THE SARKEE TIMES

Constitutional Reform of Sark

Public Consultation Document

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1. Introduction

At its July 2007 meeting, Chief Pleas will consider approving a Reform Law creating a Chief Pleas having 28 seats, 12 reserved for Tenants and 16 reserved for non-Tenants. Is it a good idea to approve this law?

- the public are unhappy about it.

- most Tenants aren't particularly happy about it.

- it does not meet the UK Government's stated "requirements".

- it is not ECHR compliant.

- there are good reasons to believe that - as it stands - it will make the governance of the Island worse.

Believing it had to meet an arbitrary deadline or risk a UK takeover, but not wanting to implement Option A, Chief Pleas created this compromise in a well intended but ad hoc manner at its Easter 2007 meeting in order to break an impasse.

Where is Sark's constitutional reform heading? Does anyone know anymore - or has it become a runaway train?

In this document we examine this question:

What is the goal of reform?

In view of the recent reorganization of the UK administration, references to the Department of Constitutional Affairs in this documents should be read to mean "the Ministry of Justice", and Lord Chancellor should be read to mean "the Minister of Justice".

Council of Europe Viewpoint

> *The Parliamentary Assembly is concerned by the current political crisis in Ukraine which culminated in President Yushchenko's decision to dismiss the Verkhovna Rada (parliament) by a decree issued on 2 April 2007.*
>
> *The Assembly considers that the ground roots of the current deadlock lie in the* ***hasty and incomplete constitutional*** *and political* ***reform*** *of 2004,* ***which failed to settle the crucial issues of separation of powers*** *...*
>
> --- a quote from the report of the Parliamentary Assembly of the Council of Europe entitled "Functioning of democratic institutions in Ukraine" (Doc.11255, 17 April 2007)

- European Convention of Human Rights is a Council of Europe convention

- the separation of powers is mandated by the ECHR

- Sark's draft Reform Law fails to settle the crucial issue of separation of powers

- and has other serious flaws pointed out in this report

Hasty and incomplete constitutional and political reform

or

A carefully drafted Reform Law to serve Sark for generations to come?

- should Sark follow in the footsteps of Ukraine or learn from its mistakes?

2. Apparent Reasons for Reform

Why reform? The reasons most commonly given are:

1) Composition of Chief Pleas is not European Convention of Human Rights ("ECHR") compliant. The Reform Law will bring democracy to Sark and make Sark's constitution fully ECHR compliant.

2) If Sark does not reform voluntarily, the UK or Guernsey will impose reform on Sark, or take over Sark.

3) It is the will of Sark people that Chief Pleas should in future constitute of 28 members, all elected by universal suffrage from amongst all eligible electors willing to stand ("Option A").

We examine these reasons first.

2.1. ECHR Compliance

Suppose for the moment that the goal of reform is to make Sark's constitution and legislature ECHR compliant.

Will passing the Reform Law as it stands be enough to achieve this goal?

In law, Sark's legislature consists of HM the Queen in Chief Pleas. This means Chief Pleas passes laws, and HM the Queen then either gives her Royal Assent, or not. On the face of it, therefore, it appears that to make Sark's legislature ECHR compliant, it suffices to make Chief Pleas ECHR compliant.

Alas, ECHR and the European Court of Human Rights ("ECtHR") are not concerned with what the situation is in law (de iure), but what it is in practice (de facto).

ECHR case law confirms what common sense dictates:

- Sark's *de facto* legislature today is not just Chief Pleas (being the Tenants, the Deputies, the Seigneur and the Seneschal) but also
    - the States of Deliberation (in Guernsey), and,
    - the Crown acting through its various emanations:
        - the Law Officers in Guernsey,
        - the DCA, and,
        - the Privy Council (specifically, its Committee responsible for the Channel Islands which today consists of the Lord President of the Privy Council, the Lord Chancellor and one other DCA Minister)),

In practice, Sark law is made through the interaction and consultations between Chief Pleas (or States of Deliberation in case of criminal laws) and the Law Officers, the DCA and the Privy Council. To which of these organs can Sark residents provide most democratic input and oversight?

In order for Sark's legislature to be ECHR compliant, not only must Chief Pleas be compliant, so must all other bodies involved in its lawmaking.

And are they? Well, how many of them are elected by Sark residents?

In terms of ECHR compliance:

- Chief Pleas is the **least problematic** and **most democratic** organ of Sark's legislature.
- the States of Deliberation, the Law Officers, the DCA and the Privy Council (as presently constituted) are **much less democratic** and much **more problematic**.

Why?

2.1.1. The Law

The preamble of the ECHR states

> *Reaffirming their profound belief in those fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an **effective political democracy** and on the other by a common understanding and observance of the human rights upon which they depend;*

Article 3 of Protocol 1 to the ECHR ("ECHR Art. P1-3") states

> *The High Contracting Parties undertake to hold f**ree elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature**,*

Article 14 of the ECHR ("ECHR Art. 14") states

> *The enjoyment of **the rights and freedoms set forth in this Convention shall be secured without discrimination** on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*

To clarify what is meant by the term "legislature" in ECHR Art. P1-3, we must look to the ECtHR case law. Matthews vs. the United Kingdom (24833/94), ¶40) establishes the principal precedent on this matter:

> *the word `legislature' in Article 3 of Protocol No. 1 does not necessarily mean the national parliament*

And furthermore (ibid., ¶54) - [any body which is]

> *sufficiently involved in the specific legislative processes leading to the passage of legislation ... and sufficiently involved in the general democratic supervision*

[of a jurisdiction]

> *constitue[s] part of the "legislature" ... for the purposes of Article 3 of Protocol No. 1*

[of that jurisdiction]. The said judgement applies this test to conclude that the European Parliament forms a part of the legislature of Gibraltar.

Applying this test to Sark establishes that *de facto* the following bodies form the legislature of Sark: (a) Chief Pleas (including the Tenants, the Deputies, the Seigneur and the Seneschal), (b) (Guernsey) States of Deliberation which enact criminal laws of Sark, (c) various emanations of the Crown which include the Law Officers, the DCA, and the Privy Council (with the Lord Chancellor being both organizationally a part of the DCA and a member of the Privy Council), who in practice exercise powers to consult, comment on, and veto Sark legislation.

It is not disputed that the European Parliament forms a part of the UK legislature. However, we submit that according to the same test, so does the EU Council of Ministers, which has wider legislative powers in relation to the EU legislation than does the European Parliament and is widely regarded as the principal legislative organ of the European Union. It is also *entirely* unelected. We ask here as an aside the question: why is the UK spending so much time and energy trying to reform a legislative body which affects 600 people many of whom are all related

to one another, when the composition of the EU legislature is much more credibly - and much more worryingly - violating the ECHR Art. P1-3 rights of 500 million EU citizens, 60 million of whom are the UK Government's responsibility? We note that these two organs, to whom we shall jointly refer as the EU legislature, through their influence on the case law and precedent of common law of the United Kingdom, indirectly also affect Sark law. It could therefore be argued that the EU legislature also exhibits characteristics of an organ which forms a part of the legislature of Sark. **And, more importantly, may do more so in the future as the EU's grip on the UK tightens.**

The legislature of Sark therefore does not consist of Chief Pleas alone, but *de facto* consists of all the above bodies and organs working together. The question of compliance of Sark's legislature with the ECHR - if it is considered - has to be considered in this context.

2.1.2. Chief Pleas

We look at the composition of Chief Pleas in detail in Section 2.1.12. Here we merely point out the following, to enable us to compare the democratic credentials of Chief Pleas to other parts of Sark's legislature:

- the people of Sark, other than the Tenants and the joint Tenement owners, elect 12 members of Chief Pleas. It is therefore, we hope, uncontroversial that they have at least *some* right to express freely their opinion in the choice of the composition of Chief Pleas.

- the people of Sark, other than Chief Pleas members, have a way to give at least *some* democratic input to members of Chief Pleas through regular informal day-to-day contacts. It is therefore, we hope, uncontroversial that at least *some* degree of effective political democracy is offered to residents of Sark by Chief Pleas.

2.1.3. States of Deliberation

Although laws other than criminal laws on Sark are enacted by Chief Pleas, criminal laws on Sark are enacted by the States of Deliberation in Guernsey. The consent of Chief Pleas or residents of Sark is not sought before such laws come into effect on Sark. This without a doubt makes the States of Deliberation a part of Sark's legislature. Sark residents have *no say whatsoever* in who sits in the States of Deliberation. The very essence of their right to express freely their opinion in the choice of the composition of the States of Deliberation is denied to them. There is a much stronger case that this breaches the ECHR Art. P1-3 rights of Sark residents than the case that the composition of Chief Pleas does.

Most importantly, unlike the case of Chief Pleas, there exists only very limited opportunity for Sark residents to express their views to members of the States of Deliberation or to provide any input into how those legislators legislate. In this respect, the very essence of effective political democracy is denied to the residents of Sark.

If this aspect of Sark's legislature is to be brought into compliance with the ECHR and effective political democracy is to be provided to Sark residents, in future, consent of Chief Pleas will have to be obtained before any new criminal laws passed by the States of Deliberation become effective on Sark, just as is required of all other laws.

Alternatively, Sark residents will have to be granted representation in the States of Deliberation, but this is an alternative Sark does not have to accept, and indeed, we suggest, would be unwise to accept.

2.1.4. United Kingdom / the Crown

The Law Officers comment on all Sark legislation in secret reports sent to the DCA. These reports are never even seen by Sark. The DCA make their own report and in practice exercise wide ranging powers to refer such legislation back to Chief Pleas or to veto it by recommending to the Privy Council and HM the Queen to withhold Royal Assent. This makes these organs de facto a part of Sark's legislature. The residents of Sark have *no say whatsoever* in how the Law Officers, the relevant DCA departments and officials and the relevant Privy Council Committee are appointed or constituted. The very essence of their right to express freely their opinion in the choice of the composition of these organs is denied to them. There is a much stronger case that this breaches the ECHR Art. P1-3 rights of Sark residents than the case that the composition of Chief Pleas does.

Since when are powers assumed by unelected UK officials to tell the residents of Sark what laws should, or should not, apply to them, ECHR compliant?

More importantly, unlike the case of Chief Pleas, there exists virtually no opportunity for all but very few, if any, Sark residents to express their views to members of the above organs or to provide democratic input into how those organs legislate. Most Sark residents have never met any employees of the DCA or any members of the Privy Council and have no opportunity to do so at all, let alone on a daily basis. DCA representatives rarely visit Sark and have a reputation for very brief visits limited to meeting a few Island officials. The nature of those meetings has a reputation for involving more of the DCA telling Sark what to do than of the DCA listening to democratic input from Sark. The democratic input appears only to be considered when it agrees with the DCA's agenda. The Lord Chancellor is not known to have ever even visited Sark. Yet, the DCA has no qualms about attempting to dictate to Sark what it must, or must not, do, and how it must, or must not, govern itself. All this is in stark contrast to members of Chief Pleas through whom local residents can provide daily direct input into the Island's government. The very essence of effective political democracy is being denied to the residents of Sark by the roles in practice assumed by the Law Officers, the DCA, the Lord Chancellor and the Privy Council as presently constituted.

If Sark's legislature is to be made ECHR compliant, these organs will have to cease exercising any and all legislative functions in relation to Sark and the right to legislate will have to be handed fully to Chief Pleas. Alternatively, the powers exercised by these organs in practice will have to be exercised by organs which can assure effective political democracy and are fully elected by Sark residents.

2.1.5. De Facto Versus De Iure

Sark's de iure legislature (HM the Queen in Chief Pleas) is very different from what its de facto legislature has evolved into.

By departing from the correct legal and constitutional position in practice, the UK administration is not only attempting to create for itself an inappropriate constitutional role on Sark, it is also breaching the ECHR rights of Sark residents.

The most appropriate way to remedy this situation is for the de facto arrangements to be brought back in line with the de iure constitutional position: for the Law Officers and the DCA to cease exercising the functions they have grown accustomed to, and for legislation to go directly from Chief Pleas to HM the Queen or a new Privy Council committee to be created which is composed entirely of representatives from Sark, advising directly HM the Queen who acts on their advice. Such de iure legislature, provided HM the Queen's new role is similar to her de facto role in UK constitution, does not suffer from all the ECHR violations that Sark's today de

facto legislature does.

CONCLUSIONS:

1) The Reform Law does not make Sark's legislature and constitution ECHR compliant because it does not address the de facto powers exercised by the Law Officers, the DCA, the Privy Council (as presently constituted) and the States of Deliberation.

2) The Reform Law does not make the Law Officers, the DCA, the Privy Council (as presently constituted) and the States of Deliberation democratically accountable to Sark residents.

3) The Reform Law is therefore insufficient to make Sark's legislature and constitution ECHR compliant.

4) If there exists a risk of ECHR challenge on the basis of the composition of Chief Pleas, there exists a much greater risk of challenge on the basis of the de facto powers exercised by the Law Officers, the DCA, the Privy Council (as presently constituted) and the States of Deliberation.

The Price & Price opinion advises us that the involvement of the Law Officers, the DCA and the Privy Council as presently constituted in Sark's legislative processes are not ECHR compliant.

RECOMMENDATIONS:

1) That a provision is inserted into the Reform Law curtailing the power of States of Deliberation to enact Sark's criminal laws without prior approval of Chief Pleas. This may require amending Section 4(3) of the Reform Law.

2) That the de facto departure of Sark's constitutional position from its de iure position is remedied, with legislation passing straight from Chief Pleas to a relevant new Privy Council Committee composed of members appointed by Sark residents, with the de facto roles of the Law Officers, the DCA and the Lord Chancellor in relation to Sark being abolished and consequently there remaining no part of the UK administration able to veto Sark legislation. This may require review of Sections 4(1) and 4(2) of the Reform Law.

If Recommendations 1 and 2 are not incorporated into the Reform Law, Sark's constitution will not be ECHR compliant and one of the principal stated objectives of reform - removing the vulnerability to an ECHR challenge - will not be achieved.

2.1.6. Sark's Autonomy

What will be the effect of reform on Sark's autonomy? Sark's legislature acts by its organs working together. The extent of Sark's autonomy - and democracy - depends crucially on whether it is Chief Pleas, or the UK administration, that has more relative power.

What does it matter if Chief Pleas is an elected body, if unelected UK officials call all the shots?

The UK exerts considerable influence over Sark. Who calls most of the shots *in reality* when Sark laws (UK laws, Bailiwick laws and local laws) are being made - Chief Pleas or the Law Officers? Is the relationship always co-operative or is it sometimes adversarial?

Most members of Chief Pleas today have had many years of service and possess considerable political experience. 40 of them have a secure position in Chief Pleas. They answer to no-one. This makes them potentially less accountable but also more independent.

Under a reformed Chief Pleas, membership of Chief Pleas will change much more regularly than it does today. More so if our assessment in Section 4.1.2 is correct that reducing the number of Chief Pleas members to 28 will lead to more resignations mid-term due to excessive workload. Members will have less political experience and less opportunity to learn the ropes of dealing with the UK, what it can or cannot do and how to stand up to them than members do today. Vulnerability to losing their seat at elections will make members potentially more accountable to the electorate but also less independent and more vulnerable to external pressure.

Whether you perceive the reform itself as beneficial or not, one thing is clear: the reform will weaken Chief Pleas relative to the UK, and so indirectly relatively to the EU, whose role in Sark today is not very great but is destined to grow. The role of the Law Officers, particularly, will be strengthened - at the expense of Chief Pleas.

There exists a legitimate concern that if Sark's constitutional reform *only* changes the composition of Chief Pleas while not addressing the roles of other parts of Sark's de facto legislature, this will make Sark's de facto legislature less, not more, democratic and accountable.

A substantial number of Sark residents have signed a petition saying they have concerns that if the Reform Law is enacted without simultaneously addressing the powers exercised by the other parts of Sark's de facto legislature, and that they do not agree to a reform of Chief Pleas unless other parts of Sark's legislature are also reformed - either simultaneously or beforehand.

A smaller, but still significant, number of Sark residents have indicated their willingness to protect their human rights and challenge the UK Government in court if these matters are not addressed before the Reform Law is approved.

If Sark's autonomy is to survive the reform process, it is imperative that the roles exercised by the UK officials in relation to Sark are reformed **no later than** Chief Pleas itself is reformed. To leave such reform until afterwards amounts to Sark handing control over to *unelected* UK officials.

This is dangerous even on a temporary basis.

If the UK continues to exert pressure on Sark as it has been doing, and enjoys more power, it may not take them long to make a mess of the Island - their track record in the UK is certainly not one that inspires much confidence. Furthermore, their accountability to the electorate in the UK gives them more incentive to do a good job in the UK than to do a good job on Sark. Moreover, once they are in charge, they may never give up their powers or may even increase their grip on

Sark.

If the UK Government is sincere in saying that their only concern is to make Sark's constitution and legislature ECHR compliant, they will welcome these proposals. Sark residents are only requesting that their human rights be respected. It is the UK that is the High Contracting Party to the ECHR, it is the UK that is responsible for the human rights violations of Sark residents caused by the de facto roles exercised by the Law Officers, the DCA and the Privy Council (as presently constituted) and it is the UK - and only the UK - that has the power to reform those roles. Unlike Chief Pleas, which only Chief Pleas itself have the power to reform.

If the UK does not welcome this initiative with open arms, their motives are not what they claim they are.

2.1.7. How Much Can We Trust the UK Government?

Even if you hate your local politicians, who should you trust more to keep Sark's best interest at heart, Chief Pleas or UK Government officials in London?

Who should you trust more to give correct, independent legal advice: UK Government officials (not even lawyers) in London, or, independent eminent legal counsel?

We look at the UK Government's track record of getting their constitutional law right and of taking care of their Dependent Territories and their inhabitants.

2.1.7.1. British Indian Ocean Territory

In 1971, the UK Government **compulsorily expelled all inhabitants** of the British Indian Ocean Territory, an Overseas Territory of the UK because the United States of America required the use of the territory as a military base.

We note that ECHR Protocol 4, Article 3 ("ECHR Art. P4-3") says that "no one shall be expelled ... from the territory of the State of which he is a national" and that ECHR Protocol 4, Article 4 ("ECHR Art. P4-4") even says that "Collective expulsion of aliens is prohibited".

How compatible are the UK Government's actions in the British Indian Ocean Territory with its claims that they care about the human rights of inhabitants of British Dependent Territories?

The original expulsion order was achieved by the passing of the British Indian Ocean Territory Ordinance No 1 of 1971. In 2000, the UK courts quashed the 1971 Ordinance. Robin Cook, the then UK Foreign Secretary, promised the UK Government would not appeal the ruling and that the Islanders would be allowed to return to their homes. In 2004, a mere 4 years later, however, the UK Government presented to HM the Queen the British Indian Ocean Territory (Constitution) Order 2004 and the British Indian Ocean Territory (Immigration) Order 2004, again attempting to deny Islanders the right to return to the Islands, this time by an Order in Council.

Islanders sought judicial review which in 2006 they won in the UK High Court. The UK Government appealed but on 23 May 2007 the Court of Appeal confirmed the High Court ruling. The Courts declared the Orders in Council unlawful (bear this in mind later when we look at what would happen if the UK Government tried to impose on Sark unlawfully).

The UK Government tried to argue that the Courts had no jurisdiction since an Order in Council is made under Royal Prerogative by HM the Queen, not by Government Ministers, and is therefore beyond the reach of review by the Courts.

What is sinister about this argument is that UK Government Ministers thereby attempted to create for themselves the power to rule by decree, without democratic accountability to the Parliament, and additionally without being subject to review by the Courts.

The Court of Appeal, fortunately, dismissed this argument and declared the UK Government's act an abuse of executive power.

2.1.7.2. Ascension Island

Ascension Island is a dependency of Saint Helena, an Overseas Territory of the United Kingdom. It is a quiet, crime-free island with beautiful beaches and a population of approximately 1100. Ascension Island was first occupied by British soldiers in the 19th century,

sent there by the British Government to prevent the French rescuing Napoleon Bonaparte who was imprisoned on St. Helena. Since then Ascension Island had been run as a virtual fiefdom belonging to a small number of businesses, such as Cable and Wireless, and British Government-related entities including the RAF and GCHQ. These bodies were known as the “Users”. Executive authority is vested in HM The Queen, who is represented in St. Helena by the Governor of Saint Helena, who in turn is represented on Ascension Islands by an Administrator. The Island is not represented in the UK Parliament.

In 1999, the UK Government outlined plans to move towards "democracy" on Ascension Island and in 2002, Ascension Island constitution was changed and the Island saw the first Island Council being elected. How successful was this "democratic" reform? Was the Island Council installed to provide democratic representation to the Islanders, or to pay lip service to democracy while allowing the UK Government to remain fully in control of the Islands (bear this in mind later when we look at this aspect of the current situation on Sark)? By March 2007, six out of seven members of the Island Council resigned on the grounds that they were "assisting to legitimise a democracy that doesn’t really exist on Ascension Island". The UK Government tried to blame the problem on the Island Council. New elections were due to take place on 1 May 2007 but in protest, only two people stood. The media report: "[the Island is] once more without representation and its people will never, ever trust the British Government again. Many are too afraid to speak up, concerned that they will lose their jobs and be ejected from the Island. But there are others who have bravely put their careers and futures on the line."

