

# **STATES OF JERSEY**

**r**

## **DRAFT STATES OF JERSEY LAW 200- (P.124/2004): SECOND AMENDMENTS**

---

**Lodged au Greffe on 26th October 2004  
by Senator E.P. Vibert**

---

**STATES GREFFE**

PAGE 28, ARTICLE 1 –

*In paragraph (1) –*

(a) *after the definition “prescribed” insert the following definition –*

– “ ‘Speaker’ means the person elected as such under Article 3;”;

(b) *in the definition “stranger” omit the words “the Deputy Bailiff,”.*

PAGE 28, ARTICLE 2 –

*Substitute the following Article –*

**“2 Constitution of the States**

(1) The States of Jersey are constituted as follows –

12 Senators, elected as provided by this Law;

the Connétables of the 12 Parishes of Jersey, who are members of the States by virtue of their office;

29 Deputies, elected as provided by this Law.

(2) All members of the States shall have the right to speak and vote in the Assembly.”.

PAGE 29, ARTICLE 3 –

*Substitute the following Article –*

**“3 Speaker of the States**

(1) There shall be –

(a) a Speaker of the States, who shall discharge the functions imposed on the Speaker by or under this Law; and

(b) a Deputy Speaker of the States, who shall discharge the functions of the Speaker at any time when the Speaker is unable to do so.

(2) The Speaker shall preside at meetings of the States.

(3) The States shall, at the first meeting of the States following an ordinary election for Deputies, elect by ballot an elected member as Speaker and an elected member as Deputy Speaker.

(4) A person elected as Speaker or Deputy Speaker shall hold office until the conclusion of the last meeting of the States before the meeting described in paragraph (3), unless he or she previously resigns or ceases to be an elected member of the States.

(5) In the event of a vacancy in the office of Speaker or Deputy Speaker, the States shall, at the next

meeting of the States, elect another by ballot, from the elected members.

- (6) The Greffier of the States shall preside at meetings of the States for the purposes of an election under paragraph (3) or (5).
- (7) If both the Speaker and Deputy Speaker are unable to preside at a meeting of the States, the Speaker shall choose the Greffier of the States or Deputy Greffier of the States to preside at the meeting.
- (8) The Speaker or Deputy Speaker, when presiding at a meeting of the States, shall not have the right to vote.”.

PAGE 32, ARTICLE 12 –

*In paragraphs (1) and (2) for “Bailiff” substitute “Speaker”.*

PAGE 33, ARTICLE 13 –

*In paragraph (2) for “Bailiff” substitute “Speaker”.*

PAGE 34, ARTICLE 15 –

*At the end of the Article add the words “disregarding the Speaker, or Deputy Speaker, presiding at the meeting”.*

PAGE 36, ARTICLE 21 –

*In paragraphs (1) and (2) for “Bailiff” substitute “Speaker”.*

PAGE 41, ARTICLE 32 –

*In paragraphs (2) and (4)(a) for “Bailiff” substitute “Speaker”.*

PAGE 44, ARTICLE 40 –

*In paragraphs (3), (4), (7)(a), (9), (11) and (13) for “Bailiff” substitute “Speaker”.*

SENATOR E.P. VIBERT

## **REPORT**

It is inconceivable to me that the States could debate wholesale changes to the States of Jersey Law without tackling the subject of the presidency of the Assembly.

The matter was fully aired by the Clothier panel and the Bailiff of Jersey, Sir Philip Bailhache, Q.C. made a vigorous public response to the whole of the Clothier Report in a letter he wrote to the then president of Policy and Resources on February 5th 2001.

In this letter, he dealt with the position of the Bailiff and in fairness to him and his views – bearing in mind the difficult position he finds himself in – both of these arguments are included at the end of this report, so that members can re-visit them.

There are a number of matters regarding the Clothier Panel's views on the role of the Bailiff, on which I wish to comment.

It was deeply disappointing that the Panel claimed that the Bailiff had suspended a member from the House. This was a very bad error, as it gave the public the impression that the Bailiff has that power. Only the States, acting as a whole, can suspend a member from the House, which is what happened in the incident Clothier referred to. He also does not have the power to decide who will speak in the House; his power is deciding when a person shall speak and only that. Every member has the right to speak (unless he falls victim of "the guillotine") and that is very clear.

