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Contract Law in a Mid-Channel Jurisdiction

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A Mid-Channel Jurisdiction—Jersey as a Mixed Legal System

I. Introduction

It is difficult to appreciate the contemporary position of a legal system without knowing about its origins. This is very much the case of the common law, evolving as it does in its characteristically incremental way over time. The historical dimension is also imperative in the Channel Islands, as the hybrid nature of the sources of law there is attributable to the particular history of those islands. We will here first analyse the historical background. This historical analysis will be followed by an overview of the current approach to sources in Jersey, and then more specifically the sources of the law of contract. A final section will then be given over to the analysis of the particular mindset or *mentalité* of a Channel Island lawyer.

II. Historical Background

The sources of law in Jersey are of an unusual and heterogeneous nature. The customary law of Jersey is based upon that of the Duchy of Normandy, and this continues to be the foundation of Jersey law.[1] The significance of Norman law is a product of the history of the Channel Islands, and whilst this is not the place for an exhaustive historical account of the sources of law in the Channel Islands,[2] it is important to place the discussion of the Jersey law of contract within its broader historical context.

[1] See *Snell v Beadle* [2001] UKPC 5, [17]–[18.]

[2] For an excellent overview, see S Nicolle, *The Origins and Development of Jersey Law: An Outline Guide* (5th edn, St Helier, Jersey and Guernsey Law Review, 2009); J Kelleher 'The Sources of Jersey Contract Law' (1999) 3 *Jersey Law Review* 17. See also the very informative discussion in G Dawes's introduction to G Terrien, *Commentaires du Droict Civil tant public que privé Observé au Pays & Duché de Normandie* [1574] (Guernsey Bar, 2010).

As is well known, the Channel Islands were, until the thirteenth century, part of the Duchy of Normandy, and thus subject to Norman customary law. That long association between continental and insular Normandy ceased in 1204 on the occasion of the historical separation between Jersey and Normandy when King John was deprived of the Duchy of Normandy by Philippe Augustus, King of France, thereby putting an end to the English sovereigns' historical connection with continental Normandy, stretching back to William the Conqueror's conquest of England. Whilst the Channel Islands became a dependency of the English Crown after the separation, the customary law of Jersey continued to be drawn from Norman customary law,[3] which itself developed and evolved over time.[4] In terms of sources of law, purists would therefore argue that the starting point for any analysis of Jersey law is the position of Norman customary law as at 1204. As we shall see, however, if that was the case, then there would be little, if any, content to the Jersey law of contract.

Norman law had formed into a cohesive oral body by the late eleventh century[5] and was eventually expressed in written form very early in the thirteenth century in the form of a text entitled *Le Très Ancien Coutumier de Normandie*, an unofficial compilation of Norman customary law.[6] Local Jersey practitioners were naturally drawn to this account of customary law.[7]

In understanding Jersey law at the time, reference must thus be made to the various sources of Norman customary law during that period. Over and above the aforementioned *Le Très Ancien Coutumier de Normandie*, these sources include *Le Grand Coutumier de Normandie*,[8] the work of an unknown practitioner and thought to date between 1235 and 1258,[9] and used extensively in the Island, as well as the various *Styles de Procéder*[10] and a commentary on the Grand Coutumier known as the *Glose*. This collection of customary law texts, referred to as the *Ancienne Coutume*, was followed in the sixteenth century by an official revised version of Norman customary law produced on royal authority.[11] Appearing in 1583, the *Coutume Reformée* drew together the local customs of Normandy (including the *Ancienne Coutume* and later developments), but also cast its net

[3] Although it might have been thought that the English common law would naturally be extended to the Channel Islands, Norman customary law continued to apply, which documentary evidence suggests was at the acquiescence of Kings John and Henry III: see R Falle and J Kelleher, 'The Customary Law in Relation to the Foreshore' (2010) 14 *Jersey and Guernsey Law Review* 124, 125–28.

[4] Nicolle (n 2) para 11.7.

[5] On this, see further Kelleher (n 2).

[6] See further Nicolle (n 2) s 4.

[7] As was noted in the leading modern Jersey case of *The State of Qatar* (1999) 3 *Jersey Law Review* 118, 123.

[8] Also known in Jersey as the Summa of Mansel (variously spelt as Mancael or Maukael).

[9] Kelleher (n 2).

[10] Including the fourteenth-century *Ancien Style*, the *Nouveau Style* and the *Le Style de 1515* which are contained in Le Rouillé's 1539 edition of the *Grand Coutumier*, and were subsequently cited by the two influential seventeeth-century commentators Le Geyt and Poingdestre.

[11] Stemming back to a 1453 Order of Charles VII of France.

wider to draw from the *ius commune*.[12] Whilst there are legitimate concerns about how authoritative the *Coutume Reformée* is as a source of law within the Island's legal system,[13] due to the fact that by this time the paths of Normandy and Jersey had diverged for a period of almost four centuries, it should not be overlooked that much of the content of the *Coutume* had been assimilated into Jersey customary law.[14]

The *Ancienne Coutume* was also supplemented by various commentaries, relied upon by the jurists in the Channel Islands, which is another striking and distinctive feature of the Channel Island's approach to sources. Prominent amongst these local commentaries is Terrien's elegant sixteenth-century commentary on Norman customary law.[15] As Dawes notes: 'Terrien was not just the last and principal authority for unreformed Norman customary law; but he also paved the way for its reform.'[16] The relevant authorities reaffirm the specific position of Terrien in elucidating the unreformed Norman customary law.[17] Dawes thus concludes that:

> Terrien continues to be an important authority for Jersey law in those areas where Jersey law continues to look to customary law, whilst taking account also of later commentators of the reformed custom, Pothier, the *Code civil* itself and, again when appropriate, modern French law.[18]

Other commentators have been influential in Jersey, including the 'distinguished duo of Lieutenant Bailiffs'[19] Poingdestre and Le Geyt in the late seventeenth and early eighteenth centuries, as well as the French jurist Robert-Joseph Pothier and, more recently, Charles Le Gros.[20] The first two of these commentators provide an understanding of how Jersey law had developed in the early seventeenth century. Jean Poingdestre was born in 1609, and was appointed Lieutenant Bailiff in 1669, a post he held until 1676 and continued thereafter as a Jurat (lay judge of the Royal Court). He was the author of a number of texts on Jersey law, including *Les Commentaires sur l'Ancienne Coutume de Normandie*[21] and *Les Lois et Coutumes*

[12] As did Scotland: see Lord Hope, 'The Role of the Judge in Developing Contract Law' (2011) 15 *Jersey and Guernsey Law Review* 6, 7.

[13] R Southwell, 'The Sources of Jersey Law' (1997) 1 *Jersey Law Review* 221.

[14] See eg *Report of the Civil Law Commissioners* (1861) para iii.

[15] Terrien (n 2).

[16] Dawes' introduction to Terrien (n 2) 33.

[17] In *La Cloche v La Cloche* [1870] UKPC 14, a case concerning the construction of a will of a testator domiciled in Jersey at the time of death, and thus subject to the law of Jersey, the Privy Council commented that: 'The commentary of Terrien, therefore, may be reasonably regarded as the best evidence of the old custom of Normandy, and also of the Channel Islands before the separation of Normandy from the English Crown.'

[18] See Dawes's introduction to Terrien (n 2) 53.

[19] Ibid, 111.

[20] C Le Gros, *Traité du Droit Coutumier de L'Ile de Jersey* [1943] (St Helier, Jersey and Guernsey Law Review, 2007).