What happened?

No-one is allowed to stay on Ascension Island without the written permission of the Administrator and in practice this means that almost everybody on the Island either works for the Users or the Ascension Island administration - or is a dependant of someone who does. No-one has “right of abode” - the right to stay on the Island after the end of their contract. Young people born on the Island, if they want to stay on after the age of 18, can only do so if they can secure employment. This rule, strictly adhered to, has resulted in several families being forced apart and it is why the right of abode is so keenly sought by Islanders. The very first legislative move of significance by the Ascension Island Council was to attempt to remedy this - by ECHR standards - human rights violation. The Island Council worked hard to negotiate with the UK Government to provide Ascension Islanders the right of abode. The UK Government at first appeared to cooperate but eventually had a change of heart and blocked the law. They claimed the reasons were financial but refused to provide any detailed explanation. They further claimed to have given the full explanation to British MPs, but the latter dispute this. Many on and off the Island believe it is possible the US would like to keep things as they are on Ascension Island which according to media reports "is festooned with intelligence gathering kit which is not protected as everyone on the Island has been checked out." The affair has been described as a huge embarrassment for the Foreign Office.

CONCLUSIONS:

1) The UK Government isn't always right on points of constitutional law.

2) The UK Government is more interested in protecting its own interests than in defending the human rights and democracy in its Dependent Territories and of their inhabitants.

2.1.8. What Does the UK Government Really Want from Sark?

We have already seen that:

1) The UK Government - understandably - act primarily to protect their own interests, not primarily the human rights and democracy of residents of British Dependent Territories.

2) Chief Pleas either does not need reform at all or only requires very minor changes to make it ECHR compliant (see Section 2.1.12).

   The UK is exerting a lot of pressure to reform Chief Pleas - in a way which will weaken it.

   Tenants stand in the way of the UK (the Law Officers, mainly) controlling Sark.

   Sark is under no obligation to comply with the ECHR - as it is not a signatory to that convention. The UK is.

3) The de facto powers exercised by the Law Officers, the DCA, the Privy Council and the Lord Chancellor on Sark need much more urgent reform than Chief Pleas does to make Sark's constitution and legislature ECHR compliant.

   The UK has kept mum about the need for reform of the powers these bodies de facto exercise.

   Yet, they are aware of this need. We have written evidence of that.

   The UK, as a signatory to ECHR, is under an obligation to remedy these breaches.

   And unlike their lack of power to reform Chief Pleas, they have the power to remedy them.

   Yet, again, unlike their desire to reform Chief Pleas, they have shown no appetite to reform the powers de facto exercised by these bodies.

   The Law Officers, the DCA and, to a lesser degree, the Privy Council help the UK control Sark.

What does that add up to?

4) The UK recently signed a framework document with Jersey and the Isle of Man which supposedly clarifies its relationship with those Crown Dependencies.

   To date, the UK has always needed to seek prior consent of Crown Dependencies before entering international treaties on their behalf.

   The new framework document claims to replace the two Islands' right to be asked for *consent* with the right to be *consulted* only.

The UK wants to, or needs to, consolidate its control of Sark.
And all the other Crown Dependencies.
Why?

5) The UK is a part of the European Union.

   The European Union wants to control and harmonize everything - its member states *and* its

neighbours.

As the case of Switzerland clearly demonstrates.

6) The EU is exerting persistent pressure on the UK to assimilate its Dependent Territories into the EU Borg.

And to make them conform.

7) The UK itself is increasingly losing its own independence to the EU.

It increasingly has to follow EU diktats whether it likes it or not.

The UK's Labour Government has been surrendering the UK's own independence to the EU:

- it gave up sovereignty in 24 areas as part of the Amsterdam Treaty,
- it gave up sovereignty in 46 further areas as part of the Nice Treaty,
- it is intending to give up sovereignty in 63 further areas as a part of a new EU Reform Treaty.

Britain's own citizens are very unhappy about this.

But they have no way of stopping it - the UK's pro-EU lobby is determined to surrender British national sovereignty to the EU.

To the same EU which is run by the likes of the former EU Commission President Romano Prodi against whom very credible parties have raised allegations of being a KGB stooge.

The same EU which is run by unelected, unaccountable bureaucrats and whose own auditors won't certify their accounts for the 12th year running, because of allegations of serious corruption.

8) The UK is bound by more and more international treaties, laws and obligations which apply - or the EU and other international bodies want them to apply - also in the UK's Dependent Territories.

Like the much maligned EU draft constitution.

Which the voters rejected in a referendum.

So the European Governments are planning to bring it back in by the back door in the form of the new Reform Treaty - this time dispensing with the referendum.

If the UK pro-European lobby get their way, the UK will **very soon** be committing itself to The Charter of Fundamental Rights - a *much* more frightening human rights document than the ECHR.

And the UK Government's positioning vis-a-vis Crown Dependencies in International Relations clearly suggests that they intend this to apply here.

But the UK has no power to enact such international treaties in Crown Dependencies - because it doesn't control them.

And has no power to make Crown Dependencies conform as the EU wants it to.

Yet.

What else does the UK Government want?

9) The UK's European Union and OECD partners are mostly high tax countries. Many of them want to create a tax cartel.

Because where a monopoly exists, taxes can rise without taxpayers being able to do anything about it.

10) Most countries perceived as tax havens by the high taxing EU countries are small island states which are British Dependent Territories.

11) The UK is under a lot of pressure from its high tax partner countries to obliterate such tax havens.

And make sure they charge their residents a lot of taxes.

Because they cannot properly manage their expenditure, high tax countries believe the whole world should be forced to suffer similar government profligacy.

12) The UK's own ever more hungry exchequer loses a lot of income from wealthy Britons moving their domicile to tax haven countries.

The Labour administration has a certain amount of sympathy to their high taxing partner countries' demands. Because its own thinking is not that different from theirs.

13) Wrapping Sark up in red tape by imposing laws like the ECHR, Health and Safety regulations, The Charter of Fundamental Rights and other bureaucratic mumbo-jumbo which takes an enormous amount of time and money to administer, implement, comply with, and police makes these vested interests' job of making Sark collect a lot of tax much easier.

14) So does imposing a system of government which will require Sark to have a paid civil service.

15) It would be unreasonable to expect the UK not to try to ensure Sark's constitutional reform satisfies these vested interests of theirs.

It is in the UK's vested interest that Sark's reform should take the shape of Option A, or another similar system which will achieve these same results.

That goes a long way towards explaining why the UK Government has been so insistent reform be in one of these forms and why they have been so insistent on micro-managing Sark's reform process.

16) There is no legal basis for the UK Government to make specific demands on the shape Sark's constitutional reform should take.

Indeed, there is no legal basis for the UK to demand Sark comply with ECHR at all. Sark is not a signatory to that Convention. Sark was never asked when the UK signed up to the Convention.

If Sark decides to do the UK a favour and assist them in meeting their ECHR obligations -

and it is not obvious that it is in Sark's best interest that it should - there are clearly *many* ECHR compliant ways to compose Chief Pleas.

Sark is thereafter free to select any of those models. It is none of the UK's business what ECHR compliant shape or form the Reform Law takes.

The UK has adopted a political stance on this issue and has been distributing circulars. The UK is not in any way entitled to do that.

But if the UK doesn't get its way, and Sark implements a Reform Law which is going to be good for Sark, the UK will fail to satisfy its vested interests - those of the UK taking control of Sark, and of Sark being crippled by increased taxation.

What does this mean to you?

16) If the UK and the EU get their way:

a) beer will cost £3 per can, not £2 per can as it does now, to cover the increased taxes,

b) instead of paying £1500 per year in taxes (the average paid by Sark residents) you will pay 6 times as much (£9000, the average paid by UK residents),

c) you will have to fill in a 20 page tax form every year, and have tax inspectors on your back checking that you are paying what they think you should,

d) shops won't be allowed to sell bent bananas because it is against EU regulations,

e) you won't be allowed to sell local meat, because all abattoirs will have to comply with EU regulations, and that costs millions per abattoir to implement. Latest European laws on labelling, quality control and ingredient testing and compliance have closed down multi-million pound industries and 40% of UK abattoirs. Could Sark afford to comply?

f) you won't be able to brew your own booze at home,

g) you will no longer be allowed to sell home-made jams and chutneys, and possibly not even dairy, because they won't comply with Health and Safety Regulations,

h) Sark might have to follow the example of the Isle of Man where EU regulations caused private individuals to have to spend millions re-surfacing their roads because they were not compliant,

i) you will have to deal with and comply with a *massive* amount of new legislation - the EU passed 112 laws which impact the UK between 27 May 2007 and 19 June 2007. That's nearly 5 new laws per day.

Between 1999 and 2007, the UK Government has been trying to consolidate its control of British Dependent Territories.

British Dependent Territories have all fought back - with a string of successes in 2007. Why should Sark be the only Island to keel over and surrender without even putting up a fight?

2.1.9. Fear of UK/Guernsey Intervention

If Sark fails to kowtow to the UK's every demand, will the UK take over?
Is Sark risking losing its independence by exercising it?

Question: Can the UK impose legislation on Sark?

Answer: No.

The UK and the Crown Dependencies (Isle of Man, Jersey, Guernsey, Alderney and Sark) form a personal union. This means they share the same Monarch but the Crown Dependencies do not form a part of the UK, and therefore laws enacted in one part of the personal union applies only there and do not apply in other parts of the union.

Laws in the UK come into effect by the action of Monarch in Parliament. Thus, the Houses of Parliament first pass an Act of Parliament, either by the approval of both the House of Commons and the House of Lords, or under provisions of the Parliament Act 1949 solely by the approval of the House of Commons once the House of Lords veto has been overruled by the House of Commons. The Monarch then grants Royal Assent, **acting as the Sovereign of the United Kingdom**, and the Act so becomes an Act valid **in the United Kingdom**.

Laws in Crown Dependencies comes into effect by the action of Monarch in Chief Pleas (on Sark), Monarch in States of Deliberation (in Guernsey), Monarch in The States of Alderney (in Alderney), Monarch in States of Jersey (in Jersey) or by Monarch in the Court of Tynwald (in the Isle of Man), respectively. When giving Royal Assent to an Act of any of those legislatures, the UK Monarch **can only act as the Sovereign of that particular jurisdiction** and can only give effect to the law **which is valid only in that particular jurisdiction**.

We spend a paragraph on terminology, since unfortunately it is rather confusing. The Monarch in Crown Dependencies is sometimes called the Lord of Man (in the Isle of Man) or the Duke of Normandy (in the Channel Islands). Some have disputed that these titles are still in use today. But the names do not matter. What matters is that there exist five entirely distinct and separate roles: the Sovereign of the United Kingdom, the Sovereign of the Isle of Man, the Sovereign of Jersey, the Sovereign of Guernsey, the Sovereign of Alderney, and the Sovereign of Sark. Thus, for example, although HM the Queen may be known as the "Duke of Normandy" in all Channel Islands, when giving Royal assent to a Jersey Projet de Loi, the "Duke of Normandy" is only acting as the Sovereign of Jersey and an Order in Council so enacted is not valid law in Guernsey, even though the Sovereign may also be called the "Duke of Normandy" in Guernsey. This is because the roles of Sovereign of Jersey and Sovereign of Guernsey are separate. Although Alderney ceded some of its autonomy to Guernsey by its Alderney (Application of Legislation) Law 1948 which states that no Projet de Loi approving additional expenditure or impinging on services to be taken over by Guernsey should be submitted to the Privy Council, and no Ordinance should be enacted which involves expenditure of public funds without the approval of Guernsey, Alderney nevertheless remains a separate jurisdiction. As does, of course, Sark.

Thus, any law coming into effect by the action of Monarch in Chief Pleas is only effective on Sark; and any law coming into effect by the action of Monarch in Parliament is only effective in the United Kingdom - and not in the other. Occasionally, United Kingdom acts state that their validity is extended to certain Crown Dependencies and such acts are sent to such Crown Dependencies for approval by their legislatures. When this happens, the Monarch is acting *simultaneously* in several of her roles as Monarch of the United Kingdom and Monarch of the relevant Crown Dependencies. She is thereby enacting the same Act in several members of the personal union simultaneously *as an administrative convenience*. But the Monarch does not act

in her capacity as Monarch of a particular member of the personal union and no such Act is valid in such a member of the personal union unless it has been given prior approval of that member's legislature.

That is not to say that a UK law cannot **purport** to be valid on Sark. Although the UK Parliament cannot enact laws valid in Crown Dependencies, the UK Parliament is sovereign. This means that an act of the UK Parliament **can** say that pigs can fly or whatever else it likes and claim to apply wherever in the world it likes. An example is the Island of Rockall Act 1972 by which the UK formally annexed the Isle of Rockall (not previously a part of the UK territory) in its entirety to protect it from Irish and Icelandic claims. Another example commonly given in legal texts is that of a UK law making it an offence to smoke on the streets of Paris. It is perfectly within the rights of the UK Parliament to enact such a law. However such a law will only be valid in the UK, not in France. Nor, more relevantly for our purposes, on Sark. Any act passed by the Queen in Parliament (acting as the Sovereign of the UK) in the UK will be a valid law in the UK **only**, and, since Sark is not a part of the UK, it will not be a valid law on Sark. Thus, it is perfectly possible to have a situation where the law of the UK is that elections on Sark are conducted in a certain way, while the law on Sark is that elections on Sark are conducted in a different way. Just as it can be law in France that smoking on the streets of Paris is legal and law of the UK that smoking on the streets of Paris is illegal. Naturally, events on Sark will evolve according to Sark law, not UK law, just as the courts of France will not enforce any smoking ban on the streets of Paris legislated for by the UK Parliament.

A slight proviso has to be made to the assertion that the UK Parliament is free to pass any law it likes. While historically, the UK Parliament has been sovereign, this sovereignty has arguably been eroded by the UK signing up to the ECHR in 1951 and further so by the UK enacting the Human Rights Act 1998. Since 1951, any attempt by the UK Parliament to enact a law valid on Sark could be challenged in the ECtHR and the UK Government could be required to take remedial action on the grounds that any such attempt would make the UK Parliament a legislature of Sark for the purposes of Article 3 of Protocol 1 of the ECHR, and thus put the UK in breach of that Article because it fails to provide Sark residents the opportunity to participate in the elections of such a legislature. Note that these considerations apply only to the UK **domestic** applicability of laws so passed, since such laws would never be effective on Sark in the first place.

Many centuries ago, the UK and the Crown Dependencies were absolute monarchies. The Monarch ruled by Royal Decree. Such authority could be delegated to his or her representatives (in Guernsey and on Sark, to the official initially called the Warden, and today called the Lt. Governor). This power was occasionally exercised (thanks to Dr. Richard Axton for giving us two examples from the 1500s and 1600s). Today, however both the UK and the Crown Dependencies are constitutional monarchies. The Queen can no more give Royal Assent (as Sovereign of Sark) to enact Sark legislation without prior consent of Chief Pleas than she can give Royal Assent (as Sovereign of the UK) to enact UK legislation without prior consent of the Houses of Parliament.

Were the UK Government to attempt to procure an Order in Council by the Sovereign of Sark enacting a Sark law without the consent of Chief Pleas of Sark (i.e. by Royal Decree) - even if there was constitutional basis for doing so - this would have to be procured by a branch of the UK Government which qualifies to be a "public authority" for the purposes of the UK Human Rights Act 1998. This has in fact been tested in courts and precedent established by the British Indian Ocean Territory case described in Section 2.1.7.1. Again, such an act would make such a public authority a Sark legislature for the purposes of ECHR Art. P1-3 and thus any such act would put the UK Government in breach of the said Convention. But more would be true in this case - such an act would put the UK Government in breach of Section 6(1) of the UK Human Rights Act 1998 and thus such an Act would be subject to being overturned in judicial review

proceedings in the UK - without having to go to ECtHR.

The UK Government in any event has no grounds to impose constitutional reform on Sark, as no breach of the ECHR has been proven. Even if it were, as we noted above, in order to attempt to impose legislation on Sark, the UK Government would have to breach the ECHR rights of Sark residents. In connection with this, we draw the reader's attention to Article 17 of the ECHR "Prohibition of abuse of rights" which provides that no one may use the rights guaranteed by the Convention to seek the abolition or limitation of rights guaranteed in the Convention. This addresses instances where States seek to restrict a human right in the name of another human right, or where individuals rely on a human right to undermine other human rights.

CONCLUSIONS:

1) The UK Government cannot enact laws valid on Sark without consent of Chief Pleas.

2) Were the UK *Government* to try to enact laws claiming to be effective on Sark their actions could be challenged in judicial review proceedings in UK courts as soon as the UK Government *proposed* to take such actions. Such laws, moreover, would not be effective on Sark.

3) There is nothing to stop the UK *Parliament* enacting laws claiming to be effective on Sark. Such laws would, however, not be effective on Sark, and such legislative action would be unlawful in UK and international law and would be subject to being challenged in the ECtHR.

Question: Could the Guernsey Lt. Governor intervene and impose legislation on Sark?

Answer: Not lawfully. Even if there was constitutional basis and precedent for doing so, the Lt. Governor is a public authority and any such attempt would breach the human rights act and be subject to being overturned in judicial review proceedings.

Question: If you're right, why are the UK Government telling us they will impose legislation on Sark if necessary?

Answer: Are they? Rumour about this has been rife, but solid evidence is non-existent.

The Seigneur stated in his letter to Chief Pleas members:

> *I am advised that [...] the DCA, acting for the Crown are very likely to [legislate for Sark].*

Chief Pleas members involved in the drafting of the Reform Law have similarly stated that the DCA made similar representations to them, namely that unless Chief Pleas approved a version of Reform Law acceptable to the DCA by a certain fixed date, the DCA would legislate for Sark. The level of detail allegedly insisted on by the DCA went down to what a certain date inserted into the Reform had to be.

If the DCA really made these threats, they were breaching the UK Human Rights 1998 Act.

They have no business telling Chief Pleas members what the Reform Law should look like.

We tried, therefore, to obtain copies of such threats made in writing to see what exactly was being said. However, it appears that such threats, if they were really made, would only have been made verbally.

We do not give much credence to verbal communications. It is too easy to be misunderstood. It is too easy for different parties to remember different versions of the exchange. Verbal communications are too easy to deny later on. A number of very respectable lawyers have advised us that the first thing law students learn in law school is that when what you say is being written down, or recorded, be very careful what you say. When it's not, who cares: say what you like - the only thing that matters is the end result.

The DCA letter to the Seigneur dated February 2007 states only that "the UK would have to remedy the situation" without stating how they propose to achieve this. We have argued elsewhere that the UK has no power to legislate for Sark and that the only remedies available to the UK, if any are needed are (1) to re-negotiate its international treaties, or, (2) to exert pressure on Chief Pleas and try to persuade them to take legislative action.

The Lord Chancellor's letter dated 7 May 2006 addressed to the Seigneur also states only that he would "not [be] able to recommend for Royal Assent" certain kind of legislation. He talks of issues, concerns, progress and targets. Vague concepts. But when it comes to the issue of who can or cannot legislate for Sark, the Lord Chancellor states only the following:

> *My officials and I will continue to offer Sark whatever support it wishes. The extent of that support will be gauged so as to avoid, wherever possible, accusations of unnecessary interference in the government of Sark by my Department or the UK.*

Not only is the Lord Chancellor not stating the UK will legislate for Sark, he is clearly stating quite the reverse.

We took the DCA to task and asked them to confirm their position on this *clearly and unequivocally in writing* - are they saying that the UK is proposing to impose legislation on Sark, or aren't they? If so, on what legal basis? We also advised them that our understanding of the law is that the UK has no power to do so, and that even them proposing to do so would be unlawful and actionable in judicial review proceedings. We sent a letter on 28 March 2007 and a follow-up letter on 18 April 2007, neither of which received a reply. We therefore followed up with a petition supported by many Sark residents dated 29 May 2007 (copies of all these letters are enclosed in the Appendix). On 12 June 2007, we received a reply which stated

> *Our position remains that constitutional reform on Sark is a matter for decision by Chief Pleas and the draft legislation will be scrutinised in the usual way when it is sent here for Royal Assent.*

This is the only thing the letter says about the question of whether the UK proposes to legislate for Sark or not. This is not quite saying the DCA will legislate for Sark, is it? This is also at odds with what Chief Pleas members, and, seemingly, the Seigneur, seem to be saying the DCA have been telling them verbally.

The DCA also advised us that the delay in answering our letter was due to the need for them to obtain legal advice. Does that not seem odd? There have been allegations that the DCA have been saying (verbally) to everyone on Sark left right and centre that they will legislate for Sark. If that is so, would they not have obtained legal advice beforehand? Would they have made threats without being legally advised? When we asked them, politely, a simple question - are they proposing to legislate for Sark or not - they had to spend months obtaining legal advice before they could answer in writing.

What exactly have the DCA been saying, and to whom? What exactly was said in these verbal exchanges?

As late as 21 June 2007, Dr Stephen Henry, a co-opted member of the General Purposes & Advisory Committee publicly stated in a public meeting, with most Chief Pleas members present, that unless Sark approved a Reform Law on 4 July 2007, the Island would imminently find itself "in considerable peril", apparently because the UK would legislate for it.