It was disappointing that Advocate Le Quesne, a member of the Clothier Panel, persisted in giving this wrong information out to the public as late as last week and that is regrettable. Such inaccuracies do not help their case and leaves them open to the claim that they had not done their homework properly on several elementary points.

The position, which I am putting to the House, is that if we wish to be seen as a mature and responsible government of the people of Jersey for the people of Jersey, it is unacceptable that the president of the House should be an un-elected person.

It is also unacceptable for any person to be permitted to be part of the States of Jersey who has not been elected by the people.

My amendments will remove from the States, the Lieutenant Governor, the Bailiff, the Attorney General, the Solicitor General and the Dean of Jersey.

I will deal with each of the positions separately:

### **The Lieutenant Governor**

His position can be easily dealt with in that at the start of each new States Assembly, following an election, the Chief Minister, on behalf of the Council Ministers and all members of the States, can issue an open invitation to him to attend any meeting of the States at his pleasure for the duration of the life of that States.

### **The Bailiff**

The Clothier Panel, I believe, summed up the general island feeling about the post of Bailiff in modern times when they wrote: "It has seemed to us that of all the historic titles in Jersey, protected over centuries by the island's autonomy that of the 'Bailiff' is the most ancient and respected and the most worthy to be preserved no matter what arrangements the passage of time may require. But while the title must remain, the function needs to be modified".

The most important modification, in my view, is that the Bailiff ceases to be president of the States of Jersey.

There is little doubt that as president of the House, the Bailiff wields some political power and patronage even if

he dismisses this in his public response to the Clothier proposal and attempts to downplay his role in this area. The right to approve the content of questions and personal statements is a subtle power that controls a certain amount of what a member can say in the House. It will be argued that this vetting process is to ensure that there is no breach of Standing Orders but this power is discretionary and open to question.

In his arguments, Sir Philip states that the Bailiff's function is not in any real sense involved in the making of law "His function, as president of the States, is that of a neutral umpire, ensuring the observance of the rules of debate."

I agree that that is precisely what his function should be – the neutral referee. Often this function is performed by the Greffier of the States. It is not necessary for the Bailiff to perform this role. It can be carried out by a member of the States, who should be elected by the Assembly, to be "the referee" and carry the title of Speaker of the States of Jersey.

It will require of the member allowing himself to go forward to election to this position to thoroughly familiarise himself with the Standing Orders (the rules of the game). We have seen this working on several occasions in the last three months and it has worked very well. The Greffier of the States will always be there to assist and stand-in for the Speaker or Deputy Speaker when neither of them is available.

The Bailiff's position will then be the Chief Judge of the Royal Court and will have no political role. This would enable the Chief Minister to have a clearly defined path in dealing with all matters relative to the good governance of Jersey, including our external relations, without any complications of the Bailiff's role.

It will be for the Chief Minister to exercise his discretion on when he would require the assistance of the Bailiff on any matter.

Sir Philip argued that the principle of the separation of powers is "quite rightly states that no one involved in making the laws should be involved judicially in a dispute based upon them". He goes on to argue that this is not the position. But recognises that it is a clear public perception both inside and outside of Jersey that it is the case.

By the houseStates appointing a Speaker from its own number, this public perception will be changed to the greater benefit of Jersey and its image both inside and outside of the island.

### **The Crown Law Officers**

There is no need for the Crown Law Officers to be members of the States. They are un-elected and their role is to provide the States with legal opinion, when required. To this degree, their role is limited as a legal opinion they give to a Committee is in most cases confidential and not available to the public in any case, for obvious reasons.

There are times when their advice is needed by the Assembly. To this end, this can be handled by a Crown Law Officer being available in the building whilst the States is in session and on call in the event of a member wishing an explanation regarding the law.

### **The Dean of Jersey**

There is no valid reason why the Dean of Jersey should be part of the States Assembly.

### **Financial/manpower implications**

There are no financial or manpower implications for the States arising from these draft amendments.