[21] Published in 1907 by the Jersey Law Society, and available at: www.jerseylaw.je/Publications/Library/JerseyLawTexts/poin01/default.aspx (last accessed 29 January 2016).

de l'Ile de Jersey.[22] Poingdestre's work has been cited in a number of Jersey cases, such as *Gallichan v Gallichan*[23] (on cause), *West v Lazard Brothers*[24] (on *dol*) and *Steelux Holdings Ltd v Edmonstone*[25] (on *dol par reticence*). Philippe Le Geyt was born in 1635. He was successively a Greffier (Officer of the Royal Court) and then Jurat before being appointed Lieutenant Bailiff in 1676 as successor to Poingdestre. His principal works were *Constitution, Lois et Usages*[26] and *Privilèges, Loix et Coustumes*.[27] These works were only published well after his death, and have been cited in a number of cases such as *Deacon v Bower*[28] (on nullity) and *Gallichan v Gallichan*[29] (on cause), and have been attributed with a certain authority on Jersey law matters.[30]

Charles Le Gros was born in Jersey in 1867. He was educated at the University of Caen, and returned to the island to practise law first as a Jersey solicitor, and then as a Jersey advocate, later serving as the Bâtonnier, the chair of the Jersey Bar. In 1929, Le Gros entered public service in Jersey and was appointed as Vicomte, and then Lieutenant Bailiff in Jersey. In parallel to his professional life, Le Gros was a scholar of the laws and customs of the island, and this gave rise to the *Traité du Droit Coutumier de l'Ile de Jersey*, published in 1943.[31]

In the rich constellation of sources of Jersey law, greater space must be given over to the eighteenth-century French jurist Robert-Joseph Pothier, as we shall see below.

III. Sources of Law in Jersey: The Particular Position of Jersey Contract Law

A. Introduction

If the definitive position for the law of contract in the Channel Islands is to be taken as 'the separation' in 1204, then any analysis of the Jersey law of contract

[22] Published in 1928 by the Jersey Law Society, and available at: www.jerseylaw.je/Publications/Library/JerseyLawTexts/poin02/default.aspx (last accessed 29 January 2016)

[23] *Gallichan v Gallichan* (1954) JJ 57, 62–63.

[24] *West v Lazard Brothers* 1993 JLR 165, 302.

[25] *Steelux Holdings Ltd v Edmonstone* 2005 JLR 152, at 157.

[26] P Le Geyt, *La Constitution, les Lois, et les Usages de Cette Ile*, tomes 1–4 (reprinted 1846, St Helier), available at: www.jerseylaw.je/Publications/Library/JerseyLawTexts/legeyt01/default.aspx (last accessed 29 January 2016).

[27] P Le Geyt, *Privilèges, Loix et Coustumes de l'Ile de Jersey* (reprinted 1953, St Helier), available at: www.jerseylaw.je/Publications/Library/JerseyLawTexts/legeyt02/default.aspx (last accessed 29 January 2016).

[28] *Deacon v Bower* (1978) JJ 39, 51.

[29] *Gallichan v Gallichan* (1954) JJ 57, 62–63.

[30] Described by the Privy Council 'as high an authority as can be produced on the local law of Jersey' (*Godfray v Godfray (Jersey)* [1866] UKPC 7, 14).

[31] Le Gros (n 20).

would be very thin indeed. At first blush, Norman customary law would not appear to be of great assistance in terms of the rules of Jersey contract law. Indeed, one authoritative commentary of French customary law undertaken by Charles Giraud notes that: '[T]he customs did not have … a general theory of obligations nor a specific theory of different contracts, with the exception of certain particular rules relating to the sale of … certain merchandise.'[32] Indeed, the *Très Ancien Coutumier* contains very little on contract law.[33] Kelleher thus observes in a Channel Islands' context, '[i]f we are to be restricted to pre-1204 customary law we are left without a theory of contract law, without even a concept of consensual obligations'.[34]

That initial position should, however, be nuanced. A French writer, Jean Yver, has, in an interesting exercise of legal archaeology, examined the position of contracts in eleventh- to thirteenth-century Normandy.[35] In a detailed study, working from primary sources, including Charters, case law compilations and customary documents, as well as the *Etablissements de Rouen*,[36] Yver traces the evolution of contractual mechanisms during the period. Whilst there was clearly no general theory of contracts, Yver's work shows that there was nevertheless a series of specific, ad hoc instruments, corresponding to the conception of a contract. These covered both contracts subject to specific formalities, such as the instrument of *fides*, as well as a series of embryonic consensual contracts, often linked to credit and security. Yver's study shows the importance of the canon law influences. However, it is also clear that Roman law had an important place as well. Indeed, Giraud's study concluded that, in the absence of a general theory of contract, 'everything was—in part at least—governed by Roman law'.[37] The resort to Roman law is also confirmed by Poingdestre.[38]

The aforementioned commentaries thus illustrate the importance of Roman law within the traditional sources relied upon to shape the Jersey law of contract. The Privy Council even asserted in the case of *Benest v Pipon*[39] that: 'The Roman law relative to prescription has been adopted into the law of Normandy, which prevails in Jersey.'[40] In the case of *Mendonca v Le Boutillier*[41] the Royal Court held that Jersey 'takes its authority in the matter of contract from Roman law'.[42]

[32] C Giraud, *Précis de l'Ancien Droit Coutumier Français* (Durand, Paris, 1852) 61.

[33] On this issue, see the detailed analysis of J Yver, *Les Contrats dans le très ancien droit Normand* (Paris, Domfront, 1926) 17. Yver notes, however, that more information on contracts is to be found in the *Grand Coutumier de Normandie*, albeit the text is of not great clarity on this point, and is described by Yver as 'the worst part of all the tome' (ibid, 17).

[34] Kelleher (n 2).

[35] Yver (n 33).

[36] Dating from around 1180, and which Yver describes as 'governing matters of debts' and which represented the 'only official regulation of the law of obligations … in Normandy' (ibid, 14).

[37] Giraud (n 32) 61.

[38] As noted by Nicolle (n 2) para 13.4.

[39] *Benest v Pipon* (1829) 1 Knapp 60, cited in Nicolle (n 2) para 13.12.

[40] *Benest v Pipon* (1829) 1 Knapp 60, 69.

[41] *Mendonca v Le Boutillier* 1997 JLR 142, 150. See also *Maynard v Public Services Committee* [1995] JLR 65, 78.

[42] *Mendonca v Le Boutillier* 1997 JLR 142, 145. References were made to the importance of Roman law in *Attorney General v Foster* 1989 JLR 70, 83.

The Roman law influences are also complemented by the relevance of the *ius commune* within the Channel Islands. Indeed, the *ius commune* was particularly influential within Jersey, supplementing the *Coutume Reformée*, as well as influencing the purely local customary law.[43] As was noted in the decision of the Privy Council in *Snell v Beadle*, '[l]ike other customary law systems, Jersey law had recourse to the *ius commune* for areas not covered by municipal customary law'.[44]

However, in the spectrum of various sources of law in Jersey, the most visible sign of civil law influences is the reliance placed upon civil law writers. Domat's writings[45] have thus been referred to on many occasions by the courts.[46] The example par excellence of reliance upon French civil law commentators is, however, that of Pothier. The influence of Pothier has been considerable, and his writings have—in some ways quite surprisingly—developed to become one of the primary sources of the Jersey law of contract.

B. The Overaching Influence of Pothier

A word will first be said about Pothier, and his work, before examining his impact in Jersey.[47] The eighteenth-century French jurist Robert-Joseph Pothier[48] was a writer on both customary and civil law who, as is well known, greatly influenced French law. Pothier's primary activity was as a judge. At the age of 21, Pothier was appointed *Conseiller du roi, juge magistrat au bailliage* and *siège présidial d'Orléans*. He carried out his judicial role for over fifty years and was particularly engaged in striving to make the justice system more efficient, swifter and more humane. Following the death of Professor Prévost de la Jannès, Pothier was designated in 1750 by Louis XV, to occupy the Professorship of French Law *(Chaire de droit français)*, at the Orleans law faculty. The King also allowed him to carry on his judicial functions. Pothier was acclaimed for his teaching, and he is said to have developed innovative teaching methods based upon concrete examples drawn from everyday life in eighteenth-century Orléans.[49]

Pothier never adhered to the Enlightenment philosophy,[50] and he was, not during the Revolution, quoted in the Revolutionary Assemblies' debates, nor is he mentioned within the preliminary reports to the first two projects of the Code civil written respectively in 1793 and 1794. It is likely that he was perceived as

[43] Nicolle (n 2) para 13.8.
[44] *Snell v Beadle* [2001] UKPC 5, [20].
[45] Such as *Traité des Lois Civiles* of 1689.
[46] See eg *Benest v Pipon* (1829) 1 Knapp 60, 69 (Privy Council).
[47] See the elegant analysis in C MacMillan, *Mistakes in Contract Law* (Oxford, Hart Publishing, 2010) ch 5.
[48] 9 January 1699–2 March 1792.
[49] J-L Sourioux, 'Aperçu de la vie de Robert-Joseph Pothier' in J Monéger, J-L Sourioux et A Terrasson de Fougères (eds), *Robert-Joseph Pothier, d'hier à aujourd'hui* (Paris, Economica, 2001) 19.
[50] J-L Halperin, 'La lecture de Pothier par la doctrine du XIXème siècle', in ibid, 66.

being emblematic of the *Ancien droit*.[51] Nevertheless, the name of Pothier was quoted during the presentation of the third Civil Code project in 1796 and it is likely that this growing influence was explained by the gradual evolution of the codification movement towards a compromise between the *Ancien droit* and the revolutionary approach.