Therefore, on 30 June 2007, we sent a legal delegation to the DCA and Peter Thompson himself brought the matter to a close by stating categorically that such scaremongering "is garbage".

So who told Dr Henry what exactly, and on what basis was he saying what he was saying?

Is it fair that Chief Pleas should take a vote while not being properly informed about this matter?

It is not clear to this date whether it was UK officials that was being delinquent and making verbal threats they were not entitled to make, or whether it was someone on Sark with an agenda that has been making up stories.

Regardless of whether you believe Sark needs reform or not, and regardless of what form you believe such reform should take, is it not essential for the future autonomy of Sark that this matter is clearly understood by everyone on Sark before any legislative action is taken, that any remaining ambiguity is resolved and the constitutional position is clearly and officially established in writing? Provided that Sark sticks to its guns, it should be established that the UK has no power to legislate for Sark whatsoever.

Even if you still doubt us and believe that the outcome will be less favourable for Sark than we maintain, surely Sark will be more autonomous if the boundaries of UK's power of Sark are clearly and simply delineated. While any lingering doubt remains as to whether the UK made any verbal threats or not, while the boundary remains vague, it will always be the more powerful, and the better legally advised party (or, at least the party that is perceived to be better legally advised), namely the UK, that will be better able to exploit the vagueness of the situation. If the UK says something today, how is Sark to dispute the UK's claim, when the perception is that the UK has had its assertions checked by a huge team of leading lawyers (a perception that, as above paragraphs suggest, may not be warranted), whereas Sark only has a team of volunteer administrators at its disposal to formulate its response?

If the UK has a lawful way of legislating for Sark which does not breach the ECHR, fine. Let's learn what it is and learn to live with it.

The UK has an obligation to tell us what it is - not make vague, veiled, verbal threats.

If they are indeed making them.

RECOMMENDATIONS:

3) That Sark officially obtains whatever legal advice is necessary to fully establish the extent of its autonomy vis-a-vis the UK and that this legal position is fully clarified to the satisfaction of all Chief Pleas members.

4) That Sark officially takes the UK to task as to whether they are proposing to legislate for Sark or not if Sark does not bow to their pressure - and on what legal basis.

   Clearly, unequivocally. And in writing.

5) That Sark obtains legal advice on such written communications from the UK, and takes legal action against the UK if its officials are making any unlawful

representations.

6) That Sark doesn't take any legislative action on the constitution until this is resolved.

7) That a leaflet be prepared to be made available to any new member of Chief Pleas explaining in simple terms the exact extent of Sark's autonomy.

8) That possibly undergoing a short course explaining this position be made a requirement of any new Chief Pleas member. Alternatively, that a Chief Pleas adviser independent of the Law Officers (who are employed by the UK and represent their interests first and foremost) be appointed responsible for understanding such matters.

If a variant of these recommendations is not implemented, Chief Pleas will forever continue to buckle under pressure from the UK claiming to have various legal powers, without knowing whether the UK really does or does not possess such powers and Sark will continue to be ruled by outsiders rather than via local democracy.

How Independent is Sark today?

We quote Leolin Price CBE QC:

> *St. Helena, Ascension Island and Tristan da Cunha are Overseas Territories of the UK. In that they are not at all like Sark or the other Channel Islands. That difference might sensibly be emphasised in what is said in your report. For those Islands, as for the Indian Ocean Territory, sovereignty is with the UK. For Sark it is not, and sovereignty is a separate, independent Sark sovereignty; and the UK government has no constitutional position as, or as part of, the government of Sark. What your report is saying is that, if independence is prejudiced or lost, and Sark became another UK "dependency", Sarkees might be treated as badly as Chagos Islanders or those who live on Ascension Island; that Sark's constitutional independence protects Sark and Sarkees and must be fiercely defended.*

In law, the sovereignty in Sark vests in the Queen (of Sark) in Chief Pleas, a sovereignty which is separate from the sovereignty of the United Kingdom, which vests in the Queen (of the UK) in Parliament.

In practice, determining whether an entity is sovereign or not is not an exact science, but is often a matter of diplomatic dispute. Sovereignty is a combination of two elements: claiming it, and exercising it. Neither element alone is sufficient ("No de jure sovereignty without de facto sovereignty.").

It is clear that Crown Dependencies are *in law* entirely separate entities from the United Kingdom. Whether they retain this status also *in reality* is entirely down to them.

<u>An entity is only independent if it exercises its independence; and is only independent to the extent it exercises it.</u>

Some countries spend centuries longing for their independence and in many cases have to spill blood in order to gain it.

Today, Sark is coming dangerously close to losing its own - by failing to exercise it.

What have other Crown Dependencies been doing?

The Jersey Attorney General has argued that the UK today has no power to legislate for Jersey.

The DCA dispute this. Jersey entrenched its position by passing the States of Jersey Law 2005, Section 31 of which states that where an Act of UK Parliament or an Order in Council is proposed to apply in Jersey is referred to the Royal Court of Jersey for registration and it appears to the Royal Court that the States of Jersey have not given their consent, the Royal Court will not register such a law but will instead refer it to the Chief Minister who in turn will refer it to the States.

This is a clear bid by Jersey to assert its sovereignty over its territory and remove any ambiguity on the matter of UK being able to legislate for Jersey or not without the consent of States of Jersey. Jersey asserted that such legislation shall not be registered by the Royal Court (and will therefore not be valid in Jersey), but will instead be referred back to the States.

If Jersey can, why can't Sark?

This is why what decisions Sark makes on the question of its constitution is of such landmark importance.

RECOMMENDATIONS:

9) That the draft of the Reform Law be amended to incorporate a provision (modeled on the equivalent provision in the States of Jersey Law 2005) as follows

Duty to refer certain matters to Chief Pleas
(1) Where it is proposed –
(a) that any provision of a draft Act of the Parliament of the United Kingdom or a Projet de Loi of the Bailiwick of Guernsey should apply directly to Sark; or
(b) that an Order in Council should be made extending to Sark –
(i) any provision of an Act of the Parliament of the United Kingdom, or
(ii) any provision of an Order in Council of the Bailiwick of Guernsey, or
(ii) any Measure, pursuant to the Channel Islands (Church Legislation) Measures 1931 and 1957, the Seneschal shall lodge the proposal in order that Chief Pleas may signify their views on it.
(2) Where, upon transmission of an Act of the Parliament of the United Kingdom containing a provision described in paragraph (1)(a) or of an Order in Council described in paragraph (1)(b) to the Court of the Seneschal for registration, it appears to the Court of the Seneschal that Chief Pleas have not signified their agreement to the substance of the provision or Order in Council, the Court of the Seneschal shall not register it but shall, in accordance with paragraph (1), refer the provision or Order in Council to Chief Pleas.

2.1.10. How did the Reform Come to Be?

Let's recall some facts on how the constitutional reform came to be.

1. About 7 years ago, it was allegedly the Law Officers who advised certain Chief Pleas members that composition of Chief Pleas had to be changed, were given 6 weeks to do it and were told to "get on with it."

2. At the time, people of Sark were asked in an informal opinion poll if they wanted Sark to change. 90% of them said "no".

Whose idea, and whose will, was reform to start with?

3. The bulk of the Reform Law was drafted by the Law Officers. Sark people, through constitutional workshops, provided an input. But the law was always being drafted between the Constitution Committee **and the Law Officers**. The most important element of choice given to Sark people was how to constitute the new Chief Pleas. 5 options were considered. They were called A, B, C, D and E (thanks to David Curtis for telling us about Option E which was apparently subsequently forgotten).

4. Sark first chose Option B. The UK rejected this, due to a petition received against giving Royal Assent to the law.

   The UK had no right to do this - the UK justified rejecting Option B on the grounds that it was supposedly not ECHR compliant, which we know today is false.

5. Sark next chose Option C. The Seigneur rejected this, under pressure from the UK.

   The UK had no right to do this - the UK justified rejecting Option C on the grounds that it was supposedly not ECHR compliant, which we know today is false.

6. The UK then took the view that reform *had to* take place in the form of Option A - not B, C, D, *or any other arrangement whatsoever*.

   The UK had no right to do this - the UK adopted this position supposedly on ECHR grounds.
   As we see in Section 2.1.12, this is clearly bogus.
   Their true reasons were political - they wanted Sark run as per Option A - in order to meet *their political agenda*.

Whose idea, and whose will, was Option A to start with?

7. Sark then negotiated a compromise: the UK Government would accept a minor - but only a minor - variation of Option A, and even then only provided it was supported by a substantial majority of Sark public in preference to Option A in an opinion poll.

   The UK had no right to make such demands. Sark has no ECHR obligations. The UK does. if Sark chooses to assist the UK in meeting theirs, any arrangement which meets them must be acceptable to the UK Government - not just the one the UK Government prefers. The UK's international obligations are not a backdoor for the UK to use to impose its will on Sark. There is no need for a supporting opinion poll either.

8. A Test of Opinion was held in August 2006 where residents were asked the question: Sark has to change and you have two options, Option A and Option Rang/Harris, a minor variation of Option A. *You have no other option. Of the two options, which one do you prefer?* Battered into submission, 56% of people stated they preferred Option A. 44% stated

they preferred the other option.

9. Although the Test of Opinion was never intended to be binding if a 20% majority was not achieved by either option, and although people were never asked if they actually wanted Option A, or any change at all for that matter (only if they preferred that option to another), the result of the Test was being very proactively presented across the Island as the will of Sark people being Option A.

   Was this an entirely fair and unbiased representation of the facts?

   But I am not entirely correct. People *had* been asked if they wanted change or no change at all - 7 years earlier, and then again in February 2007 in an informal poll organized by Simon Couldridge, a Sark resident - and both times they clearly said *no*.

10. Sark people - including many of those who voted against Option A in the Test of Opinion, finally caved in and conceded that Option A is the will of the people of Sark.

    And today, many truly believe this is so.

    And sadly today, this probably is so. The brainwashing by the UK Government is complete.

    This does not, however, mean that people cannot be persuaded that an even better alternative exists - but we must present good reasons to them.

Were the people taking the Test of Opinion given correct and unbiased information?

How many Sark residents participating in the Test of Opinion, or even how many members of Chief Pleas, were properly aware at the time of taking the Test, or are even properly aware today:

a) of the potentially adverse consequences of Option A Reform Law on Sark's autonomy and perhaps even on democracy on Sark and of the shifting of power and control of Sark from Sark's local legislature to unelected UK officials with no democratic accountability?

b) that the UK has no lawful power to interefere in Sark or take over Sark?

c) that Option A Reform Law is itself not ECHR compliant on the basis of the remaining powers of the Seneschal, and the powers de facto exercised by the Law Officers, the DCA, the Lord Chancellor and the Privy Council as presently constituted?

d) that the aspect of Options B, C, D and Rang/Harris relating solely to the composition of Chief Pleas are in fact fully ECHR compliant, as are many other Options, some involving much less change from Sark's present constitutional arrangements?

How many would have changed their votes had they known these facts?

How did the Seigneur get to start supporting Option A?

e) the Lord Chancellor wrote in his letter to the Seigneur on 7 May 2006 as follows:

> *I would not have been able to recommend for Royal Assent [Option C] legislation about which there are serious or substantial ECHR compliance issues. [...] As more time passes so increases the level of criticism that is faced by Sark and the*

UK for the apparent failure to resolve the fundamental criticism: that the constitution of Chief Pleas is in breach of ECHR.

This letter no doubt played an important role in persuading the Seigneur that the only Reform Law Option he could support was Option A. Persuading the Seigneur, who commands much following among the people of Sark, no doubt had as a consequence the persuading of many other people on Sark of the same.

This letter also appeared to convince the Seigneur that unless he supported Option A, the UK would end up taking over Sark, although we do not quite understand how the Seigneur came to such a conclusion.

This letter also seriously misleads the Seigneur. While legal opinion varies somewhat about how likely Option C is to be ECHR compliant, one thing is clear: it is either clearly, or very probably, ECHR compliant. The Lord Chancellor is wrong to say that this legislation has serious or substantial ECHR compliance issues (assuming he is referring to the issue of composition of Chief Pleas, not other aspects of Sark's constitution, such as the Lord Chancellor's own powers in relation to Sark, which do indeed have serious ECHR compliance issues, as do the corresponding aspects of the Option A Reform Law). He is also wrong to imply that he would refuse to recommend Royal Assent to the legislation. Him refusing to do so, as we have indicated earlier, would breach ECHR Art. P1-3, as he himself is not an elected representative of Sark people. By sending this letter, the Lord Chancellor was inappropriately responsible for spreading misinformation on Sark and stifling a solution to Sark's constitutional impasse which was acceptable to a consensus of opinion on Sark at the time.

The Lord Chancellor is wrong to pass off an unproven allegation that the composition of Chief Pleas is not ECHR compliant as a fact. At the same time he fails to point out that many other aspects of Sark's present constitutional arrangements, such as the UK's own powers over Sark, are much more likely to be non-compliant with the very same provision of the ECHR.

f) as a result of the Lord Chancellor's letter, the Seigneur circulated the above letter from the Lord Chancellor to all Chief Pleas members accompanied by a letter of his own. In it he stated

The Crown has the right to legislate for Sark if Chief Pleas is seen to be totally intractable to legal advice from the Crown Officers of the Bailiwick and legal advice from the DCA itself if as a result of which we remain non compliant. I am advised that if Chief Pleas elect to go forward with Option C or any variant thereof other than Option A or put forward any further delaying motion the DCA, acting for the Crown are very likely to do just that. We would lose all control of the legislation and should the Sark Chief Pleas be considered incapable of good governance, could place Sark more firmly under Guernsey control to prevent similar occurrences in the future, then we really would lose some of our independence. Such a move would reflect very badly on all the Dependencies and be disastrous for Sark's future status.

It is unquestionable that the Seigneur's actions stopped the enactment of Option C and steered the political process on Sark in the direction of Option A. The Seigneur's endorsement of Option A undoubtedly persuaded many Chief Pleas members and members of Sark public to follow suit.

Bud did the Seigneur correctly represent the contents of Lord Chancellor's letter to members of Chief Pleas? The Lord Chancellor's letter says that he would not have been able to recommend Royal Assent to Option C legislation. He talks of issues, concerns, targets and progress. Vague concepts. He also says his officials will offer Sark whatever support it wishes - the extent of support to be gauged *so as to avoid accusations of unnecessary interference by the UK in the government of Sark*.

Is the Seigneur right to interpret this letter as implying the Crown will legislate for Sark, and will do so imminently, and that Guernsey will take over Sark? We have no doubt the Seigneur was acting with Sark's best interests at heart and out of genuine fear and concern that the UK would come to Sark and take over, and that he fully believed what he was saying. We do not, however, believe that his interpretation of the Lord Chancellor's letter and its presentation to Chief Pleas members was correct.

Wrong as the Lord Chancellor's letter was on several points, the Lord Chancellor not only does not say what the Seigneur says his letter implies, he in fact expressly states the exact opposite. The fact that the letter carries the Seigneur's authority no doubt convinced many people of Sark that immediate reform - even if ill-thought out - was required, or Guernsey or the UK *would* take over.

How many people changed their vote in the Test of Opinion as a result of this?

Or did the Seigneur receive any verbal communications or representations further to, and contrary to, what is stated in the Lord Chancellor's letter? Is that why he said that the DCA were "very likely to do just that"? As we explored in Section 2.1.9, there is evidence that DCA officials made verbal threats to various parties on Sark of the UK imposing on Sark. As we said before, if this was the case, this was unlawful and the details should be made public. If any public authority in the UK made the statement the Seigneur states they did, such a public authority had breached Section 6 of the UK Human Rights Act 1998, under Section 7 of which any resident of Sark is able to take such a public authority to court for **proposing to act** in breach of the ECHR.

g) as a result of the Seigneur's veto of Option C, a number of Chief Pleas members distributed a circular which stated

> *We have been told by the Law Officers and the DCA that Option C would almost certainly be refused Royal Assent because it is so* ***easily challengeable*** *under Human Rights law. ...* ***Option C is not acceptable under Human Rights and is no longer a serious contender****. ...* ***whatever the outcome of an opinion poll, it can never provide sufficient support for Option D****. ... On 5th July, Chief Pleas has to decide what to do. ...* ***If we have not begun the reform process in earnest by [September], our present system would certainly not stand up to challenge, and the process of reform could be taken out of our hands. ... The only safe route for Sark is to adopt Option A on 5th July****.*

This circular clearly implies that by voting for anything other than Option A, voters risk exposing Sark to dire consequences.

How many people changed their vote in favour of Option A in the Test of Opinion as a result of this?

But, although we have no doubt the circular was written in good faith, the circular also misinforms the reader. Although there have been various shades of legal opinion received as regards Options C and D, no legal opinion ever stated that either of those

options was *easily challengeable*. All legal opinions agree that those options are at least probably ECHR compliant; and some go as far as saying that they are certainly compliant. The allegation that the present system would certainly not stand up to challenge is being presented as fact, which it is not. It is not true that the process of reform could be taken out of Sark's hands. Moreover, this circular implies that this could happen imminently, while there is in fact no legal justification for the UK to show much an interest in Sark's internal affairs in the absence of an adverse ruling by the ECtHR.

h) the Seigneur has stated that only himself and a certain small number of Island officials could undertake a human rights challenge, and that he refused to do so. This is not correct. Any individual aggrieved person living on Sark could do so. He has also stated that only individuals have standing to complain. This, again, is not quite correct. There have been several cases where legal persons (such as political parties) have initiated human rights challenges.

i) on 21 February 2006, Deputy Richard Dewe circulated a circular, in preparation to the Opinion Poll organized by Deputy Geoff Gurden to all households stating that

> *I believe it is unreasonable to ask you to participate in such a ballot unless you are aware of the facts that have led up to the statement that the present composition of Chief Pleas does not conform to either the European or United Nations Conventions of Human Rights. The Queen cannot be seen to have any part of her Realm that is not Human Rights compliant.* ***We must conform.***

Of the proposition by Madam Phyllis Rang and Deputy David Cocksedge he said

> *Although this proposition allows the Tenants to be elected by all qualifying residents, it does not overcome the fact, that by guaranteeing the Tenants 14 seats, it is disproportionate to their numbers (46 including joint owners). ... If Chief Pleas decides to approve the Rang / Cocksedge proposition, it can only result in a delaying action, because there is no doubt that it will again be challenged ... and that the challenge will be upheld.*

How many people changed their vote in favour of Option A in Geoff Gurden's poll as a result of this?

Deputy Dewe was repeating information given to him by sources he had reasonable grounds to believe were authoritative. We have no doubt he was acting with Sark's best interests at heart. Nevertheless, much of what he says is wrong.

MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application no. 9267/81) makes clear that "[i]t does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory". For example, Slovenia's ECHR compliant electoral system features the ratio of the smallest to largest constituency of 12:1 compared to 9:1 on Sark under Option C, and it is not deemed disproportionate.

The letter is also wrong in saying that "The Queen cannot be seen to have any part of her Realm that is not Human Rights compliant.". The ECHR does not apply in the British Overseas Territories of Pitcairn, Henderson, Ducie and Oeno Islands, Saint Helena (including Ascension Island and Tristan da Cunha) and British Indian Ocean Territory.

j) at the public meeting held at the Island Hall on 15 August 2006, preceding the Test of Opinion, Deputy Guille stated there was an obligation to the ECHR and therefore the Status Quo of Chief Pleas was not an option.

k) the Opinion Poll Information Sheet stated "A variety of factors, particularly arising out of obligations under the European Convention of Human Rights, **require** that changes be made to the composition of Chief Pleas."

How many people who voted for Option A didn't want change at all, but believed change was required and believed that if change was to be implemented, it might as well go all the way?

This sheet is misleaeding the voters. The Price & Price opinion clearly explains why there is no **requirement** for Sark to change. Firstly, Sark has no international obligations under ECHR - the UK has. Secondly, no breach has been proven.

The outcome of the Test of Opinion would have been the opposite if only 25 people changed their vote.

How many people changed their vote due to the misinformation they were presented?

2.1.11. The Seneschal

It only takes listening to one meeting of Chief Pleas to realize that the Seneschal, as the President of Chief Pleas, exerts immense influence on:

- when Chief Pleas meetings are called,
- what is on the Agenda of Chief Pleas meetings,
- what is the order of items on the Agenda (thus having the power to effectively neutralize some items),
- how Chief Pleas debates proceed,
- which legislation is passed by Chief Pleas, and even on
- which Chief Pleas propositions get to be voted on and which do not.

This makes the Seneschal not only a part of Sark's local legislature but indeed makes him its most powerful member. Residents of Sark have no say whatsoever in how the Seneschal is appointed and the very essence of their right to freely express their opinion in the choice of his appointment is denied to them. There is a very strong case that this is a breach of ECHR Art. P1-3. It is absurd to argue that Tenants - the less influential members of Chief Pleas - must subject themselves to a general election whereas its most powerful member does not.

