Governor) by its Law Officers in Jersey, and following consultation by the Privy Councillor responsible to the Crown for the affairs of Jersey (and **not** in his capacity as a member of Her Majesty's Government in the UK), the Queen in Council gives that assent.

- vi. Registration: the Law is registered by the Royal Court and, under the Interpretation (Jersey) Law 1954 only then is it passed. A Law may come into force immediately or later via an Appointed Day Act.
- vii. Publication: under the Official Publications (Jersey) Law 1960, the enactment of legislation by the States must be published by the States Greffier in the Jersey Gazette, including information on the date when it came into force and where copies may be obtained.

The average time between the adoption of a draft Law and its registration in the Royal Court after confirmation by the Privy Council is six months.

²³⁹ For a more detailed account of the process than is necessary for the purposes of the examinations, see L. Marsh-Smith, "The production of legislation in the Crown Dependencies" (2009) 14 *Jersey and Guernsey Law Rev.*

Regulations of the States

- 8.11. Regulations are used (i) where a Law provides the States with a power to legislate for the purpose of implementing that Law; or (ii) where an Order in Council provides the States with a power to legislate (e.g. various 19th century public order Orders in Council). In each case, sanction of such Regulation by an Order in Council is not required. A power to legislate (by order, regulation, rule or bye-law) for the implementation or alteration of the empowering legislation can be conferred upon the States in full assembly, e.g. the Housing (Jersey) Law 1949 which empowers the States may make regulations for giving effect to the provisions of the Housing Law and for the due administration thereof.

Triennial Regulations

- 8.12. Triennial Regulations may only be used to enact and renew provisional laws and ordinances for periods not exceeding three years. Such regulations must not infringe the Royal prerogative, nor be contrary to the permanent and fundamental law of the Island (therefore not a useful legislative instrument for changing existing law.) The power for the States to make provisional laws for up to three years' duration was noted in the Order in Council in March 1771 (which also sanctioned the Code of 1771). This provided: "And his Majesty doth hereby order that no Laws or Ordinances whatsoever, which may be made provisionally or with a view of being afterwards assented to by His Majesty in Council shall be passed but by the whole assembly of the States of the Island; And with respect to such provisional Laws and Ordinances so passed by them, that none shall be put or remain in force for any time longer than three years ..." An Order of Council made in 1884 expanded the power to make triennial regulations by providing that they could be re-enacted and renewed, but only for further periods of three years, but also imposed a proviso that they should relate "exclusively to subjects of a purely municipal and administrative nature." There was a further proviso, probably inserted out of an abundance of caution, that such regulations "do not infringe upon the Royal Prerogative and are not repugnant to the permanent political or fundamental laws of the Island." A proposition to pass a new triennial regulation is made in the form of a *Projet de Règlement* and the procedure is similar to that for passing a *Projet de Loi*, except that the Royal assent is not required. Triennial Regulations are not used as often as they used to be, due to the fact that it has been found to be more practical to insert into Laws powers to make changes by means of regulations of the States or ministerial orders. They have been used to "test the water" — such regulations may be perpetually re-enacted and thus become effectively permanent.

Orders and Rules

- 8.13. Orders are instruments made in exercise of powers conferred by Acts of UK Parliament, Laws or Regulations. The power to make an Order depends on the terms of the relevant Act of UK

Parliament, Law or Regulation. Generally the responsibility for making an Order lies with the relevant Minister. Under the Royal Court Law 1948, the Superior Number of the Royal Court was given the power to pass Royal Court Rules. Currently, an Order is not generally submitted to the States for approval but, having been made by the Minister upon whom the responsibility for making an Order rests, is laid before the States and promulgated by publication in the Jersey Gazette. However, an Order and any Rules made by the Royal Court are subject to annulment.

- 8.14. Under the Subordinate Legislation (Jersey) Law 1960 any enactment passed in the exercise of a power conferred by a principal enactment shall be laid before the States as soon as possible after it is passed. At any time thereafter the States may resolve that it be annulled and it shall cease to have effect without prejudice to anything previously done thereunder. Article 28 States of Jersey Law 2005 provides that a Minister may delegate certain functions but not any power to make an enactment.

9. Relationship between Jersey and the European Union

Introduction to European integration

- 9.1. In Jersey, as elsewhere, people are often befuddled about 'Europe'. Lawyers should never be confused on these matters so it may hardly need to be said that there are two systems of 'European law'.
- i. The European Union (the subject matter of this chapter), which currently has 27 Member States. The European Court of Justice has its seat in Luxembourg.
 - ii. The Council of Europe, which currently has 47 Member States. The European Court of Human Rights, which adjudicates on the European Convention on Human Rights, has its seat in Strasbourg. This is not part of the syllabus.

The European Union

- 9.2. The European integration process was launched with the setting up of the European Coal and Steel Community (ECSC) in 1951 by six west European countries, including France and Germany. In 1957 those six countries agreed to enlarge the scope of their co-operation to form the European Economic Community (EEC), the principal aim of which was to form a common market amongst the member states. The UK joined the EEC on the 1 January 1973.

Background: the principal EU treaties²⁴⁰

The EU currently operates on the basis of two treaties:

- The Treaty on the Functioning of the European Union (abbreviated to 'TFEU'). This is a much amended version of the original 1957 'Treaty of Rome'
- The Treaty on European Union ('TEU'), originally signed at Maastricht in 1992 revised by the Treaty of Amsterdam (1999,) the Treaty of Nice (2003) and the Lisbon Treaty (2009).

Texts of the treaties are on-line here:

<http://eur-lex.europa.eu/en/treaties/index.htm>

- 9.3. The authorities in Jersey considered that joining the EEC would be to the detriment of Jersey. However, Article 355 TFEU (formerly Article 299(4) and 227(4)) in previous treaties extends it to the European territories of Member States. Much

²⁴⁰ There is an open question as to the extent to which these Treaties apply to Jersey. The Treaty of Rome clearly does to the extent of Protocol 3 because that is a Protocol to the UK's Accession to the EEC, but there is not a territorial extent clause in the other treaties. In any event, they could only apply to the extent they are concerned with Protocol 3 matters anyway. This is of particular relevance to the Maastricht treaty dealing with the single market, because that concept mixes the common customs areas with other considerations which are probably outside Protocol 3.

of the debate surrounding the Kilbrandon Report, which was prepared around the time the UK was considering joining the EEC, must be seen in this light. In the end, Jersey became linked to the EEC in some respects only, through Protocol 3 of the Treaty Relating to the Accession of the United Kingdom to the European Economic Community. Much has changed since the time of Protocol 3.²⁴¹ Nonetheless, the legal nature of Jersey's relationship with Europe is less important than the economic impact of the process on Jersey as an autonomous jurisdiction whose economic prosperity is closely linked to Europe. Against this background it is not surprising that Jersey has come under pressure to adopt the EC's "fiscal acquis" (e.g. in relation to taxation).

- 9.4. The European Economic Area (EEA) agreement unites the EU member states and three European Free Trade Association (EFTA) states — Iceland, Liechtenstein and Norway²⁴² — into an internal market governed by some basic rules aimed at free movement of goods, services, capital and persons.²⁴³ Pursuant to the European Economic Area (Jersey) Law 1995, all enactments dealing with the EC which also relate to EEA To the extent that EC Rules apply to Jersey and form part of the EEA Agreement, the Island is bound by that latter Agreement too. This is given effect in Jersey in domestic Law by the European Economic Area (Jersey) Law, 1995.

Application of EC law in Jersey

- 9.5. Jersey is not a Member State nor an Associate Member of the EU.

The relationship of the Islands to the EU is governed by Article 355 (5)(c) TFEU and by Protocol 3. The Treaty applies to the Islands (as territories for whose external affairs in the UK is responsible) only to the extent described in Protocol 3. This has greatly narrowed the extent to which the Treaty will apply to Jersey. Any change in these arrangements would require an amendment to the Treaty of Accession and in turn the Treaty (any such amendment must be ratified by all Member States including the UK). Jersey is treated as part of the United Kingdom for the purposes of applicable provisions of the Treaty (i.e. those matters described in Protocol 3), but as a third country for the purposes of non-applicable provisions of the Treaty (e.g. fiscal harmonisation and financial services).

Protocol 3

- 9.6. Article 355(5)(c) TFEU, (formerly Article 229(6)(c) and 227(5)(c) in previous treaties) provides that the Treaty applies to the Channel Islands only to the extent necessary for the

²⁴¹ A. Sutton, "Jersey's Changing Relationship with the United Kingdom" in P. Bailhache (ed.), *A Celebration of Autonomy. 1204-2004 800 Years of Channel Islands Law* (2005).

²⁴² But not Switzerland, which is also a member of EFTA.

²⁴³ This Agreement applies to Jersey, but only to the extent of Protocol 3.

implementation of Protocol 3. In areas falling outside the Protocol, Jersey remains free (subject to the duty not to discriminate between EU citizens – Article 4 of the Protocol) to legislate as it wishes. Sutton points out that Protocol 3 raises a legitimate expectation under EC law that, for example, EC tax rules would not be extended to it by the UK without Jersey's consent. The text of the Protocol is:

Article 1

1. The Community rules on customs matters and quantitative restrictions, in particular those of the Act of Accession, shall apply to the Channel Islands and the Isle of Man under the same conditions as they apply to the United Kingdom. In particular, customs duties and charges having equivalent effect between those territories and the Community, as originally constituted and between those territories and the new Member States, shall be progressively reduced in accordance with the timetable laid down in Articles 32 and 36 of the Act of Accession. The Common Customs Tariff and the ECSC unified tariff shall be progressively applied in accordance with the timetable laid down in Articles 39 and 59 of the Act of Accession, and account being taken of Articles 109, 110 and 119 of that Act.

2. In respect of agricultural products and products processed therefrom which are the subject of a special trade regime, the levies and other import measures laid down in Community rules and applicable by the United Kingdom shall be applied to third countries.

Such provisions of Community rules, in particular those of the Act of Accession, as are necessary to allow free movement and observance of normal conditions of competition in trade in these products shall also be applicable.

The Council, acting by a qualified majority on a proposal from the Commission, shall determine the conditions under which the provisions referred to in the preceding subparagraphs shall be applicable to these territories.

Article 2

The rights enjoyed by Channel Islanders or Manxmen in the United Kingdom shall not be affected by the Act of Accession. However, such persons shall not benefit from the Community provisions relating to the free movement of persons and services.

Article 3

The provision of the Euratom Treaty applicable to persons or undertakings within the meaning of Article 196 of that Treaty shall apply to those persons or undertakings when they are established in the aforementioned territories.

Article 4

The authorities of these territories shall apply the same treatment to all natural and legal persons of the Community.

Article 5

If, during the application of the arrangements defined in this Protocol, difficulties appear on either side in relations between the Community and these territories, the Commission shall without delay propose to the Council such safeguard measures as it believes necessary, specifying their terms and conditions of application.

The Council shall act by qualified majority within one month.

Article 6

In this protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the Island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or grandparent was born, adopted, or naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.

The administrative arrangements necessary to identify those persons will be notified to the Commission.

- 9.7. Article 1 of the Protocol applies the EC "rules on customs matters and quantitative restrictions" to Jersey. In particular Article 30 TFEU (formerly Article 25 and Article 12 of previous treaties) provides for these matters between EU member states (including Jersey). Jersey forms part of the EC customs territory and is treated so far as industrial, agricultural and horticultural products are concerned as an EC member. These products may be imported into or exported from Jersey to other Member States without customs duties being imposed. The common customs tariff between members and non-members applies and Jersey may impose duties on imports and exports with non-members. Plender notes that "customs matters" is broader than "customs duties". Therefore the Treaty applies not just to the physical import or export of goods, but also to rules relating to the production or marketing of goods.²⁴⁴ Physical barriers may be caught under the expression "customs matters", but it is less likely that technical barriers (e.g. toy safety measures) and fiscal barriers (e.g. harmonisation of taxation of cigarettes) would be

²⁴⁴ R Plender, "The Protocol, the Bailiwicks and the Jersey Cow", in R. Plender (ed), *Legal History and Comparative Law* (London: Frank Cass 1990).

embraced. Article 1(2) provides that the EC rules on import measures re: agricultural products and products processed therefrom which “are the subject of a special trade regime” (which are designed to enable free movement of such agricultural products intra-EU) apply to Jersey. This may mean that the EC provisions on anti-competitive practices and abuse of a dominant position would apply to arrangements between Jersey and (say) France (but not the UK) relating to such agricultural products,²⁴⁵ but this conclusion may have been affected by *Jersey Produce Marketing Organisation Limited v States of Jersey and Others*.²⁴⁶ The rules are now drawn sufficiently widely that EC law is likely to apply to any restrictions having “an effect” in the EU. Those aspects of community rules which are designed to promote the free movement of products are certainly applicable to Jersey. It is sometimes difficult to establish whether a measure which is partly based on the treaty base for harmonisation of rules for free movement of goods and partly on other treaty bases such as health grounds, does or does not apply to the island. Article 3 of Council Regulation 706/73 permits the Channel Islands and the Isle of Man to retain, concerning trade in live animals, fresh meat and meat based products, the specific provisions in relation to foot and mouth disease which they apply to such imports. Save for this provision, no formal derogations have been obtained for Jersey.

- 9.8. Under Article 2 Channel Islanders do not benefit from EC provisions on free movement of persons and services, although they can continue to benefit from the rights they enjoy in the UK. Thus Jersey is in the position of a third country, with no legal rights of access to EU markets, e.g. in financial services.
- 9.9. Article 4 provides for the requirement to treat equally all natural and legal persons in the EC, i.e. a duty to refrain from discrimination. Decisions of the European Court in *Barr and Montrose*²⁴⁷ and *Rocque*²⁴⁸ have clarified the scope of Article 4:
 - There shall be no discrimination between any “citizens of the Union”, including (not other than) British citizens (i.e. Jersey cannot discriminate between British citizens and other EU citizens).
 - There is no prohibition on discrimination between Islanders and Community Nationals (therefore the Housing Law does not conflict).
 - The prohibition extends to the EU law as a whole, thus when introducing legislation in areas subject to EU law, Jersey is obliged not to discriminate between EU nationals.