**REPORT OF THE REVIEW PANEL ON THE MACHINERY OF GOVERNMENT IN JERSEY (THE  
'CLOTHIER' REPORT)**

## Chapter 8

### **The Bailiff**

- 8.1** We come now to the very important issue which we have been asked to consider, the future of the high and honourable office of Bailiff. The office of Bailiff is a distinctive feature of the present Machinery of Government in Jersey and many of our previous considerations build up to it.
- 8.2** The word 'bail', French in derivation, now has many connotations in English, all involving some notion of trust. In ancient times the Bailiffs of Jersey and Guernsey played a significant part in the government of their bailiwicks. In view of their isolation in those early days, the Bailiffs must have both declared and administered the law to their peoples. As time passed the Bailiffs of Jersey came to be supported by 12 trusted persons, prominent in the community and sworn to assist the Bailiffs in government – the Jurats. Thus was the Jersey parliament born. Over the centuries the assembly came to incorporate three estates: the clergy, the Jurats and the Connétables, and thus to acquire the title of "The States of Jersey". The Island's assembly developed over the years to the extent that power has in theory, though not entirely in practice, passed from the Bailiff to the people.
- 8.3** It has seemed to us that of all the historic titles in Jersey, protected over centuries by the Island's autonomy, that of the 'Bailiff' is the most ancient and respected and the most worthy to be preserved no matter what rearrangements the passage of time may require. But while the title must remain, the function needs to be modified.
- 8.4** There are three reasons of principle for saying that the Bailiff should not have a role, both in the States and as Chief judge in the Royal Court:-
- \* The first is that no one should hold or exercise political power or influence unless elected by the people so to do. It is impossible for the Bailiff to be entirely non-political so long as he remains also Speaker of the States. A Speaker is the servant of an assembly, not its master and can be removed from office if unsatisfactory. The Bailiff, appointed by the Queen's Letters Patent to a high and ancient office, should not hold a post subservient to the States.
  - \* The second reason is that the principle of separation of powers rightly holds that no one who is involved in making the laws should also be involved judicially in a dispute based upon them.
  - \* The third reason is that the Bailiff in his role as Speaker of the States, makes decisions about who may or may not be allowed to speak, or put questions in the States, or about the propriety of a member's conduct. Such decisions may well be challenged in the Royal Court on grounds of illegality but, of course, the Bailiff cannot sit to hear and determine those challenges to his own actions.

We now consider these reasons further.

- 8.5** The duality in the Bailiff's present function has been the subject of widespread debate in recent years. There is additionally the complication that the Bailiff plays a significant role in the executive area of government, principally but not exclusively, as the direct link to the Home Office. English constitutional law scarcely exists save as a collection of conventions, more or less observed, in this respect differing from the many modern democracies with written constitutions. However, a general consensus seems to have been established that it is undesirable for those who make the laws also to adjudicate upon them.

The underlying thought must be that a judge who interprets his own laws is liable to make them mean what he would like them to mean on an occasion, as opposed to what he has previously written and promulgated to the people. Many in Jersey have said that this perception of constitutional propriety is over-delicate and does little justice to the modern judicial temperament or the capacity for independence of successive Bailiffs.