The true impact of Pothier commenced during the Restoration period.[52] Pothier is perceived as being one of the most important sources for the drafting of the Code civil for at least two reasons. First, much of the content of the Code civil was inspired by his publications. Second, and contrary to the oft-perceived view of the Code civil as a clean break from the past, there was a real desire to attempt to bridge the *Ancien droit* and the Code civil, and thus his works were a natural reference point.

(i) Pothier's Influence on the Common Law

Pothier's role in the civil law is well documented. Less recognition has, however, been given to Pothier's influence beyond the borders of France, and yet his writing has had a profound impact on English as well as American law.[53] Pothier's first publications were recognised and appreciated from an early date in England and United States,[54] and particularly from the time when his works were translated into English.[55] The most striking example of his impact on US law is the Supreme Court decision of *Laidlaw v Organ*.[56] Even though Chief Justice John Marshall did not ultimately adopt the principles laid down by Pothier concerning the existence of precontractual disclosure obligations, and preferred the notion of caveat emptor, Pothier's approach was extensively cited. Pothier has been cited more than a hundred times in the Case Reports of the US Supreme Court, and he is officially recognised in the US House of Representatives as one of those figures, amongst whom are Justinian and Blackstone, who established 'the principles that underlie American law'.[57]

The impact of Pothier on English law is also considerable. Ibbetson thus notes that:

> [I]n the last decade of the eighteenth century there started to appear a steady stream of treatises on the law of contract. … The model from which judges and writers derived

[51] The law under the *Ancien Régime* (ie before the Revolution—see Tocqueville's 1856 essay entitled *L'Ancien Régime et la Révolution* was made up of customary law in the north (and central France), and Roman-inspired written norms in the south.

[52] Marking the return of the French monarchy in 1814.

[53] See MacMillan (n 47) 104–06.

[54] Sir William Jones, *An Essay on the Law of Bailments* (1781, US edition) 29–30.

[55] His renown came in the common law world with a translation of his *Traité des Obligations* in two volumes undertaken by William David Evans, published in London in 1806 and in the US in 1826, 1839 and 1853.

[56] *Laidlaw v Organ* 15 US 178; 2 Wheat 111 (1817).

[57] See http//:aoc.gov/capitol-hill/relief-portrait-plaques-lawgivers/robert-joseph-pothier (last accessed 4 January 2015).

> their inspiration was the *Traité des obligations* of the French jurist Robert-Joseph Pothier.[58]

Zimmerman observes similarly that: 'Pothier's treatises, accessible to English lawyers in translated versions, became one of the most influential sources [of the modern law of contract].'[59] Baker attributes to Pothier 'the seeds of the English law of offer and acceptance, mistake, frustration, and damages'.[60] The draftsman of the Sale of Goods Act, Sir Mackenzie Chalmers, was profoundly influenced by Pothier's *Traité du Contrat de Vente*.[61] Judges also cited Pothier as an authority. Best J stated that Pothier's *Treatise on the Law of Obligations* was, as an authority, 'the highest that can be had, next to a decision of a court of justice in this country'.[62]

(ii) Pothier and the Jersey Law of Contract

In Jersey, the works of Pothier have been particularly influential. His civil law treatise *Traité des Obligations* is much cited in the case law on the law of contract, and his customary law works such as the *Coutume d'Orléans* are also influential. Indeed, such is the prestige of this writer that he has metamorphosed into a quasi-authority of Jersey law. The reasoning behind this unusual process of evolution—from foreign treatise-writer to source of law in a mid-Channel jurisdiction—is explained by a number of factors. Pothier's role both in explaining and tracing the customary law of Orléans, and his pioneering work in restating the law of obligations, through his *Traité des Obligations*, provides dual reasons of particular relevance within the Jersey legal system. As Nicolle has explained:

> Pothier thus serves as authority in two fields. Where in accordance with the usual principles of customary law interpretation, the local (Norman/Jersey) customary law requires assistance from other customary law systems … recourse may be had to his writings on the Coutume d'Orléans. … In those areas of law, eg contract, where Jersey, like other customary law systems, had little or nothing of its own and drew upon civil law … recourse may be had to his non-customary, civilian influenced works.'[63]

In the sphere of contract law, the Jersey courts have often described Pothier as the 'surer'[64] or 'surest guide'[65] to the Jersey law of contract. His works have been influential in structuring many elements of contract law. Indeed, in *Golder*,[66]

[58] D Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, OUP, 1999) 220.
[59] R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford, OUP, 1996) 336–37.
[60] JH Baker, *An Introduction to English Legal History* (4th edn, Oxford, OUP, 2002) 352–53.
[61] See eg Zimmermann (n 59) 336.
[62] *Cox v Troy* (1822) 5B & Ald 474, 4808.
[63] Nicolle (n 2) para 14.12.
[64] See eg *HM Viscount v Treanor* (1969) JJ 1243, 1245.
[65] *Selby v Romeril* [1996] JLR 210, 218.
[66] *Golder v Société des Magasins Concorde* (1967) JJ 721.

the Royal Court went as far as ruling that: '[T]he principles stated by Pothier we believe to be the principles of our law.'[67] Concrete examples of Pothier's influence on Jersey case law abound, including the definition of the basic aspects of a contract,[68] the *vice de consentement* of *dol*, the notion of the *objet* of a contract,[69] the latent defect warranty (*vices cachés*),[70] the rules concerning penalty clauses[71] amongst others. Indeed, Kelleher has calculated that Pothier has been cited in approximately half of the contract law cases before the Jersey Royal Court since 1950![72]

It might seem unusual for a legal system to rely upon a doctrinal writer in such an extensive way as a source of law. Pothier is moreover a commentator from a different era, a different legal system and to some extent a different legal tradition. Indeed, even the language of Pothier's texts are foreign to a great many Jerseymen and women. However, there is, as we have seen, an intellectual and legal argument underpinning the role of Pothier in Jersey. We have already seen above the twin pillars for this influence.[73] The clarity of Pothier's civil law works, as well as their format akin to restatements, and the accessible English translations, helps explain the enduring relevance.[74] The influence of Pothier on the common law world is also of relevance, but the key factor is the way in which Pothier represents a direct and accessible route into a structured and coherent presentation of the civil law of obligations which corresponds well with the pre-existing structure and approach of Jersey law.

C. Assessing the Relevance of Modern French Law

Much debate has occurred about the relevance of modern French law within the formal hierarchy of sources of Jersey law. From one perspective, the adoption of the French Code civil in 1804 can be seen as an obstacle to the reception of modern French law in the Jersey system, traditionally founded, as we have seen, upon the pre-existing customary law. According to such an approach, the rupture with the *Ancien Droit* as symbolised by the adoption of the Napoleonic Code meant that, from a Jersey perspective, the evolutionary process from its Norman customary origins was broken. It is true that the unification of the French systems

[67] Ibid, 730. More recently, in the case of *Flynn v Reid* [2012] JRC 100, the Royal Court acknowledged the relevance of Pothier's statements of general application (at [103]).