The effect of all the Reform Law as it stands is to shift the power in Chief Pleas from other Chief Pleas members to the Seneschal. Under a reformed Chief Pleas, members will rotate much more regularly than they do today. If our assessment in Section 4.1.2 is correct that reducing the number of Chief Pleas members will lead to more resignations mid-term due to excessive workload, Chief Pleas is likely to be filled with members having served only a short length of time and possibly having little political experience and understanding of Chief Pleas Rules of Procedure. Such members are most likely to rely on the more experienced members for guidance on how to conduct themselves in Chief Pleas.

At the same time, the Seneschal's term appointment is extended from 3 years to for-life. He is granted a substantial salary for performing his role, therefore allowing him to dedicate himself full time to it. He will clearly be the most experienced and best versed member of Chief Pleas in Chief Pleas Rules of Procedure and will also be perceived as such. His advice will therefore carry authority, even on those occasions when it is incorrect. He will therefore have enormous power to direct Chief Pleas.

The constitution is being drafted with the long term in mind. The present Seneschal is a great chairman. He clearly prepares well for debates, reads his papers and otherwise performs his role diligently. Yet even he has not been beyond reproach, taking a partisan line on occasion. We do not know today who the future holders of the position of the Seneschal will be or what sort of people they will be. By further concentrating the power of Chief Pleas in its single most powerful member and by giving him an appointment for life, is this bringing democracy to Sark, or is it creating on Sark a fertile ground for the establishment of a future dictatorship?

Our concern is exacerbated when we observe that the President of Chief Pleas also retains his role of Chief Judge and that Rule 10(5) of Chief Pleas Rules of Procedure gives the President of Chief Pleas the power to order another member of Chief Pleas to leave the chamber, and Rule 10(6) allows him to propose that another member be suspended from service of Chief Pleas. Yet Chief Pleas and members of Sark public have no supervisory power over the Seneschal. It is the UK Government, and *only* the UK Government, through the office of the Lt. Governor (de facto acting on the advice of the Law Officers), that retains such power.

Nominally, the Seneschal loses his right to speak in the reformed Chief Pleas. How he is expected to chair debates under such conditions and how likely that rule is to be adhered to in

practice is unclear. We must note also that the Seigneur, who appoints the Seneschal and is likely to be his close associate, retains his right to speak in any event.

In order to control Chief Pleas, in future, the UK Government will go a long way by securing the co-operation of the Seneschal. By pressure or otherwise. As long as his actions have approval of the UK Government's representatives in Guernsey (the Lt. Governor and the Law Officers), Chief Pleas and members of Sark public will be left with no recourse.

In order to assure compliance of the Seneschal's role with the ECHR and to ensure effective political democracy on Sark, the power to appoint and remove the President of Chief would have to be brought under the democratic control of either the residents of Sark or their local legislature (Chief Pleas) and the appointment made subject to election at regular intervals, as for other members of Chief Pleas, and as stipulated by ECHR Art. P1-3.

CONCLUSIONS:

1) There is a strong case that the unelected, for-life nature of appointment of the Seneschal as President of Chief Pleas is not ECHR compliant

If the Reform Law is to improve rather than harm democracy on Sark, we recommend the following be incorporated into the Reform Law:

RECOMMENDATIONS:

10) That if every other member of Chief Pleas is to be elected, the Seneschal (in his role as President of Chief Pleas) is elected too.

If Recommendation 10 is not incorporated into the Reform Law, Sark's constitution will not be ECHR compliant and one of the principal stated objectives of reform - removing the vulnerability to an ECHR challenge - will not be achieved.

2.1.12. Chief Pleas (Revisited)

Suppose the goal of reform is still making Sark's constitution and legislature ECHR compliant.

1) Must Chief Pleas be reformed at all?
2) If yes, must reforms be anywhere near as drastic as any of the options (A, B, C, D, Rang/ Harris) considered to date?
3) Is Option A the only ECHR compliant way of choosing members of Chief Pleas?

The first answer to question 1 is no. Sark has no international obligations under ECHR and the UK has no power to impose legislation on Sark. Thus, Sark may, without any breach of any obligation on its part, choose to do nothing. The UK Government, however, *has* the obligation to reform the role of the Law Officers, the DCA and the Privy Council as the UK is a High Contracting Party to the ECHR and has obligations under that convention to rectify the human rights breaches caused by the roles of those organs.

However, for the rest of this section, we assume that Sark wants to *voluntarily* help the UK meet its ECHR obligations as they apply to the territory of Sark.

The answer to question 3 is clearly *no*. Several eminent lawyers have already told us so. But it doesn't take a lawyer to see that. Common sense will do. If Option A were the only way, every Council of Europe member state would have an Option A based parliament. Yet none, in fact, do. Options B, C, D, Rang/Harris and Rang/Miller/Harris (12+16) are all known to be probably OK. We do not dwell on that, because we believe there exist much better arrangements which are also clearly ECHR compliant. We focus on them instead.

How about Status Quo - is it compliant?

The UK Government claims that Sark's current composition of Chief Pleas is in breach of the ECHR. It is far from obvious that this is indeed the case, or at least, that any *drastic* changes are needed to make it compliant. The UK Government is not entitled to represent - as it has been doing - their claim as fact. The right to rule whether such claims are factual or not is the prerogative of the ECtHR and that Court has never even considered the matter, let alone ruled on it. The UK Government alleges a breach under ECHR Art. P1-3 either alone, or in combination with ECHR Art. 14. The ECtHR has decided 46 cases alleging a breach of ECHR Art. P1-3 (see Appendix for the list of all decided cases). None of these cases concerns a situation even vaguely similar to Sark so as to give us much guidance as to what the Court would decide in the case of Sark. Due to the lack of much guiding case law, any challenge to the composition of Chief Pleas would end up in the ECtHR itself and would create entirely new case law.

Effective Political Democracy on Sark

How well is effective political democracy spoken to in the preamble of the ECHR achieved on Sark? Sark has, as of 2007, an electorate of 418 and a parliament with 49 members (12 elected by the general public). This equates to one member of parliament for every 8.5 voters (one member of parliament elected by the general public for every 35 voters). The vast majority of Chief Pleas members are locally resident and are relatively easily accessible to members of Sark public and many are readily available and willing to discuss their concerns with them. Those who are not can be, and often are, successfully put under informal pressure through mechanisms which only a small community like Sark can provide. It is possible for any resident of Sark who wishes to do so, to speak to, and voice their concerns to, a significant proportion of members of Chief Pleas within a matter of hours; to most, or all of them within a matter of days. Although not every Sark resident participates in the election of every member of Chief Pleas, a

good degree of participation in the government of the Island by the people is provided through such lobbying and contacts. Furthermore, all Sark residents are able to participate in elections of a significant proportion of members of Chief Pleas. The electoral power of an individual voter on Sark is very great by world standards. Nowhere else do so few voters elect so many representatives. It is by these means that Sark achieves a degree of *direct* effective political democracy which indeed may well be unrivaled. Although these means are perhaps unusual and (today) unique, they are nevertheless effective. Where else does an individual resident have the opportunity to provide as much input on a daily basis into how their country is governed as the residents of Sark do? The term effective political *democracy* refers to *government by the people*, not to a particular system of achieving this.

We must bear in mind how democracy in the Western world has historically evolved. Throughout history, commencing at least with Ancient Greek city states, states which have been, and continue to be, recognized as democratic, have achieved effective political democracy through means not dissimilar to the arrangements in place today on Sark. Democracy by these means was principally replaced by one-man-one-vote representative democracy because the population of countries grew too large to continue to allow their subjects regular direct participation in government on a daily basis. Sark, however, remains small enough to be able to continue to provide this option.

ECHR Articles

We turn now to ECHR Art. P1-3 and ECHR Art. 14. We have heard many arguments that these articles are currently being breached. The ECtHR, when making its judgments, must take account of Article 63(3) of the ECHR which states:

> *The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.*

In the case of MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application no. 9267/81) the ECtHR established the now well known principles that (i) the rights under ECHR Art. P1-3 are not absolute but may be subject to limitations, (ii) any electoral legislation must be assessed in the light of the political evolution of the country concerned, so that features that would be unacceptable in the context of one system may be justified in the context of another and (iii) that the High Contracting States have a wide margin of appreciation in this sphere.

What is the relevant political evolution of Sark? The present constitutional system on Sark was established when Sark was colonized by the 40 original families in 1565. Chief Pleas was established and first met in 1579. The Island was divided into 40 constituencies (families), each represented in Chief Pleas by one representative. Thus, the original composition of Chief Pleas had decent democratic credentials, given the population of the Island and social views of that period. With time, additional inhabitants settled on the Island and were granted leases of land. As population of the Island grew, leaseholders found themselves unrepresented in Chief Pleas and so in 1922, the 41st constituency was created to represent the leaseholders in Chief Pleas by an additional 12 Deputies of the People.

This division into 41 constituencies remains in existence to this day. 40 of these constituencies still send one representative to Chief Pleas each, and one constituency (currently of size 418) elects 12 representatives. In this way, every resident of Sark has the opportunity to express his or her opinion in the choice of the composition of Chief Pleas at reasonable intervals in elections held by secret ballot.

The only people who arguably have a valid complaint that composition of Chief Pleas does not provide them with the rights stated in ECHR Art. P1-3 on the basis that they do not have an

opportunity to express their opinion in the choice of the composition of Chief Pleas at regular intervals are the joint Tenement owners who do not have a seat in Chief Pleas nor have the right to vote. But if necessary, this is easily remedied by holding regular elections in the 40 constituencies consisting of the joint owners of a Tenement to elect the Tenement representative.

Residents other than joint Tenement owners therefore do not have a valid complaint under ECHR Art. P1-3 alone. Any complaint would have to be on the basis of Article ECHR Art. P1-3 taken in combination with Article ECHR Art. 14, i.e. that the electoral system of Sark is discriminatory because the electoral power of inhabitants belonging to the first 40 constituencies is disproportionate to the electoral power of inhabitants belonging to the 41st constituency. How solid are the grounds for this complaint?

The electoral model of splitting of a jurisdiction into constituencies, each of which elects its own representatives is very common. Such an arrangement can be found, for example, in the European Parliament, which currently has 785 members, of which each constituent nation elects a certain pre-determined number in accordance with its own locally determined system of elections. Furthermore unequal voting power is commonplace in democratic voting systems today. In MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application no. 9267/81), the Court held that

> *[i]t does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory.*

Germany and France, for example, elect one representative to the European Parliament per roughly 800,000 inhabitants, but Luxembourg and Malta elect one per roughly 80,000; thus, Maltese and Luxembourg citizens have 10 times the electoral power of Germans and the French.

We take the further example of Slovenia, whose electoral system was examined for ECHR compliance upon its admission to the European Union and was deemed to be ECHR compliant. Slovenia is split into 90 electoral constituencies. Voters with the least electoral power are members of exactly one constituency of size 22,000 electing one candidate. Voters with the most electoral power are members of exactly two constituencies, one of size 22,000 and another of size 2,000, each electing one candidate. Thus, voters with the greatest voting power have 12 times the voting power of voters with the least electoral power.

In Sark, a member of a Tenement constituency of size 2 electing 1 representative has 17 times the voting power of a member of leaseholder constituency of size 418 electing 12 candidates. A ratio comparable to that of the constituencies of Slovenia and the European Union. This demonstrates that to the extent that the voting power of members of the first 40 constituencies is greater than the voting power of members of the 41st constituency, this difference is comparable to other systems of elections which are generally accepted as ECHR compliant. Indeed by introducing the minor change of

- increasing the number of Deputies to 17, and/or,

- changing the first 40 constituencies to constituencies consisting of joint Tenement owners and their families, each electing one candidate

the difference in voting power would match or better that of Slovenia, and thus only be subject to criticism on ECHR grounds if Slovenia's system of elections is too - which we know it is not.

ECtHR case law (see, for example, MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application

no. 9267/81)) clearly shows that establishing that a legitimate aim is being pursued and that the means employed [to pursue this aim] are not disproportionate, is sufficient justification to allow the ECtHR to conclude that a differential in voting power between different classes of voters is not in breach of the ECHR.

The differential in voting power on Sark between Tenants and leaseholders has historically developed through the growth of leaseholder population. But even today it is pursuing several legitimate aims. Sark is unusual amongst territories of Council of Europe states in that it is a privately owned Island. Consequently, only a very small proportion of its population are landowners. Were Chief Pleas to have leaseholder majority, it is possible or even likely, as we further argue in Section 3.1, that a land reform would be implemented which would take land away from landowners at an undervalue and give it to leaseholders and therefore violate the right of landowners to peaceful enjoyment of their possessions. Such rights are not protected in international law, and, currently, also not in Sark's domestic law, since, for obvious historical reasons, this has never before been necessary.

It is legitimate, therefore, to insist that landowners have a majority in Chief Pleas until appropriate safeguards are put into law to prevent such a confiscatory land reform. Not only to protect landowners' rights, but also to protect against a possible deterioration of community relations, and possibly even political and economic instability or even civil disorder that may result.

We suggest therefore that allegations of disproportionality are not justified.

Further Considerations

How does the average Sark resident's ability to express their will in the composition of their legislature compare to that of, say, a resident of Gibraltar? A complaint by a resident of Gibraltar that she was denied participation in the elections of members of the European Parliament (MATTHEWS v. THE UNITED KINGDOM (Application no. 24833/94)) which was upheld by an adverse ruling against the United Kingdom in 1999 was finally rectified by the UK Government only in 2004 by allowing the 27,967 Gibraltarians to participate in the elections within the United Kingdom constituency of South West England of approximately 4 million inhabitants; thus, Gibraltarians, who represent approximately 0.7% of that constituency, have, for practical purposes, no influence whatsoever over the composition of even a single member of European Parliament, yet the United Kingdom government deems this arrangement sufficient to meet its obligations under ECHR Art. P1-3 with respect to Gibraltar. The UK's remedy of the ECHR breach does not *de facto* offer Gibraltarians the opportunity to even elect a single member of their EU legislature. Yet it is deemed ECHR compliant. How does this stack up with Sark leaseholders' right to elect 12 members? It is pertinent to note that the United Kingdom government did not feel under any obligation to rush any reform through prior to the ECtHR pronouncing its judgement against it.

Taken in the context of Sark's unique situation and history, an applicant challenging Sark's current composition of Chief Pleas would face an uphill struggle to prove his or her case.

Effective local political democracy in a small community like Sark is achieved, and always will be achieved, more through informal day to day contacts between residents and Chief Pleas members than through the ballot box. Although the way membership of Chief Pleas is determined will profoundly influence the governance of Sark, the effect may - through the shifting of power to the Law Officers and other external bodies - surprise some people. The extent of democracy on Sark is determined, and always will be determined, more by the number of members of Chief Pleas than by the question as to what proportion of them are elected. All drafts of Reform Law considered to date reduce the number of members of Chief Pleas from 52 to 28 -

this erodes, not improves, effective local political democracy.

2.2. Protecting Individual Freedoms

In 1854, the United States of America was facing an impasse over the issue of slavery and passed the Kansas-Nebraska Act. This proposed popular sovereignty as the solution - Stephen A. Douglas, the most powerful man in the U.S. Senate at the time, argued that the people of each territory should decide by democratic means - by will of the (white) majority - whether to allow slavery (of blacks) or not. Abraham Lincoln, his main political opponent, argued against the will of the majority to protect the minority, and was described as a tyrant and anti-democrat by many of his contemporaries because of it.

Lincoln did reject the democratic will of the majority. Was he acting anti-democratically? Most of us today would not condemn Lincoln for his decision. Why?

Every society believes that limits exist to the right of the majority to impose its will on, and impinge on the personal freedoms of, minorities and individuals. Most societies (including all major countries except Israel, New Zealand and the UK) enshrine these limits in a document called a constitution, a law which - since its purpose is to guard against oppression by the majority - by design cannot be changed by a mere simple majority vote. Incidentally, this is why we argue that Chief Pleas legitimately required a greater than simple majority be achieved in the Test of Opinion in order to justify a constitutional change.

Where the line lies between the will of the majority and the personal freedom of the individual varies from society to society.

Most societies emphasize the will of the majority. Most societies also have high taxes and a powerful Big Brother state able to intrude on an individual's privacy and impinge on his rights and his freedoms any time it likes.

Sark traditionally emphasizes personal freedom. It is an important part of its heritage. It is something to be proud of. It is a big part of what makes Sark different.

It's all very well if today the will of the majority is to take away from *them* and give to *us*. But the will of the majority is fickle. Soon enough *you too* will be one of *them*.

Democratic principles advocate asking the majority for their opinion. But there is nothing undemocratic about asking a minority for their opinion *as well*.

The Rang/Miller/Harris Reform Law is vulnerable to the accusation that it goes against the will of the majority of Sark's population.

But Option A equally suffers from the legitimate accusation that it goes against the will of the Tenants and impinges on their rights, personal freedom, and property.

RECOMMENDATIONS:

11) Any solution to Sark's constitutional problem should be approved by **both** the vote of a majority of Sark's population, thus giving it popular mandate, **and**, the vote of a majority of the Tenants in a separate **free** vote. It should not disenfranchise, oppress, or put into a position of intense discomfort, any other section of the community either.

The purpose of limiting the majority's right to suppress individual freedom does not only benefit the minority. It also ensures harmonious community relations. Oppression and involuntary alienation of a minority's or an individual's rights by the majority invariably leads to resentment, social tension, and conflict. The bare minimum level of minority rights protection is that which

ensures the society is free from armed conflict, social disorder and social unrest resulting from such resentment. What will happen if the reformed assembly decides to take Tenants' land away? Will they go peacefully?

The Tenants as a group have clearly indicated unease about transitioning to Option A. The Tenants as a group have been more than generous when they offered transition to Options B, C, D, or Z. That involved significant concessions on their part. If somebody made unsolicited *demands* from you that *you* hand over some of *your* rights or possessions, how compliant would *you* be? Sark has since its colonization in 1565, been a privately owned - not a public - Island. HM the Queen, the Seigneur, the Tenants and the Freeholders owe their proprietary rights in the Island to either purchase for a substantial sum of money, or descent from the original settlors or subsequent purchasers. The rest of us did not have to buy such an expensive bit of land, or develop a previously uninhabited, pirate-infested bit of rock.

A big country should not be run as a personal fiefdom. A legislature elected by universal suffrage is clearly more appropriate.

A hotel clearly will not be run by the democratic will of its staying guests; nor will a private home; nor will a privately owned country estate. They will be run by their owners, or by their management.

Sark is not a country. Nor is Sark a private estate. Sark is somewhere in between a country and a collection of 40 privately owned country estates.

Its government is rightly constituted as being somewhere in the middle of that spectrum likewise.

2.3. Does Sark Need to Comply with the ECHR?

No. Sark is not a High Contracting Party to the ECHR. The UK is. The UK has undertaken ECHR obligations to its fellow High Contracting Parties with respect to Sark's territory without asking for Sark's consent. Now the UK is asking Sark to comply with its obligations.

This is not unlike the UK committing to the USA to enforce a smoking ban on the streets of Paris without asking France's consent and then trying to bully France into enforcing it.

We suspect France would (rightly) say that such an undertaking is the UK's problem.

What about The Human Rights (Bailiwick of Guernsey) Law, 2000?

That is an internal law which is no business of the UK.

If the Royal Court of Guernsey or the Seneschal's court declares an incompatibility with the ECHR under this Law, that is the end of the matter. It is merely an advisory declaration which imposes no obligation on Chief Pleas to take any notice of it. If Chief Pleas chooses to implement a remedy subsequent to such a declaration, it is free to do so, and if it chooses not to - for example, if national interest consideration warrant it - it is likewise free not to.

If Chief Pleas chooses not to implement any remedy, The Human Rights (Bailiwick of Guernsey) Law, 2000 carries no penalties of any substance.

In this way this law - which binds Sark, is very different from the ECHR - which binds the UK. The ECHR carries with it international obligations to other High Contracting Parties and the ultimate sanction that a High Contracting Party breaching it may be expelled from the Council of Europe.

The Human Rights (Bailiwick of Guernsey) Law, 2000 is merely an internal Bailiwick of Guernsey law with no teeth which carries no international obligations.

While we do not advocate willfully committing illegal acts, we likewise have to keep a sense of proportion and not subject a society to enormous changes lest it violate a law which is far from clearly being violated and whose penalties are toothless.

3. Other Reasons for Reform

Not all reasons for reform are publicly stated or officially acknowledged. Here we look at some reasons in this category.

3.1. Land Reform

Sark is not a heavily regulated Island and government interference in the day-to-day life of its inhabitants is, by world standards, extremely low. Chief Pleas do not pass many intrusive laws, or, indeed, many laws at all. Life on Sark is very friendly, simple and uncomplicated. There is nevertheless a large body of people on the Island who genuinely want to change Chief Pleas. Why? Clearly, the answer has to be that they wish Chief Pleas to legislate differently than the current one is legislating. Otherwise, why replace it? As Chief Pleas can hardly legislate less, the logical conclusion has to be that some people want it to legislate more. More specifically, there are certain laws they want it to pass, which they believe the current Chief Pleas will never pass. One of the most significant such laws, if not the most significant, is land reform.