²⁴⁵ Powell, “Applicability of European Union Competition Regulations in Jersey” (1997) 1 *Jersey Law Review*.

²⁴⁶ 2005 JLR 513

²⁴⁷ [1991] ECR I-3479.

²⁴⁸ [1998] ECR I-4607.

Plender suggests that this may require Jersey to recognize professional qualifications, protect patents and recognise banking and insurance undertakings from other Member States as though they were those of the United Kingdom.

Article 4 is not to be interpreted so as to apply indirectly rules not otherwise applicable in Jersey by virtue of Protocol 3, e.g. rules on free movement of workers. In *Rocque*²⁴⁹ Article 4 was applied to Jersey deportation arrangements because the situation fell within EU law (rules on free movement of workers). However, the rules themselves on free movement of workers could not be applied to Jersey by the back door to allow a community national to gain employment in Jersey.

- 9.10. According to Article 5, in the event that difficulties appear in relations between the Community and Jersey, the European Commission shall without delay propose to the European Council such safeguard measures as it believes necessary, specifying their terms and conditions of application. The European Council is required to act within one month, by qualified majority. Plender points out that Article 5 can apply to either temporary or permanent difficulties: the “difficulties” do not need to be experienced in common by all of the territories making up “either side”; it would be enough if Jersey alone, or any Member State alone, was experiencing difficulties. Jersey is permitted, pursuant to a Council Regulation, to retain the prohibition against imports of cattle (to protect against foot and mouth). This exception was effected by means of a Council Directive rather than by means of Article 5. Sutton notes that “difficulties” are not confined to trade or even economic difficulties. The contrary view would be that Article 5 only applies to those parts of Treaty necessary to maintain free trade and the non-discrimination clause.
- 9.11. Article 6 defines amongst other things a “Channel Islander”. This is defined quite narrowly and excludes anyone who was, or any of whose parents or grandparents were, born in the UK. A British citizen who is a “Channel Islander” under the Protocol will have his or her passport endorsed with the words “the holder is not entitled to benefit from European Community provisions relating to employment or establishment.”

Application of EC law to Jersey through Protocol 3

- 9.12. The Treaty requires for its implementation and that of the instruments made under it, a modification of the laws of the territories to which it applies. This was achieved by the European Communities (Jersey) Law 1973 which brought the relevant treaties into domestic law. Article 2 of the Law provides that applicable EU rules are automatically incorporated into the Island’s domestic law. It is arguable that EU case law on the “direct effect” of EU law would be applicable in Jersey. Under EU law, where there is a conflict between Community law and national law, Community law

²⁴⁹ [1998] ECR I-4607.

prevails. Jersey legislation which infringes European law can be challenged (by way of judicial review) in the courts. A Jersey court could decide the issue for itself (on basis of existing precedents) or refer to European Court of Justice (ECJ). Article 3 of the Law states that in legal proceedings any question as to the meaning or effect of provisions of the Treaty having effect in Jersey, or of any Community instrument having like effect (including Council Regulations), shall be treated as a question of law and (if not referred to the ECJ for determination) be determined in accordance with the principles laid down by, and any relevant decisions of, the ECJ. The remainder of the Law seeks to implement the customs, agricultural and non-discriminatory provisions and other matters required to give effect to Protocol 3.

Forms of EC Law

9.13. The key EU institutions from the perspective of law making are the Council of the EU (meetings of Member States governments at ministerial level), the Commission, and the European Parliament. The TFEU confers certain powers on these institutions to make regulations and issue directives (as well as taking decisions, making recommendations and giving opinions):

- Directives — these describe the agreed objectives, leaving it to Member States to achieve these through legislative or administrative action, e.g. in relation to customs duties. A Member State may not rely on its own failure to implement a Directive as a defence as against an individual seeking to enforce the rights contemplated by the Directive in a national court.
- Regulations — these are ‘directly applicable’ as law in each Member State, e.g. the anti-competitive and abuse of dominant position provisions. Regulations may confer rights and obligations on private citizens.

Regulations and Directives apply to Jersey to the extent that they relate to Protocol 3 matters. Article 2 of the European Communities Legislation (Implementation) Jersey Law 1996 provides that the States may make regulations to give effect to any provision of the Treaty or any instruments thereunder (whether directly applicable or not, so could include Regulations and Directives). Such regulations would be a necessity in the case of a Directive and desirable in the case of a Regulation where local implementation measures are required. An example is the Cattle (Identification) (Jersey) Regulations 2002. Sutton points out that the fundamental principles of European law (direct effect, supremacy of European law and state liability towards citizens for breach of European law) as well as proportionality, legal certainty and legitimate expectations apply to the Crown Dependencies. “Soft law” instruments such as communications, guidelines and recommendations apply to Jersey to the extent that they are based on the provisions of the Protocol.

Rights of European Citizens in Jersey

9.14. Article 4 of Protocol 3 sets out a duty of the authorities in Jersey to refrain from discrimination. In "The Rights of European Citizens in Jersey",²⁵⁰ Plender queries the scope as follows:

- Is a citizen of an EU member (other than the UK) entitled to enter Jersey free of immigration control?
- Is he or she immune from deportation from Jersey following conviction on the basis that UK citizens are not subject to immigration control in Jersey nor subject to deportation?

Protocol 3 must be read in light of Article 227(5)(c) EC, which provides that EC law is inapplicable to Jersey save to the extent necessary to ensure the implementation of Protocol 3. Protocol 3 also provides that Jersey people shall not benefit from Community provisions relating to free movement of persons and services. A key authority is *Pereira Roque v Lieutenant Governor*.²⁵¹ Pereira Rui Rocque, a Portuguese national, was admitted to Jersey without restriction. Following two convictions for larceny the immigration service recommended his deportation. Rui Rocque contended that his treatment was contrary to EC law. The Royal Court (for the first time) referred certain questions of EC law to the European Court of Justice, staying the deportation order until those questions were resolved. The main statutory provisions involved were:

- British Nationality Act 1981: "the United Kingdom" includes the Channel Islands and a person born in Jersey (and their child) obtains British citizenship in the same way such persons born in England would do. No control of immigration exists between the Channel Islands and the United Kingdom.
- Immigration Act 1988: a person does not require leave to enter or remain in Jersey in circumstances where, pursuant to an enforceable EC right, that person has the right to enter or remain in the UK.
- Immigration Act 1971: a person who is not a British citizen is liable for deportation from Jersey if (amongst other things) the Lieutenant Governor deems his deportation to be conducive to the public good. British citizens have the right of abode in Jersey and may not be deported.

Both of these Immigration Acts were extended to Jersey by Order in Council in 1993.

²⁵⁰ (1998) 2 *Jersey Law Review* 220.

²⁵¹ 1998 JLR 246

Scope of Art 4 of Protocol 3

9.15. On the face of it, the terms of Article 4 do seem to preclude discrimination of this sort. However, if this was right, it would have led to the surprising results that:

- As Jersey permitted British citizens free access, it would need to provide citizens of other Member States with free access, so that it could not invoke public health, public security and public order exceptions which even Member States may invoke against citizens from other Member States — so Jersey would be in a worse position than are Member States.²⁵²
- Jersey could not realistically impose such exceptions on British citizens as, given the definition of a British citizen for these purposes, it included a good 50 per cent of Jersey residents so would permit Jersey potentially to deport all such persons. Furthermore, such an action would appear to be contrary to other international instruments to which, through the UK, the island is party, such as the International Covenant on Civil and Political Rights.
- While Jersey must allow citizens from Member States to enter and remain, no right exists for 'a Channel Islander'²⁵³ to enter and remain in Member States (other than the UK).

The ECJ rejected Rui Roque's case. It drew a distinction between arrangements for the treatment of nationals within the same Member State (which was essentially what the arrangements between the UK and Jersey were) and arrangements for the treatment of nationals from other Member States. The ECJ held that by virtue of Article 227(5)(c) EC and Protocol 3, the provisions on freedom of movement of workers did not apply to Jersey. The provisions of Article 4 of Protocol 3 could not be interpreted in such a way as to be used as an indirect means of applying EC laws which are not applicable to Jersey, such as freedom of movement of workers. Jersey was not therefore limited to deporting persons only on the grounds of public health, public security and public order

²⁵² It is arguable that this is indeed the effect of the current position. The Common Travel Area (see fn. 162, above) rules mean that Jersey must apply the same immigration rules as the UK and this extends to all EEA nationals. Yet the Channel Islander has no reciprocal rights into EU member states. See, generally, the report *The Status of Channel Islanders in the European Union, presented to the States by the Chief Minister* (February 2008). <http://www.statesassembly.gov.je/documents/reports/45051-30164-1222008.htm>

²⁵³ Protocol 3 provides: 'In this protocol, Channel Islander or Manxman shall mean any citizen of the United Kingdom and Colonies who holds that citizenship by virtue of the fact that he, a parent or grandparent was born, adopted, naturalised or registered in the Island in question; but such a person shall not for this purpose be regarded as a Channel Islander or Manxman if he, a parent or grandparent was born, adopted, or naturalised or registered in the United Kingdom. Nor shall he be so regarded if he has at any time been ordinarily resident in the United Kingdom for five years.'

(i.e. in the same circumstances as a citizen of another Member State could be deported from the UK). However, the ECJ noted that Jersey should not base the exercise of its powers on factors which would essentially lead to an arbitrary distinction for deportation orders for EU citizens, e.g. a deportation order in circumstances where British citizen would not have been subject to “repressive measures or other genuine and effective measures intended to combat such conduct”. Plender suggests that such existed in relation to the offence committed by Rui Roque, as British citizens convicted of similar offences were liable to imprisonment and binding over orders. The Immigration Act 1971 formerly provided that a deportation order made in Jersey also took effect in the UK, unless the Secretary of State decided otherwise. The ECJ noted that the effect of deporting Rui Roque could not be to deport him from the UK if the UK was not entitled to do so under EC law (as it would be subject to the public health, public security and public order requirements). Plender further suggests that Jersey’s current arrangements for deportation may be challenged and it may be better for a deportation order made by the Lieutenant Governor to require the person concerned to depart from and remain outside the Bailiwick; the authorities of the remaining parts of the ‘common travel area’²⁵⁴ may then decide whether or not to follow suit. Plender’s suggestion was in fact implemented by a provision in the Immigration and Asylum Act 1999, which amended the 1971 Act and provided that a deportation order made in Jersey will not take effect if the offender is, *inter alia*, a citizen of an EEA country.²⁵⁵

Referrals to the European Court of Justice

9.16. Only those parts of EC law applied to Jersey by virtue of Protocol 3 will be relevant within Jersey (e.g. if they affect intra-EC trade). Under Article 267 TFEU (formerly Article 234 EC):

- the European Court of Justice (ECJ) has jurisdiction to give preliminary rulings on (inter alia) the interpretation of the Treaty;
- where an interpretation question is raised before a national court of a Member State, that court may, if it considers that a decision on the question is necessary to enable it to give judgment, request the ECJ to give a ruling thereon;

²⁵⁴ ‘The UK, the Channel Islands, the Isle of Man and the Republic of Ireland collectively form a common travel area. A person who has been checked at immigration passport control at the point of entry into the common travel area does not normally need leave to enter at any other part of it. There is therefore no requirement for separate entry clearances to be issued where the applicant is going to transit through or remain for a while in one part of the Common Travel Area before travelling to another part’:
<http://www.ukvisas.gov.uk/en/ecg/commontravelarea>

²⁵⁵ See “Deportation and Human Rights” (2007) 11 *Jersey and Guernsey Law Review* 146

- where an interpretation question is raised in a case pending before a court of last instance that court shall bring the matter before the ECJ.
- 9.17. The English Courts follow the criteria set out in *Bulmer v Bollinger*²⁵⁶ and it is probable that the Jersey courts would follow the same criteria. “Necessary” means conclusive in the case; therefore the ruling is not necessary if other matters remain to be decided. In addition:
- There is no need to refer a question that has already been decided by the ECJ.
 - There is no need to refer a point which is reasonably clear and free from doubt.
 - The Court must consider all the circumstances of the case (time before a ruling, overloading of the ECJ, difficulty and importance of the case, expense involved, wishes of the parties).
- 9.18. The Royal Court has an inherent jurisdiction to submit a reference either of its own motion or on the application of either party, and at any time during the course of the proceedings. This is confirmed by *Department of Health and Social Security (Isle of Man) v Barr*²⁵⁷ and *Pereira Roque*.²⁵⁸ The ECJ has previously accepted jurisdiction by ruling on questions put to them by the Royal Court. The reference must be submitted by a judge; therefore the reference will normally be in the form of, or supported by, a judgment that sets out the facts of the case, the Court’s reasons for making a reference, and the question(s) that are being referred for a preliminary ruling. In advance of the hearing, it is usual for all parties to the proceedings to consult for the purpose of drawing up an agreed statement of facts, and the precise wording of the question(s) to be posed. In the absence of agreement on any matters, the arbiter will be the judge.
- 9.19. Unless the Royal Court orders otherwise, the proceedings will usually be stayed: an application should be made pending the preliminary ruling by the ECJ. *Jersey Produce Marketing Organisation Ltd v States of Jersey and Jersey Potato Export Marketing Board*²⁵⁹ established the principles regulating the grant of interim relief in the form of a stay where the substantive action is a challenge to legislation. Once the Royal Court has made an order for a reference to be made to the ECJ, it will be submitted to the Registrar of the European

²⁵⁶ *HP Bulmer Ltd v J Bollinger SA (No.2)* [1974] Ch 401 (CA)

²⁵⁷ C355/89 *Department of Health and Social Security (Isle of Man) v Montrose Holdings Ltd* [1991] ECR I-3479;
<http://www.bailii.org/eu/cases/EUECJ/1991/C35589.html>

²⁵⁸ 1998 JLR 246

²⁵⁹ 22 July 2002 (unreported)

Court. At present, it takes approximately 18 months for a preliminary ruling to be heard by the ECJ.