[68] *Golder v Société des Magasins Concorde* (1967) JJ 721; *Selby v Romeril* 1996 JLR 210.

[69] *Groom v Stock* (1965) JJ 429.

[70] *Kwanza Hotel Limited v Sogeo Company Limited* (1983) JJ 105.

[71] *Viscount v Treanor* (1969) JJ 1243; *Doorstop Ltd v Gillman and Lepervier Holdings Ltd* [2012] JRC 199.

[72] Kelleher (n 2).

[73] Namely the proximity of the customary law of Orléans with that of Normandy, and Pothier's pioneering work in restating the law of obligations.

[74] Moreover, Jersey is not the only legal system that has adopted commentaries as formal sources of law: see, for instance, the institutional writers in Scotland.

of *pays de droit écrit* in the south and *pays de droit coutumier* in the north during the post-revolutionary codifications was an important turning point in European legal history.[75] By bringing an end to the pre-existing customary law systems, including that of Normandy, a link to the Channel Islands was thus undoubtedly brought to an end. From that perspective, it could thus be argued that modern French law is merely a reference point for the law of Jersey, to be used, along with other systems, out of merely comparative law interest.

The foregoing analysis is, however, an overly simplistic one. A contrary argument can be made that as the Code civil drew upon the *Ancien Droit*, and that the writing of Pothier was of great influence on the drafting of the Code, the reference to the Code and to modern French law may therefore be a legitimate source of Jersey law. Moreover, as Dawes argues (in respect of the law of Guernsey), the '*Code civil* maintains the *esprit* of customary law to a much greater extent than English law and thereby derives its right to be consulted and cited by Guernsey lawyers'.[76]

Indeed, there is an established tradition in Jersey of looking to modern French law to supplement the understanding of concepts which are rooted in the civil law, but on which there is little Jersey authority. A number of examples may be given. In formulating the doctrine of latent defect warranty,[77] known also as the doctrine of *vices cachés* (itself deriving from the Roman law remedy of *actio redhibitoria*),[78] the Jersey courts explicitly drew upon modern French law in formulating the law. Thus, in the case of *Kwanza Hotel Limited v Sogeo Company Limited*, the Court of Appeal referred explicitly to the French Civil Code, as well as commentaries.[79] In doing so, the court noted that there was a practice in Jersey of 'referring to the law of France in commercial matters'.[80] In the earlier case of *Wood v Wholesale Electrics Ltd*,[81] on the same issue of defective goods, the Royal Court had similarly relied upon modern French authority to supplement Pothier's writings. In the case of *Benest v Pipon*,[82] the Privy Council noted, on an issue relating to prescription, that '[t]he Code Napoleon makes use of nearly the same expressions on this subject'.[83]

In a different area of contract law, in the case of *Fort Regent v Regency Suite*,[84] which concerned the issue of waiver/*renonciation*, the Royal Court looked to

[75] For a description of the period leading up to the codification process, see A von Mehren and J Gordley, *The Civil Law System: An Introduction to the Comparative Study of Law* (2nd edn, Little, Brown and Company, 1977) 48.

[76] G Dawes, 'From Custom to Code—The Usefulness of the *Code Civil* in Contemporary Guernsey Jurisprudence' (2004) 8 *Jersey Law Review* 255.

[77] Which entails that, on the sale of property or goods, there is an implied warranty that there are no hidden defects in the item sold.

[78] See Zimmermann (n 59) 317.

[79] *Kwanza Hotel Limited v Sogeo Company Limited* (1983) JJ 105, 116–18.

[80] Ibid, 113.

[81] *Wood v Wholesale Electrics Ltd* (1976) JJ 415.

[82] *Benest v Pipon* (1829) 1 Knapp 60.

[83] Ibid, 69.

[84] *Fort Regent v Regency Suite* 1990 JLR 228.

modern French authorities[85] (as well as to Nicholas's *French Law of Contract*),[86] and indeed opined that: 'We are quite satisfied that we can draw sufficient from the French authorities which have been stated time and time again in this court to be preferred.'[87] In the case of *Warner v Hendrick*,[88] on the doctrine of *réception* in contract law, the court looked to modern French law sources, in determining the contours of this doctrine.[89] Other areas of contract law have also been affected. In the case of *In the Estate of Father Amy*, Deputy Bailiff Birt recognised that the Jersey courts had drawn upon modern French law in some areas such as cause or in respect of penalties.[90] In the recent case of *O'Brien v Marett*, the French Civil Code was referred to as a reference point for understanding the notion of *erreur*.[91]

A case seen as particularly important for the relevance of modern French law is that of *Selby v Romeril*,[92] in which the Royal Court held that:

> It is true that Pothier has often been treated by this court as the surest guide to the Jersey law of contract. It is also, however, true that Pothier was writing two centuries ago and that our law cannot be regarded as set in the aspic of the 18th century. Pothier was one of those authors upon whom the draftsman of the French Code Civil relied and it is therefore helpful to look at the relevant article of that Code. … In our Judgment it may now be asserted that by the law of Jersey, there are four requirements for the creation of a valid contract, namely, consent, capacity, objet and cause.[93]

Clearly, this statement was an important one. Kelleher has summarised the impact as follows:

> The effect of this statement was to take the three requirements of a valid contract established by Pothier which had been followed in Jersey (see *Osment v Constable of St Helier*) and to recast them in the mould of Article 1108 of the Code Civil. The full implications of this extension are yet to be seen, but it cannot be other than to invite from counsel submissions based on the interpretation of this and other articles in the Code Civil made by modern French courts and writers.[94]

However, in other cases, the Jersey courts have counselled caution. The Court of Appeal thus held in *Public Services Committee v Maynard*:

> However, care has to be taken in referring to French legal texts in connection with the law of Jersey. After the Channel Islands were severed from the rest of the Norman

[85] Ibid, 232.
[86] Ibid, 233.
[87] Ibid, 233.
[88] *Warner v Hendrick* 1985–86 JLR 366.
[89] Ibid, 370–72.
[90] *In the Estate of Father Amy* 2000 JLR 80, 93.
[91] *O'Brien v Marett* [2008] JCA 178, [55]–[57].
[92] *Selby v Romeril* 1996 JLR 210.
[93] Ibid, 218.
[94] Kelleher (n 2). The judge in that case has recounted how, on the handing down of that judgment, 'some shock waves were felt in the legal profession' (P Bailhache, 'Jersey: Avoiding the Fate of the Dodo' in S Farran, E Orucu and S Patrick (eds), *A Study of Mixed Legal Systems: Endangered, Entrenched or Blended* (Farnham, Ashgate, 2014) 100).

> territories in what is now France, Norman customary law continued to develop in Jersey, Guernsey and Normandy in parallel, but not with identical developments. In Normandy, development was naturally affected by doctrines prevailing in other parts of France. The Napoleonic Codes embodied much of the pre-existing laws of the French provinces, but with some material changes. After the Napoleonic Codes came into existence, French law developed independently of developments in Jersey and Guernsey, under the direction or influence of French statutes, French jurisprudential writers and the case law of the French courts. Accordingly, no great weight can be placed on French law as it exists today in ascertaining what is Jersey law, except perhaps on a comparative basis as showing how the same problems have been treated in another legal system.[95]

In the later case of *Re Esteem Settlement*,[96] the Royal Court cited this passage with approval, and went on to say that:

> We would add respectfully that modern French law may also be of assistance if it is clear that the principles being considered originated in the old customary law and have not been subject to great change. More detailed exposition of the old principles than was undertaken by the writers on customary law is sometimes available. … the Court must always be careful, when considering writers on modern French law, to ensure that it is not inadvertently incorporating some aspect of French law which is not the same as that from which the law of Jersey is derived.[97]

However, as Nicolle has pointed out, the concluding phrase of the passage in *Maynard*[98] may be misleading:

> The history of French influence on Jersey law over the centuries suggests that the conclusion embodied in the final sentence of the above extract is an over-simplification. The continuous grafting of post-separation developments in Norman law onto the Jersey legal system, where they took root and flourished, was a recognised feature of Jersey's legal development from an early date, see Le Geyt's comments … on the assimilation of parts of the Coutume Reformée, while the assimilation of provisions from customary law systems of other parts of the *pays de droit coutumier*, from French writers on the civil law, and from post-revolutionary French law are all equally well attested and too well established to be reversed now save by legislation.[99]

Richard Southwell QC, who gave judgment of the Court of Appeal in *Maynard*,[100] has responded extra-judicially to the points made by Stéphanie Nicolle QC. In an article in the *Jersey Law Review*,[101] supplementing a previous article,[102] Southwell argues that:

> Stéphanie Nicolle is right to emphasise that throughout the period since 1204, despite the separation of mainland Normandy and these Islands, there has been a continuing

[95] *Public Services Committee v Maynard* 1996 JLR 343, 350.
[96] *Re Esteem Settlement* unreported, 17 January 2002 (reissued 11 March 2002).
[97] Ibid, para 253.
[98] *Public Services Committee v Maynard* 1996 JLR 343, 350.
[99] Nicolle (n 2) para 14.2.
[100] *Public Services Committee v Maynard* 1996 JLR 343.
[101] R Southwell, 'A Note on Sources of Jersey Law' (1999) 3 *Jersey Law Review* 213.
[102] R Southwell, 'The Sources of Jersey Law' (1997) 1 *Jersey Law Review* 221.

> influx into Jersey law of doctrines developed on the mainland of France. The law of Jersey would be far poorer if this influx had not continued after the Napoleonic Codes had replaced the customary laws of France, and down to recent times. … However, the Court of Appeal was perhaps right to warn in *Maynard* against arbitrary dipping into French law by the courts of Jersey to use whatever titbits they might think suitable. In each case it is for the courts to ascertain what is the law of Jersey, and to rely on the French Codes and jurisprudence in their modern form only to the extent that they are shown to be continuous with the customary law before codification as stated by for example, Domat or Pothier, or by way of comparative analysis as in *Snell v Beadle*.

The Privy Council seemed to lend some support to this view in the case of *Snell v Beadle*[103] (concerning the civil law doctrine of lesion in Jersey)[104] and expressed a preference for resorting to Roman law, declaring—in rather summary fashion—that 'French law as it exists today in the French Codes or the current jurisprudence is unlikely to be of direct assistance'.[105]

In her writings, Nicolle has given a number of reasons why the Code civil and decisions made under it are of relevance.[106] She has pointed out that the Code civil in many ways perpetuated the pre-existing law and thus both the relevant provisions and related decisions provide useful light on the interpretation of the pre-existing law, applicable in Jersey.[107] Moreover, she argues that up to the end of the nineteenth century, the customary law of Jersey assimilated features of contemporary French law.[108] Finally, she points out that the Code civil has on occasion been the basis for certain Jersey legislation.[109]

Other commentators have supported such an approach. Hodge has written eloquently about, and in favour of, 'the value of the civilian strand',[110] arguing that the civil or Roman law heritage is important, and that this is a fundamental distinction from English law, which 'has developed from different origins and has relied on statute to discard inconvenient relics from the past'.[111] Dawes points out that it is wrong to view the Code civil as representing some sort of rupture with what went before, and argues that:

> If there is no obvious customary law solution to a customary law problem, then it is entirely appropriate to see what modern French law provides. … It is striking how familiar the provisions of the Code Civil can appear to a Channel Island lawyer familiar with customary law.[112]

[103] *Snell v Beadle* [2001] UKPC 5.
[104] See generally Chapter 5 below.
[105] At para 21, with reference to Southwell (n 101).
[106] See generally Nicolle (n 2)
[107] Ibid, para 14.17.1. See also *Selby v Romeril* 1996 JLR 210, 218.
[108] Ibid, para 14.17.3.
[109] Ibid, para 14.17.2. The references given by Nicolle do not, however, include statutes relating to contract law.
[110] P Hodge, 'The Value of the Civilian Strand' in P Bailhache (ed), *A Celebration of Autonomy: 1204–2004, 800 Years of Channel Islands' Law* (St Helier, Jersey Law Review, 2005).
[111] Ibid, 44.
[112] G Dawes, 'Citation from other Legal Systems: A Reply' (2004) 1 *Jersey Law Review* 69.

It should moreover be observed that the Jersey Law Commission in its *Final Report on the Jersey Law of Contract* underlined the importance of modern French law, subject to certain safeguards:

> French law has played, and still does play, a significant role in the development of Jersey contract law. Given the origins of Jersey law it is of no surprise that the Ancienne Coutumier, the Coutumé Reformée, French writers or the Code Civil are frequently used as authority.[113]

From many perspectives, it is not surprising that Jersey continues to draw upon civil law concepts. The very genetic structure of Jersey contract law is that of a civil law system, deriving from Norman customary law. This is not merely a historical feature, but it can be seen from the basic building blocks of the Jersey law of contract, which include concepts such *la convention fait la loi des parties*, the notion of *cause*, the notion of consent/*volonté*, and the corollary concept of *vices de consentement* (to mention but a few). Within this context, the resort to modern civil law influences is understandable. If the DNA of a system is of a civil law provenance, then it is likely that transplants from a similar culture will be appropriate. From that perspective, it is logical that the courts and commentators should look to modern French law, albeit simply as *persuasive* rather than binding authority, for guidance as to the development of the law of contract.

In parallel with the civil law, another other legal system which, in recent times, has had a marked influence on the Jersey law of contract is that of England and Wales.

D. The Impact of English Law of Contract

Traditionally, the impact of the common law in Jersey contract law was minimal[114] as the historic links to the Norman customary law, and the reliance on civil law writers, such as Pothier, posed a natural barrier to the transplantation of English law. A distinction could thus be drawn with other areas of Jersey law, such as criminal law or tort law, where the influence has traditionally been much greater.[115] More recently, however, a shift in approach to contract law occurred, with an increased influence of the English common law.

Nicolle detected signs of the influence of English law during the nineteenth century, as the Jersey courts started to regard it 'of relevance, if not as authority'.[116]

[113] At para 7.

[114] See on this, *Fort Regent v Regency Suite* 1990 JLR 228, 233; *Wood v Wholesale Electrics Ltd* (1976) JJ 415, 425.

[115] Although this can lead to uncertainty in borderline cases, most notably between tort and contract, eg the issue of precontractual liability which under French law sounds in delict—see Chapter 3 below, at 52–58.

[116] Nicolle (n 2) para 15.16.

Initially, resort to English law may not have been born from a conscious and deliberate shift in approach to the formal sources. As Nicolle explains:

> The 1960s and 1970s saw sporadic reliance upon English principles of contract law. It is at times difficult to escape the feeling that this owed as much to inability or disinclination of counsel to cite proper authority to the courts as to any considered conviction that English law was the appropriate authority to cite.[117]

Indeed, this is borne out by judicial statements. There are a number of cases in which Jersey judges have expressed disappointment at the fact that counsel has relied solely upon English law,[118] to the detriment of either French law,[119] or, more strikingly, to Jersey authority itself.[120]

In other cases, the courts have simply assumed that English law has 'much in common' with Jersey law,[121] and then went on to apply the relevant English authorities. Indeed, in the case of *Kwanza Hotels Ltd v Sogeo Co Ltd*,[122] the Royal Court went as far as to state that it has 'been the practice of the Court for many years to have regard also to the law of England in cases where no clear precedent was to be drawn from the law of Jersey'.[123] This approach may in part explain why the issue in question, the doctrine of *vices de consentement* (factors vitiating consent), has evolved into such a confused state, a suspicion perhaps confirmed by the assertion of the Royal Court in *Kwanza* that 'the principles enunciated by Domat and Pothier have much in common with the law of England relating to misrepresentation'!![124] Difficulties also arose in *Scarfe v Walton*,[125] another case where it was asserted that English law has 'much in common' with Jersey law,[126] as the excerpts from Domat's *Les Loix Civiles* cited by the Royal Court in that case related to the circumstances in which an *action redhibitoire* (*vices cachés*) may be brought, rather than the issue of *vice de consentement*.[127]

In a number of other cases, it is recorded by the courts that the parties agreed on the application of English law, but without explaining why. A recent Jersey

[117] Ibid, para 15.17.