- 8.6** A number of our witnesses asserted that such was the tradition of impartiality and integrity in successive Bailiffs that the supposed conflict between legislative and judicial functions was merely one of theory and perception. We fully accept all that has been said about the honourable and correct conduct of Jersey's long succession of Bailiffs. It is, however, impossible to say that the conflict is unlikely ever to arise when it has in fact arisen in very recent times.
- 8.7** The Bailiff recently found reason to suspend a Member of the States from sitting and that ruling was challenged as unlawful in the only place where such a challenge could be heard, namely the Royal Court. The Bailiff is the senior Judge and would have been expected to sit in judgement himself on so important and contentious a matter. But of course he could not. A Judge of the Channel Islands Court of Appeal was summoned to hear the complaint and ruled that the Bailiff had the power to act as he did and that every assembly is entitled to regulate and control its own proceedings.
- 8.8** It might be argued by some that episodes of conflict are isolated coincidences and that the Bailiff has never before been challenged in his function as Speaker, or at any rate not on record. But we live in times, however little we may like them, when challenges to authority are ever more frequent and determined. Furthermore, the introduction of Human Rights legislation is likely to lead to more such challenges. See, for example, the complaint of one McGonnell in Guernsey which he took to the European Court of Human Rights.
- 8.9** Naturally, some of our witnesses drew comparisons between the so-called "duality" of the Bailiff's office and that of the Lord Chancellor at Westminster. In fact the decision-making power of the Lord Chancellor is not, in our opinion, anything like as extensive as that of the Bailiff. As a member of the Cabinet, the Lord Chancellor must carry the other members with him in any important decision he has to make. But even were it our business to judge the constitutional propriety of the office of Lord Chancellor of England and find it lacking, it is hardly sensible to follow one bad example with another.
- 8.10** The two examples cited above show that the conflict between roles in the legislature and the judiciary is not merely one of theory and perception, but occasionally has practical manifestations. It is easy, of course, to say that the conflict can always be circumvented by the selection of a suitable judge to try any case in which the conflict appears to arise. We do not accept that such an ad hoc remedy should form the permanent basis of a proper constitution. Indeed, it is only in Jersey and Guernsey that one finds this most unusual arrangement whereby the Speaker of the Island Assembly and the Chief Justice are one and the same person.
- 8.11** The notion that the legislature, the executive and the judiciary are three separate estates in any constitution is intellectually satisfying but practically inaccurate. Jersey's constitutional arrangements, in line with those of the United Kingdom, have their origins in the mediaeval doctrine of the authority of the Crown which encompassed all three powers of government: executive, legislative and judicial. Some 300 years ago that was challenged by the view that, as a defence against tyranny, the three powers should be kept separate. What evolved in almost all democratic countries, however, including for all practical purposes the United Kingdom, was a fusion of the executive and legislative powers in membership of a national assembly, but with an independent judiciary. In the assembly some held office and some did not. What we believe to be essential is that there should be some form of audit of the former by the latter, whether a party system exists or not, and that on no account should a majority of the members hold executive office.
- 8.12** The task of the judiciary is to apply the laws which will most commonly have been proposed by the executive and endorsed by the legislature. It is now recognised almost everywhere that this requires that the judiciary should form a separate estate which is truly independent. The complexity and scope of modern legislation and the extent of executive action to which they have given rise have made both the

reality and perception of such independence even more imperative.

- 8.13** Neither the underlying principles nor the volume of evidence can in our opinion be ignored any longer. For these reasons, we **recommend** that the Bailiff should cease to act as the president of the States or to take any political part in the Island's government and that the States should elect their own Speaker. It follows that he should cease to be the principal link with the Home Office. He should be liberated to do what all Bailiffs of recent times have been especially qualified and trained to do, namely be the Island's Chief Justice. There was never a time when the volume, scope and complexity of litigation in the Royal Court of Jersey were more demanding than they are today.
- 8.14** It is the inevitable consequence of our recommendation that the Chief Minister, rather than the Bailiff, would henceforward be the direct link to the Home Office in London. This does not mean that the Home Office might not communicate directly with the Bailiff on any matter where it seemed appropriate to seek his advice.
- 8.15** We **recommend**, however, that the ancient office of Bailiff should continue to be accorded the respect in which the office has been held for so long. It would be appropriate for the Bailiff to swear in Ministers in his Court and present them with their seals of office. Just as in England the Lord Chancellor takes precedence over the Prime Minister, so should the office of Bailiff continue to be the highest in the Island on all occasions when the order of precedence is observed.



**Extract from letter from the Bailiff of Jersey to the President of the Policy and Resources Committee dated 14th February 2001 and published in full in the Jersey Evening Post**

“The Panel describes the rôle of the Bailiff as a ‘very important issue’. It is perhaps regrettable therefore that it receives such slender consideration. One might have hoped for a summary of the arguments for change contrasted with a summary of the arguments in favour of the status quo, so that members could make an informed decision on this issue. Instead, the Panel begins with its conclusion that the dual rôle should cease and gives three reasons of principle. Of these reasons the first is arguable, the second is misleading and the third is wrong. The consequences of change, and the arguments in favour of the status quo are not mentioned at all.