9.20. Only three cases have been referred to the ECJ pursuant to Article 267 TFEU (Article 234 EC and Article 177 EC in previous treaties):

- i. *Pereira Roque v Lieutenant Governor*²⁶⁰ — a referral from the Royal Court in Jersey, noted above.
- ii. *Department of Health and Social Security (Isle of Man) v Barr*²⁶¹ (1990) — a referral from the Isle of Man, regarding the restriction of access to employment of persons who were not Manxmen.
- iii. *Jersey Produce Marketing Organisation Ltd. v States of Jersey and Jersey Potato Export Marketing Board*²⁶² (2005) — a case that concerned Article 1 of Protocol 3 in the agricultural sector. In 2001 the States introduced the Jersey Potato Export Marketing Scheme to regulate the export of Jersey Royal potatoes to the UK. Producers were obliged to register, enter a marketing agreement and pay contributions to the scheme and that marketing organisation must enter into a management agreement. The scheme restricted land which could be used for export crops and which producers and marketing organisations could buy/sell potatoes. JPMO applied for judicial review and the Royal Court asked the ECJ to rule on whether or not the scheme was in contravention of specific articles of the EC Treaty. The ECJ held that:
 - the specific articles did apply as a result of Article 1 of Protocol 3;
 - the effect of the Scheme was to establish a difference in treatment between Jersey's domestic and export trade in such a way as to provide a particular advantage to Jersey's domestic market at the expense of UK trade, which was contrary to Article 29 EC;
 - the Producer contributions calculated by reference to the tonnage of potatoes exported constituted charges having an effect equivalent to customs duties and were therefore precluded by Articles 23EC and 25 EC and Article 1 of Protocol 3 (contributions calculated by reference to land usage, without a distinction between exports and imports, would have been acceptable so far as they

²⁶⁰ 1998 JLR 246

²⁶¹ C355/89 *Department of Health and Social Security (Isle of Man) v Montrose Holdings Ltd* [1991] ECR I-3479;
<http://www.bailii.org/eu/cases/EUECJ/1991/C35589.html>

²⁶² 2005 JLR 513

were not financing the Scheme in contravention of Article 219 EC, even though the contributions were not paid to the States);

- although Jersey and the UK were the same “Member State” for the purposes of the Treaty, the Scheme was nevertheless precluded by Article 29 EC as it was possible that potatoes might be re-exported to other Member States: the scheme may create an obstacle to such onwards export and have a restrictive effect on other markets; and
- it was no defence that the scheme was not disproportionate in relation to the objective pursued, which is to promote fairness and transparency in the relationship between producers and marketing organisations: such objectives could be pursued by other means which did not involve the introduction of measures having an effect equivalent to a quantitative restriction on exports prohibited by Article 29EC.

Other developments

- 9.21. Channel Islanders may petition the European Parliament or complain to the Ombudsman in respect of the administration of the European Union’s institutional bodies which directly affect them and come within Protocol 3. Measures on police and criminal judicial co-operation do not apply to Jersey, but the UK has undertaken to consult the Islands fully about such measures.

Commentary

- 9.22. While as a matter of strict legal theory, the impact of EU law in Jersey is limited by the terms of Protocol 3, in practice EU law has a much greater impact. This can be illustrated by reference to two EU initiatives which, if one were to have regard to Protocol 3 alone, should not have been relevant to Jersey, but in practice have been of the utmost relevance, at least in the case of the second illustration.
- i. In respect of a Justice Initiative, UK Ministers agreed without any consultation with the island that Jersey would be bound by the Council decision establishing the European Judicial Network. Thus Jersey was committed to an association for advancing better the objectives of international mutual legal assistance despite being outside the EU for these purposes and despite its not having consented.
 - ii. In respect of the EU tax package, UK Ministers made taxation commitments on Jersey’s behalf without proper consultation with Jersey and without its consent. These tax matters have required the Island completely to re-think its taxation structures, with all the political and economic debate that such an exercise inevitably involves.

9.23. In “Jersey’s Changing Constitutional Relationship with Europe”,²⁶³ Sutton argues that:

- with rare exceptions, economic relations under the Protocol have been uncontroversial—the real issues have arisen in respect of areas such as tax and economic crime. Jersey is increasingly affected by EU law and policy in areas outside the scope of Protocol 3 and recent disputes in relation to, e.g. EU tax harmonisation, have been outside the scope of the UK’s constitutional relationship with Jersey and in breach of EU principles.
- Financial services have become an integral part of Jersey’s economy — however, Protocol 3 does not cover the freedom to provide services including financial services.
- Jersey’s virtually complete internal autonomy needs to be matched with a comparable level of external independence. In particular, Jersey should look to the experience of other similar jurisdictions (e.g. Andorra, San Marino, Monaco) to see whether alternatives to Protocol 3 exist which might better guarantee Jersey’s original aims of political stability and growing economic prosperity – the lack of international status has handicapped Jersey in that it has found it politically impossible to avoid responding to aggressive EU initiatives and protocol 3 has provided no legal protection whatsoever.

²⁶³ (2005) 9 *Jersey Law Review* 7

10. The States

Elected members

10.1. The elected membership of the States consists of:

- 10 Senators (to be reduced to 8 after the election in October 2014)
- 12 Constables, one for each Parish
- 29 Deputies, split by constituency

Senators

10.2. Senators are elected by the electorate of the Island, to sit for a term of four years. The office was created in 1948 to replace the Jurats who ceased to be members of the States. Appointment takes place upon Senator designate taking the oath of office.

Connétables

10.3. Constables (Connétables) are elected for four years.²⁶⁴ Each Parish elects one Constable who becomes the Head of the Parish. The Constable is a member of the States by virtue of his or her office and is entitled to both speak and vote. The role of the Constable is discussed in more detail in the following chapter on the Parish. As with the other members of the States, the Connétables take their oath of office before the Royal Court. This oath is a historic one, having barely altered since the Code of 1771.

Deputies

10.4. Under the States of Jersey Law 2005 (SJL), Deputies are elected to a constituency, as provided by the SJL. They are elected for a term of four years. Appointment becomes effective when the Deputy designate takes the oath of office in the Royal Court.

Elections

10.5. Elections are governed by the Public Elections (Jersey) Law 2002, as amended. Legislation adopted by the States makes provision for an “ordinary election” of Senators and Deputies to take place in October 2014 and for all Members (i.e. including Connétables) in mid-May every fourth year commencing in May 2018.²⁶⁵

10.6. Parishioners are entitled to vote at an election if they are listed on the Parish’s electoral register. There is a positive duty on eligible persons to register (although not to vote) once they have been resident in Jersey for at least two years. Provision for postal voting is made. The costs of elections are

²⁶⁴ See generally Connétables (Jersey) Law 2008, as amended by the States of Jersey (Miscellaneous Provisions) Law 2011.

²⁶⁵ States of Jersey (Miscellaneous Provisions) Law 2011.

met by the Parish unless it is an election for senators, in which case the majority of the expenses are met by the States. Elections are ordered by the Royal Court and the nomination meetings in the parishes are held as directed the meeting being chaired by the Constables (in the case of Senators) or by the Constable of the relevant Parish (in the case of Constables and Deputies). A returning officer (Autorisé) for each electoral district is appointed by the Royal Court. The Constable assists the Autorisé for each election other than where he or she is a candidate. Disputes are heard by the Royal Court within 6 months of the election. The Royal Court has the power to declare that a casual vacancy has arisen or declare an entire election void, depending on the circumstances.

Non-elected members

10.7. The non-elected members are:

- The Bailiff
- The Lieutenant Governor
- The Dean of Jersey
- The Attorney General
- The Solicitor General

The roles of these Crown officers are examined in the next chapter.

States officers

10.8. Under Article 41 of SJL the Greffier of the States is appointed by the Bailiff with the consent of the States. He or she acts as clerk of the States. No formal qualifications are stipulated. A deputy may be appointed with the consent of the Bailiff (to act in the absence or incapacity of Greffier). Employment packages are determined by the States Employment Board. The Greffier's consent is required to the appointment and termination of officers to his department. The Greffier may be suspended from office by the Bailiff, who shall refer the matter to the States. Appointment may be terminated by the States, with discussions to take place in camera. In the absence or incapacity of both the Greffier and Deputy Greffier, an officer of the States Greffe is appointed by the Bailiff as Acting Greffier. The Greffier, Deputy Greffier and Acting Greffier are all required to an oath in the prescribed form upon assuming office.

10.9. The Viscount is the executive officer of the States.²⁶⁶ He is appointed by the Bailiff.

Proceedings of the States

10.10. The Bailiff is the President of the States and during its sittings acts as its speaker. If the Bailiff and Deputy Bailiff are unable to preside, the Bailiff chooses an elected member or the Greffier or Deputy Greffier to preside. This person has the

²⁶⁶ Article 42 SJL

powers of the Bailiff when presiding at a meeting (subject to standing orders). An elected member presiding shall not have the right to vote. The quorum for the States to be lawfully constituted is 27 elected members. All members are under a duty to attend.²⁶⁷ Decisions are reached by a majority of the elected members present voting for them. Where votes are equally divided, the proposition fails and the decision is reached in the negative. The acts and proceedings of the States are valid notwithstanding a want of qualification, a defect in the election of a member or a vacancy in the members.

Council of Ministers

- 10.11. Under the SJL, the system of government in Jersey was changed significantly. All States Committees were abolished and replaced with a Council of Ministers made up of nine Ministers and one Chief Minister. The current Ministers are appointed in respect of (1) Economic Development, (2) Education, Sport and Culture, (3) Health and Social Services, (4) Home Affairs, (5) Housing, (6) Planning and Environment, (7) Social Security, (8) Transport and Technical Services and (9) Treasury and Resources.
- 10.12. The SJL repealed the ancient rights of veto and dissent vested in the Lieutenant Governor and the Bailiff respectively. These had not been exercised for many years, but their abolition could be seen as a recognition that the Crown has abandoned any residual claim to interfere in the domestic affairs of Jersey. This is reflected in the first preamble: "Whereas it is recognised that Jersey has autonomous capacity in domestic affairs".

Chief Minister

- 10.13. Under Article 19 SJL, the Chief Minister is appointed by the States from the elected members following:
- each election of Deputies;
 - the Chief Minister ceasing to be an elected member;
 - the death or resignation of the Chief Minister;
 - the incapacity of the Chief Minister for 8 weeks or more;
 - a vote of no confidence in the Chief Minister or the Council of Ministers; or
 - the Chief Minister Designate ceasing to be so.
- 10.14. The Chief Minister is ineligible for appointment as a Minister or Assistant Minister (Article 20). Article 21 states that the appointment of the Chief Minister ceases when a further appointment takes effect or where the Chief Minister ceases to be a Senator or a Deputy by reason of disqualification from office. The Chief Minister may resign by notice in writing to the

²⁶⁷ Standing Orders 53 to 56 deal with the roll call and the consequences of being *en défaut*.

Bailiff, who then notifies the States (Article 22). The Chief Minister may appoint any Minister to be Deputy Chief Minister, and may dismiss such person. (Article 24). The Chief Minister may personally discharge, or delegate, the functions of an absent or incapacitated Minister. (Article 27). The Chief Minister may appoint up to two Assistant Ministers.²⁶⁸ The Chief Minister may, with the States approval, move a Minister from one office to another. The Chief Minister is required to establish, maintain and publish a list of Ministers and Assistant Ministers and the functions exercisable by them and by the Chief Minister personally.²⁶⁹

Ministers

10.15. Ministers are appointed by the States from the elected members following nomination by the Chief Minister or an elected member: nominations take place following selection of Chief Minister Designate.²⁷⁰ This means that the Chief Minister may not have the ultimate say over his executive, despite the recommendation of the Clothier Report that the Chief Minister should be able to choose his preferred team. Upon the final selection, the Chief Minister and the Ministers are appointed.²⁷¹ The appointment of a Minister ceases:²⁷²

- when a further appointment takes effect;
- upon dismissal by the States;
- upon the Minister ceasing to be an elected member; or
- upon a States vote of no confidence.

10.16. Only the Chief Minister may propose a dismissal and may only do so with the agreement of the majority of the Council of Ministers after the Minister has been given the opportunity to be heard. The proposal must state the reasons for the dismissal. A Minister may resign by notice in writing to the Chief Minister, who shall inform the States.²⁷³ The number of Ministers (inc. Deputy Ministers and Assistants) may not exceed 22 individuals (to be reduced to 21 after the elections in October 2014).²⁷⁴ Given that there are 53 elected members of the States, this has meant that the majority of elected members are outside the executive. The SJL also provides for the appointment of scrutiny committees and panels to review the actions of the executive.

²⁶⁸ Article 25.

²⁶⁹ Article 30.

²⁷⁰ Articles 19(5) and 23.

²⁷¹ Article 19(7)

²⁷² Article 21.

²⁷³ Article 22.

²⁷⁴ Article 25. The reduction was made by the States of Jersey (Miscellaneous Provisions) Law 2011- in force 5 August 2011.

Ministerial powers

10.17. Under Article 26 SJL, each Minister (including the Chief Minister) is a corporation sole with an official seal. Each Minister has the power to:

- enter into agreements for the purpose of his office;
- acquire, hold and dispose of moveable property;
- do any other thing which he can do by virtue of his office; and
- do anything reasonably necessary or expedient for or incidental to any of the above.

10.18. A Minister may, in the name of his office:

- sue or be sued in civil proceedings; and
- be charged in criminal proceedings.

10.19. The senior “officers” of an administration for which a Minister is responsible are accountable to that Minister in respect of policy direction. This assumes a level of collective responsibility between the Ministers themselves. Documents sealed by a Minister shall be received in evidence without further proof, unless the contrary is shown.

Duty to refer matters to the States

10.20. Article 31 SJL imposes a duty on the Chief Minister to lodge any proposal that a UK Act should apply directly to Jersey or that an Order in Council should extend a UK Act or any measure pursuant to the Channel Islands (Church Legislation) Measures 1931 and 1957 to Jersey. Where such legislation is transmitted to the Royal Court for registration and it appears that the States have not signified their agreement to the substance thereof, the RC shall refer the provision or the Order in Council to the Chief Minister, who shall refer it the States.