[118] See *Incat Equatorial Guinee Ltd v Luba Freeport Ltd* 2010 JLR 28, para 24.

[119] In the case of *La Motte Garages Ltd v Morgan* 1989 JLR 312 the Court underlined that it was somewhat disappointing that the parties had relied on English law, rather than 'mine the rich lodes of our ancient French law'.

[120] In *Donnelly v Randalls Vautier Ltd* 1991 JLR 49 counsel's preference for citing English case law and thereby omitting Jersey case law was lamented: 'The court, although entitled to rely heavily upon English authorities, particularly in this kind of case, must always have regard first and foremost to Jersey law and it is disappointing to note that neither counsel has deemed it appropriate to cite Jersey authority' (57).

[121] See eg *Scarfe v Walton* (1964) JJ 387, 393; *Kwanza Hotels Ltd v Sogeo Co Ltd* (1981) JJ 59, 65.

[122] *Kwanza Hotels Ltd v Sogeo Co Ltd* (1981) JJ 59. The case was subject to appeal to the Court of Appeal: (1983) JJ 105.

[123] *Kwanza Hotels Ltd v Sogeo Co Ltd* (1981) JJ 59, 65.

[124] Ibid. See further discussion of this topic below.

[125] *Scarfe v Walton* (1964) JJ 387.

[126] Ibid, 393.

[127] See discussion at p 106 below.

decision has, however, addressed this issue openly. The case of *Toothill v HSBC Bank plc*[128] concerned proceedings brought by a bank against Mr and Mrs Toothill for the repayment of loans and an overdraft. Mrs Toothill resisted repayment on the basis that the bank was guilty of misrepresentation by conduct and *dol par réticence* (or misrepresentation by non-disclosure) by failing to inform her that the loans did not conform to its lending guidelines. She also claimed that she had entered two of the loans and the overdraft under the undue influence of her husband. On the issue of sources of law, counsel for the plaintiff[129] conceded during the hearing that as she was not aware of any Norman or French principles which might assist, she would have to rely upon the English law principles laid down in the well-known cases of *Barclays Bank PLC v O'Brien*[130] and *Royal Bank of Scotland plc v Etridge (No 2)*.[131] Counsel for both parties thus accepted that on this issue, the law of Jersey should be similar to that of England as outlined in these two cases.[132]

In the decision, the Court approved this position and went on to articulate pragmatic reasons why resort should be had to English law in such a case. The Court explained that this position was consistent with the underlying policy factors:

> There are strong policy grounds for thinking that the law in this jurisdiction should be the same as in England. The majority of banks who lend money on the security of immovable property in the Island are UK-owned. Their guidelines and procedures have been established in accordance with the clear judicial guidance offered in Etridge and their personnel will have been trained accordingly. Furthermore, the competing policy considerations referred to by Lord Nicholls in the passage quoted in para 24 above are equally applicable in Jersey and a solution which addresses both considerations needs to be found. In our judgment, the position established in Etridge achieves a proper balance between these competing considerations and we hold the law of Jersey to be of like effect.[133]

In practice, there are now areas of the Jersey law of contract where English authorities are regularly cited. As we shall see below, this clearly is the case in respect of the remedy of damages. English law has also exercised an important influence in another sphere of remedies, that of *résolution*.[134] On the other hand, however, in respect of the adjacent topic of the remedy of specific performance, the Jersey courts have not been prepared to adopt the principles of English law, holding on

[128] *Toothill v HSBC Bank plc* 2008 JLR 77.

[129] The terminology of 'plaintiff' continues to be used in Jersey and so will be adopted here throughout.

[130] *Barclays Bank PLC v O'Brien* [1994] 1 AC 180, [1993] 3 WLR 786, [1993] 4 All ER 417, [1994] 1 FLR 1.

[131] *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.

[132] *Toothill v HSBC Bank plc* 2008 JLR 77, 89.

[133] Ibid.

[134] The Royal Court in *Hamon v Webster* (unreported, 19 July 2002) held that, except in relation to leases where special rules apply, the Jersey courts prefer the English law approach (para 67).

the contrary that '[i]n our view, the word "equity" in Jersey corresponds mainly to the French *équité*'.[135] This has led the Jersey Law Commission to describe this area of the law as illustrative of the 'uncertainties that are inherent in seeking to ascertain the Jersey law of contract'.[136] This cherry-picking approach to the sources of the law of contract has caused complexity and has not advanced the cause of legal certainty.

E. Brief Conclusion on Sources

The sources of the Jersey law of contract remain a somewhat contested issue. As we have seen, the civil law was traditionally a source of influence. However, more recent Jersey cases have illustrated a strong gravitational pull towards English law. The enactment of the Supply of Goods and Services (Jersey) Law 2009 reinforces this tendency, given the fact that the 2009 Law is based upon English statutes.[137] The close ties with the UK provide cultural and economic reasons to draw upon the stock of ideas and concepts of the common law, as does the fact that the members of the Jersey legal profession (as well as a majority of Jersey Court of Appeal judges) are primarily educated at English universities and law schools.[138] The tendency to draw upon English law has, however, been questioned, sometimes by prominent sources. For instance, the Jersey Law Commission in its Consultation Paper on the Jersey law of contract observed that:

> [I]t is noteworthy that English law has in recent years influenced Jersey contract case law. It is questionable, however, from a strict jurisprudential view, whether there are any circumstances when English law should be followed.[139]

Indeed, in some recent cases, the Jersey judiciary has indicated a more sceptical attitude to the use of English law. In the case of *Incat Equatorial Guinee Ltd v Luba Freeport Ltd*, Deputy Bailiff William Bailhache (as he then was) responded robustly to an attempt by one party to rely upon English sources:

> The Defendant submitted that it was useful to look at *Chitty on Contracts*, a textbook on English Contract Law and the authorities referred to therein. There seems little doubt that if one were seeking to ascertain the English Law of Contract, Chitty would be a good place to start. It may indeed be a helpful textbook in assisting the Royal Court in construction cases, where the language of a particular contract which is under consideration in the Royal Court is similar to the language which has been under consideration in the English courts. Nonetheless, it is clearly a textbook which is to be approached with some

[135] *Trollope v Jackson* 1990 JLR 192, 198. See also *Ex parte Viscount Wimborne* (1983) JJ 17, 19–22.

[136] Jersey Law Commission, *Consultation Paper: The Jersey Law of Contract* (Consultation Paper No 5, February 2002) para 10. Available at: www.lawcomm.gov.je/Contract.htm (last accessed 4 January 2015).

[137] T Hanson and C Marr, 'An Introduction to the Supply of Goods and Services (Jersey) Law 2009' [2009] *Jersey and Guernsey Law Review* 347.

[138] See generally A Binnington, 'The Law of Contract—Which Way?' in Bailhache (n 110) 61.

[139] Jersey Law Commission (n 136) para 7.