Taking the Panel’s reasons in reverse order, it is said that the Bailiff makes decisions about who may or may not be allowed to speak, or put questions, and about the propriety of a member’s conduct. In fact, the Bailiff has no power to prevent any member from speaking, nor from asking questions. He determines the order of speaking and disallows questions which do not comply with Standing Orders, but can do no more. As to the propriety of a member’s conduct, the Panel illustrates this by stating ‘the Bailiff recently found reason to suspend a member of the States from sitting ...’ This is quite simply wrong. It is highly regrettable that the Panel should have neglected to ascertain the facts so as to necessitate the re-opening of a matter far better laid to rest. In fact, the member concerned was suspended by the States, not by the Bailiff, by 36 votes to 3 for a refusal to comply with the Standing Orders of the Assembly. The Panel continues by contending that the subsequent challenge to the States’ decision in the Royal Court, (when clearly the Bailiff could not preside), is evidence that the Bailiff should not preside in the States. In fact that challenge, despite being struck out as disclosing no cause of action, did establish an important constitutional principle. That principle is that the decisions of the States in relation to the regulation of their own internal proceedings cannot be challenged in the Royal Court. In the unlikely event of the States suspending a member in future in similar circumstances, it is now settled that such a decision cannot be reviewed by the Court. Accordingly, the Bailiff’s presidency of the States gives rise to no conflict in this respect.

The Panel then refers to the principle of separation of powers and quite rightly states that no one involved in making the laws should be involved judicially in a dispute based upon them. No mention is made, however, of the fact that the Bailiff is not in any real sense involved in the making of laws. His function as President of the States is that of a neutral umpire, ensuring the observance of the rules of debate. The Panel suggests that the introduction of Human Rights legislation is likely to lead to more frequent challenges to the Bailiff’s presiding in the Royal Court and it refers to the Guernsey case of McGonnell. The Panel does not, however, state that the European Court of Human Rights expressly disavowed any constitutional theory such as the separation of powers. The Court found, in short, that there was nothing inherently wrong with the Bailiff’s dual rôle in the Court and in the States. Measures have already been taken to avoid any conflict arising in practice.

Finally, the Panel asserts that no one should hold or exercise political power or influence unless elected by the people to do so. But the Bailiff has no political power. He neither speaks nor votes on any motion unless he has to use a casting vote; but his casting vote is always exercised in favour of the status quo. To remove the casting vote would in practice change nothing and might well be a sensible amendment. The Panel does not draw attention to the House of Lords nor to the Senate in Canada nor to numerous other Commonwealth legislatures containing appointed members. In the United Kingdom, the Lord Chancellor and the Law Lords (the country’s most senior judges) all speak and vote in the House of Lords, whereas by contrast the Bailiff is completely neutral.

There is no valid constitutional or legal reason preventing the Bailiff from presiding in the States. The question is rather one of perception.

Although not mentioned by the Panel, the arguments in favour of the retention of the status quo, with the Bailiff continuing to act as President of the States, were helpfully summarized in the report of the Guernsey Review Panel. They include the following:-

- (1) The Bailiff will have a detailed knowledge of the island's machinery of government and of the constitutional relationships with the United Kingdom and the European Union, and is able to advise members accordingly.
- (2) As a non-elected appointment, the Bailiff is seen to be independent of local political bias, and to be able to act impartially.
- (3) Through his judicial experience the Bailiff will have a suitable bearing and expertise to command the respect of States Members, to maintain order, and to promote an appropriate image of the Assembly to the outside world.
- (4) The available pool of States Members with adequate experience and expertise is likely to be comparatively small and there may be a lack of willingness amongst able States Members to accept such office as an alternative to active political involvement in the machinery of government.
- (5) Contested elections for the position of Speaker in a small community might be seen to undermine that person's authority.
- (6) Under the current arrangements, there is a person available to deputize for the Bailiff in the event of illness or unavailability in the shape of the Deputy Bailiff, who is equally qualified by training and experience.
- (7) An elected Speaker would not necessarily be legally qualified and would therefore need legal support. A Speaker's Counsel would be necessary, unless it were made a requirement that the Greffier of the States was legally qualified.