10.21. In *In the Matter of the Terrorist Asset-Freezing (Temporary Provisions) Act 2010* the Royal Court considered the effect of Art 31. The Court explained that the “effect of Article 31 of the 2005 Law is that, as a matter of Jersey law, the approval of the States is necessary before an Act of the Westminster Parliament can be registered with the Royal Court”.²⁷⁵ The court noted that the only previous statement about the effect of not registering a UK Act is in *Ex p Bristow*²⁷⁶ in which “the Court in passing observed that the British Parliament had the power to legislate for the Island and there was nothing which prescribed that an Act of Parliament which applied in express terms to the Island could not take effect unless it was registered in the rolls of the Royal Court”.²⁷⁷ The Royal Court, acknowledging that it had heard no argument on the issues,

²⁷⁵ [2011] JRC 047, para 12.

²⁷⁶ (1960) 35 PC 115.

²⁷⁷ [2011] JRC 047, para 15.

expressed “no opinion on whether, even in 1960, these observations were correct” and suggested that “the matter remains open for argument on a future occasion”. The Royal Court summarised a number of “significant developments” which the Attorney General had suggested may call into question the approach taken in *Bristow* and which indeed might be thought to signal that *ex p Bristow* would not be followed today.

General consequence of a grant of power

10.22. Article 11 of the Interpretation (Jersey) Law 1954 provides that unless the contrary intention appears, a power may be exercisable:

- in some cases, but not all;
- in full, or to any lesser provision;
- to make the same provision for all cases; or different provision for different classes;
- to make different provisions for different purposes; and
- conditionally or unconditionally

In *Attorney-General v Giggles Ltd*²⁷⁸ it was held that the knowledge of an officer may not necessarily be imputed to the relevant Committee;²⁷⁹ where an exercise of discretion is required, this cannot be exercised by an administrative official. It must be exercised by the relevant Minister, subject to any permitted delegation.

Delegation

10.23. Where the Chief Minister is absent or incapacitated, the Deputy Chief Minister shall discharge the Chief Minister’s functions.²⁸⁰

In the absence or incapacity of a Minister, the Chief Minister may personally perform such Minister’s functions, or may designate another Minister to do so: this includes the power to make enactments and shall not affect any delegation made by the relevant Minister. A Minister may delegate wholly or partly functions conferred on him by the SJL, any other enactment or any UK enactment having effect in Jersey to:²⁸¹

- an Assistant Minister; or
- an “Officer”.

10.24. A Minister shall not delegate:

²⁷⁸ 1985-86 JLR 179. See also *Pinel v Housing Committee* 1970 JJ 1545.

²⁷⁹ It remains to be seen whether this decision necessarily survives the move to ministerial government. The basis of the decision may be less solid if there is a single Minister’ especially where he may have given a wide delegation of his powers to officials.

²⁸⁰ Article 27 SJL.

²⁸¹ Article 28 SJL.

- any power to make an enactment;
- any power to decide an appeal under an enactment; or
- any function the delegation of which is prohibited.

10.25. The delegation of functions under Article 28 does not prevent the Minister exercising functions personally. Where a licence, permit or authorisation is granted in purported exercise of delegated functions no criminal proceedings shall lie against any person for any act done or omitted to be done in good faith in accordance with the terms of such licence, permit or authorisation by reason that the functions had not been delegated or a requirement of the delegation had not been complied with. "Officer" means a States' employee within the meaning of the Employment of States of Jersey Employees (Jersey) Law 2005 and includes:

- a member of the States of Jersey Police Force;
- an officer appointed under the Immigration Act 1971 as extended to Jersey by the Immigration (Jersey) Order 1993; and
- employees employed pursuant to a contract with the States Employment Board.

Power to move Ministers/change offices

10.26. The Chief Minister may with States approval move a Minister from one office to another.²⁸² The States may, by regulation:

- establish/abolish Ministerial positions;
- determine a Minister's title;
- confer functions on a Minister;
- transfer all or some functions from one Minister to another; and
- direct that functions shall or shall cease to be exercisable concurrently with another Minister.

10.27. Such regulations may only be lodged by the Chief Minister and may include all provisions necessary or expedient for the purposes of giving full effect to the Regulations, such as:

- the transfer of movable property, rights enjoyed or liabilities incurred (even if no claim made);
- the carrying on and completion of anything already commenced;
- the amendment of enactments;
- the construction of UK enactments having effect in Jersey;
- the construction and adaptation of any instrument, contract or legal proceedings;

²⁸² Article 29 SJL.

- the increase or decrease of the maximum number of Ministers; and
- the consequential amendment of standing orders.

10.28. Article 48 of the States of Jersey Law 2005 enables the States to establish a Privileges and Procedure Committee, a Public Accounts Committee, Scrutiny Panels and Committees of Enquiry. Standing Orders adopted by the States have in fact established the PPC, PAC and a number of Scrutiny Panels. The Panels have wide powers to issue summonses to persons to attend before them and to demand the production of documents or the answering of questions.²⁸³

²⁸³ States of Jersey (Powers, Privileges and Immunities)(Scrutiny panels, PAC and PPC)(Jersey) Regulations 2006

11. The Parishes

- 11.1. There are twelve parishes in Jersey, the boundaries of which were fixed in Norman times.²⁸⁴ Each Parish is divided into vintaines (with the exception of St Ouen, which is divided into cueillettes). A Parish is a corporation, a legal entity with perpetual succession, separate from its parishioners.²⁸⁵
- 11.2. The parish, with the Connétable at its head and the Assemblée Paroissiale (Parish Assembly) as a democratic forum, is an important part of the constitutional fabric of Jersey. Over the centuries, the parishes have acquired (and shed) legal duties for functions that have made life civilised in the Island. They once (but no longer) administered primary education and welfare assistance to those in need.
- 11.3. An understanding of the role of the Parish is of importance to legal practitioners for two main reasons. First, although in practice the Connetable no longer has an active policing role, the Parish continues to be at the heart of unique Jersey institutions that play important roles in the criminal justice system—the honorary police and the Parish Hall Inquiry. With the arrival of a professional salaried police force covering the whole Island, “the honoraries’” role has diminished but they continue to be important features of the administration of justice in Jersey, both in terms of community policing and because the Centeniers initiate criminal prosecutions in the Magistrate’s Court, subject always to the oversight of the Attorney General. Secondly, the parishes have roles in a range of regulatory functions (though in more recent times there has been a tendency to confer such functions on a Minister rather than a Connétable), and especially in licensing matters.
- 11.4. Practitioners seeking to navigate their way around the law relating to Parishes will quickly realise that the law has not been codified. There are gaps, some matters are regulated by customary law, and others by legislation. A working party on the Parish Assembly (prompted by criticisms made by the Clothier committee) reported in 2001 as follows:
- “... statutes are in the French language and drafted in a style well removed from that of the present day. They are old; they are disparate, reflecting as they do the antiquity and evolution of the Island’s Parish Assemblies for which they have over centuries made provision. To some, the possibility of a brand new Law in the English language codifying all matters relating to Parish Assemblies and sweeping away the various Lois (and Orders in Council) at the foundation of the Parish system of administration may be attractive: to the Working Party it is not. The antiquity of a Law is often its strength rather than its weakness. It is submitted that this is true of the statutes governing Parish Assemblies; they are the subject of a large

²⁸⁴ M Syvret and J Stevens, *Balleine’s History of Jersey* (1981) p 16.

²⁸⁵ *Parish of St Helier v Manning* 1982 JJ 183.

body of Jersey case law ...; they are at the foundation of more than two Centuries of practice and custom which has served the Island well, and are at the core of its unique honorary system".²⁸⁶

Historical position

- 11.5. The *Loi au sujet des assemblées paroissiales* 1804 codified some aspects of the customary law relating to the parish and the Connétable. It outlined Parish organisation and procedure, but did not deal with the legal relationship of the Parishes to the States. The law recognised the distinction between the civil and ecclesiastical functions of the Parish, defining the latter. The Law is premised on the basis that there are two kinds of Parish Assembly - the Parochial/Civil Assembly and the Ecclesiastical Assembly. The former was presided over by the Constable and the latter by the Rector of the Parish. The Ecclesiastical Assembly has no income generating jurisdiction and, should it require funds for repairs to the Church fabric, was required to make recommendations to the Civil Parish Assembly which would disburse funds under the authority of the Connétable who would reflect necessary ecclesiastical spending in the estimates for fixing the parish rate. Membership of the Parish Assembly was originally confined to parish officers and ratepayers above a certain level set by the Assembly. Over the years, however, the franchise was gradually extended. The Connétable was named as head of the Assembly and the Constable's officers were elected by the Assembly..
- 11.6. Through the 19th century the parishes assumed additional responsibility, such as that for elementary education. Some roles were placed on a statutory basis (for example, licensing of the sale and consumption of alcohol). The Parish continued to serve as a militia area

Officers of a parish

- 11.7. Each parish is run by a number of elected officers, namely²⁸⁷
- a Connétable²⁸⁸
 - several centeniers (the next most senior members of the honorary police and those who in practice carry out the most important policing functions at parish level)
 - two procureurs du bien public ('public trustees' responsible for oversight of the parish finances and, with the Connétable, for land transactions authorised by the Parish Assembly)
 - several vingteniers (members of the honorary police)

²⁸⁶ *The Working Party on Parish Assemblies: Report* (RC 38/2001, presented to the States on 4 December 2001 by the Legislation Committee), para 12.8.

²⁸⁷ See S. Pallot, 'Le Connétable et sa Paroisse' (2003) 7 *Jersey Law Review*.

²⁸⁸ Loi (1905) au Sujet des Assemblées Paroissiales.

- several constable's officers (also members of the honorary police)
 - two inspecteurs des chemins ('roads inspectors') for each vingtaine.²⁸⁹
- 11.8. Note that Deputies representing the parish or districts of the parish in the States Assembly are *not* officers of the parish; they are States Members. A Deputy for a parish or a district within a parish who is not a ratepayer nonetheless has a right to attend though not to vote at an Assembly.²⁹⁰
- 11.9. Each Parish is required by law to have committees:
- 11.10. a Comité des Chemins ('roads committee'), responsible for the 'chemins vicinaux' (minor roads) in the Parish²⁹¹
- 11.11. an Assessment Committee for the purposes of the Rates (Jersey) Law 2005.
- A parish may choose to set up other committees for particular purposes (for example, to oversee the management of old people's homes provided by the parish).
- 11.12. Parishes have ecclesiastical as well as civil responsibilities. The details of ecclesiastical law fall outside the syllabus. In outline it need only be noted that when an ecclesiastical Parish Assembly meets, the rector rather than the Connétable presides. The ecclesiastical Parish Assembly is responsible for electing two parish officers who have primarily ecclesiastical duties: surveillants (church wardens) and les Collecteurs d'Aumônes (almoners). Responsibility for maintaining the fabric of the parish church and the rectory rests, however, with the civil authorities and in practice all major funding for the Anglican church is decided by the civil Parish Assembly. The reason for this is that, unlike in England, the ownership of the ancient parish churches - as opposed to the district churches - and rectories vests in the parish and not the Church Commissioners.

Qualification for and election to parish offices

- 11.13. Customary law required all officers to be residents of the parish (*domicilié*) in which they held office. This rule continues to apply to parochial officers who are not in the honorary police, notably the procureurs du bien public²⁹² and to Connétables. An exception to the rule is that in relation to St Helier, the St Helier (Qualifications for Office) (Jersey) Law 1976 provides that rate payers who do not reside in that parish are not

²⁸⁹ Loi (1914) sur la Voirie, Art 4.

²⁹⁰ Loi (1804) au sujet des assemblées paroissiales, Art 3.

²⁹¹ Loi (1914) sur la Voirie, Art 2. Note that the singular is 'un chemin vincinal'.

²⁹² *In The Matter Of A Procureur Du Bien Public Of St. Peter* 2008 JLR 163.

disqualified from being elected to or holding any honorary office.

- 11.14. Legislation has also introduced a degree of flexibility in relation to the honorary police in all parishes. The Honorary Police (Parochial Domicile) (Jersey) Law 1999 permits members of the honorary police (but not Connétables) to serve the remainder of their term in a parish if they move to reside in another parish. The Police (Parochial Domicile) (Amendment) (Jersey) Law 2004 went a step further to allow a person (with the consent of the Attorney General) to seek re-election as an honorary police officer even though he had moved to live outside the parish.
- 11.15. In the great majority of cases, officers of the parish are nowadays elected unopposed as there is a more limited pool of people willing and able to contribute their time to serve their parish than in times gone past. Where a contested election is held, elections for Connétable, centenier, or procureur du bien public are by secret ballot in accordance with the Public Elections (Jersey) Law 2002. Other officers are elected at the Parish Assembly by the electors and parish officers.²⁹³

The Parish Assembly²⁹⁴

- 11.16. The Royal Court has held that ‘the Principals and Officers, adopting a resolution at a properly convened meeting, are the ultimate authority in all parochial matters’.²⁹⁵ Procureurs du Bien Public are thus required to carry out duly considered instructions of the Parish Assembly, even if they disagree with their wisdom.
- 11.17. In addition to the officers of the parish, the Rates (Jersey) Law 2005 specifies the following as members of the civil Parish Assembly (l’Assemblée Paroissiale):²⁹⁶
- a person who resides in the parish and is registered for the parish as an elector in public elections;
 - a person solely liable to pay a rate;
 - where two or more persons are liable to pay a rate, the person whose name appears first on the Rates List; and
 - a person whose name is for the time being, and has been for at least 48 hours, on the list kept by the Connétable in accordance with Art 29(3) of the Rates (Jersey) Law 2005 as a representative of a body corporate.

²⁹³ Loi (1871) sur le mode d’élection des Vingteniers; Loi (1853) au sujet des centeniers et officiers de police, Art 3; Loi (1972) concernant les Vingteniers de la paroisse de St. Hélier.

²⁹⁴ A useful summary of legislation and case law relating to Parish Assemblies (more detailed than is necessary for examination purposes) may be found in *The Working Party on Parish Assemblies: Report* (RC 38/2001, presented to the States on 4 December 2001 by the Legislation Committee).

²⁹⁵ *In re Grouville (Procureurs du Bien Public)* 1970 JJ 1451, 1459.

²⁹⁶ Rates (Jersey) Law 2005, Art 23.