> caution insofar as the law of Jersey is concerned, as the basic principles of our law do not have the same provenance.[140]

In another decision, *Sutton v Insurance Corporation of the Channel Islands Limited*, a similar point was made:

> Of course, we accept that the paucity of contract cases coming before the Royal Court means that there will be fewer precedents available to the Court than would be perhaps desirable; but it appears to us that the Court should be cautious to declare the Law of Jersey by abstracting principles from the Law of England which have been drawn fundamentally from a different approach to the law of contract.[141]

It is true that such legal transplants from English law, if taken in isolation, can present disadvantages. The original DNA of the law of Jersey is that of Norman customary law. Jersey contract law clearly has its origins in the civil law. This is not just a historical specificity, but also impacts on language, concepts, legal reasoning and structures of the Jersey law of contract, as we shall see throughout this book. Clearly there are issues relating to accessibility of materials,[142] which are particularly acute for Norman customary law, but which also apply to modern French-language materials, given that the familiarity with French language is decreasing, even within the Jersey legal profession. However, it is difficult to escape the conclusion that, given the background, Jersey contract law has a good deal in common with the civil law (as well as in many areas with the common law). Indeed, it is quite difficult to see how Jersey lawyers can properly look to the common law for guidance on topics such as the classification and categorisation of contracts, given the presence of distinctions between lucrative/onerous transactions,[143] the notion of potestative contractual conditions (*condition potestative*),[144] or more fundamentally when the doctrine of consideration is absent from Jersey law. Similar comments could also be made about the distinctively subjective civilian approach[145] which is premised upon the parties' own consent, a notion that was again underlined recently by the Court of Appeal as adopted by Jersey law.[146] This is very different to the common law approach, as we shall see, and on which there is a good deal of debate.

[140] *Incat Equatorial Guinee Ltd v Luba Freeport Ltd* 2010 JLR 28, para 24.

[141] *Sutton v Insurance Corporation of the Channel Islands Limited* [2011] JRC 027

[142] See generally P Hodge, 'The Value of the Civilian Strand' in Bailhache (n 110).

[143] See *Re Esteem Settlement*, unreported, 17 January 2002, in which the Royal Court explained that a lucrative transaction ('*aliénations faites pour cause lucrative*') consisted of an alienation to a volunteer, whereas an onerous transaction concerned 'an alienation made for value' ('*aliénations faites pour cause onéreuse*') ([298]).

[144] Namely contractual obligations which depend for their fulfilment purely on the will of one of the parties. See *Groom v Stock* (1965) JJ 429, 434.

[145] See pp 38–48 below.

[146] The Court of Appeal in *O'Brien v Marett* was unambiguous on this point: '[T]he Jersey law of contract determines consent by use of the subjective theory of contract' (*O'Brien v Marett* [2008] JCA 178, [55]). See, however, the recent decision of the Jersey Court of Appeal in *Home Farm Developments Ltd v Le Sueur* [2015] JCA 242, which has generated some uncertainty on this issue. See discussion below in Chapter 3, pp 45–46.

One aspect, however, which remains a majority view is that the Jersey law of contract currently lacks the necessary coherence and clarity as to sources which is a fundamental requisite of a modern legal system.[147] We will thus examine the reform options below.[148]

IV. The Mindset or *Mentalité* of a Channel Island Lawyer

We have seen from the perspective of sources of law that Jersey provides a fascinating example of the functioning of a hybrid legal system in a small jurisdiction, in which civil law and common law influences continue to affect the evolutionary process of the law. This unique combination of sources has had an impact on the substantive law of obligations in the Channel Islands, as we shall see. The impact has not been restricted to the substantive angle, however: there has also been a considerable impact on the mindset or *mentalité* of the Channel Island lawyer. In many ways, this impact has been as profound as the substantive dimension, and it will be argued in the following section that the traces of the hybrid approach can be seen in the following areas: the process of law-making and the evolution of case law; an open-textured approach to norms and sources of law; the methods and patterns of legal reasoning; and the role of the judge.

A. Evolution of the Law: The Doctrine of Precedent or *Jurisprudence Constante*?

As we have already seen, not only is Jersey a civilian system without a code, but it is as a corollary a legal system in which many areas of the law are a construct of case law. In this respect, the law of obligations is no exception, with legislation only occasionally supplementing the case law on this topic. Whilst that might seem to run contrary to traditional perceptions of civil law jurisdictions, it should be recognised that, in reality, the role of case law has been important in the civil law systems as exemplified by French law,[149] particularly in terms of the law of obligations.[150]

[147] Jersey Law Commission (n 136).

[148] See Chapter 8 below, pp 176–185.

[149] Laquièze thus refers to the 'rapid rise of judicial power' in contemporary France: A Laquièze, 'Etat de Droit and National Sovereignty in France' in P Costa and D Zolo (eds), *The Rule of Law: History; Theory and Criticism* (Berlin, Springer Verlag, 2007) 281.

[150] The entirety of French tort law, expounded by a handful of succinct articles in the Civil Code, is premised upon the detailed *jurisprudence*. Note however the recent Governmental proposals to reform tort law : http://www.textes.justice.gouv.fr/art_pix/avpjl-responsabilite-civile.pdf

This therefore begs the question as to the rules governing the *evolution* of case law in Jersey. The first point to make is that, unlike in civil law systems, there is indeed a formal doctrine of precedent in Jersey. The operation of this doctrine has, however, shown marked differences with that in the common law, and has thus contributed to a very dynamic approach to the development of case law. We will examine the specific rules, and then compare these with the civil law notion of *jurisprudence constante*.

The leading authority on the doctrine of precedent in Jersey is *The State of Qatar*.[151] In this case, the Jersey Royal Court rejected the English approach to *stare decisis*, considering that the rigours of the English rules of precedent did not apply in Jersey.[152] A series of reasons were given to explain the rejection of that conception of the doctrine. Accepting the attachment to civil law, it was emphasised that, as a corollary, Jersey as a *pays de droit coutumier* has in many ways 'more in common with France than with England'.[153] An interesting parallel was drawn by the judge in that case between the French ancient régime *parlements*,[154] and the Jersey Royal Court, notably the dual judicial and law-making functions, with the latter function abandoned in both jurisdictions, first in Jersey in 1771, and then as part of the revolutionary settlement in France.[155] Even though the well-known prohibition on *arrêts de règlements* in Article 5 of the French Civil Code[156] did not have an equivalent in Jersey, the judge noted the importance in both jurisdictions of the primary sources of law (namely customary law or legislation), as well as the phenomenon of *jurisprudence constante*/settled jurisprudence whereby 'a line of cases [decide] a point in a similar way'.[157] Other, more pragmatic reasons were also given. Unlike in England, there was not the requisite 'mass of case law' which was necessary for the proper functioning of the principle of precedent, and a perfected system of law reporting was only a relatively recent development; as a result 'there is no basis in this jurisdiction upon which a system of rigid precedent could be founded'.[158]

Despite the rejection of the English approach to precedent, and the greater proximity with the civil law notion of *jurisprudence constante*, the Court noted that, in common with other legal systems, Jersey 'acknowledge[s] the persuasive force of judicial precedent'.[159] The advent of reliable law reports in Jersey

[151] *The State of Qatar* 1999 JLR 118.

[152] Ibid, 122. See the discussion of the rules of precedent in Guernsey in G Dawes, *Laws of Guernsey* (Oxford, Hart Publishing, 2003) 13–16.

[153] Ibid, 125.

[154] See generally JWF Allison, *A Continental Distinction in the Common Law* (Oxford, OUP, 1996) 138–42.

[155] Ibid, 125.

[156] 'Judges are forbidden to decide cases submitted to them by way of general and regulatory provisions.'

[157] Ibid, 125.

[158] *The State of Qatar* 1999 JLR 118, 122, 124–25.

[159] Ibid, 123.

had assisted that process, as well as institutional developments, most notably the creation of the Jersey Court of Appeal in 1961. With that background in mind, the judge set out the rules as follows:

> [The Royal Court] is generally bound by the decisions of the Court of Appeal and of course, as it always has been by the decisions of the Judicial Committee of the Privy Council sitting on appeal from the courts of this jurisdiction. We qualify the proposition only because, in our judgment, it is open to the Royal Court, as it would be to a Scottish court, to decline to follow a decision which has been invalidated by subsequent legislation or some such compelling change of circumstance. … The court is not bound by the decisions of the Judicial Committee of the Privy Council sitting on appeal from some other jurisdiction.[160]

The approach to precedent is therefore different, and much more flexible, than the traditional English approach:[161] the Royal Court may depart from its previous decisions in case of 'compelling change of circumstance'.[162] The Jersey courts have considerably loosened the shackles of the traditional English approach to *stare decisis*. This is a feature of the law which has had an important impact on the general approach of Jersey lawyers.[163] Coupled with an open approach to sources, the less restrictive methodology as regards case law authority has created a dynamic and in many ways innovative approach to the development of the law, described in one case aptly as an 'organic'[164] evolution.