Leaseholder enfranchisement is a leading underlying reason why many Sark residents supporting reform (especially the Option A Reform Law) have been keen to see reform. To state it in simple terms, leaseholder enfranchisement involves the compulsory taking of land from Tenants, Freeholders, and the Seigneur and the assignment of freehold interest to leaseholders. Many people expect constitutional reform, especially if it involves a Chief Pleas having a leaseholder majority, will lead to this, and it is this reason, perhaps even more so than the wish for democracy, that is creating many supporters of reform.

It has been said that leaseholder reform can be implemented so as to grant long leaseholders a freehold in exchange for less than fair compensation. It has also been said that this would breach the original landowner's human rights and be discriminatory; that enfranchisement could only take place in exchange for fair compensation. What is the reality? It is important for Chief Pleas to be aware of the legal position and the likely consequences for Sark of leaseholder enfranchisement before voting in any Reform Law because leaseholder enfranchisement is very likely to feature high on the agenda of any new Chief Pleas. On what terms could enfranchisement be implemented? Do members deem protection offered by international law alone sufficient or not? If not, do any protections additional to the international law need to be built into the Reform Law (as in some other countries' constitutions)?

Concern for security of tenure of leaseholders is a legitimate concern which deserves to be brought into the open and debated. This does not, however, necessarily mean that compulsory taking of land from Tenants and Freeholders is the best, or even a correct, way to address this concern.

3.1.1. The Law

The principal human rights case in this area is the case decided by ECtHR of JAMES AND OTHERS v. THE UNITED KINGDOM (Application no. 8793/79) involving the Duke of Westminster. The case involved a number of acts of leaseholder enfranchisement under the UK's Leasehold Reform Act 1967 and the UK Housing Act 1974 (the "Acts") from land in Belgravia in Central London belonging to the estate of the Second Duke of Westminster (the "Estate"). The Acts stated roughly as follows (this description is necessarily abridged, we refer you to the Acts or the ECtHR judgement for the more precise but more complicated explanation):

a) they concerned leases under which the ownership of the land and buildings belonged to the landlord,

b) the 1967 Act provided for holders of leases whose term *at the creation of the lease* had been longer than 21 years and whose properties were of low value to acquire the ownership of the buildings in exchange for no compensation at all (this was achieved by extending - for free - their leases by 50 years, subject to paying only the ground rent; this being the period during which nominally the buildings would fully depreciate), and gave them the option to acquire the freehold in exchange for paying their landlord essentially the value of the bare underlying land,

c) the 1974 Act provided for holders of leases whose term at the creation of the lease had been longer than 21 years and whose properties were of medium value to acquire the freehold in exchange for paying the value of the freehold property to a third party investor on the assumption that the leaseholder had the right to remain in the property indefinitely but paying a "fair" rate of rent.

d) in case of property which in 1964 was a low value property, and in 1974 was a medium value property, the leaseholder could obtain the 50 year lease extension for free on the 1967 Act terms, and buy the freehold on the 1974 Act terms.

The stated purpose of the Acts was to redress the perceived injustice suffered by leaseholders who purportedly built and maintained the buildings and therefore had a "moral entitlement" to owning the said buildings but then had to surrender them to the landlord when the lease expired. An additional stated purpose was to redress the hardship suffered by leaseholders suffering insecurity of tenure when their lease expired, although this had already been previously addressed by the Rents Acts (which may provide a more viable basis for Sark's own leasehold reform).

The Trustees acting under the will of the Second Duke of Westminster submitted as follows:

- 215 of their leaseholders acquired properties compulsorily from the Estate under the Acts,
- their properties were acquired at a price below, and often, far below, market value,
- the unencumbered freehold value of the properties was from £44,000 to £225,000, the compulsorily enfranchised price varied from £2,500 to £111,000.
- in one case, the leaseholder came into occupation of a lease 3 months prior to the 1967 Act coming into force, paid £9,000 for the lease, without prospect of enfranchisement, was able to purchase the freehold at 28% of its proper value, and sold it less than 1 year later for a profit of 636% (£116,000).
- in at least 31.25% of the cases, the leaseholder who enfranchised did not remain in occupation of the property, but sold the freehold within 1 year of acquiring it, and in 11.25% of the cases did not occupy after enfranchisement at all.
- in 18.75% of the cases, the leaseholder sold the lease with the benefit of the right to enfranchise, after making the claim to enfranchise but before enfranchising
- the profits made by the leaseholders on onward sales varied from £32,000 to £182,000,
- in all cases, the leaseholders were already entitled to security of tenure, subject to conditions laid down by the Rent Acts, upon expiry of the lease,
- in no case except 3 was the property built either by the leaseholder who enfranchised or by his predecessors. In only 6 cases was the property occupied by members of the leaseholder's family continuously since the creation of the lease. In 42.5% of cases, the period of occupation of the property by the enfranchising leaseholder, the length of occupation was less than 8 years. In some cases it was as short as 3 years. In cases where leaseholders occupied houses built, repaired and improved by previous leaseholders in accordance with the contractual terms of their leases, it could not be said that the leaseholder had any "moral entitlement" to ownership of the house merely by reason of occupying that house; yet they had enfranchisement entitlement under the Acts. The

enfranchising leaseholders bore no resemblance to the kind of people deserving protection the 1967 Act was enacted for.

Therefore, argued the Trustees, the UK Government had breached their rights under Article 1 of Protocol 1 to ECHR ("ECHR Art. P1-1") which states:

> *Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of their possessions except in the public interest and subject to conditions provided for by law and by general principles of international law.*

They further argued that the public interest test in the deprivation rule is satisfied only if the property is taken for a public purpose of benefit to the community generally and, as a corollary, the transfer of property from one person to another for the latter's private benefit alone can never be "in the public interest".

They also argued that limiting the Acts only to low value properties is inconsistent with the philosophy of the legislation; if the principle is right, it should apply no matter what the value of the property; and that furthermore, this is discriminatory and therefore in breach of ECHR Art. 14.

The court ruled unanimously that there was no violation of ECHR Art. P1-1 either alone, or in combination with ECHR Art. 14. Firstly, it ruled that the Acts qualified to be exempt from ECHR Art. P1-1 on grounds of the public interest exclusion:

- the compulsory transfer of property from one individual to another may constitute a legitimate means for promoting the public interest. The taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being "in the public interest".

- because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is "in the public interest". The decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may reasonably differ widely.

- eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. Modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces.

- the justice and injustice of the leasehold system and the respective "moral entitlements" of leaseholders and landowners are matters of judgement on which there is clearly room for legitimate conflict of opinions.

Secondly, on the issue as to whether the public interest exclusion to ECHR Art. P1-1 required fair compensation to be paid to the landlords, the Court ruled as follows:

- the convention is silent as to whether ECHR Art. P1-1 requires *any* compensation to be paid at all in circumstances where deprivation of possessions is permitted by the Article. The majority of the court held that the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference not justifiable under ECHR; although one of the judges wrote a concurring opinion stating that in his view the convention does not contain any requirement for compensation at all. ECHR does not, however, guarantee the right to full compensation in all circumstances. Legitimate objectives of public interest, such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less than the reimbursement of the

full market value. In some exceptional circumstances, it is justifiable to take property in the public interest without payment of any compensation at all.

- the Acts risked a number of "undeserving" leaseholders being able to make "windfall profits". That was a policy decision made by the Parliament, which the Court cannot find so unreasonable as to be outside the State's margin of appreciation. Any hardship as a result of making a "windfall profit" was suffered not by the landlords but rather by the predecessor (s) in title of the enfranchising leaseholder.

On the issue as to whether the Acts were discriminatory and therefore in breach of ECHR Art. P1-1 in combination with ECHR Art. 14, the Court held that:

- the Parliament was entitled to restrict the law to low value properties only so as to redress the cases of greatest hardship. This does not violate ECHR Art. 14. The introduction of price bands reflects the Parliament's desire to exclude from the benefits of enfranchisement the better-off leaseholders not considered to be in need of economic protection.

- therefore, there has been no violation of ECHR Art. P1-1.

Thus, we have to reach the conclusion that if Chief Pleas passed a law taking land away from landowners, at a compensation far below market value, or even without compensation, the law would stand up to a challenge in ECtHR. International law offers no protection to landowners and leaves it up to the local constitutions and local legislatures to decide what protections to provide, if any at all; international law gives such legislatures, and such constitutions wide, virtually unconstrained latitude on this issue. We note that all draft Reform Laws considered by Sark to date offer landowners no protection whatsoever. Regardless of whether Chief Pleas considers this to be a conscious choice or not, international law would be likely to view it as one.

3.1.2. The Consequences

If the issue of constitutional reform has created an unpleasant enough atmosphere on the Island, the issue of leaseholder enfranchisement, once it arises, is likely to create a much worse atmosphere still. We hope that Chief Pleas members - Tenants and non-Tenants alike - willing to rush through a Reform Law in order to satisfy the UK and, in the short term, diffuse the tension in the community, will give this consideration.

If Tenants are unhappy when demands are made of them to give up their automatic seats in Chief Pleas, will landowners not grumble even more if a law is passed by a leaseholder-majority Chief Pleas which deprives them of their land? What is of significance is that landowners will have no legal recourse available to them, unless appropriate checks and balances are built into the Reform Law.

As soon as leaseholder enfranchisement is seriously proposed, an immediate consequence will surely be that no landowner will be willing to issue any more new leases; and some may wish to acquire existing outstanding leases. As a consequence, people on leases too short to enfranchise will sooner or later find themselves homeless. People who are able to do so may be forced to leave the Island. But many local people unable to work anywhere else will have nowhere else to go. Further enfranchising legislation may then be required compulsorily acquiring further land from landowners - namely land that is not subject to any lease at all. Landowners will not be able to stay outside enfranchising legislation by having no leases on their land.

This could lead to economic and political instability, loss of reputation of the Island internationally, tension in the community, and an inability to attract inward investment and

economically develop the Island.

Large countries like the Soviet Union and the United Kingdom can survive for a long time before failing economically once they start pursuing damaging economic policies, but in the case of a small community like Sark, economic failure, and the falling into someone else's lap (either Guernsey's or the UK's) could come rather more immediately.

Land reform raises other concerns. Every jurisdiction has a legitimate right to restrict immigration and to protect the quality of life of the inhabitants it does permit to occupy its territory. Some jurisdictions achieve this through a formal immigration policy; and some through property ownership restrictions (Jersey and Guernsey by limiting the supply of properties in which immigrants may acquire any proprietary interest whatsoever; and Sark, in part, by limiting the supply of properties in which immigrants may acquire a freehold interest). If leaseholder enfranchisement were implemented, there is every likelihood that the Island would be overrun, that crime and social problems would increase and that the community spirit which is at the very heart of the Island's way of life would be lost forever.

3.1.3. Recommendations

To avoid much more severe problems further down the line, Chief Pleas may find it wiser to properly debate the land reform issue before constitutional reform is approved. Are the Tenants comfortable approving a constitutional Reform Law not incorporating any protections for landowners' land rights, in the light of the facts that a land reform is very likely to follow soon after a new assembly is sworn in, and that international law offers landowners virtually no protection? Are Freeholders comfortable about this? If not, protections have to be *carefully* drafted and incorporated into the Reform Law. E.g. any change to land law by the new Chief Pleas could be legislated to require the consent of a majority (or all of) landowners (the Seigneur, Tenants and Freeholders). Such protections would need to be carefully drafted in order not to leave loopholes in the law, e.g. change to the constitutional law itself would then also need to require the consent of landowners, otherwise the new Chief Pleas could sidestep protections against land reform by repealing the relevant sections of the constitutional law.

Can the Reform Law be passed without incorporating these protections? Can an amendment to the law be agreed upon and enacted later? Doing so, at a minimum, risks the possibility that Chief Pleas will enact constitutional reform and thereafter fail to agree on the wording of the amendment and will therefore fail to enact it while enacting constitutional reform - or that the Crown will refuse to enact such subsequent legislation (for example, following a petition by a large number of leaseholders), leaving landowners completely unprotected.

3.2. Holding Tenants Accountable

Some Islanders are dissatisfied with the job certain Chief Pleas members are doing. They are frustrated because they are not made accountable, and the Islanders themselves cannot do anything about it.

Although many members of Chief Pleas share many of these concerns, they rarely do anything about it. De facto Chief Pleas does not require, or enforce, much accountability of their members.

The following observations are worth making:

- acts complained of are in fact limited to a very small number of members of Chief Pleas. Does this justify breaking the whole system? Would it be sufficient to provide a mechanism for removing a Tenant from his seat if an overwhelming majority (e.g. 3/4) of the electorate supported this?

- taxpayers have a legitimate claim to demand accountability of Chief Pleas members. Unless Chief Pleas members start requiring, and enforcing, accountability of individual members, support for reform among the public is likely to grow.

- the same degree of accountability can nevertheless not be expected of Chief Pleas as could be expected of members of a traditional government. Chief Pleas members are volunteers. One cannot expect the same standards of performance from volunteers as one would be entitled to expect from fully paid administrators. Sark politicians more often than not do a comparable, or indeed, much *better* job than paid politicians do in other jurisdictions. Indeed, although some of the complaints raised against Chief Pleas have merit, relatively speaking, Sark is, by world standards, run very well.

  Residents of high tax paying countries have a legitimate expectation to demand high standards of performance of their politicians. Taxes on Sark are extremely low; and the vast majority of them are paid by the Tenants. People who complain might wish to bear in mind that you get what you pay for. If you want better performance, you will have to pay (a lot) more - and in the end it is questionable if you will get better performance after all.

  Sark residents get extremely good value for money in terms of quality of governance received in exchange for taxes paid.

- **constitutional reform is changing how Chief Pleas legislates. It is doing nothing to improve the administration of the Island or accountability of Chief Pleas members. People who expect an improvement in this area may be disappointed with the outcome. A reform of the administration of the Island may be more useful - without even needing a reform of the legislature.**

3.3. Enabling Tenants to Resign

Some Tenants wish to be able to resign their post in Chief Pleas. If Tenants were allowed to withdraw from political life voluntarily and a Deputy were elected in their place, enough of them may voluntarily withdraw and be replaced by Deputies to satisfy all parties.

3.4. Government by Newcomers

Some don't like newcomers to the Island being able to participate in government straight away. For them, a goal of reform is to stop people being able to do so by buying a Tenement.

A person should have sufficient time to learn about the Island before being able to participate in running it. The principal criteria for choosing members of the legislature are, however, surely, ability and integrity. Not all newcomer Tenants have done a good job, but others have brought much brainpower, expertise, and commitment to the Island. New blood is attracted to the Island through the purchase of Tenements; surely, that is good for the Island. Overall, there doesn't seem to be any bias against the quality of contributions from newcomers. But there is tendency to judge newcomers more harshly when they make a mistake than a local person who is seen to be "one of us".

The issue of government by newcomers applies no less to Deputies than it does to Tenants. Indeed, there are few real Sarkees amongst the Deputies; most are *relative* newcomers. We do not see a problem with this, however, or a need to specifically regulate it. A newcomer will be known to fewer people. This creates an automatic - and in our view, sufficient - hurdle to them getting elected.

About the only valid complaint against newcomers in Government is that they want to change the Island before getting to know it. But this seems to be an argument against reform, not for it.

It is not clear how the Reform Law is going to make any difference to the issue of government by newcomers. And perhaps it shouldn't. Surely the appropriate way to handle bad governance is equally for everybody, irrespective of their length of residence.

We make one final point. Under its new regime, one of the biggest problems Sark will face will be an inability to recruit a sufficient number of volunteers to stand for Chief Pleas to ensure a fully functioning government. Today, several Deputies have not been in the Island for that long. It appears that long term residents simply do not stand in the numbers required. By further restricting who can and who cannot stand, Sark is exposing itself to an even greater risk of a total collapse of its government, or having to rely on a paid civil service.

4. Checks and Balances

The fundamental principle of the rule of law is that the will of the majority in parliament rules supreme. Most modern societies, have, however, found, that unrestricted majority rule leads to the oppression of minorities and the infringement of freedoms of individuals. They recognize that individual freedom deserves protection - protection from oppression by the government. Those not represented in government, or not sufficiently represented in government, deserve protection from governmental excesses and abuses.

Price & Price recommended that some checks & balances be built into Sark's Reform Law for this purpose.

It has been argued that Sark already possesses all the necessary checks and balances in the form of the Law Officers, the Lt. Governor, the DCA and the Privy Council on the one hand and the ECHR and The Human Rights (Bailiwick of Guernsey) Law, 2000 on the other.

The problem with these mechanisms is that the role of the former is in fact in contravention of the latter and will therefore have to disappear. They hand over control over Sark to outside bodies, who, instead of protecting the interests of those whom they are meant to be protecting, may choose instead to promote their own or those of their employer. Such mechanisms also abdicate a part of Sark's sovereignty and independence to the UK. Does Sark trust anonymous UK officials who know little about the Island more to temper the rule of its government than it does its own people? Surely it is much more appropriate that checks and balances are implemented by means *internal* to Sark, so that parties implementing them are always able to promote the best interests of Sark.

Likewise, the problem with leaving Sark's checks and balances entirely to the control of international human rights law is that it completely abdicates the control of what protections of individual's rights and freedoms Sark offers its residents to outside parties. Which means Sark may have to enforce protections it does not want to, and which are completely unsuitable for its local circumstances, while at the same time not being able to offer the protections genuinely needed. The development of protections of individual's freedoms is left entirely to the politicians of large Council of Europe member states, to the ECtHR and national courts of Council of Europe member states which develop the European human rights case law in line with their own traditions, social mores and local requirements.

Checks and balances, in order to be effective, must be tailored to the special needs of the jurisdiction for which they are designed. It is clear that checks and balances which are appropriate for a small Island state with a tradition of Western feudalism will be inappropriate for a large former Communist state with a tradition of socialism and a large welfare state, or an Islamic state with a tradition of sharia law - and vice versa.

For example, if checks and balances were to be designed for Sark's existing constitutional arrangements, they would surely focus on the protection of leaseholders' personal freedoms, since it is they that have minority representation in the government.

On the other hand, checks and balances designed for a Chief Pleas based on the Reform Law will focus on protecting landowner's personal freedoms, since it is they that will receive minority representation.

Thus, the checks and balances are best kept to the jurisdiction to tailor in accordance with its own needs and requirements and its own social development.

We predict that Council of Europe states will eventually recognize this themselves and that the

ECHR, which has been wreaking havoc across European countries and causing enormous expense, will implode on itself with time.
Checks and balances we explore hereby fall into two categories:

1) **Separation of powers**. These checks and balances are internal to the government by splitting the government into several different organs each of which ensures that the others do not exceed their authority.

2) **Entrenched laws**. These checks and balances are external to the government. Most societies protect the freedom of individuals and minorities by enshrining them in a law which cannot be amended or repealed by a simple majority vote in parliament. Such a law is typically called a constitution, a constitutional law or an entrenched law. All countries today except the UK, Israel and New Zealand possess such laws.

   The ECHR itself is a law possessing characteristics of an entrenched law and it could be said that by signing up to it, the UK has for the first time in history curtailed the sovereignty of its Parliament and adopted a written constitution - drafted by somebody else - by the back door.

4.1. Separation of Powers

The separation of powers of the Legislature, Executive and the Judiciary lies at the heart of all modern democracies. Council of Europe best practice mandates full and complete separation of the legislature and executive from the judiciary. The question of separation of powers has been an issue for the UK Government itself in recent years. The UK Government announced in 2003 when appointing Lord Falconer to the Cabinet as the Secretary of State for Constitutional Affairs, that the office of Lord Chancellor would be abolished because his triple role as member all three branches of Government was not appropriate and was in breach of the ECHR.

In Sark, the three traditional branches of government roughly correspond to the following:

a) the Legislature: the primary organ of the legislature is Chief Pleas, although, as we have pointed out, the complete legislature of Sark presently nominally consists of, for laws other than criminal laws, "the Queen in Chief Pleas" and, for criminal laws, "the Queen in States of Deliberation (of Guernsey)". In practice this means that the legislature of Sark consists of the Chief Pleas (the Seigneur, the Seneschal, the Tenants and the Deputies), the States of Deliberation, the Law Officers, the DCA, the Lord Chancellor, the Privy Council, and Her Majesty the Queen.

b) the Executive: the Committees of Chief Pleas.

c) the Judiciary: the Seneschal and the Deputy Seneschal.

How does separation of powers work in practice?

In the USA, the Executive (the President and the departments reporting to him), the Legislature (being the Congress) and the Judiciary (the Supreme Court) are entirely separate.

The UK enforces strict separation of its judiciary from its legislature. The House of Commons Disqualification Act 1975 forbids judges from being Members of the House of Commons. Members of the Executive (Government Ministers) are all members of the Legislature (the Houses of Parliament). Nevertheless, the House of Commons (Disqualification) Act 1975 provides that no more than 95 holders of Ministerial office may sit and vote in the House of Commons at any one time. As MPs number 646, this ensures that the backbenchers can always

outvote Government Ministers in a House of Commons vote by a ratio of more than 5:1. The separation of the Legislature and the Executive is only partial, but the Legislative has (in theory) ultimate supervisory power over the Executive (in practice it is actually the leadership of large political parties that controls both, but we do not get into that here).

In Vanuatu, the constitution restricts the number of Ministers to be at most 1/4 of the number of MPs (which currently stands at 52); thus, the backbenchers always outnumber Ministers by a ratio of 3:1.