- 11.18. A person has only one vote, even if they fall into more than one of these categories. Some legislation refers to the Parish Assembly as being the assembly 'of principals and officers of the parish'; this relates to the time until 1975 when only ratepayers of a certain value (more than 50 'quarters') were members of the Assembly. The definition of membership of the Parish Assembly set out in the Rates (Jersey) Law 2005 would probably be held to apply in all contexts on ordinary rules of construction; and custom and practice prior to that legislation in terms of voting procedures also points in that direction. The Clothier committee recommended that there be "a more formal structure for the Parish Assembly. Its present composition and membership are somewhat uncertain".²⁹⁷ A working party set up to consider the matter reported that it had "not been able to identify any fundamental flaw in the present structure of Parish Assemblies and does not recommend that there be any changes to the existing membership of Parish Assemblies".²⁹⁸
- 11.19. Most Parish Assembly meetings are held to conduct routine business. They can, however, also be held at the initiative of parishioners. The Connétable must call a Parish Assembly meeting within eight days of receiving a request to do so from four or more members of the Assembly.²⁹⁹ It is open to the Connétable to permit parishioners to use a Parish Hall for the purposes of informal meetings to discuss matters of local concern; such meetings are not, of course, a Parish Assembly.
- 11.20. The Notice of the meeting must be placed in the parish box (*boîte grillée*) in the Parish cemetery and notice must be given in the Jersey Gazette at least two days prior to the meeting.³⁰⁰ The Connétable is required to put every matter proposed and seconded to discussion and to the vote.³⁰¹ Meetings instigated by parishioners can be an important method of calling parish officers to account.³⁰²
- 11.21. The 2001 Working Party on Parish Assemblies recommended that the Comité des Connétables produce a code of practice to make clear the voting procedures for propositions and

²⁹⁷ *Report of the Review Panel on the Machinery of Government in Jersey* (2000), 7.5.

²⁹⁸ *The Working Party on Parish Assemblies: Report* (RC 38/2001, presented to the States on 4 December 2001 by the Legislation Committee), para 12.1.

²⁹⁹ Loi (1804) au sujet des assemblées paroissiales, Art 9.

³⁰⁰ Loi (1905) au Sujet des Assemblées Paroissiales; Loi (1842) sur les publications dans les Eglises.

³⁰¹ Loi (1804) au sujet des assemblées paroissiales, Art 12.

³⁰² e.g. on 3 May 2011 hundreds of parishioners attended an Assembly at St Saviour to protest over a proposed development (supported by the constable) of an agricultural field.

amendments to propositions; it appears that this has not been published.³⁰³

11.22. The Parish Assembly's specific powers and duties include:

- approving or ratifying any contracts entered into by the Parish (which will normally act through the Connétable and the two procureur du bien public); a Connétable cannot bind the Parish contractually without the authority of the Parish Assembly.³⁰⁴
- under the Licensing (Jersey) Law 1974, considering and making recommendations to the Licensing Assembly about liquor licences: applicants and objectors may be represented by advocates or solicitors³⁰⁵
- under the Rates (Jersey) Law 2005, electing members of the parish's Assessment Committee and approving estimates and setting the 'parish rate'
- electing vingteniers and constable's officers
- choosing a person who is resident in the parish as registrar for the purposes of the Marriage and Civil Status (Jersey) Law 2001
- naming streets and assigning numbers to premises under the Naming of Streets and Numbering of Premises (Jersey) Law 1960
- powers to decide on compulsory purchase of land under the Roads Administration (Jersey) Law 1960.

The Connétable

11.23. The Connétable is head of the Parish (often referred to as 'the father of the parish'). The earliest mention of Connétables in their modern role is in the late 15th Century. Le Herissier notes that the Connétable had a customary law responsibility for the safety and responsibility of his parishioners and suggests that this is the origin of the Connétable's policing role.³⁰⁶ Connétables may have been in existence long before the late 15th century.³⁰⁷

³⁰³ *The Working Party on Parish Assemblies: Report* (RC 38/2001, presented to the States on 4 December 2001 by the Legislation Committee), para 12.5.

³⁰⁴ *Osment v Constable of St Helier* 1974 JJ 1.

³⁰⁵ The Licensing Assembly consists of the Governor, Bailiff and Jurats. It sits four times a year. At the December sitting, each Connétable reports on the management of licenced establishments in his or her Parishes.

³⁰⁶ R.G. Le Hérissier, *The Development of the Government of Jersey 1771-1972* (1974)

³⁰⁷ See S. Pallot, "Le Connétable et sa Paroisse" (2003) 7 *Jersey Law Review* 284

- 11.24. Connétables are elected by registered electors in their parish for a four year term, but remain in office until their successor is sworn in.³⁰⁸

Membership of States Assembly

- 11.25. Connétables are creatures of customary law and sit in the States Assembly “by virtue of their office”³⁰⁹ as head of the Parish. Parish Assemblies, not the States Assembly, are where a Connétable is primarily accountable for the conduct of affairs within the parish. Where a States Member seeks to a question “relating to a function or official responsibility which each Connétable has in his or her parish” Standing Orders of the States provides that it “shall be addressed to the chairman of the Comité des Connétables”. This committee of the States Assembly consists of the 12 Connétables and is chaired by the longest serving Connétable.
- 11.26. The place of Connétables in the States Assembly has been the subject of political controversy for many years. The 1947 Privy Council report concluded that “there is some force in the objections to the retention of the Constables in the States” but did not recommend any change on the basis that it was right that given “the importance of agriculture and horticulture in the life of the Island” there should be “a slight preponderance in favour of the rural areas” in the level of representation.³¹⁰
- 11.27. In 2000, the Clothier committee recommended that Connétables should cease to be ex officio members of the States Assembly. In making this recommendation, the committee asserted that almost all Connétables were elected unopposed, an assertion that was disputed by the Connetables as plainly wrong as three quarters of them had had to face a contested election; that they were less active in the States than the Deputies for their respective parishes; that many of them prioritised work in their parishes over States’ work, assertions that some would say are hard to support given that as at 2011, one Connetable was a Minister, another the Chairman of the Privileges and procedures Committee and three others either sit on that committee or on the Planning Applications Panel, others having worked in Scrutiny ; and that more candidates for the post of Connétable would come forward if it was no longer a requirement that they sit in the States, which on any analysis was pure speculation.³¹¹ This recommendation was made in the context of suggesting that it

³⁰⁸ Connétables (Jersey) Law 2008, as amended by the States of Jersey (Miscellaneous Provisions) Law 201- (adopted in January 2011); the term of office was previously three years.

³⁰⁹ States of Jersey Law 2005, Art 2(1).

³¹⁰ Home Office, *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands*, Cmd 7074 (1947).

³¹¹ *Report of the Review Panel on the Machinery of Government in Jersey* (2000), 3.8.

‘should be open to the States to commit to the Parishes some, or part of some, of the public services’, so giving Connétables an enhanced role at parish-level.³¹²

- 11.28. To date, the States have rejected proposals to change the position of Connétables (except to agree that the term of office of Connétables and election dates should be the same as other elected States members). In 2009, ahead of one of the recent debates about the composition of the States Assembly, the Privileges and Procedure Committee argued that ‘The link that Connétables provide between the Parishes and the States is considered by many to be vital and, in addition, many members expressed the view during the “in Committee” debate in 2007 that it would possibly deal a very severe blow to the whole Parish system if the Connétables lost their right to sit in the States’.³¹³ Pallot suggests that the office of Connétable is representative of a truly democratic system and that no change should be effected unless there a real vice is apparent. Pallot can see no such vice and notes that the availability of the Parish Assembly presided over by the Connetable provides parishioners with a unique outlet for any concerns or grievances they may have.

Legal powers and duties

- 11.29. The Code of 1771 laid out some general duties which are reflected in the oath of office of Connétables:

- to keep and uphold the peace;
- to prosecute mutineers and disturbers of the peace; and
- to execute the commands of the Lieutenant-Governor, Bailiff and Jurats.

- 11.30. More recent legislation has placed a range of specific regulatory powers and duties on Connétables, including:

- each December and January, serve on landowners in the parish written notice to provide information needed for the assessment of rates³¹⁴
- deciding on permits for Sunday trading by retailers and places of refreshment;³¹⁵
- deciding on licences for the retail of fireworks³¹⁶
- deciding on licences for pawnbrokers³¹⁷

³¹² *Report of the Review Panel on the Machinery of Government in Jersey* (2000), 7.4.

³¹³ Privileges and Procedures Committee, *Composition and Election of the States: Revised Structure* (lodged au Greffe 19 May 2009), 4.3.

³¹⁴ Rates (Jersey) Law 2005, Art 3.

³¹⁵ Shops (Sunday Trading) (Jersey) Law 1960; Places of Refreshment (Jersey) Law 1967.

³¹⁶ Explosives (Jersey) Law 1970.

- deciding on firearms certificates;³¹⁸
- granting written permission for using any road within the parish for various purposes including exhibits and displays, parades and processions, playing any musical instrument for reward, or use of audio-visual equipment;³¹⁹
- registration of buildings for the purposes of the solemnization of marriages³²⁰
- issuing dog licences³²¹
- issuing driving licences³²²
- responsibilities in relation to complaints about members of the honorary police in the Connétable's parish³²³
- in relation to elections: preparing and maintaining electoral registers,³²⁴ convening and presiding over nomination meetings, and organising aspects of the poll³²⁵
- the temporary closure of a road for an event³²⁶
- the Connétable of St Helier has a variety of powers in relation to the regulation of the use of roads and over parking in that parish³²⁷
- civil defence functions under the Civil Defence (Jersey) Law 1952
- making orders in respect of various kinds of nuisances on private property affecting public health³²⁸
- receiving notification and attending an inquest of a person who was resident in the parish³²⁹

³¹⁷ Loi (1884) sur le prêt sur gages.

³¹⁸ Firearms (Jersey) Law 2000, Art 3; Firearms (General Provisions) (Jersey) Order 2001.

³¹⁹ Policing of Roads (Jersey) Regulations 1959, Art 3; and see also Customary Law (Choses Publiques) (Jersey) Law 1993, Art 2.

³²⁰ Marriage and Civil Status (Jersey) Law 2001, Arts 15, 18; Marriage and Civil Status (Approved Premises) (Jersey) Order 2002.

³²¹ Article 4, Dogs (Jersey) Law 1961.

³²² Road Traffic (Jersey) Law 1956.

³²³ Police (Complaints and Discipline) (Jersey) Law 1999, Pt 3.

³²⁴ Both the 1947 Privy Council report and the 2000 Clothier report called for an Island-wide electoral registration system but these recommendations have not been accepted by the States.

³²⁵ Public Elections (Jersey) Law 2002.

³²⁶ Road Traffic (Jersey) Law 1956, Art 67.

³²⁷ Road Traffic (St. Helier) (Jersey) Order 1996 (made under the Road Traffic (Jersey) Law 1956).

³²⁸ Loi (1934) sur la Santé Publique, Art 8.

- every November, sending to the Viscount a list of parishioners eligible for jury service³³⁰
- power to make an application to the Magistrate's Court for forfeiture of goods under the Merchandise Marks (Jersey) Law 1958, Art 22.

11.31. This list (which is not exhaustive) may at first sight seem to be rag-bag of regulatory functions with little underlying principle. A rationale for functions being carried out by the Connétable is that a parish-based elected officer is likely to have better local knowledge and be more responsive to local needs and views than a Minister and a Minister's civil servants would be. This justification is probably still a strong one in the rural parishes but less so in the urban ones. Regulatory functions are now more likely to be conferred on a Minister, with a duty to consult Connétables, than directly on Connétables.

Conduct and bias

11.32. The law does not permit any parish officers to have business interests that may give rise to a conflict of interest or apparent bias in the carrying out of their public functions.³³¹ A Connétable convicted of a criminal offence may be ordered by the Royal Court to resign in the absence of special circumstances, even though there is a long record of service and he retains the confidence of Parish electors.³³²

Role of the Royal Court

11.33. As Connétables sit in the States Assembly "by virtue of their office", it has been suggested that they stand in a different relationship to the Royal Court than other elected States members: "the Royal Court has no powers to discipline a Senator or Deputy whereas it is able to rebuke a Connétable".³³³ While it may be difficult to foresee circumstances in which the Royal Court would "rebuke" a Connétable, there is no doubt that the Royal Court has a supervisory jurisdiction in respect of Connétables. This may be invoked in three main contexts.

11.34. First, the Royal Court, on a representation by the Attorney General, could decline to administer the oath to a person elected to office if it was thought that the person did not meet the formal criteria of eligibility for office (such as residence in the parish) or was for some reason (such as having a criminal

³²⁹ Inquests and Post-Mortem Examinations (Jersey) Law 1995.

³³⁰ Loi (1912) sur la procédure devant la Cour Royale; Criminal Procedure (Tirage) Rules 2002.

³³¹ See e.g. *In re Clarke* (1989) JLR N 9; *Re Lindsay* (1969) JJ 1163.

³³² *In re Connétable of St John* (1994) JLR N-1.

³³³ *Composition and Election of the States Assembly: election dates for Connétables* (Lodged au Greffe on 19 April 2007 by the Comité des Connétables), para 6.

conviction) unfit for office; or can exercise an inherent jurisdiction if there were obvious evidence of a breach of the oath or other misconduct - see *In the matter of the Constable of St Helier JRC/051* [2001]. The Royal Court has considered similar questions in relation to the parish offices of procureur du bien public and centenier and there is no reason in principle why it should not do so also in relation to the office of Connétable.³³⁴

11.35. Second, in carrying out public functions a Connétable is subject to the ordinary judicial review jurisdiction of the Royal Court and is a public authority for the purposes of the Human Rights (Jersey) Act 2000.

11.36. A third opportunity for the Royal Court to exercise a supervisory role is at a Visite Royale. The Royal Court 'visits' two of the parishes every August (thus each parish receives a visit every six years). The Court having processed into the parish hall, examines the parish accounts (which will already have been subject to professional audit by accountants) and scrutinises the books of account of the roads inspectors. Then, with twelve *voyeurs* (chosen from the parish officers and electors), the court proceeds to conduct the *visite des chemins*, dealing with any issues of encroachment to ensure that public rights of lawful use of public roads and paths can be enjoyed without obstruction.³³⁵

Centeniers and other members of the Honorary Police

11.37. Members of the honorary police are (in order of seniority): Connétables; centeniers; vingteniers; and constable's officers.³³⁶ In practice, it is on centeniers that the majority of day-to-day parish policing responsibilities fall. Detailed consideration of the criminal justice procedures in which centeniers participate fall outside the scope of the Jersey Legal System and Constitution examination and are dealt with in the Civil and Criminal Procedure examination.