The consequences of change should also be understood. If the Bailiff is no longer President of the States, he will have no authority to speak for or to represent the Island. The people could no longer look to the Bailiff to perform the representational rôle which he currently undertakes on ceremonial or public occasions. He could no longer make himself available to give impartial advice as a kind of constitutional long-stop. This public representational rôle derives from the presidency of the States. If one goes, so does the other. The influence which the Bailiff has as a Crown Officer would pass not to the elected Speaker nor to the Chief Minister, but to the Lieutenant Governor. The historical links with an ancient office and with the Royal Mace would both go.

None of these considerations was mentioned by the Panel. At the end of the day it is for members to weigh them in the balance against the issue of perception and the desire which members may have to choose their own speaker."

**Extract from address by Jersey-born law Professor, Andrew Le Sueur, delivered at the Jersey Law Review Conference 1204-2004 on 2nd July this year and published in full in the JEP on July 28th, 2004.**

Professor Le Sueur, of Birmingham University, is Barber Professor of Jurisprudence at the University of Birmingham. He is a specialist adviser to the Commons Constitutional Affairs Committee and was also specialist adviser to the House of Lords Select Committee on Constitutional Reform

JUDGES SHOULD BE LEFT TO BE JUDGES.

“As we celebrate 800 years of King John’s charter, many people have acknowledged that what makes us different from the UK is not so much our culture or language, but our distinctive legal and constitutional arrangements.

The office of Bailiff is at the heart of these. Jersey has been well served by men of distinction whose wisdom has steered generations through some turbulent times. Sir Philip Bailhache ranks among the most distinguished of Bailiffs. Nevertheless, I believe that the time is right to recognise that the office of Bailiff needs to be reformed.

The Bailiff is the island’s chief judge and presides over the Royal Court. He is also *ex officio* president of the Jersey Court of Appeal. He is President of the States Assembly, and not only keeps good order during debates but decides questions of procedure. In the exceptional situation where the vote of the elected Members is tied, the Bailiff has a casting vote.

The Bailiff is the channel of communication between the insular authorities and the UK government. He also exercises power of control over public entertainment in Jersey. By any measure, this is a wide range of responsibilities.

Calls for reform are nothing new. The Clothier committee in their December 2000 report recommended that the Bailiff should cease to act as the President of the States and the principal link between the insular authorities and the Department for Constitutional Affairs.

Instead, the committee said, ‘he should be liberated to do what all Bailiffs of recent times have been especially qualified and trained to do, namely be the Island’s Chief Justice. There was never a time when the volume, scope and complexity of litigation in the Royal Court of Jersey were more demanding than they are today’.

**Compelling**

I agree, and I believe that a significant development since the Clothier commission considered the question makes the case for reform even more compelling. This is the Human Rights (Jersey) Law, which is likely to be brought into force in the next year. It is closely modelled on the UK’s Human Rights Act 1998, and Guernsey has also adopted similar legislation.

The Human Rights Law allows people to use arguments in court based on the fundamental rights and freedoms set out in the European Convention on Human Rights. (This is an international treaty dating back to the 1950s, and is separate from the European Union).

Among the rights protected are the following:

- Right to life (Article 2).
- Prohibition of torture or inhuman or degrading treatment or punishment (Article 3).
- Right to a fair trial (Article 6).
- Right to respect for private and family life (Article 8).
- Freedom of thought, conscience and religion (Article 9).
- Freedom of expression (Article 10).

- Prohibition of discrimination (Article 14).

### **Independence and impartiality**

Around the world, key features of good legal systems are the independence and impartiality of judges. In many countries the gap between these standards and the reality in the courtroom is huge. Judges take bribes. They also decide cases on the basis of their political sympathies rather than the law.

Jersey, like the UK, can take pride in the incorruptibility of its judges and the absence of party political influence in the courtroom. The personal integrity of successive Bailiffs of Jersey has played no small part in bringing this about.