In Guernsey, the legislature has 45-49 members of whom 11 have executive functions, thus backbenchers outnumber members of the executive by a ratio of more than 3:1.

In Sark, there is no separation of power between the legislature and the judiciary. The Seneschal is at the head of both. As we see below, **this makes Sark's constitution not ECHR compliant.**

Sark has no formal restriction ensuring the "backbencher" members of Chief Pleas outnumber members of Chief Pleas who are members of some committee in any vote of Chief Pleas. However, as of 26 January 2007, 21 out of 49 sitting members of Chief Pleas were not members of any Committee, providing the essential supervisory function of the Legislature over the Executive. The ratio of the number of backbenchers to members of the Executive is approximately 1:1. This is the minimum which still (just) allows the Legislature to retain the ultimate control over the Executive, which goes some way towards explaining why we so often hear complaints about the lack of accountability in Chief Pleas. **This is essential and the destruction of this principle by reducing the number of members to 28 and completely dispensing with backbencher legislators in the Reform Law undermines democratic credentials of Sark's reformed constitution.**

4.1.1. Separation of Judiciary and Legislature

The ECHR mandates the separation of judiciary from the legislature and the executive. The landmark ECtHR case is MCGONNELL v. THE UNITED KINGDOM (Application no. 28488/95), concerning the Bailiff of Guernsey, which established that the Bailiff's dual role as a member of legislature and judiciary was in breach of ECHR.

As a result, the UK itself was forced to split the Lord Chancellor's judicial, executive and legislative role.

The Seneschal's dual role of Chief Judge and President of Chief Pleas is vulnerable to the same ECHR challenge.

The ECtHR ruled that the mere fact that an individual presides over a legislature while a piece of legislation is being debated or voted on is capable of casting doubt on his impartiality if he subsequently sits as a judge of a case in a court involving such a law, and that such a doubt, however slight its justification, is sufficient to vitiate the impartiality of such a court, and that therefore the rights of a party taking part in such court proceedings against whom an adverse ruling is made are being violated through a breach of Article 6(1) of the ECHR.

This is particularly problematic in view of the fact that the Reform Law extends the Seneschal's term to a lifetime appointment.

The Seneschal, in one of his roles (President of Chief Pleas), forms a part of the Island's legislature. The lack of Seneschal's voting power and the lack of right to speak under the new proposed Reform Law offers no help with this. In MCGONNELL v. THE UNITED KINGDOM

(Application no. 28488/95), the ECtHR held of the Bailiff's function as president of States of Deliberation:

> *The Court does not accept the Government's analysis that when the Bailiff acts in a non-judicial capacity he merely occupies positions rather than exercising functions: even a purely ceremonial constitutional role must be classified as a "function".*

If Sark's constitution is to be made ECHR compliant, the Seneschal's dual role will have to be split.

The principal reason given against such a split is the perceived consequent cost implication of having to pay two officials instead of one. This problem is easily avoided by if the President of Chief Pleas is an unpaid chairman/speaker elected by Chief Pleas members from one of their number.

While on this subject, Guernsey has apparently made it clear that they do not believe Sark is fit to introduce its own company law because it does not possess a legally qualified judge. Since the introduction of a company register, and the development of a finance industry is a potentially key future sector of the Island's economy, does it make sense for Sark to prevent itself from ever developing such an economic sector by not ensuring its Chief Judge is legally qualified?

RECOMMENDATIONS:

12) That a provision is inserted into the Reform Law splitting the role of the Seneschal into an unpaid President of Chief Pleas, elected by Chief Pleas members from among one of their number, and a separate, paid role of Chief Judge, preferably required to be legally qualified.

If Recommendation 12 is not incorporated into the Reform Law and the Seneschal dual role were to be challenged in ECtHR, it would be unlikely to survive such a challenge. One of the principal stated objectives of reform - removing the vulnerability to an ECHR challenge - will not be achieved.

4.1.2. Separation of Legislature and Executive - Number of Members

As of 26 January 2007, 28 members of Chief Pleas were members of at least one Committee, there were a total of 126 Chief Pleas Committee posts, 3 of which were vacant, 29 of which were filled by co-opted non-Chief Pleas members, and 94 of which were occupied by Chief Pleas members. In addition, 16 Appeals Tribunals posts were filled by non-Chief Pleas members.

This means that the average Chief Pleas member was sitting on approximately 2 Committees.

If the number of Chief Pleas members is reduced to 28, that would mean the average Chief Pleas member would sit on 4.5 Committees, assuming all members of the Legislature are also members of the Executive, a questionable constitutional practice since it would leave nobody to oversee the Executive to the detriment of accountability of Chief Pleas. The amount of legislative work can only be expected to rise (drastically) with increasing influence of the UK, EU and international laws. Workload per member of a 28 member Chief Pleas will be enormous. Assuming each Committee post takes 4 hours per week of each member's time, the average member will spend 18 hours per week on Committee work alone. Adding on top of that general legislative work and political lobbying, we arrive at an estimated figure of a minimum of 22 hours per week. If the more democratically acceptable model of at least half the legislators not being members of the Executive is adopted, this workload will instead be double, i.e. 44 hours per week. We note that these are *average* workloads.

As of 26 January 2007, the most active member of Chief Pleas was a member of 8 committees, 4 times the average. It is to be expected that workload will continue to be unevenly distributed in the future, no matter which system of government is adopted, and that the most active members of Chief Pleas, in order to compensate for the less active ones, will under a 28 member system have to effectively work more than a full time job just to carry out their Chief Pleas duties. It seems unrealistic to expect 28 volunteers to come forward to take on this amount of work.

We suggest that the present day workload of the average Chief Pleas member is about the limit of what can be expected from a volunteer member. We believe that the workload will increase in the future as legislative burden increases. Furthermore, we believe that the current ratio of backbenchers to executive of 1:1 is about the minimum - if not less than the minimum - tolerable in a democratic society.

This leads us to the conclusion that, if the executive function of government is in the future to continue to be carried out by volunteer members of Chief Pleas, the number of members of Chief Pleas cannot be reduced, i.e. that 49 members is about the minimum viable. We believe that this number will be difficult to achieve and that it most certainly cannot realistically be achieved with a fully elected Chief Pleas where all members are elected from a single constituency of 418 eligible electors. Perhaps there is some hope in a system with 40 constituencies corresponding to Tenements where the Tenant is required to stand if no other candidates put themselves forward. We therefore give this system some further consideration below.

Even taking such precautions, we have serious reservations about the present model of volunteer government being sustainable in a fully elected Chief Pleas where nobody is required to perform the duties of a member of Chief Pleas as Tenants are today. If we look to similar jurisdictions worldwide, we find as follows:

Jurisdiction	Population	Legislature	Executive	Civil Service
Cocos (Keeling) Islands	596	7 (1 / 85)		
Ascension Island	1,100	7 (1 / 157)		
Christmas Island	1,402	9 (1 / 156)		
Tokelau	1,449	21 (1 / 69)		
Niue	1,492	20 (1 / 75)	4 (1 / 373)	
Norfolk Island	2,114	9 (1 / 235)	4 (1 / 529)	
Alderney	2,200	11 (1 / 200)		
Falkland Islands	3,105	8-10 (1 / 310-385)	3-6 (1 / 518-1035)	
Guernsey	65,573	45-49 (1 / 1339-1457)	11 (1 / 5961)	2,000 (1 / 33)

The numbers in brackets represent the proportion of the total population who are members of the legislature, executive or civil service.

These numbers translated into Sark scale (electorate of 418, population of approx. 600) represent a legislature of no more than 6-9 members, an executive of no more than 3 (about 1/2-1/3 of the legislature), and a supporting paid civil service of about 20. While we are not proposing that this model of government is desirable, since it will require paying 20 professional full time civil servants, we do however believe that the fact that essentially every other jurisdiction in the world with an elected government has, in the long term, settled down to roughly these proportions, and because common sense suggests that it will be difficult to fill the required number of posts with elected volunteers who will be under no obligation to stand for Chief Pleas service, means that the government Sark under a fully elected Chief Pleas model will eventually settle down to this model too. So perhaps the honest thing for Chief Pleas to do would be to adopt a model in this vein from the start.

What will happen if a 28 member Chief Pleas is created? This is what we predict. Firstly, due to excessive workload, it will not be possible to maintain any separation of powers between the Legislature and the Executive. Secondly, regardless of this, not all 28 members will pull their weight equally in Chief Pleas. This will result in either the government not functioning properly, or in immense workload left for the remaining members, or, most likely, both. The members with the most workload will soon enough resign, or demand paying, or both. Resignations and a reputation for hard work without reward will lead to an inability to fill the vacated posts, with the same workload now being concentrated in even fewer hands. Quality of administration will suffer as Chief Pleas loses its members, with the hardest working ones resigning first. Eventually, the system will fail it will be recognized that in order to provide stability and the required administrative support, civil servants have to be employed.

This is less likely to happen if the number of members is increased from the start so that the average workload is less.

Once the system has got itself a bad reputation for requiring too much of a committment, fixing the system by increasing the number of members subsequently will be more difficult.

Civil servants, once paid, of course have to justify their existence. This means that, in addition to having to pay them a salary out of taxpayer funds and having to live by their commands, they will feel obligated to create law and regulations. Much increased regulation will be the end result; followed by the increased cost of enforcing the additional regulations, and so even more civil servants. A self-reinforcing positive feedback loop will result - just as it does everywhere else in the world.

4.1.3. Political Activity by Civil Servants

In a number of countries, political activities by civil servants are curtailed or prohibited (e.g. the Greek constitution prohibits senior public sector employees from standing as candidates in elections for 3 years after ceasing their civil service employment; in UK, the House of Commons (Disqualification) Act 1975 and the Local Government and Housing Act 1989 likewise forbid civil servants and senior local government public sector employees from standing as candidates in elections). In the case AHMED AND OTHERS v. THE UNITED KINGDOM (Application no. 22954/93) where a number of civil servants complained that their rights under ECHR Art. P1-3 and other articles of the ECHR were being infringed because they were forbidden from being politically active due to their public sector positions, the court found no violation of the ECHR. In concurring opinion, judge de Meyer wrote as follows:

> *It is not only legitimate, but also necessary, especially in a democratic society, to ensure as far as possible the loyalty of officers in public service towards the authority to which they are accountable and at the same time the freedom of the electorate in its choice of representatives.*
>
> *The people are entitled to count on the objectiveness, impartiality and political neutrality of their servants, those being essential requirements of a position of trust. They are likewise entitled not to be exposed to a risk that their servants may, during elections or in other circumstances, benefit personally or politically from their position.*
>
> *Members of staff in the public service must not therefore be allowed to be members of assemblies elected by the people or to stand as candidates for such assemblies, or permitted to take part in any manner whatsoever in the activity of the parties. Common sense dictates that such interests are incompatible with the public service.*
>
> *People who wish to work in public service must renounce "politics", that being a*

restriction on their freedom of expression, freedom of association and electoral rights that is inherent in their position.

In GITONAS AND OTHERS v. GREECE (Application no. 18747/91; 19376/92; 19379/92; 28208/95; 27755/95), the court ruled similarly that ECHR rights of the applicants were not violated because their election as MPs were annulled due to them having stood for parliament within 3 years of having held certain public sector positions, candidatures which were forbidden by the Greek constitution.

We note that currently Sark is failing to comply with this principle of democratic best practice as several members of Chief Pleas in the past have also been employed by the Island.

RECOMMENDATIONS:

13) That a provision be inserted into the new Reform Law forbidding political activity by those employed by the Island or holding public office for the duration of their appointment and a certain period (e.g. following Greece's example, 3 years) thereafter.

4.2. Entrenched Laws

In designing the entrenched laws appropriate for Sark under the new constitutional regime, we bear the following requirements in mind:

1) In future, Chief Pleas is going to have a leaseholder majority. Whereas today, the Island's largest possessors of private property and its largest taxpayers possess a majority in Chief Pleas, in future this will not be the case. Therefore, laws entrenching ban of confiscatory transfers of private property and protecting against unchecked increase in taxation deserve consideration.

2) Today, Chief Pleas consists of many independent voices which cannot be easily replaced. These voices already represent a check and balance against each other. In future, through electoral manipulation, a single party could relatively easily gain control of Chief Pleas. Thus, protection against a single party gaining control of the Island deserve consideration.

3) Today, most Chief Pleas members have considerable political experience. In the new Chief Pleas, turnover of members will increase. Therefore, checks and balances against inexperienced members not knowing the extent of Sark's independence abdicating its independence to external parties deserve consideration.

4.2.1. Protection of Private Property

With Chief Pleas transitioning from the hands of the Island's main landowners and taxpayers, the question of protection of private property against government expropriation becomes relevant.

Most states provide some constitutional protection of private property, although the protection varies widely.

At one end of the spectrum today is Zimbabwe whose policy on the protection of private property is well known and need not be repeated.

In the USA, The Fifth Amendment to the Constitution states:

> *[No person shall be] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.*

In Council of Europe member countries, the ECHR Art. P1-1 states:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

Although the wording of these clauses is similar, the actual amount of protection offered in practice varies widely.

In the USA, for example, the initial interpretation of the public use exclusion was very narrow and allowed only the taking of property for the use by public bodies. This changed in 1954 in the case of Berman v. Parker in which the U.S. Supreme Court allowed the transfer of private land to private developers under the public use exclusion. It justified this by arguing that the term "public use" encompassed a broader notion of public benefit than simply providing government facilities, railways and other utilities commonly used by the public.

A case similar to that in Sark today arose in Hawaii in 1984. Hawaii's legislature determined that

private ownership of land on the Island of Oahu was concentrated in so few hands as to form an oligopoly, causing the private market in land to malfunction. In response, the Hawaiian government proposed to increase the number of owners by, among other things, granting full ownership rights to those who previously used land as a tenancy. The U.S. Supreme Court upheld Hawaii Government's actions.

In 2005, in the case of Kelo v. City of New London, the interpretation of public use exclusion was further expanded by the U.S. Supreme Court to permit cases where the sole public benefit obtained from the transfer of private property from one party to another was the fact that the new owners would pay more in taxes than the original owners did.

The Supreme Court however also recognized that individual States have the authority to pass statutes or state constitutional amendments further restricting eminent domain by either defining public use narrowly in their states or by granting property owners more rights than the federal Constitution if they so chose.

As a result of this ruling, several U.S. States have voluntarily passed laws or constitutional amendments voluntarily restricting the use of the public use restriction on their territories further than is mandated by the Federal Constitution. E.g. Florida now restricts the taking of private property under the public use exclusion solely if the property will be used by a government entity. Sark could follow Florida's example.

Council of Europe contains a wide spectrum of member countries. In order to accommodate the wide moral values represented in these countries, as we have already seen in Section 3.2, the ECtHR has diluted ECHR Art. P1-1 in case law to such an extent that it becomes almost meaningless.

At the end of the spectrum opposite to the countries just described lies Japan. In Japan, the government has extremely limited powers of expropriation of private property. This received wide publicity when the government tried to expand Narita International Airport and, in the face of stiff opposition, was forced to pay disproportionate amounts of money to residents on sites slated for development to induce them to sell out and leave.

Where on this spectrum does Sark see positioning itself in the future? Does it want to be more like the socialist member countries of the Council of Europe? More like Florida? Or more like Japan? The decision is up to the present Chief Pleas and must be consciously made.

If no additional protections for private property are enshrined in its constitution, by default, Sark will offer protections in law equivalent to, indeed weaker than, the most socialist member states of the Council of Europe.

RECOMMENDATIONS:

14) Chief Pleas may consider inserting clauses similar to the following into the Reform Law:

No person shall be deprived of their property without due process of law; nor shall private property be taken for public use (which shall be narrowly interpreted to mean the use by a governmental body only), without compensation at full market value.

No change to land law may be enacted without the express consent of a 3/4 majority of Landowners.

The above provisions may not be amended or repealed without the consent of a 3/4

majority of Landowners.

15) The Constitutional Reform on Sark is causing jitters to potential investors in the Island. It would reassure such potential investors, and many local residents, if a clause along the following lines were inserted into the Reform Law:

No new taxes may be introduced, and existing taxes may not be increased, without the express consent of a 3/4 majority of the Landowners.

The above provisions may not be amended or repealed without the consent of a 3/4 majority of Landowners.

4.2.2. Remuneration of Politicians

It is likely, under a fully elected Chief Pleas, that Chief Pleas members will eventually have to be paid to perform their duties. However, unless a protection is enshrined into the Reform Law, it will be Chief Pleas members themselves that will set their own remuneration.

Wherever in the world members of a parliament enjoy this power, the inevitable result has been a continuous increase of members' salaries in excess of the rate of inflation, even during times of recession and while all other public workers' salaries have been declining or not keeping up inflation. The United Kingdom is a clear example of this, as are many other countries.

The reason this has not happened to date is that Tenants, in addition to having a majority in Chief Pleas, also pay the majority of the Island's taxes. It is pointless for them to pay themselves salaries which in the end they themselves have to fund.

But in the future, when the principal taxpayers and members of Chief Pleas are largely separate bodies of people, it may become important to build checks against Chief Pleas members being able to increase their salaries without limit into the constitution.

RECOMMENDATIONS:

16) Chief Pleas may consider making an amendment to the Reform Law similar to the following:

> *That Chief Pleas members will receive no remuneration, and that their remuneration will not be increased, without the express prior consent of 3/4 of the Landowners and 3/4 of members of the electoral roll.*
>
> *That the above provision may not be amended or repealed without the consent of 3/4 of Landowners and 3/4 members of the electoral roll.*

Another interesting alternative is offered by the 27th Amendment to the U.S. Constitution:

> *No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.*

4.2.3. Preventing Usurpation of Power

The existence of Tenants ensures that Chief Pleas always represents a diversity of independent views. It is difficult for any one party to acquire too much power. To do so, one would have to

purchase approximately 25 Tenements. A fully elected Chief Pleas will be more susceptible to electoral manipulation and usurpation of power. This could be done in one of many ways. Enshrining protections against this deserves some thought.

Many countries provide constitutional safeguards against usurpation of power and dictatorship.

The former Article 68 of Turkish Constitution states:

> *[...] No political party shall be formed which aims to advocate or establish [...] any form of dictatorship.*

Many countries limit the maximum length of term of their most senior politicians in order to prevent too much power accumulating in one person's hands and to avoid the consequent corruption that may result. For example, the 22nd Amendment to the U.S. Constitution limits the U.S. President's term to no more than 2 terms of office. Many European countries have similar restrictions.

Countries which do not have such limits (e.g. the United Kingdom) often observe the phenomenon that leadership of political parties in power starts out as being "cleaner" than their predecessor but gradually becomes more and more corrupt the longer it stays in power. Both the last Tory government and the present Labour government in the UK have been subject to such accusations.

We offer some suggestions guarding against a takeover by means of electoral system manipulation in Section 6.2.

Here we offer protections against other means of takeover.

RECOMMENDATIONS:

17) That Chief Pleas consider amending the Reform Law as follows:

> *That the duration of a term of Chief Pleas will not be extended to longer than 5 years without the express prior consent of 3/4 of the Landowners and 3/4 of members of the electoral roll.*
>
> *That the maximum term of appointment of the President of the General Purposes & Finance Committee shall be two terms of Chief Pleas.*
>
> *That the maximum term of appointment of the President of Chief Pleas shall be two terms of Chief Pleas.*
>
> *That the above provisions may not be amended or repealed without the consent of 3/4 of Landowners and 3/4 members of the electoral roll.*

Although ECHR Art. P1-3 provides some of the safeguards against the scenario of extending a Chief Pleas session indefinitely, we note that.

a) that Article guarantees the free expression of the people in choice of the *legislature*; it does not prevent the establishment of an *executive* with extensive powers.

b) that Article guarantees the free expression of the people at *reasonable* intervals, but what is a *reasonable* interval?

c) remedies available in the ECtHR are not timely, and are limited to monetary compensation and the declaration of incompatibility (as are remedies in domestic courts available under The Human Rights (Bailiwick of Guernsey) Law, 2000). This may not be much use in practice.

4.2.4. Surrendering Autonomy

One thing that has become apparent during the constitutional debate is how many members of even the existing Chief Pleas are unaware of the autonomy Sark enjoys. Some Chief Pleas members would have been quite happy to cede the power to legislate in the area of Financial Services over to Guernsey at the January 2007 meeting of Chief Pleas. With the new assembly will come new politicians, less experienced than the present members of Chief Pleas. It is natural that their familiarity with Sark's constitutional position and autonomy will be even lower.

On the other hand, we see an increased propensity on the part of the UK to interfere in Sark's internal affairs. With the rising power of the EU and European and international institutions, the amount of attempted interference by external powers in Sark's internal affairs and outside pressure on Sark is likely to increase.

RECOMMENDATIONS:

18) That Chief Pleas consider amending the Reform Law as follows:

> *That any new law passed ceding autonomy of law making power to an external party (e.g. Guernsey, the UK, or the EU) be subject to additional hurdles such as, for example, approval of a 2/3 majority in a referendum and a separate 3/4 majority of Landowners.*
>
> *That the above provisions may not be amended or repealed without the consent of 3/4 of Landowners and 3/4 members of the electoral roll.*

Sark will be most vulnerable immediately after the new Chief Pleas is formed, therefore this amendment might be considered as a matter of urgency.