11.38. Centeniers are, after the Connétable, the senior honorary police officers of the parish, and are elected by the constituents of the Parish.³³⁷ The number of centeniers is by various pieces of legislation set approximately in relation to the size of the population of the Parish; there are currently 56 centeniers across the Island. Centeniers are typically on duty for a week at a time, usually every 3 or 4 weeks depending upon the roster within the parish, and are on call 24 hours a day during that period.

³³⁴ See e.g. *In the Matter of Pallett* 2008 JLR Note 10; *In the Matter of a Procureur du Bien Public of St Peter* 2008 JLR 163.

³³⁵ See further P. Bailhache, "The Visite Royale and Other Humbler Visits" (1998) 2 *Jersey Law Review*.

³³⁶ Honorary Police (Jersey) Regulations 2005, reg. 1.

³³⁷ See Centeniers (Terms of Office)(Jersey) Law 2007 (elections to be held at fixed intervals).

- 11.39. The powers of centeniers fall into three main categories. First, they (and only they) have power to charge and bail offenders before a case goes to the Magistrate's Court. Second, centeniers present some cases to the Magistrate's Court (others being presented by Legal Advisers from the Law Officers' Department).³³⁸ Third, centeniers conduct Parish Hall Enquiries.
- 11.40. One of the centeniers in each parish is appointed by the Connétable to be chef de police,³³⁹ with day-to-day operational responsibility for the management of the honorary police force of the parish. The formalisation and reform of the role of the office of chef de police in the late 1990s has enabled Connétables to cease to have an operational policing role, though they retain overall responsibility for the effective and efficient policing of their parish. Every chef de police is a member of the Comité des Chefs de Police, which has a number of statutory duties.³⁴⁰
- 11.41. A parish which fails to elect a centenier to fill a vacancy is in contempt of the Royal Court and the parish is liable to be fined.³⁴¹ Members of the honorary police are sworn in before the Royal Court. This is normally a formality, though in exceptional circumstances (for example, where the person elected has criminal convictions) the Attorney General may ask the Royal Court to consider whether it is appropriate for the oath of office to be administered.³⁴²
- 11.42. In some circumstances the senior centenier of a parish may act for the Connétable in his absence. Legislation permitting a centenier to attend the States Assembly in the Connétable's absence was repealed in 1974.
- 11.43. Over the years, there have been various attempts to reform the police system in Jersey. Following substantial pressure from the United Kingdom, a small paid police force was established in St Helier in 1854 (along with a Police Court), although the new police only possessed the powers of a Constable's Officer in the honorary police. As a result of criticisms of the operation of the police in 1950 an inquiry into the honorary system was initiated. The report gave a vote of confidence to the honorary system. The States of Jersey Police Force, with power in all parishes, was established in 1951 by the Paid Police Force (Jersey) Law 1951 to supplement the honorary police force. Parishes still had complete discretion as to whether or not they

³³⁸ For a more detailed review of this function than is needed for examination purposes, see Education and Home Affairs Scrutiny Panel, *The Rôle of the Centenier in the Magistrate's Court* (S.R.18/2007).

³³⁹ Honorary Police (Jersey) Regulations 2005, Pt 3.

³⁴⁰ Honorary Police (Jersey) Regulations 2005, reg 8.

³⁴¹ See e.g. *In the Matter of the Public Elections (Jersey) Law 2002 and in the Matter of the election of a Centenier in the Parish of St John* [2005] JRC020B (£5,000 fine for failure of the parish to elect a centenier on three occasions).

³⁴² See e.g. *In the Matter of Pallett* 2008 JLR Note 10.

would call upon the resources of the paid police and had total control over arrest, search warrants and charging.

11.44. The Police Force (Jersey) Law 1974 overhauled the system of policing and conferred much wider powers upon the professional police while reserving significant functions for their honorary colleagues. The 1974 Law defined a 'police officer' as meaning a member of the Force (the States or professional police) or a member of the Honorary Police. All police officers now have the power to arrest a suspect, although in practice honorary police officers generally act as auxiliaries to the States police. Important powers theoretically reserved to the Connétables though in practice to the centeniers are :

- the granting of bail, and
- the formal charging of any person with an offence³⁴³

The 1974 Law and regulations made thereunder restricted the power of the honorary police to investigate alleged offences by requiring them to call in the States police if a prescribed offence (any serious offence) was in question.

11.45. Under Art 5 of the 1974 Law, members of the honorary police are "empowered to act within the territorial limits of that parish", which includes police headquarters, the General Hospital, and the prison. There are however a number of qualification to this rule. One parish may request assistance from the honorary police of another, and when such assistance is given the officers of the 'assisting parish' have all the powers of the 'requesting parish'.³⁴⁴ Honorary police may pursue a person into another parish for the purposes of arresting him. Moreover, Connétables and centeniers have jurisdiction in criminal cases outside the parish in which an offence was committed if authorised by the Connétable or centeniers of the parish where the offence was committed.³⁴⁵

11.46. Vingteniers and Constable's Officers have a more limited range of powers than Centeniers. Within their parish in relation to crimes currently or very recently committed, they have the same police powers of Connétables and Centeniers, but must inform and take any person arrested to the Connétable or Centenier without delay.³⁴⁶

11.47. The Connétable of each parish is vicariously liable for torts committed by members of the honorary police in the course of their duties. The Honorary Police (Jersey) Regulations 2005 (made under the 1974 Law) set out additional features of the framework for the honorary police.

³⁴³ Subject to the overriding power of the Attorney General (see above).

³⁴⁴ Police Force (Jersey) Law 1974, Art 5A.

³⁴⁵ Criminal Procedure (Connétables and Centeniers)(Jersey) Law 1996.

³⁴⁶ Loi (1840) augmentant les pouvoirs des officiers de Police Honorifique; Loi (1853) au sujet des centeniers et officiers de police.

Role of Attorney General as head of the Honorary Police

11.48. The Attorney General (see below) is the titular head of the Honorary Police. In this role, he offers help and guidance to the Comité des Connétables, the Comité des Chefs de Police, and the Honorary Police Association in respect of honorary police matters.³⁴⁷ The Attorney General may offer guidance to Centeniers as prosecutors. If a centenier refuses to exercise his discretion and prosecute where the Attorney General considers a case should be brought, the AG may initiate proceedings.³⁴⁸

Parish Hall Enquiries

11.49. Any person reported for committing any offence in Jersey appears before a Centenier, who decides what action to take. In less serious cases, offenders may be invited to attend at the Parish Hall of the parish where the alleged offence was committed. The circumstances are then reviewed by the Centenier: the Parish Hall Enquiry. It is not a court of law. Attendance is voluntary and the offender may request that the matter be heard before a Magistrate. The Centenier may decide whether or not the attendee can be accompanied. The results are not published, but the outcome is recorded at Police Headquarters. This is a "Parish Hall Sanction", not a criminal conviction, although the record may be produced at subsequent enquiries or court appearances. They do not need to be declared on job applications or visa requests. If the offender does not attend, the Centenier may issue a summons requiring him to appear before the Magistrate's Court. The role of the Centenier is to determine (a) whether there is sufficient evidence to justify a charge; and (b) whether it is in the public interest to prosecute. The Centenier may:

- take no further action;
- issue a Written Caution;
- impose a financial penalty of up to £100 for certain minor statutory offences;
- place the attendee under a voluntary supervision order (Probation Service or Alcohol and Drugs Service) for 3-6 months (followed by a Written Caution);
- use the "Pitstop Scheme" with a Written Caution - a scheme for young people who have committed a motoring offence;
- defer his decision for a limited period, customarily 3 months, (usually used in conjunction with conditions such as payment of compensation or a written apology coupled with good behaviour during the deferral); or

³⁴⁷ See generally the Honorary Police (Jersey) Regulations 2005.

³⁴⁸ Police Force (Jersey) Law 1974. See also *AG v Devonshire Hotel Ltd* 1987-88 JLR 577.

- charge and bail for a court appearance.

All options other than a formal charge can only be adopted with the offender's consent.³⁴⁹

Household waste collection

- 11.50. Each parish is responsible for providing regular collections of household waste. Waste is disposed of in accordance with the Waste Management (Jersey) Law 2005.

Maintenance of Roads

- 11.51. Parishes were originally responsible for the maintenance of all roads and they were entitled to levy a special rate for the purpose. By 1930 each constable had power over traffic, road maintenance and miscellaneous matters in his own Parish. There has been some transfer to the States in this area. The *Loi sur la voirie* (1914) provides for main roads (*grandes routes*) to be administered by the States and minor roads (*chemins vicinaux*) to be administered by the Parishes.
- 11.52. Each Parish must establish a Roads Committee (*Comité des Chemins*) and elect two Roads Inspectors (*Inspecteurs du travail des chemins*) for each Vingtaine.³⁵⁰ Part of their function is to ensure that landowners carry out the *branchage*.
- 11.53. The principle of branchage also applies to roads, the relevant rules being contained in the *Loi* (1914) *sur la Voirie* [the law on road maintenance]. In each parish, visites du branchage take place during the first fortnight of July and September (on dates announced by the Comité des Connétables) to ensure that occupiers of land adjoining roads have complied with their obligations. Occupiers of land (not owners) are responsible for ensuring that trees and other vegetation is cut back to give a clearance of 12 feet over main roads and by-roads and 8 feet over footpaths and landowners must remove any other encroachments, including all cuttings and trimmings, on the public highway.³⁵¹ During a visite, the Connétable, centeniers and members of the Roads Committee visit the roads of the parish accompanied by the vingteniers in their respective vingtaines, levying fines of up to £50 for each contravention. Only one penalty may be imposed for several contraventions of the same kind (e.g. untrimmed hedging plants) along one stretch of land.

Welfare

- 11.54. From at least the 16th century until 2009, the Parish had a duty to provide assistance to poor persons of the Parish by furnishing the means for food, clothing and accommodation. The Code of 1771 placed this obligation on a formal footing.

³⁴⁹ See generally Raynor and Miles, "Evaluating the role of the Parish Hall Inquiry" (2004) 8 *Jersey Law Review* 17

³⁵⁰ *Loi* (1914) *sur la Voirie*.

³⁵¹ *Loi* (1914) *sur la Voirie*, Art 41.

Under the Poor Law (Amendment) (Jersey) Law 1953 each Parish was placed under a duty to assist persons in need who were born in the Parish and the dependents, whether they were born in the Parish or are ordinarily resident there. (The States were responsible for assisting 'non natives'). The duty was not unlimited: there was still an obligation on individuals to help themselves as far as possible and for relatives to assist. The obligation of the Parish was been further defined by legislation transferring responsibility from the Parish to the States, such as:

- The Children (Jersey) Law 2002 places the Minister for Health and Social Services under a duty to receive into care children in need of care and protection
- The Mental Health (Jersey) Law 1969 makes provision for the compulsory admission to hospital and to guardianship of certain patients suffering from mental disorder.

11.55. The duties of the Parish in relation to welfare have been fundamentally affected by the transfer of the funding obligation from the parishes to the States. Since 2009, Parish welfare has been replaced by Income Support, administered by the Department for Social Security.³⁵²

Parish finances

11.56. Funding for the work of the parish is raised in various ways: principally by the parish rate (see below); but a parish may also borrow money and charge fees (e.g. for dog licences and fire arms certificates) and levy fines.

11.57. The Rates (Jersey) Law 2005 provides the basis for liability, assessment and collection of rates based on the ownership and occupation, value and use of land. The rateable value of land is expressed in 'quarters'. Each parish publishes a Rates List, setting out 'each area of land in the parish that is separately owned or occupied and is liable to rates'. Rates are payable annually.

11.58. Two types of rate are levied by the parish. The first is the **parish rate**, consisting of the foncier rate and the occupier's rate. Subject to certain exceptions, the owner of any land in the parish is liable to foncier rate. Subject again to certain exceptions, any occupier of land in the parish is liable to occupier's rate. Where land is occupied by the owner, he is liable to both foncier and occupier's rate. The parish rate is applied to the general expenses of the parish and may vary from parish to parish. The Parish Assembly has traditionally set the level of parish rates which by its influence on the parish budget is the mechanism for exercising democratic control over the parochial administration. Each Assembly is required by the 2005 Law to elect an Assessment Committee for the parish. An appeal lies to the Rate Appeal Board, appointed by the States.

³⁵² Income Support (Jersey) Law 2007.

- 11.59. The second type of rate is the **Island-wide rate**, consisting of the domestic rate and non-domestic rate. It was introduced as part of reforms that saw the transfer of responsibility for welfare payments and residential care from the parishes to the States of Jersey Social Security Department, designed to distribute the burden of costs more fairly between the urban and rural parishes. The Island-wide rate is set at the same level for all parishes by the Supervisory Committee, consisting of the 12 parish Connétables. The role of the parish is to collect and pay the rates to the States of Jersey Treasury.

12. Public Officers

Introduction

12.1. The principal officers of the Crown in Jersey are:

- The Lieutenant Governor
- The Bailiff
- The Deputy Bailiff
- The Attorney General
- The Solicitor General

12.2. Giving evidence to the Carswell committee, the Bailiff described the procedure adopted for making recent Law Officer and Deputy Bailiff appointments. The post is advertised and applications are made to the Lieutenant Governor. A three person selection panel is convened, consisting of the Bailiff, the senior Jurat, and the chairman of the Jersey Appointments Commission. Following a shortlisting process, consultation takes place with the Jurats, the States Consultative Panel, the Chief Minister, the senior Connétable, the senior Deputy, the senior Senator, a number of other States members, the Bâtonnier, the president and former president of the Law Society and the president of the Chambre des Ecrivains, the other Crown Officers and the local Commissioner. Interviews are then held. The name of the strongest candidate is finally passed on to the Lieutenant Governor with a full report of the process, who transmits this to the UK Ministry of Justice.³⁵³ It is for the Secretary of State for Justice/Lord Chancellor to make a final recommendation on appointment to Her Majesty.