But independence and impartiality encompasses more than just this. Justice must not only be done, but clearly be seen to be done.

Applying Article 6 of the European Convention, the European Court of Human Rights in Strasbourg has held that in assessing whether a court is truly independent, regard must be had to 'the existence of guarantees against outside pressures and the question whether the court presents an appearance of independence'.

Similarly, in relation to impartiality, a court must not only be free from bias or personal prejudice, but it 'must be impartial from an objective viewpoint, that is it must offer sufficient guarantees to exclude any legitimate doubt in this respect' (Findlay v UK, 1997).

The increasing importance of human rights law in the Jersey constitutional system puts the Bailiff in a gradually more difficult situation. There are growing tensions between the Bailiff's role as States president and the Island's chief judge.

### **The McGonnell case and its implications**

A CASE about a shed in a field in Guernsey has become one of the leading cases on judicial independence and impartiality.

In its judgment in 2000, the European Court of Human Rights held that it was wrong for a person (the Deputy Bailiff) to preside over the States when it was debating and adopting a law, and then a few years later sit as a judge in a case in which that law was interpreted and applied.

No one in that case doubted the integrity of the Deputy Bailiff; it was a question of perception. The court said that 'the mere fact' that he had presided over the legislature was 'capable of casting doubt on his impartiality when he subsequently determined, as a sole judge of law in the case', Mr McGonnell's planning dispute.

### **Influenced**

The court added that Mr McGonnell 'therefore had legitimate grounds for fearing that the Deputy Bailiff may have been influenced by his prior participation in the adoption of the law'.

Since the McGonnell case, the Bailiffs of Guernsey and Jersey have been careful to avoid similar situations. If a case appears before the Royal Court involving legislation passed by the States when the Bailiff was presiding over the Assembly, then the Deputy Bailiff or a Commissioner must now sit as the judge to hear the case.

In itself, the McGonnell case has not put too much pressure on the system. If this were the only impact of human rights on the office of Bailiff, then it would be possible for Jersey to continue much as before – although many people might think it strange that we structure our affairs so that our chief judge is not able to sit on important cases involving recently adopted legislation.

But there are two further pressures on the role of the Bailiff, both arising from the Human Rights (Jersey) Law 2000. As the law is not yet in force, these pressures have not yet arisen in practice, but it seems inevitable that

they will.

### **The new duty of interpretation**

THE Human Rights (Jersey) Law changes the way in which Jersey courts must interpret all legislation, whether adopted by the States before or after 2000.

Until now, the function of a judge has been to work out what the States meant to achieve by passing the legislation in question, by looking at the words used in that law.

In contrast, the Human Rights Law requires the Bailiff, like all other judges, to approach interpretation in a new way. The duty of the court will in future be – ‘so far as it is possible to do so’ – to ‘read and give effect’ to legislation so that it is compatible with the rights set out in the European Convention for Human Rights.

In carrying out this task, the Bailiff and other Jersey judges must take into account the case law of the European Court of Human Rights.

On occasion, the Royal Court may feel the need to stretch the words of a law so that it is made compatible with Convention rights. The Royal Court may also find itself having to over-rule its own previous interpretations of a law, as well as those of the Court of Appeal and Privy Council.

This new approach to interpreting law sets up a new constitutional relationship between the States Assembly and the judges. The function of the Bailiff and other judges will no longer be to give effect to the will of the States, but to scrutinise laws adopted by the States to ensure that they comply with human rights.

This, in itself, makes it inappropriate to combine in a single post the task of regulating the conduct of States meetings and examining the outcome of those meetings. It would be far better for there to be an arm’s length relationship between the Island’s judges and legislators.

The interpretation duty is a subtle and pervasive mechanism for bringing laws into conformity with human rights principles. Over a period of years, the Royal Court of Jersey – like its counterparts in the UK and Guernsey – will be asked by lawyers acting in civil and criminal cases to adopt new readings of laws.

The new interpretation duty is also likely sometimes to result in controversial judgments that are unpopular with States Members, and indeed with ordinary people.

### **Motherhood**

Like apple pie and motherhood, we can all approve of human rights in the abstract – but when human rights principles are applied in specific cases, people are not always so happy about the outcome.