5. A Strategic Look At Reform

Sark's constitution has served it well for 442 years. Those who doubt that ought perhaps to live in some other countries and see what problems they have. But times change. From time to time every system of governance deserves to be reviewed and adapted and improved if appropriate. Resisting reform *per se* is foolish. But insisting on reform per se is equally unwise. Reform must be justified. Why change? What do we want to achieve? It the reform is to succeed, we must first understand, agree, and expressly state the reasons and goals of our reform. Unless the goals are clear, we will not succeed in achieving them.

Here we give one possible set of goals to serve as a starting point and see how well Status Quo and drafts of Reform Law considered to-date stack up to them. We also ask: can we do any better?

The reform must:

1) First and foremost, preserve that which for the Island works well.

2) Not put Sark's political stability at risk.

3) Not put Sark's economic stability at risk and enable it to develop its economy.

> Sark's economy is primarily based on two industries: tourism and finance. Tourism depends heavily on Sark's feudal constitution. If this is tinkered with, the tourist industry, already affected, will further decline. Sark's low tax status has attracted many wealthy people to the Island and fiduciary businesses to set themselves up on the Island. Guernsey has already stifled some of Sark's financial services industry. This must be reversed. Finally, if, as a consequence of reform, Sark loses its low tax status (e.g. by introducing income tax), this will drive wealthy settlers away and destroy its remaining offshore finance industry.
>
> Sark is a remote island, very expensive to access. Shipping rates are exorbitant. If Sark loses its two primary economic sectors, it will have to develop new ones in order to survive. This will be very difficult and Sark may end up - as hard as it is to imagine this today - depending on UK subsidies or else become a ghost town. All this could happen in very short order too.
>
> Some of the principal issues Sark is facing today which are preventing its development are:
>
> 1) high prices and constrained timetables of Island shipping,
> 2) lack of its own finance sector and corporate registry.
>
> The latter is presently apparently being hampered by the lack of a legally qualified judge.

4) Ensure good, prudent governance, including proper separation of powers.

5) Make the legislature accountable to the taxpayers.

> It is OK for Tenants to only be accountable to other Tenants if they pay all the Island's tax, but not otherwise.
> Those ultimately responsible for creating criminal law must also be accountable.
> The Crown must also be accountable - or be replaced by an organ that is.

6) Have broad, majority, support of the public.

7) Have broad, majority, support of the Tenants in a separate, *free*, vote.

8) Not only cater for half the Island while alienating the other half.

9) Be compliant with international law.

> Sark has no international ECHR obligations, but if it is decided to assist the UK in complying with theirs, this means that the non-compliant roles of the Seneschal, various emanations of the Crown (the Law Officers, DCA, Lord Chancellor, the Privy Council) will also have to be addressed.

5.1. Status Quo

1) ✔ Preserves what has worked well in the past.
2) ✔ Best system to ensure political stability - tried and tested system known to work.
3) ✔ Best system to ensure economic stability.
   ✔ Preserves links with feudal past - favourable consequences for the tourist industry.
   ✔ Low tax environment is preserved - allowing finance industry to develop.
   ✘ No legally qualified judge, hampering the development of finance industry.
4) ✘ Poor separation of powers: the Seneschal is a member of both the judiciary, the legislature, and, as the Island's most senior civil servant, arguably of the executive.
5) ✘ Members of Chief Pleas have limited accountability.
   ✘ States of Deliberation, Law Officers, DCA, Privy Council have no accountability to the electorate whatsoever.
6) ✔ Believed to have substantial support among the community. The public have never been formally asked if they wished to retain Status Quo or a system involving minimal change. In informal polls taken in late 1990's, 90% of the public stated they did.
7) ✔ Believed to have substantial support among the Tenants.
8) ✘ Opposed by a significant proportion of the population.
9) ✘ ECHR compliance:
   - ✔ - minorities are well represented in Chief Pleas:
     - ✔ - indigenous Sark population guaranteed representation through the many indigenous Sark families still owning Tenements
     - ✔ - no disenfranchisement of Little Sark which is guaranteed representation
   - ✘ - non-compliant dual role of the Seneschal as Chief Judge and President of Chief Pleas
   - ✘ - non-compliant unelected organs forming a part of Sark's legislature (the Law Officers, the DCA, the Lord Chancellor, the Privy Council as presently constituted)
   - ✘ - non-compliant unelected President of Chief Pleas
   - ✘ - some risk of non-compliance on the grounds of the composition of Chief Pleas

5.2. Options A, B, C, D, E, Rang/Harris, Rang/Miller/Harris (12+16)

1) ✘ Complete break with the past.
2) ✘ Substantial risk of political instability. Untried and untested.
   ✘ Significant risk of total govenment failure e.g. due to inability to recruit sufficient number of volunteer candidates.
   ✘ Land reform could lead to extreme tensions in the community.
3) ✘ Breaks with feudal past - adverse consequences for the tourist industry.
   ✘ Risk of increased taxation and income tax - putting financial industry at risk.
   ✘ No legally qualified judge, hampering the development of finance industry.
4) ✘ Poor separation of powers: the Seneschal is a member of both the judiciary, the legislature, and, as the Island's most senior civil servant, arguably of the executive.
   ✘ Insufficient number (28) of Chief Pleas members to ensure separation of the legislature and the executive.
5) ✔ Chief Pleas members are all elected, providing a degree of accountability to taxpayers.
   ✘ States of Deliberation, Law Officers, DCA, Privy Council have no accountability to the electorate whatsoever.
   ✘ More power ceded to parties with no democratic accountability whatsoever (the Law Officers, the DCA, the Privy Council (as presently constituted), the Lord Chancellor).
   ✘ Concentrates local democracy in fewer pairs of hands (28 rather than 52).
   ✘ Concentrates more power in unelected Seneschal appointed for life, with no democratic accountability.
6) ✘ With the exception of Option A, these options enjoy little popular support.
   ✘ Option Rang/Miller/Harris is open to criticism that it goes directly against the will of the people.
7) ✘ With the exception of Option Rang/Miller/Harris, these options enjoy little support among the Tenants.
   ✔ Option Rang/Miller/Harris has sufficient support in Chief Pleas to be adopted.
8) ✘ All these options divide the Island; each slightly satisfies some Islanders, but strongly alienates the rest of the Island.
9) ECHR compliance:
   - ✘ - minorities are well represented in Chief Pleas:
     - ✘ - indigenous Sark population could end up unrepresented
     - ✘ - Little Sark could end up unrepresented
   - ✘ - non-compliant dual role of the Seneschal as Chief Judge and President of Chief Pleas
   - ✘ - non-compliant unelected organs forming part of Sark's legislature (the Law Officers, the DCA, the Lord Chancellor, the Privy Council as presently constituted)
   - ✘ - non-compliant unelected President of Chief Pleas
   - ✔ - virtually certain compliance of composition of Chief Pleas

The options are as follows:

A = 28 Deputies elected by universal suffrage (or 32)
B = 14 Tenants elected by Tenants + 14 non-Tenants elected by non-Tenants (or 16+16)
C = 14 Tenants + 14 non-Tenants all elected by universal suffrage (or 16+16)
D = 12 Tenants + 16 non-Tenants all elected by universal suffrage
E = 40 Tenants + 40 non-Tenants elected by non-Tenants
Rang/Harris = 8 Tenants + 12 Deputies + 8 runners up all elected by universal suffrage
Rang/Miller/Harris = Option D for one term of Chief Pleas, followed by a binding referendum choosing between continuing with Option D or switching to Option A

We note the following ambiguities with the Rang/Miller/Harris option:

- what happens to a Tenant's seat in Chief Pleas if he dies while in office or sells his/her Tenement? Is there a bye-election or does his heir/successor take the seat?
- can Tenants stand as Deputies?
- what happens if not enough Tenants stand to fill 12 places? Can Tenants be obligated to stand?
- can the Seigneur stand as a Tenant or as a Deputy? If not, his rights under ECHR Art. P1-3 are arguably being violated.

5.3. Compromise: Adjusting Status Quo

The alternative we present here is designed to change Sark's existing constitutional arrangements minimally so as to meet our stated goals. We start with Status Quo and amend it as follows:

- at each election, elections are also held among the joint Tenement owners to elect the Tenement representative. Alternatively, to make constituencies more proportionate, they could be expanded to include, e.g.:

    - the first (second, third) person in line to inherit the Tenement, or,
    - the joint Tenement owners' descendants, or,
    - the joint Tenement owners' descendants and their spouses, or,
    - the joint Tenement owners' families.

  This would be in keeping with Sark's traditions while modernizing them slightly: an Island colonized by 40 families, each of whom elects one representative; plus the rest of the population.

    - (optionally) each Tenement can be given, at each election, the option of presenting no candidate in which case the seat is vacated and made available to an additional Deputy to be elected. The Tenant is only obligated to stand if no other candidate puts their name forward (alternatively, Chief Pleas duty can be made a public duty and a random candidate from the Tenement can be chosen in such an eventuality).

    - (optionally) each Tenant can, at each election, be "unseated" by the following method, or some variation of it: a petition of at least 10 residents stating cause and then a vote of 3/4 of the resident population voting in favour of the proposition "I agree with the stated cause for unseating the Tenant and that this Tenant should be unseated for this term of Chief Pleas"; such seat to be vacated and an additional Deputy to be elected for the duration of that term of Chief Pleas.

- the powers of the Crown (the Law Officers, the DCA (including the Lord Chancellor)) are removed and the Privy Council Committee for Sark affairs is reformed so as to be composed of Sark representatives, thus making these parts of Sark's legislature ECHR compliant.

- all criminal laws passed by Guernsey are required to receive prior Chief Pleas approval, to make this element of Sark's legislature ECHR compliant.

- the role of the Seneschal is split into an elected unpaid President of Chief Pleas and a legally qualified Chief Judge.

- optionally the number of Deputies is increased to 17 (or another number, as advised by learned counsel)

1) ✔ Preserves most of what has worked well in the past.
   ✔ Not too radical a departure form a tried and tested system known to work.
2) ✔ Evolutionary system likely to guarantee political stability.
3) ✔ Evolutionary system likely to guarantee economic stability.
   ✔ Preserves links with feudal past - favourable consequences for the tourist industry.
   ✔ Low tax environment is preserved - allowing finance industry to develop.
   ✔ Legally qualified judge enables finance industry to develop.
4) ✔ Good separation of powers between the judiciary, legislature and the executive.
5) ✔ People have ultimate control of their entire legislature.

✔ People can unseat Tenants if they are particularly dissatisfied with them
✔ Chief Pleas members are made ultimately accountable to the electorate
✔ No remaining unaccountable non-resident parts of legislature of Sark.

6) ? Community support would have to be tested.
7) ? Support among Tenants would have to be tested.
8) ?
9) ✔ ECHR compliance:
    - ✔ - minorities are well represented in Chief Pleas:
        - ✔ - indigenous Sark population guaranteed representation through the many indigenous Sark families still owning Tenements
        - ✔ - no disenfranchisement of Little Sark which is guaranteed representation
    - ✔ - roles of Chief Judge and President of Chief Pleas are separate.
    - ✔ - non-compliant powers of unelected organs forming a part of Sark's legislature (the Law Officers, the DCA, the Lord Chancellor, the Privy Council as presently constituted) curtailed
    - ✔ - President of Chief Pleas is elected.
    - ✔ - legal advice is that composition of Chief Pleas is very likely compliant

- Tenants not wanting to participate in politics can choose to do so, while retaining their land

5.4. Compromise: Adjusting Option A

The alternative we present here is designed to be a more evolutionary version of Option A, adjusted so as to meet our stated goals. Its features are:

- a fully elected Chief Pleas having 40 representatives, one from each Tenement (alternatively, the Island is divided into 40 constituencies in some other fashion). The Tenant is required to stand if nobody else from the Tenement puts their name forward (alternatively, Chief Pleas service can be made a public duty and a random representative can be chosen in such an eventuality).

- a Tenants' (or Landowners, i.e. including Freeholders) Scrutiny Committee is established. How its affairs are conducted is left to the Tenants (or Landowners).
    - rationale:
        - it is likely be formed anyway under Options A or similar alternatives, and giving it formal powers is going to avoid the body performing its functions through legal challenges

        - the purpose of this body is to provide a check and balance against Chief Pleas now more likely to be composed of members with less financial connection to the Island, and to external influence

    - powers this body could have:
        - to veto any legislation amending law related to land,
        - to veto any legislation introducing new taxes or increasing existing taxes,
        - to approve or reject the Budget,
        - to veto any legislation related to the constitution of Sark or external relations,
        - to initiate legislation

- the de facto power exercised by the various emanations of the Crown (Law Officers, the DCA (including the Lord Chancellor)) cease being exercised and the Privy Council Committee for Sark affairs is reformed so as to be composed of Sark representatives, thus bringing Sark's legislature in compliance with ECHR

- all criminal laws passed by Guernsey are required to receive prior Chief Pleas approval, to bring this part of Sark's legislature in compliance with ECHR

- the role of the Seneschal is split into an elected unpaid President of Chief Pleas and a legally qualified Chief Judge.

1) ✘ Relatively extensive break with the past.
   ✔ Less radical departure form a tried and tested system known to work.
2) ? A bold but still reasonably evolutionary system with some chance to provide political and economic stability.
   ✔ Guarantees an always functioning government of 40 members.
   ✘ Untried and untested.
3) ? A bold but still reasonably evolutionary system with some chance to provide economic stability.
   ✘ Fairly strong break with the feudal past, which may adversely affect Sark's tourism, although some elements of it are retained.
   ✔ Some checks and balances against runaway taxation - favourable for continuing development of finance industry and inspiring confidence in international investors.
   ✔ Legally qualified judge, allowing finance industry to develop.
4) ✔ Good separation of powers between the judiciary, legislature and the executive.

5) ✔ People have ultimate control of their entire legislature.
   ✔ Chief Pleas members are made ultimately accountable to the electorate.
   ✔ Good democratic credentials.
6) ? Community support would have to be tested.
7) ? Support among Tenants would have to be tested.
8) ?
9) ✔ ECHR compliance:
   - ✔ - minorities are well represented in Chief Pleas:
     - ✔ - indigenous Sark population guaranteed representation through the many indigenous Sark families still owning Tenements
     - ✔ - no disenfranchisement of Little Sark which is guaranteed representation
   - ✔ - roles of Chief Judge and President of Chief Pleas are separate.
   - ✔ - non-compliant powers of unelected organs forming a part of Sark's legislature (the Law Officers, the DCA, the Lord Chancellor, the Privy Council as presently constituted) curtailed
   - ✔ - President of Chief Pleas is elected.
   - ✔ - virtually certain compliant composition of Chief Pleas.

6. Elections

Sark's current system of general elections is simple. It is adequate today when only 12 members of Chief Pleas out of 52 are elected using it and the future of the Island is not at stake if things go wrong. A well functioning electoral system will be *much* more important for a reformed Chief Pleas. Getting the system of elections right is therefore of paramount importance.

The electoral system should offer voters as much democratic input as possible and be as well proofed against electoral manipulation as possible.

These are the main issues to be addressed:

a) will Sark be split into several independent constituencies, or will the whole Island be one electoral constituency?

b) what system of elections will be used within each constituency?

c) how to ensure fair elections?

6.1. Ensuring Fairness of Elections

As elections in Florida and elsewhere demonstrate, getting elections right in practice is fraught with difficulties. Paper based elections are prone to many problems, but electronic voting systems are only better provided they are properly designed.

Concerns have been raised that under a reformed Chief Pleas, if not enough candidates stand to fill the posts advertised, this will represent an opportunity for the electoral Returning Officer to fill the posts with his friends. Whether this threat is real or only perceived, the fact that this perception exists is cause of concern. The system of elections must not only be transparent but must also be seen to be transparent.

We make no recommendations but suggest that these issue, which was brought to our attention by a third party, be given urgent attention.

6.2. One Constituency or Several?

Today, general elections on Sark are held in a single constituency. Everyone seems to assume that this is the way it has to be in the future too. Clearly, this system is the simplest. Simplicity aside, for all other purposes, splitting the Island into constituencies is better. Here is why:

Concentration of Power

If the Island is a single constituency, a single person or organization controlling a sufficient number of residents (looking at results of past elections, about 100 will do) can take over the majority of Chief Pleas seats. Today, this is not a concern as the equivalent takeover would require the purchase of about 20 Tenements which is virtually impossible for anyone to achieve. The division of the Island into several constituencies makes it harder for any one party to take over the Island - a takeover then requires securing a majority in many constituencies rather than just in one, which is much more difficult. A particularly good division into constituencies for this purpose is one based on Tenements, as the takeover would then have the additional requirement of having to secure the support of a majority of the Tenants, which makes it harder still.

Continuity of Government and Democracy

If the whole Island is one constituency, considerable risk exists that not enough candidates will stand to fill all available seats. There no way even to guarantee a quorum and continuity of government. If the Island is divided into several constituencies, it is highly unlikely that any constituency will present no candidates at all as members of that constituency would soon become aware that noone is standing and somebody would put their name forward.

Moreover, if a constituency system based on Tenements is adopted, the Tenant can be required to stand (as they are today) if no other candidate puts their name forward, thus always guaranteeing 40 filled seats and continuity of government. This is another reason in favour of this system.

Less candidates standing than there are available seats is also bad for democracy - for members would get elected without necessarily having any support from the public. As of the date of preparation of this document, four out of nine sitting Deputies in Chief Pleas were elected without a single vote having been cast for them. This gives them scarcely more democratic credentials than Tenants possess.

Representation of Minorities

If the Island is a single constituency, there is no guarantee that minorities (e.g. Sark's indigenous population; Little Sark) receive representation in Chief Pleas. Indigenous population of Sark is put at risk of being made second class citizens on their own Island. In a constituency based system, separate constituencies can be created to represent minorities, thus ensuring they receive a voice in Chief Pleas.

Finally, a constituency based system also goes some way to addressing the issue raised in Section 6.1.

6.3. What Constituencies

Here are some possible ways Sark could be split into constituencies:

a) the whole Island as a single constituency,
b) 40 Tenements, each forming a single constituency,
c) constituencies based on postal codes (GY9 0SA/B/C/D/E/F/G),
d) three constituencies: Great Sark, Little Sark, Brecqhou,
e) 40 Tenements each forming a single constituency, each electing one representative, an additional constituency having a few reserved seats for indigenous people of Sark.

6.4. Electoral System

What is the best voting system to be used in each constituency?

We look for a voting system satisfying these criteria:

1) Voters should be offered as much electoral input as possible.

2) The system should be as immune to distortions and deliberate manipulation as possible.

We look at the first criterion first, then return to the second one in Section 6.4.4.

It may be worth considering, for systems which do not per se guarantee a certain minimum number of votes achieved by the elected candidates, a threshold is additionally set for the minimum votes that must be received by a candidate in order to be elected. If this is not achieved, the election for that post is held again, with candidate nominations re-opened (but only perhaps one more time), without imposing the minimum quota on the second round.

In every election, each voter is going to have his or her own idea of preferences of the candidates standing.

For example, let us say the candidates standing are Alice, Ben, Charles, David, Ethan and Frank.

Voters Oonagh and Tue and Thea are voting.

Oonagh's favourite candidate is Alice. If Alice can't get in, she would like Ben to get elected. Her third choice is Charles. She doesn't much care for the other three candidates, but she definitively doesn't want Ethan to get in. Oonagh's preferences can be stated in tabular form:

Oonagh

1 Alice
2 Ben
3 Charles
4 David
4 Frank

Tue's favourite candidate is Ben. He also quite likes Charles, and Alice, although slightly less than Charles. He doesn't care about the other candidates. Tue's preferences can be stated in tabular form:

Tue

1 Ben
2 Charles
3 Alice

Thea's favourite candidate is Charles. Her second choice is Ben. She doesn't care about the other candidates, but she really doesn't want either David, Ethan or Frank to get in. Thea's preferences in tabular form are:

Thea

1 Charles
2 Ben
3 Alice

We shall use this example in all the voting systems we examine. We shall also assume that Oonagh, Tue and Thea are not just single voters but rather than there are 300 voters, of whom 105 have Oonagh's preferences, 100 have Tue's preferences, and 95 have Thea's preferences.

Or, to present all the voters' preferences in tabular form:

Oonagh (105)	Tue (100)	Thea (95)
1 Alice	1 Ben	1 Charles
2 Ben	2 Charles	2 Ben
3 Charles	3 Alice	3 Alice
4 David		
4 Frank		

Given the above voters' preferences, which candidate should a good electoral system elect?

We note that:
- the top 3 candidates are clearly Alice, Ben and Charles
- 205 out of the 300 voters prefer Ben to Charles
- 195 out of the 300 voters prefer Ben to Alice
- 195 out of the 300 voters prefer Charles to Alice

We might therefore conclude that the ranking of the top 3 candidates is as follows:

1 Ben
2 Charles
3 Alice

Thus, if there is only one available seat, it should go to Ben.
If there are two, they should go to Ben and Charles.
If there are three, they should go to Ben, Charles and Alice.