12.3. Two other public officers of importance in the administration of justice are appointments made by the Bailiff:

- The Judicial Greffier
- The Viscount.

The Lieutenant Governor

12.4. The Lieutenant Governor was originally known as the Warden, and when first appointed by the Crown in the 14th century was so appointed for the islands of both Jersey and Guernsey. Subsequently the islands came under separate government of a "Captain" who by 1550 was described as "Captain and Governor". The Lieutenant Governor is appointed by the Crown by Letters Patent under the Great Seal after consultation with the island authorities, and in particular the Bailiff.

12.5. The Lieutenant Governor is a member of the States of Jersey but has no right to vote. Although he is not precluded by law from speaking, convention has it that he speaks on his first and

³⁵³ Mr M Birt, evidence to the Carswell review, 4 May 2010.

last appearance in the States only. The Order in Council of 15 June 1618 provides that the Bailiff shall in the Court and in the Assembly of the States take the seat of precedence “as formerly” and that in all other places and assemblies, the Governor shall have precedence.

- 12.6. The Lieutenant Governor is the personal representative of the monarch. His office also provides the channel for official correspondence between the island authorities and Her Majesty’s Government in Westminster. He has a number of executive responsibilities in relation to immigration and nationality under the Immigration (Jersey) Order 1993, extending the Immigration Act 1971, the British Nationality Act 1981 and other relevant immigration provisions to the island with modifications.

The Bailiff

- 12.7. The Bailiff is appointed by the Crown and holds office during good behaviour. Traditionally his Letters Patent state that he ceases to hold office at the age of 70. No qualification is required, although it is self-evident that a qualification in Jersey law is required.
- 12.8. The Bailiff performs the following public functions:
- President of the Royal Court (Chief Justice)
 - President of the Court of Appeal (though in practice rarely sits in this court)
 - President of the States Assembly³⁵⁴
 - Deputy Governor in the absence of the Lieutenant Governor
 - President of the College of Electors under the Royal Court (Jersey) Law 1948 (Jurats, Senators Constables, and Deputies and all practising Advocates and Solicitors); the Bailiff is a member, but may only vote in the event of a tie after a second ballot
 - Member of the Emergencies Council
 - President of the Assembly of Bailiff, Governor and Jurats, inter alia responsible for regulating the sale of alcohol.
 - Responsibility for giving permission for certain types of public entertainment, including theatre, cinema and cabaret performances.³⁵⁵ Since 1987, an advisory panel appointed by the States Assembly has delegated authority

³⁵⁴ States of Jersey Law 2005, Art 3. In 2010, the *Review of the Role of the Crown Officers* under the chairmanship of Lord Carswell recommended that the Bailiff should not continue to act as President of the States but it is unclear whether this recommendation will be adopted.

³⁵⁵ Licensing (Jersey) Law 1974, Pt 10.

in the name of the Bailiff who is not involved in any respect with the decision taking process.³⁵⁶

- The Bailiff has the power to appoint Lieutenant Bailiffs (usually Jurats) and Commissioners, any of whom may preside over the Royal Court and exercise other judicial functions of the Bailiff as required.
- The Bailiff appoints the Magistrate.
- The Bailiff approves the appointment by the Attorney General of Crown Advocates.³⁵⁷
- The Bailiff is the civic head of the Island, carrying out various ceremonial duties (such as on Liberation Day and Remembrance Sunday) and receiving distinguished visitors to Jersey.
- The Bailiff has a role as 'guardian of the constitution'. Although under the States of Jersey Law 2005 the Chief Minister now has responsibility for the Island's external affairs,³⁵⁸ the Bailiff continues to have a role in dealing with official correspondence between the United Kingdom and Jersey. This ensures that the Bailiff is kept informed of any developments which may have constitutional implications. Outgoing formal or official correspondence to the Ministry of Justice (the UK government department responsible for relations with the Island) goes from the Bailiff via the Lieutenant Governor, with input from the Attorney General.³⁵⁹ Incoming correspondence takes the reverse route. The substance of the correspondence is settled by political decision of the Chief Minister who is responsible for the island's external relations.

12.9. Le Herissier points out that it is only in the post-war period that the powers of the Bailiff have been limited to any appreciable extent, due mainly to the changing perception held by the subsequent incumbents.³⁶⁰ He describes how, during the 17th Century a dispute arose between the Governor (Sir John Peyton) and the Bailiff (Jean Hérault) about the respective duties of the two positions. At this time the Governor was seen as the representative of the Crown and the Bailiff as the representative of the people. The Privy Council ruling established that in the Royal Court and in the States the Bailiff would take precedence while in all other places the Governor would have precedence. The ruling was seen as confirming the

³⁵⁶ The States have approved in principle the transfer of this function away from the Bailiff; the Carswell review took a similar view.

³⁵⁷ Crown Advocates (Jersey) Law 1987. The Carswell Committee accepted the suggestion of the Bailiff and Attorney General and recommended that the Bailiff's role should end (see para 5.33).

³⁵⁸ Art 18(3)(b).

³⁵⁹ *Review of the Role of the Crown Officers*, para 5.28.

³⁶⁰ *The Development of the Government of Jersey 1771-1972*

rights of Islanders to domestic autonomy and to judicial independence. There is sometimes perceived to be a conflict between the Bailiff's role as an officer of the Crown and as the "Guardian of the Constitution", that is, the representative of the people of Jersey and protector of the Island's constitutional privileges. In the Privy Council committee's report of 1947 it was noted that it was the duty of the Bailiff to represent the views of the people of the Island.³⁶¹ His position as President of the States would also support the view that his duty is to the people of Jersey and, by discharging that, he discharges his duty to the Crown.

- 12.10. The potential conflict between his parliamentary and judicial positions is sometimes raised. There has been discussion over many years about the possible splitting of the Bailiff's legislative and judicial roles into two separate offices. In *R (Barclay) v Secretary of State for Justice*³⁶² the English Court of Appeal held that the position of Seneschal in Sark, with its combination of judicial and legislative roles is a breach of Article 6 of the ECHR.³⁶³ In *McGonnell v United Kingdom*³⁶⁴ the European Court of Human Rights found that, in the context of a particular planning appeal, the Guernsey Bailiff's executive and legislative functions meant that his independence and impartiality as a judge were capable of appearing open to doubt and his position did not meet the requirement of objective impartiality. The implications of these findings for the Bailiff of Jersey (whose role is slightly different from that of his counterpart in Guernsey and the Seneschal in Sark) is unclear, particularly in light of the Human Rights (Jersey) Law 2000, which empowers the Royal Court to declare States legislation incompatible with Convention rights. The States of Jersey Law 2005 addressed some concerns with the Bailiff's executive role by the removal of his casting vote and power of dissent. Le Herissier suggests that the separation of the Bailiff's powers could destroy the essential part played by the Bailiff in the Island's relationship with the Crown³⁶⁵, but whatever the merits of that view in 1972, the move to ministerial government may well have affected that possibility.
- 12.11. In December 2010, a committee of review established by the States, chaired by Lord Carswell, made a number of

³⁶¹ Home Office, *Report of the Committee of the Privy Council on Proposed Reforms in the Channel Islands*, Cmd 7074 (1947).

³⁶² [2008] EWCA Civ 1319; [2008] WLR (D) 376 CA.

³⁶³ [2009] SC 9.

³⁶⁴ (2000) 30 EHRR 289. For a discussion of some of the implications of the case, see Matthews, "The dog in the night-time" (2000) 4 *Jersey Law Review* 164

³⁶⁵ For a general discussion of the Bailiff's role, see Bailhache, "The cry for constitutional reform - a perspective from the office of Bailiff" (1999) 3 *Jersey Law Review* 253

recommendations in relation to the office of Bailiff.³⁶⁶ The committee recommended that the Bailiff should cease to be President of the States Assembly (being replaced in that role by a person elected by members). The committee favoured the Bailiff continuing as the chief judge of the Island and continuing to “act and be recognised as the civil head of Jersey”. The acceptance or otherwise of these recommendations will be a matter of political judgement for the States Assembly.

The Deputy Bailiff

- 12.12. The Deputy Bailiff is appointed by the Crown. The position created in 1958 to deal with the Bailiff’s increasing workload. No qualification is strictly required, although clearly a legal qualification is essential. The Deputy exercises such functions as are assigned to him by the Bailiff. He or she is a judge *ex officio* of the Court of Appeal (though, like the Bailiff, rarely sits in this court).

The Viscount

- 12.13. The Viscount’s office is said to be as old as the office of Bailiff. The Viscount operates through the Viscount’s Department (established in 1930).³⁶⁷ In practice, however, many of the functions of the Viscount (for example, that of the Coroner) are delegated to the Deputy Viscount and members of the Viscount’s Department. The Viscount has the powers of a Centenier for the purposes of the enforcement of the States of Jersey Law 2005 (for example, removing suspended members and strangers under Standing Orders). The Viscount is not subject to the jurisdiction of any court in respect of the exercise of powers conferred by the States of Jersey Law 2005. The Viscount is Chief executive officer both of the Royal Court and the States. The Viscount is appointed by the Bailiff; no special qualification is required. Since 1948 the Viscount has not been a member of the States. The Viscount’s Department is responsible for ensuring the decisions of Jersey’s Courts and States Assembly are carried out. It deals with executing orders such as serving summonses and other legal documents on members of the public and making wage arrests, as well as other general court enforcement duties. The Viscount acts as coroner, determining whether or not a post mortem is necessary; considers the Police and post-mortem examination reports; and determines whether or not an inquest is required.
- 12.14. An inquest is usually presided over by the Deputy Viscount, generally sitting alone, although he can summon a jury of 12 people to assist him in special cases involving a matter of public interest. The inquest is held in public. The Deputy Viscount calls witnesses of his choice and examines them on oath. Members of the deceased’s family, or a lawyer acting for them, can ask questions of the witnesses, as can any other

³⁶⁶ *Review of the Role of the Crown Officers* (2010).

³⁶⁷ See, generally, Article 42 SJL.

person with a sufficient interest in the case (again, through a lawyer, if desired). At the end of the inquest, the Deputy Viscount returns what is commonly called a “verdict”, which is a short narrative statement setting out the findings. If a jury has been summoned, the Deputy Viscount will outline the law to them in public, before retiring with them in private when they consider their verdict. The Deputy Viscount is forbidden by law to make any finding of civil or criminal liability. He or she cannot blame anyone for anything in connection with the death. No-one is on trial. There are no parties to an “action”. The inquest is designed to find out what actually happened, not what might have happened if someone had done something differently or made a different decision. If a member of the deceased’s family believes that someone is at fault in relation to the death, proceedings have to be brought in the Royal Court. An inquest is just a fact-finding exercise, although the circumstances underlying the facts are investigated fully. The Deputy Viscount reports his verdict to the Bailiff who, if he is satisfied with it, orders its registration by the Judicial Greffe. After that registration, a copy of the verdict is sent to the Registrar of Births, Deaths and Marriages for the Parish in which the deceased died; the death is registered by that Registrar and the Deputy Viscount signs the Register of Deaths. A death certificate is then issued by the Registrar. If necessary, the Deputy Viscount issues a cremation certificate, which has to be countersigned by the Medical Officer of Health.³⁶⁸

- 12.15. The Viscount has a further important function as the Island’s official receiver. He administers *désastre* proceedings, examining and investigating debtors’ activities, as well as reporting offences. The Viscount is responsible for initiating action and proceedings in relation to bankruptcy offences and transgressions, as well as progressing the system of discharge from personal bankruptcy.
- 12.16. The Viscount is also responsible for administering assets restrained or frozen under *saisies judiciaires* granted pursuant to the Drug Trafficking Offences (Jersey) Law 1988 and other legislation designed to curb money-laundering and other serious crime.

The Attorney General

- 12.17. The Attorney General is the senior Law Officer of the Crown. He has five principal functions –
 - legal adviser to the Crown on matters of Jersey law
 - legal adviser to the States Assembly, Ministers, Scrutiny Panels and other public bodies; he also assists individual States members in the exercise of their public functions to the extent he is able to do so without conflict

³⁶⁸ See generally the Inquests and Post-Mortem Examinations (Jersey) law 2005. A practical explanation of the history of inquests is to be found in Wilkins, “Development of the Inquest process” (2005) 9 *Jersey Law Review* 301

- responsibility for the prosecution service in all courts
- responsibility for inter jurisdictional assistance in criminal matters and the conduct of investigations into serious fraud
- titular head of the Honorary Police.

His office is an ancient one. The role of Attorney-General was first recorded at the end of the thirteenth century. It is an appointment by the Crown and by tradition his Letters Patent expire on the holder's 70th birthday.

- 12.18. The office has always been of the first importance in the administration of justice. Although his third function has been described for convenience as 'director of public prosecutions' the role is far wider than that. He is the '*partie publique*' which may best be translated as 'Minister of Justice'. It is his function to safeguard the public interest in the widest sense.³⁶⁹ At one time the Royal Court was not properly constituted without the presence of the Attorney General. His duties include the offering of advice ('*conclusions*') to the Court in a comparable way to the advice offered by the Advocate General to the European Court of Justice. In criminal proceedings the Royal Court cannot sentence an offender without hearing the *conclusions* of the Attorney General (or a Crown Advocate appointed by him) as to the appropriate sentence. In civil proceedings the Attorney is frequently called upon to protect the interests of charities in general and other public interests which require protection. At *Visites Royales* he offers *conclusions* on the matters raised with the Court by the parochial authorities. In relator proceedings (or *causes en ajonction*), such as those arising from the raising of the *Clameur de Haro* he again assists the Court by offering *conclusions* as to the dispute between the parties. The Attorney General may be described as the universal joint of the justice system.
- 12.19. The role has of course changed over the centuries, and particularly during the period following the Liberation in 1945. In the 19th century the Crown officers were appointed and paid by the Crown and were responsible not to the States but to the Crown. In disputes between the Crown and the States, such as the Prison Board case in 1891, the Attorney General would appear for the Crown against the States. Up until the mid 20th century the Crown Officers sometimes appeared to exercise political influence and did not view themselves as solely legal advisers. In 1919 there was a dispute between the Bailiff and the Attorney General as to the latter's role in relation to a debate on the Tobacco Bill. (The Attorney General felt that his political role was key.) This situation was noted with disapproval by the Privy Council Committee during its 1946 review and no Crown Officer has since sought to assume the formal position adopted by the Attorney General in the Tobacco Bill debate.