Recent cases in England (where the UK’s Human Rights Act 1998 came into force in 2000) show that the new interpretation duty – which is there same there as it is in Jersey – can put judges in the position of having to make far-reaching decisions.

Last month, for example, the House of Lords held that the words ‘a person who was living with the original tenant as his or her wife or husband’ in a law to protect the surviving partner from eviction on the death of the tenant applied to gay couples.

In Jersey, it does not take too much legal imagination to see that among the laws that may need to be read in new ways are those dealing with housing and the status of children whose parents are not married.

I am not suggesting that after the Human Rights (Jersey) Law comes into force the Royal Court will be flooded with human rights cases. Much depends on how well attuned the Jersey Bar becomes to using human rights principles as part of the normal array of arguments that can be deployed to help their clients.

If the experience of the UK is followed in Jersey, lawyers will often rely on a human rights argument in a case along with other points that turn on local law. There will be cases – some of them controversial – or else there is little point in the States having adopted the Human Rights Law in 2000.

### **The Royal Court's declarations of incompatibility**

THE primary duty on the Royal Court, as I have just described, will be to interpret laws so that they conform to human rights. On relatively rare occasions, the court may come to the conclusion that the words of a law cannot be stretched sufficiently to make the law compatible.

In such situations, the court will make a 'declaration of incompatibility', recognising that there is a problem with a law.

For lawyers and their clients, such a declaration is very much a booby prize. A declaration of incompatibility does not affect the validity or application of the law found to be contrary to human rights.

The purpose of the declaration is to alert the States to the fact that there is law that needs to be reconsidered and that a new law amending or repealing it needs to be debated and adopted.

It is difficult to see how the Bailiff can preside over a case in the Royal Court in which a declaration of incompatibility is granted by him, and then preside over the States Assembly when it debates and adopts a new amending law – or, perhaps, refuses to do so.

Elected Members may want to be critical of the wisdom of the Royal Court's judgment, and will either have to be reticent for fear of offending the Bailiff, or put the Bailiff in the unacceptable position of keeping order over a meeting in which a judgment of his is analysed.

Elected Members may want explanations of what the judgment really means (something which will be given by the Attorney General). Again, it is easy to see how and why the Bailiff presiding over the States Assembly on such an occasion is likely to be in a difficult position. It would be far better for there to be a clearer division between the States and the Royal Court.

### **The future for the office of Bailiff**

THE constitution of Jersey is not organised in accordance with any strict doctrine of 'separation of powers', something we share with the UK. The pressure for change to the office of Bailiff comes not from some international court but is the consequence of the decision of the States to adopt the Human Rights (Jersey) Law in 2000.

Joined-up thinking about constitutional reform leads me to the conclusion that it would be better for the Royal Court and the States Assembly if the roles of chief judge and presiding officer were no longer combined into a single post.

Jersey people over the ages have demonstrated time and time again their ability to adapt to the changing world around them.

Today, among the main challenges for the Island is reforming its machinery of government and incorporating human rights principles into local law.

The influence of the Bailiff would not be diminished if the separation I propose takes place. In other legal systems, the chief justice is a person of great stature, and this would continue to be so here.

Like the UK, Jersey is moving from a 'political' to a 'legal' constitution in which the role of judges in protecting fundamental rights and freedoms is assuming a new importance. Jersey ought not to have to muddle through with the Bailiff and Deputy Bailiff having to box and cox, the one presiding over the States when the other has had to excuse himself and vice versa.

## **Who will preside over the States**

IF the Bailiff and Deputy Bailiff cease to be presiding officers in the States Assembly, who will take on this role? It is not for me to answer this question here.

What does need to be pointed out is how unusual the Jersey and Guernsey arrangements are.

Hardly any other parliament requires its country's chief justice to be involved in the work of the legislature, and be its figurehead.

The normal practice is for one of the elected members to take on the role of speaker, supported by a legal adviser.

As the States moves towards a system of ministerial government, with the prospect of political parties in Jersey now on the horizon, it is time to recognise that the Island's judges should be left free to be judges."