It is worth noting than in a first-past-the-post system, the favourite candidate would have been Alice.

We look at more examples in sections that follow.

6.4.1. First Past the Post

This system of elections is suitable for elections in single or multi-seat constituencies.

It is most popular in the UK and its former colonies (including the USA). A variant of this voting system is in use in Sark today.

There are k candidates standing for s available seats, and each voter gets to cast v votes (or, up to v votes, i.e. between zero and v votes).

The numbers of votes received by each candidate are added up and the top s candidates by total number of votes cast are declared elected.

Examples:

1) If there are k candidates standing for 1 available seat and each voter gets to cast 1 vote, we have s=1 and v=1. This is the most commonly known First Past the Post system.

2) If there are k candidates standing for 12 available seats and each voter gets to cast up to 12

votes, we have s=12 and v=12. This is the system used at general elections in Sark today.

The primary advantage of this system is that it is simple to understand and administer, and results in cheapest elections.

It will be seen, however, that this system does not ask for much democratic input from voters. How much democratic input does this system ask from each individual voter? Each voter only gets to state (up to) the top v of his favourite candidates. He can say nothing about the order of preference he holds those candidates in.

Examples:

In our example election, we have k=6 as there are 6 candidates.

1) If v=1 (each voter gets one vote),

Oonagh might normally vote for Alice.
Tue might vote for Ben.
Thea might vote for Charles.

If there is one available seat, Alice will get it.
If there are two, Alice and Ben will get them.
If there are three, Alice, Ben and Charles will get them.

2) If v=2 (each voter gets two votes),

Oonagh might normally vote either just for Alice, or for Alice and Ben.
Tue might vote for Ben, or Ben and Charles.
Thea might vote for Charles, or Charles and Ben.

Who will get the seats depends on whether voters vote for their second choice candidates, or not.

It will be seen that this system therefore produces results which may be deemed to be perverse (i.e. if there is only one seat, and each voter gets only one vote, Alice gets elected, even though she is the least preferred candidate).

The higher the value of v (i.e. the more votes each voter is allowed), the more democratic input this voting system allows the voters. Thus, it is best to set v equal to the total number of candidates standing, not the number of seats available, as is presently the case in Sark. It is not clear why the existing choice was made in Sark the way it was.

So if Sark chooses to retain its current electoral system, it might wish to increase the number of votes offered to voters in this way, and moreover allow them to exercise any number of votes, between zero and the maximum permitted, to allow voters the most freedom, the most choice, and also the least opportunity to spoil a vote.

This special case where v=k (i.e. every voter gets to either vote or not vote for every candidate standing) is also called Approval Voting, since each voter either approves or does not approve every candidate standing. It is the most democratic variant of this voting system.

6.4.2. Supplementary Vote

This system of elections is suitable for elections in single-seat constituencies.

Each candidate casts either one or two votes - a first preference and, optionally, a second preference.

If any candidate wins an absolute majority (>50%) of all first preference votes cast, he is declared the winner.

Otherwise, all but the top two candidates (by number of first preference votes) are eliminated and the votes of eliminated candidates are reallocated to the second preference candidate (provided the second preference candidate has not also been eliminated).

The candidate with the greatest number of votes is then declared the winner.

This is the system used to elect the Mayor of London.

It is a slight improvement over the First Past The Post voting system in the case where there is only one available seat and every voter gets to exercise up to *two* votes. Indeed, it is the same as that system, except it allows the voters to order the candidates in order of preference, thus allowing them slightly more democratic input.

6.4.3. Preference Voting

This family of voting systems can be used for elections in single-seat or multi-seat constituencies.

Voters get to state their full preference list - i.e. they list candidates in order of preference by writing the number "1" next to the name of their favourite candidate, "2" next to the name of their second favourite candidate, and so on. If a voter does not want to support a candidate at all, he does not have to mark his name at all. In some variants of this system, voters can give several candidates equal preference.

Thus, ballot papers in our election example will look like this:

Oonagh (105)	Tue (100)	Thea (95)
1 Alice	1 Ben	1 Charles
2 Ben	2 Charles	2 Ben
3 Charles	3 Alice	3 Alice
4 David		
4 Frank		

How are the winners decided? There exist several methods, we look at only one of them.

6.4.3.1. Single Transferable Vote

This system of preference voting is used for certain kinds of elections in Scotland, Northern Ireland, Ireland, Malta, Australia, Canada, New Zealand and USA. It was first proposed in 1821 and first used in elections in Denmark in 1856. Its popularity worldwide has been growing in recent years. It has been recommended by the Jenkins Commission to be used in elections to the House of Commons.

How does this system decide which candidates get elected?

Let's demonstrate by looking at our example election.

We look at voters' first choices first. The candidates have the following number of votes each:

105	100	95	0	0	0
Alice	Ben	Charles	David	Ethan	Frank

No candidate has reached overall majority (151 votes).

The candidates with the least votes is eliminated and his votes are reallocated to his supporters' second preference candidate. David, Ethan and Frank are eliminated without any consequence.

Charles is eliminated next and his votes are reallocated to his supporters' second preference candidate (Ben). The candidates now have the following numbers of votes:

105	195
Alice	Ben

Ben has reached overall majority and is thus elected. We repeat that in a normal first past the post system where voters only have the opportunity to indicate their first preference candidate, Alice would have been elected although nearly 2/3 of the electorate prefer Ben to Alice.

A clear advantage of this system is that is is more democratic than the multi-seat variant of first past the post since it allows voters to express more information on their voting sheet, i.e. in addition to being able to only approve or disapprove candidates, they can also list them in order of preference.

Another advantage is that the system is more robust - it is virtually impossible to spoil a ballot.

A final advantage is that this system does not "waste" any votes. All information expressed by the voters is taken into account.

The system is easily adapted to multi-seat constituencies. Voters give exactly the same information on the voting sheet as if there is only one seat - i.e. the ranking of candidates in order of preference.

To decide who gets elected, first, each candidate is allocated the votes of his supporters who named him their first preference candidate.

If any candidate has reaches a predetermined "quota" (50% in the case of a single seat), he is allocated a seat and any votes he has obtained in excess of the quota are allocated to his supporters' next preference candidate.

In multi-seat elections, one of several quotas is used; if V is the number of valid votes cast and s is the number of available seats, the Hare quota is V/s; the Droop quota is $V/(s+1)+1$ rounded down to the nearest integer; the Hagenbach-Bischoff quota is $V/(s+1)$; the Imperiali quota is $V/(s+2)$ etc. Most commonly, the Droop or the Hagenbach-Bischoff quota, or a slight adjustment of the two quotas, $V/(s+1)+\varepsilon$ where ε is a small number is used.

If no candidate has reached the quota, the candidate with the least votes is eliminated and his votes are redistributed to his supporters' next preference candidate.

The process is repeated until all seats are filled.

Where *s*=1, i.e. the constituency only has one seat, this system of voting is also called Instant Runoff Voting.

Where there are two classes of available seats (e.g. Tenants and non-Tenants), this system is easy elegantly adapted to cope. If one category of seats is filled, the remaining candidates still in the running in that category are removed from the election and their votes of their supporters are re-allocated to the next preference candidate in the other category and the process continues.

6.4.3.2. Instant Runoff Voting with Batch Elimination

This system of elections is suitable for elections in single-seat constituencies.

This system is similar to the system described in Section 6.4.3.1. Candidates vote by ranking their candidates in order of preference in exactly the same way as in Instant Runoff Voting.

If no candidate wins an overall majority of first preference votes cast, all but the top two candidates (by number of first preference votes) are eliminated and then of the two, the candidate which is ranked higher on the greatest number of ballots is elected.

Example:

1) In our example election, Ben would again be the winner.

6.4.3.3. Other Preference Voting Systems

Single Transferable Vote is by no means the only preference voting system available.

We only mention two other methods here, the Ranked Pairs method and the Schulze method.

Theoretical properties of preference voting systems have been widely studied.

The most famous result is Arrow's Impossibility Theorem which proves that it is not possible to design a voting system which possesses the following properties which one might think any fair system of elections must obviously possess:

1) (Pareto efficiency) if candidate A is ranked higher than candidate B by every voter, then the voting system will declare candidate A as ranked higher by the electorate than candidate B.

2) (non-dictatorship) there isn't a single individual voter such that the voting system always produces the same result as the preferences stated by this voter.

3) (independence of irrelevant alternatives) as long as every voter keeps the relative preference of candidates A and B the same, but possibly re-arranges the preference order of other candidates, the voting system places candidates A and B in the same order of preference.

But it gets worse. Let's say in an election, one candidate is so popular that when compared to any other candidate individually, he is preferred (ranked higher) by more than 50% of the voters. There isn't always such a candidate. But when such a candidate exists, he is called the Condorcet winner of the election.

A system of elections is called a Condorcet method if it satisfies the Condorcet criterion: whenever there exists a Condorcet winner, he is elected.

You might think every fair method of elections obviously has to be a Condorcet method.

But this is far from the truth.

None of the variants of the first-past-the-post system are Condorcet methods, as we have seen before.

Single Transferable Vote is likewise not a Condorcet method.

Examples of Condorcet methods are: Ranked Pairs method, Schulze method, Kemeny-Young method, Minimax (Simpson-Kramer) method, Nanson's method.

Comparison of these methods could be done in a further report.

6.4.4. Tactical Voting and Manipulation

Tactical voting is a particular issue for Sark. If the electoral system is not carefully chosen, a small well-organized group could cause significant electoral distortions.

What is tactical voting?

It is a situation where a voter votes differently than his true preferences to achieve a particular objective. For example, voters may vote for candidates they predict are most likely to win, even if their true preference is different. Worse, groups of voters may agree a common tactical voting strategy and exert a more than due influence on the election's outcome.

According to the Gibbard-Satterthwaite theorem tactical voting is possible in all non-dictatorial deterministic voting systems. Yet some systems are more vulnerable than others.

The first-past-the-post system is deemed to be particularly vulnerable. In a single-seat constituency, voting for any but the top two or three candidates results in the voter's vote being completely wasted and having no effect, thus tactical voting is the order of the day. Similar effects occur in multi-seat constituencies. A common empirically observed consequence of this is the emergence of a two party system ("Duverger's law"). This can be seen in the UK and its former colonies (including e.g. the USA) where this voting system is most popular.

Preference voting systems are less prone to these phenomena because when a voter votes his first preference for a candidate other than the top few, should his first choice candidate not get elected, the vote is reallocated to his lower preference candidates and thus does not go to waste.

This results in less incentive for tactical voting and more incentive to state one's true preferences.

A further interesting feature of the first-past-the-post system is that the winning candidate can be elected by many fewer than 50% of the votes cast - so long as he has the most votes.

Preference voting systems ensure that the winning candidate (in a single seat constituency) has support *at least at some level of preference* of at least 50% of the electorate.

A further advantage of the Single Transferable Vote system of elections, if used in a multi-seat constituency, is that it is *proportional*.

An analysis of Sark's past elections shows that roughly 100 voters voting collaboratively would have been able to secure a majority (and, only a few more, a substantial majority) of Deputies in

Chief Pleas by co-ordinating their voting under Sark's present voting system.

Single Transferable Vote would allow a co-operating group of voters only to elect the proportion of Chief Pleas members (roughly) equal to their proportion of the total number of voters participating in the election. It would therefore require 209 voters (today) voting co-operatively to secure a majority in Chief Pleas.

The exact number of voters who could have, by pre-agreeing a voting strategy, secured half the seats in a Deputies' election in the past few years and therefore taken over a fully elected Chief Pleas:

1999:	126.	147	for a 75% majority
1996:	131.	157	for a 75% majority
1987:	129.	167	for a 75% majority
1984:	112.	124	for a 75% majority
1981:	112.	130	for a 75% majority
1978:	100.	118	for a 75% majority
1975:	107.	119	for a 75% majority
1972:	75.	89	for a 75% majority
1969:	73.	85	for a 75% majority

Under the Single Transferable Vote system, we would today require approx. 209 for a majority, and approx. 313 for a 75% majority.

6.4.5. Recommendations

We conclude with the following

RECOMMENDATIONS:

19) That Chief Pleas approve the Single Transferable Vote system of elections for elections in Sark.

7. Conclusions

1) Sark's draft new constitution, as it stands, is not necessarily more democratic than its existing one. Unelected UK officials and representatives of the UK Government in Guernsey see their relative legislative powers increased. Locally, power is concentrated in 28 pairs of hands instead of 52 and is particularly concentrated in the hands of the Seneschal, whose term of appointment is extended for life. Guernsey's wholly undemocratic power to legislate for Sark in the area of criminal law remains.

2) The Reform Law as it currently stands puts Sark's autonomy at risk.

   Implementing the Reform Law on the UK's orders itself amounts to voluntarily surrendering Sark's autonomy.

3) The draft Reform Law as it stands introduces serious problems into the quality of governance of Sark:

   - 28 members of Chief Pleas implies that the more active members of Chief Pleas will have to spend 40+ hours per week on Chief Pleas committee work.

   - there is no separation of powers between the judiciary, the executive and the legislature, as demanded by Council of Europe - the sponsoring body of the ECHR - best practice.

     The Seneschal remains the president of legislature and president of the judiciary.

     Reducing the number of members from 52 to 28 means that the legislature and the executive will no longer be able to be separated - as now, they are.

4) Sark is under no obligation to comply with ECHR as it is not a High Contracting Party to that convention.

   In order to be ECHR compliant, the composition of Chief Pleas requires only minor changes, not major ones as the UK Government is claiming.

5) The Reform Law does not go far enough to make Sark's constitution ECHR compliant. At least the following aspects of it are not ECHR compliant:

   a) the Seneschal's dual judicial and legislative role,
   b) the Seneschal's role as unelected President of Chief Pleas for life,
   c) the de facto powers exercised by the Law Officers, the DCA and the Privy Council as presently constituted,
   d) the role of the States of Guernsey in making criminal law.

   Unlike the composition of Chief Pleas, c) is clearly in breach of the ECHR *by the UK* which is a High Contracting Party to the said Convention and require remedies in order to make them ECHR compliant; and furthermore, the UK has the power to remedy it.

   a) and d) are also much more unequivocally in breach of ECHR than composition of Chief Pleas is.

6) The UK Government has a poor track record of getting their constitutional law right.

7) The UK Government has a poor track record of protecting human rights and democracy in those Dependent Territories where it has taken control.

8) Many Chief Pleas members are willing to go ahead with the Reform Law only because they are afraid of imminent UK intervention.

   The UK has no power to intervene.

   Allegations have been made, although unverified, that behind the scenes, UK officials have made verbal threats to Chief Pleas members to intervene.

   Such threats, if really made, have been unlawful.

   Chief Pleas members should know better than to take verbal threats seriously and should either ignore them completely or demand that they are repeated in writing - upon which legal action can be taken against them.

9) Option A may be the will of a lot of people on Sark today, but it was the will of the UK Government first - long before it had any support on the Island at all.

10) A proper solution to Sark's constitutional situation will enjoy the genuine support of a majority of Sark residents as well as the genuine support of a majority of Tenants in a separate, free, vote.

    Neither of the current front runners of Reform Law satisfies these requirements - Option A is not acceptable to a majority of Tenants, and the compromise Easter 2007 Rang/Miller/Harris 12+16 option can credibly be accused of not having popular support.

11) Much less radical alternatives exist which are ECHR compliant, which will allow Sark to develop a good model of governance. We hope that at least some of these can be found which is acceptable to everyone.

Sark today has two options. It can either implement constitutional change in a hurry, without addressing the flaws identified in this document (and possibly others which may be identified as the proposed law is scrutinized) or conduct a proper review of its constitution and do a good job (and therefore take some time doing it). Only the first option seems to be considered by most people today - principally due to the pressure from the UK Government.

What's the worst that will happen if we take our time in seeking the best possible future for Sark? First of all, the UK Government will not come and step in. As we explain in Section 2.1.9, they have no power to do so, and as we explain in the appendix (letter from Dr. Slivnik to Peter Thompson dated 28 March 2007), to attempt to do so would be a serious human rights violation by the UK Government subject to being overruled by the courts.

The worst that would happen is that some Sark resident would challenge next Chief Pleas elections in ECtHR. Suppose such a challenge were successful - which is far from a foregone conclusion. Then what? The applicant in MATTHEWS v. THE UNITED KINGDOM (Application no. 24833/94) won against the United Kingdom; as the United Kingdom government had no power to remedy the situation, the only consequence was that half of the applicant's approximately £100,000 legal fees had to be paid by the United Kingdom government. The applicant did not apply for compensation, so none was awarded, but we are advised by Leolin Price that if compensation had been sought, if one had been awarded at all, it would at worst have been nominal. Therefore, if *all* of 418 Sark's electors chose to sue the United Kingdom government - and won, which is far from a foregone conclusion - the worst that would happen is that the United Kingdom government would have to refund half their legal fees and pay 418 times a nominal compensation.

Furthermore, the ECtHR (or Bailiwick of Guernsey courts under The Human Rights (Bailiwick of Guernsey) Law, 2000) have no power to impose upon Sark a change of legislation (i.e. enact new laws or strike down existing laws they deem incompatible), only to declare its incompatibility with ECHR. It remains the prerogative of Chief Pleas to amend legislation.

Should ECtHR give an adverse ruling, Sark would be able to study the ruling and see how our constitution was in breach and what needed to be remedied. This could give us some surprises! Without having access to case law guiding us what the Court would find objectionable, and without seeing the Court's reasoning on what grounds Sark's system is non-compliant (in the event that the court would reach such a conclusion) it is impossible also to know the extent of remedies that would be required, and what would be adequate. This is why there is some disagreement among legal scholars as to the confidence they have in Option B/C/D/Z reforms being safe from a challenge on ECHR grounds - if the court has not even declared status quo non-compliant, and on what grounds, how are we to decide what really needs changing, how extensively, and whether changes so introduced will satisfy the Court? This is not mere theorizing - we shall give examples below where ECtHR rulings have been quite surprising.

It is not by coincidence that most countries follow this conservative approach to reform as a matter of routine (cf. the Isle of Man birching law).

So this is the *worst* case outcome if we adopt the prudent approach. The best case outcome, is, of course, a very bright future for the Island.

It certainly sounds a lot cheaper than having to rescue an Island whose economy has failed because it has implemented, under pressure, a hasty and not properly thought out constitutional reform.

Just how foolish will the people of Sark feel if a Reform Law is implemented hastily, especially while credible questions of ECHR compatibility of aspects of the draft Reform Law remain, Sark's heritage collapses as a result, and in the end the new law is challenged and is still found to be in breach of the ECHR?

Appendix

A. ECHR Cases

Alleged violations of Protocol 1, Article 3

[1] MATHIEU-MOHIN AND CLERFAYT v. BELGIUM (Application no. 9267/81), 2 March 1987
[2] GITONAS AND OTHERS v. GREECE (Application no. 18747/91; 19376/92; 19379/92; 28208/95; 27755/95), 1 July 1997
[3] UNITED COMMUNIST PARTY OF TURKEY AND OTHERS v. TURKEY (Application no. 19392/92), 30 January 1998
Violation of Protocol 1, Article 3 was alleged but the Court did not consider it necessary to consider this complaint due to violation of ECHR under other Articles having been established.
[4] SOCIALIST PARTY AND OTHERS v. TURKEY (Application no. 21237/93), 25 May 1998
Violation of Protocol 1, Article 3 was alleged but the Court did not consider it necessary to consider this complaint due to violation of ECHR under other Articles having been established.
[5] AHMED AND OTHERS v. THE UNITED KINGDOM (Application no. 22954/93), 2 September 1998
[6] MATTHEWS v. THE UNITED KINGDOM (Application no. 24833/94), 18 February 1999
[7] LABITA v. ITALY (Application no. 26772/95), 6 April 2000
[8] GAULIEDER v. SLOVAKIA (Application no. 36909/97), 18 May 2000
Violation of Protocol 1, Article 3 was alleged but the case was struck off as it was settled out of Court. The applicant was standing as an MP on a political party's platform; when doing so, he had signed an undated resignation letter and handed it to the party. When he later quit membership of the party, the party used the undated resignation letter to effect his resignation as an MP against his stated wishes at the time. The applicant claimed this breached Protocol 1, Article 3 of ECHR.
[9] CYPRUS v. TURKEY (Application no. 25781/94), 10 May 2001
Violation of Protocol 1, Article 3 was alleged by the applicant government in proceedings before the European Commission of Human Rights but this claim was not pursued in proceedings before the ECtHR. The Court therefore did not consider it necessary to consider this complaint.
[10] REFAH PARTISI (PROSPERITY PARTY) AND OTHERS v. TURKEY (Application no. 41340/98; 41342/98; 41343/98; 41344/98), 31 July 2001
[11] PODKOLZINA v. LATVIA (Application no. 46726/99), 9 April 2002
[12] SELIM SADAK AND OTHERS v. TURKEY (Application no. 25144/94; 26149-26154/95; 27100-27101/95), 11 June 2002
[13] REFAH PARTISI (THE WELFARE PARTY) AND OTHERS v. TURKEY (Application no. 41340/98; 41342-41344/98), 13 February 2003
[14] VICTOR-EMMANUEL de SAVOIE v. ITALY (Application no. 53360/99), 24 April 2003
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