³⁶⁹ See *Le Cocq v Attorney General* 1991 JLR 169

- 12.20. In 1947 the Crown and the States agreed, in consideration of the assignment of the benefit of the Crown Estate in Jersey, that the salaries of the Crown Officers would be paid by the States. With the development of self-government, and the democratic reforms of 1948, the Law Officers have ceased to play any significant political role, although their advice is often sought on broad policy issues as well as legal issues.
- 12.21. The Attorney General has the right to attend, and an unfettered right to speak in the States as a non-elected member. He generally speaks only to offer legal and constitutional advice, or in relation to matters closely affecting the functions of the Law Officers, such as criminal justice. As a member of the States, he may be questioned on matters falling within his responsibilities.

Judicial Review of the Attorney General's functions

- 12.22. In *Re McMahon and Probets*³⁷⁰ it was held that there is no Jersey authority for the proposition that the court has any general supervisory power over the Attorney General, whose position is unlike that of the States and its Committees engaged in the administration of the Island. The Attorney General, in exercising his discretion in matters arising from criminal investigations in Jersey and abroad, acts as the principal law officer of the Crown and is answerable neither to the States nor to the Royal Court except when it is sitting as a court of trial. The court has a very limited power in appropriate cases to examine (a) whether the Attorney General had the power to make a decision; (b) the extent of any such power; and (c) whether it has been exercised in the appropriate form. In this case the Attorney General's decision to issue a notice under the Investigation of Fraud (Jersey) Law 1991 was a political one affecting the public interest generally and was accordingly outside the range of discretionary action which the court should review. In the light of subsequent decisions (see below), it would seem unlikely that *Re McMahon and Probets* represents the current state of the law.
- 12.23. In a number of subsequent cases the reviewability of the exercise of the powers of the Attorney General has been explored more deeply. In *Barra Hotel Ltd v Attorney General*³⁷¹ the Court of Appeal held that there is no "reasonable suspicion or apprehension" that a fair trial was not possible because the Bailiff might preside over a criminal case prosecuted on behalf of his brother, the Attorney General, where both were simply performing the regular duties of office. If there was some other relevant fact, for example, the Attorney General was called as witness or his credibility otherwise in issue, there would be potential for apparent bias. In *Re Sine*³⁷² (2000) it was stated that the Attorney General acts on behalf of his

³⁷⁰ 1993 JLR 35.

³⁷¹ 26 October 2000 unreported.

³⁷² 1999 JLR 135.

office not personally and is not therefore precluded from acting as *amicus curiae* merely because an allegation of misconduct is made against him personally, although on the facts it may be improper in which case the Attorney General may nominate a Crown Advocate to appear.

- 12.24. In *Attorney General v Rouille*³⁷³ it was held that the Attorney General's discretion to decide whether or not to prosecute was not reviewable by the Court unless the prosecution was vexatious or oppressive. In *Acturus Properties Ltd. v Attorney General*³⁷⁴ (2001) it was held that decisions made under the Investigation of Fraud (Jersey) Law 1991 were to be presumed correct unless the contrary was proved – the burden of proof was on the applicant; the Attorney's decisions were, however, subject to judicial review on the normal grounds of illegality, irrationality and procedural impropriety. Similarly, in *Hilsenrath v Attorney General*³⁷⁵ there was held to be an assumption that the Attorney General's decisions under the Criminal Justice (International Co-operation) (Jersey) Law 2001 were properly made, but they would have been subject to judicial review on the conventional grounds. If such allegations had been made, the disclosure of the documents might have been ordered in the interests of justice.

The Solicitor General

- 12.25. The Solicitor General is a Crown appointment. The Solicitor is the deputy to the Attorney General and performs any of the Attorney's functions as authorised by him. He or she is a non-elected member of the States in his or her own right. The Solicitor General has an unfettered right to speak but subject to the same practice as applies to the Attorney General. It has been suggested that in the case of conflict between the Crown and the States, the Attorney General would represent the interests of the Crown and the Solicitor General would represent the interests of the States/Public, but it is very doubtful if this solution would be acceptable today. However, one has to be careful what one means when using the expression "the Crown". If it means UK Government Ministers, they would doubtless be advised in any serious constitutional dispute by their own lawyers even up to the UK Attorney General, and it would not be considered appropriate by anyone that the States should not turn to their own legal advisers, namely the Attorney General and the Solicitor General.

The Judicial Greffier

- 12.26. The Greffier is appointed by the Bailiff. The appointment may only be suspended by the Superior Number of the Royal Court and dismissed by Her Majesty in Council on a petition of the Superior Number of the Royal Court. The Greffier acts as the

³⁷³ 1995 JLR 315.

³⁷⁴ *Acturus Properties Limited v Attorney General* [2001] JLR 43.

³⁷⁵ 2005.

clerk to the court and also determines various interlocutory applications. The Judicial Greffier has a status, when acting judicially, of an English district or county court judge.³⁷⁶ Until recently, any discretion delegated to the Greffier remains for the court or judge to exercise on appeal and the Court therefore has generally exercised an unfettered discretion to hear an appeal from the Judicial Greffier. However, the position has recently been affected by two decisions of the Royal Court, *Downes v Marshall* 2010 JLR 265, a family case, and *Incat Equatorial Guinea Limited v Luba Freeport Limited* 2010 JLR 435, a case on taxed costs. The decisions were respectively that an appeal should only be allowed against a decision of the Family Registrar or the Greffier on taxation if, in exercising his discretion the Registrar/Greffier had taken into account irrelevant matters or ignored relevant matters, or there had been some procedural impropriety or he had otherwise arrived at a conclusion that was wrong to the extent that intervention was required in the interests of justice and fairness. In other cases on appeal, the better view is that while the decision should be given due weight and consideration, the Royal Court sitting as an appellate court has an unfettered discretion and can hear the appeal as a rehearing *de novo* if appropriate. but the court is entitled to look at the matter afresh subject to certain clear principles. It is within the discretion of the Royal Court to allow an appeal against an order for costs made by the Greffier on the ground that it would have reached a different decision. Frivolous or ill-considered appeals against costs should be avoided, however, as the potentially substantial cost of an unsuccessful appeal will fall on the applicant. It was stated in *Richomme v Le Gros*³⁷⁷ that the Judicial Greffier should ensure that proceedings before him or his deputies are properly recorded so that, on an appeal from his order, the Royal Court may review his decision without the need for a repetition of the evidence. Where, however, no proper transcript of the proceedings is available, the court may in the interest of justice treat the appeal as a rehearing.

³⁷⁶ *Murphy v Collins* 2000 JLR 276.

³⁷⁷ 1994 JLR Note 6

Appendix 1: Framework for developing the international identity of Jersey

Following the statement of intent agreed on 11 January 2006, the Chief Minister of Jersey and the UK Secretary of State for Constitutional Affairs have agreed the following principles. They establish a framework for the development of the international identity of Jersey. The framework is intended to clarify the constitutional relationship between the UK and Jersey, which works well and within which methods are evolving to help achieve the mutual interests of both the UK and Jersey.

1. The UK has no democratic accountability in and for Jersey which is governed by its own democratically elected assembly. In the context of the UK's responsibility for Jersey's international relations it is understood that -
 - The UK will not act internationally on behalf of Jersey without prior consultation.
 - The UK recognises that the interests of Jersey may differ from those of the UK, and the UK will seek to represent any differing interests when acting in an international capacity. This is particularly evident in respect of the relationship with the European Union where the UK interests can be expected to be those of an EU member state and the interests of Jersey can be expected to reflect the fact that the UK's membership of the EU only extends to Jersey in certain circumstances as set out in Protocol 3 of the UK's Treaty of Accession.
2. Jersey has an international identity which is different from that of the UK.
3. The UK recognises that Jersey is a long-standing, small democracy and supports the principle of Jersey further developing its international identity.
4. The UK has a role to play in assisting the development of Jersey's international identity. The role is one of support not interference.
5. Jersey and the UK commit themselves to open, effective and meaningful dialogue with each other on any issue that may come to affect the constitutional relationship.
6. International identity is developed effectively through meeting international standards and obligations which are important components of Jersey's international identity.
7. The UK will clearly identify its priorities for delivery of its international obligations and agreements so that these are understood, and can be taken into account, by Jersey in developing its own position.

8. The activities of the UK in the international arena need to have regard to Jersey's international relations, policies and responsibilities.
9. The UK and Jersey will work together to resolve or clarify any differences which may arise between their respective interests.
10. Jersey and the UK will work jointly to promote the legitimate status of Jersey as a responsible, stable and mature democracy with its own broad policy interests and which is willing to engage positively with the international community across a wide range of issues.

Signed 1 May 2007

Secretary of State for Constitutional Affairs

Chief Minister, Jersey

Appendix 2: Advocates and Solicitors Examinations: Past Papers

IMPORTANT NOTES

1. Please write legibly—unreadable papers may result in lost marks.
2. Your written paper will have to be photocopied so please:-
 - Write in **black** ink
 - Write well within reasonable margins, i.e. 1" all round each page
3. Write your assigned number at the **top left hand corner of each page** and the page number in the **top right hand corner of each page** (remembering to keep within photocopy margins, i.e. 1" all round each page).
4. Number your answers and start each new answer on a new page.
5. Write on one side of the paper only.
6. **ANSWER 5 QUESTIONS, INCLUDING AT LEAST TWO FROM EACH OF PARTS A AND B.**
7. Each question carries equal marks. Where a question is divided into parts, each carries the marks (expressed as percentages) shown in brackets.
8. Support your answers wherever possible by reference to statutory judicial or other authority. Give reasons for your answer
9. Time allowed: 3 hours.

June 2011

PART A

1. (a) To what extent might it be appropriate to look at a work such as *Chitty on Contracts* as a guide to the law of Jersey? [50%]
- (b) The Attorney General seeks your opinion. Ramon has been charged with manslaughter, under circumstances where the victim had died as the result of overdosing on heroin that Ramon had supplied to her. There is authority from the House of Lords to the effect that a conviction (for homicide) is not possible under such circumstances (the chain of causation having been broken by the deceased's voluntary act). But there is authority from the High Court in Scotland that a homicide conviction can be entirely appropriate under such circumstances such as Ramon's (the chain of causation not being broken). There is no relevant Jersey authority on the point.

In the light of the available case law, advise the Attorney General as to what the Royal Court may find to be the Jersey law in this regard [50%]

2. Explain the operation of the doctrine of precedent within the judicial system in Jersey.
3. (a) What is customary law? What is its role in the law of Jersey? [80%]
(b) Is it appropriate to refer to a non-Norman *coutume* before the Royal Court? [20%]
4. Explain who you would regard as the two most important 16th-century commentators on the *Ancienne Coutume*. (With reference to later authorities, you should describe the impact of their work in Jersey.)

PART B

5. It is 2015. You are the newly appointed Attorney General. The recently elected Government of the United Kingdom has promised "to deal once and for all with tax havens". It secures the passage through Parliament of a Tax Fairness Act, which purports to remove the legislative competence of the States of Jersey in respect of taxation and further provides that all rates of taxation in Crown Dependencies are henceforth to be governed by statutory instrument, made by the Secretary of State.

What advice would you give to the States?

6. Explain the nature of Jersey's legal relationship with the European Union.
7. (a) Describe the role and functions of the Parish Constable. [80%]
(b) Describe the role and functions of the lieutenant governor. [20%]
8. It is 2012. The United Kingdom becomes a signatory to an international treaty intended to facilitate the seizure of the financial assets of the families of various former leaders of Arab states. The local branch of an Arab bank which holds assets for certain of these families seeks your opinion as to the legal consequences for Jersey of this treaty and the United Kingdom's decision to become a party to it.

What is your advice?

September 2010

PART A

1. Explain the role of customary law in Jersey.
2. Who are the most prominent 18th century commentators on the *Coutume Reformée*, what are their principal works and what is their status in Jersey?
3. (a) What is relevance of the *ius commune* in Jersey? [50%]
(b) Describe and explain the contemporary relevance of the work of Pothier to the courts of Jersey. [50%]
4. It was observed *In re Esteem Settlement* (2002) that "in the absence of Jersey judicial authority, the greatest weight was

to be attached to writers on the law of Jersey, i.e. Poingdestre (when writing of Jersey law rather than Norman law) and Le Geyt." Discuss the accuracy of this statement.

PART B

5. To what extent is the account, presented in the *Kilbrandon Report*, of the main features of the constitutional relationship between Jersey and the United Kingdom of contemporary relevance?
6. According to European Community law, what are the rights of citizens of member states in Jersey?
7. Describe the roles of
 - (a) the Viscount [40%]
 - (b) the Greffier [40%]
 - (c) the Solicitor General [20%]
8. To what extent is the exercise of the powers of the Attorney General judicially reviewable?

June 2010

PART A

1. It has sometimes been suggested that the mixture of sources of law in Jersey presents difficulties. What could these be?
2. What is the status of the doctrine of *stare decisis* in Jersey?
3.
 - (a) What are the *Ancienne Coutume de Normandie* and the *Coutume Reformée*? [20%]
 - (b) Describe the relative standing in Jersey of the *Ancienne Coutume de Normandie* and the *Coutume Reformée*. [80%].
4. To what extent is French law a source for that of Jersey?

PART B

5. Under what circumstances can the Parliament of the United Kingdom legislate for the domestic affairs of Jersey?
6.
 - (a) Can the royal assent lawfully be refused to a Law adopted by the States of Jersey? [50%]
 - (b) The preamble of the States of Jersey Law 2005 provides: "Whereas it is recognised that Jersey has autonomous capacity in domestic affairs; Whereas it is further recognised that there is an increasing need for Jersey to participate in matters of international affairs". What is the significance of this? [50%].
7. Describe the application of European Community law in Jersey.
8.
 - (a) What is the membership of the States of Jersey? [20%]
 - (b) What are the principal role and functions of the Parish Constable? [80%].