In this respect, contract law is no exception. There are myriad examples where the Jersey courts have developed contract law rules in a proactive manner. One striking example of this dynamic interpretation of the law was the advent and development of the doctrine of *vice cachés*/latent warranty defect in Jersey law—a civil notion par excellence as we shall see.[165] Other examples may be cited.[166]

This organic and dynamic development of the law has, however, entailed that case law stability, and to some extent legal certainty, has been sacrificed in favour of

[160] Ibid, 125.

[161] See though how continental *jurisprudence constante* reasoning is starting to filter through into English case law, particularly through the influence of the European Court of Human Rights. This can be detected in the judgment of Lord Slynn of Hadley in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 (HL) [26], as well as in more recent cases: see analysis in M Andenas, E Bjorge and D Fairgrieve, 'A Fair Price for Violations of Human Rights?' (2014) 130 *LQR* 47, 50. See also S Pattinson, 'The Human Rights Act and the doctrine of precedent' (2015) *Legal Studies* 142.

[162] *The State of Qatar* 1999 JLR 118, 125.

[163] Note also that until the 1950s, the Jersey courts adopted a style of judgment that was similar to the French approach. Known as *jugements motivés*, these were very concise decisions, commencing with a passage which usually began 'Considérant que par la loi et côutume de cette ile …' and then provided the procedural history and an overview of the facts, followed by a short summary of the reasons for the court decision. See further *Attorney General v Weston* (1979) JJ 141; *Fogarty v St Martin's Cottage Limited* [2015] JRC 068.

[164] *Grove v Baker* 2005 JLR 348, para 13.

[165] See pp 132–139 below.

[166] There are also other striking examples of interventionist approach of the courts in Jersey, such as the review of penalty clauses, or in an *action paulienne*. See pp 31–32 below.

innovation. There are indeed examples of some instability and lack of consistency in the contract law cases, as we shall see, and the examples of *dol par reticence*[167] or the remedy of *résolution*[168] spring to mind. In the future, one of the challenges for Jersey law will be to ensure that a more settled approach can be found, which reconciles the need for legal certainty in contract law, with the ability to adapt to new circumstances, or evolution in societal expectations of a modern contract law. We will examine this issue below.[169]

B. Methods of Legal Reasoning

The methods and patterns of legal reasoning mark an important difference between the common law and civil law systems. Whilst this may be seen in a myriad different ways,[170] it is fair to say that civil law systems have traditionally illustrated an attachment to principle-based reasoning, whereby solutions are given by means of deductive reasoning from abstract principles to factual circumstances.[171] In France, this is typified by the application of the pithy principles found in the Civil Code by the judges to the facts of cases. This attachment to conceptualism[172] thus strikes one as very different to the typical pragmatic common law approach, famously described by Lord Goff as 'principles gradually emerging from concrete cases',[173] rather than the alternative approach in continental formulations of reasoning from external and abstract formulations. To take Lord Goff's characterisation, this is an example of common lawyers reasoning upwards and outwards from the facts of the cases, rather than the civil lawyer reasoning downwards and inwards from abstract principles.[174]

Whilst it is difficult to specify with precision the exact modes of reasoning in an individual system, it is submitted that there are indications in Jersey of patterns of thinking which reflect the civil law approach. Many Jersey cases illustrate a mode of reasoning which is strikingly principle-based. In that sense, it strikes a contrast with the casuistic method which typifies common law thinking, attached as it is to jurisprudential-based reasoning and thought-patterns. Two examples will be given. The first indication of this phenomenon is to be found in the prominence

[167] See pp 94–97 below.
[168] See pp 163–166 below.
[169] See Chapter 7 below.
[170] On this see A Garapon and I Papadopoulos, *Juger en Amérique et en France* (Paris, Odile Jacob, 2003).
[171] See generally ibid.
[172] For an elegant analysis of French conceptualism and English pragmatism, see D Harris and D Tallon, 'Conclusions' in *Contract Law Today: Anglo-French Comparisons* (Oxford, Clarendon Press, 1989) 386–90.
[173] R Goff, 'The Future of the Common Law' (1997) 46 *ICLQ* 745, 753.
[174] Ibid.

of maxims in Jersey. Whilst legal maxims play a role in most legal systems,[175] the ubiquity of these abstract principles in Jersey is striking. This is very much the case in Jersey contract law, and the superstructure of the law of contract is made up of a series of such maxims. These are not just convenient summaries of a legal rule, but are instead viewed as a basic premise upon which the law of contract rests. Indeed, such is the strength and importance of these principles that courts have on occasion referred to them as 'sacred' principles.[176]

The prime place of maxims in Jersey law has thus had a tangible effect on legal reasoning. There is a detectable preference for reasoning from such principles as a basic starting point of analysis of a legal problem. Many examples of this can be found in the case law, such as the recent judgments in *Incat Equatorial Guinee Ltd v Luba Freeport Ltd*[177] (concerning the maxim of *la convention fait la loi des parties*) or *Flynn v Reid*[178] (concerning *volonté or* 'true consent') or the burden of proof in showing that a non-competition clause in an employment contract goes no wider than reasonably necessary.[179] Principle-based reasoning is particularly apparent in cases raising novel problems.[180]

The second example is related to the previous one. Over and above the importance of these maxims, other features of the Jersey law of contract are also marked by the presence of underpinning precepts, or 'conceptual systemisation',[181] which are again illustrative of principle-based reasoning. There are thus frequent references to abstract concepts, or as one judge has labelled it, '[the] philosophical theory which underpins our law of contract'.[182] This can be seen in the fundamental concept of consent or *volonté*. As we shall see,[183] this broad concept underpins the entire law of contract, determining the main elements of a contract: how a contract is formed, how it is undermined, and the effects of a contract amongst others. *Consentement* or *volonté* also links to the discussion about the subjective or objective approach to the law of contract.[184] This is an essential dichotomy in

[175] Such as the maxims of equity in common law legal systems: see eg M Levenstein, *Maxims of Equity: A Juridical Critique of the Ethics of Chancery Law* (New York, Algora, 2014).

[176] Le Gros, *Traité du Droit Coutumier de L'Ile de Jersey* (1943), in his chapter entitled 'De la Clameur Révocatoire ou Déception D'Outre-Moitié du Juste Prix' described *la convention fait la loi des parties* as follows: 'C'est un principe en quelque sorte sacré que la convention fait la loi des parties' (350). However, note the word of caution uttered by the judiciary as concerns the weight of maxims: *Wood v Establishment Committee* 1989 JLR 213, 236.

[177] *Incat Equatorial Guinee Ltd v Luba Freeport Ltd* 2010 JLR 287, [22].

[178] *Flynn v Reid* [2012] JRC 100, [21].

[179] *CPA Limited v Keogh* [2015] JRC 09, at [22].

[180] Such as the case of *Cooke v Mold* 2010 JLR 193 in which, in the absence of any Jersey authority on the rules applying to a precontractual private tender, the Royal Court reasoned from the first principles, notably the maxim of *la convention fait la loi des parties*.

[181] G Teubner, 'Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences' (1998) 61 *MLR* 11, 21.

[182] *Cronin and Luce v Gordon-Bennet* 2003 JLR N22, para 17.

[183] See pp 36–38 below.

[184] See pp 38–47 below.

determining the key characteristics of contract law, and shows an attachment to the abstract underpinning concepts of the law of contract in a way that would seem very unusual for a common lawyer. It is not of course the existence of principles that is surprising but rather the methodological approach of the Jersey courts in taking the principle or maxims as the *starting point* of the legal reasoning, which is then applied contextually to the specific issue in question. Recent cases have illustrated the way in which the consent of the parties—interpreted in a subjective manner—has had a crucial impact on the structure and content of specific contract rules.[185]

C. An Outward-looking Mentality

A recent trend in many jurisdictions globally has been the growing use of comparative law during the forensic process. Judges now resort to comparative law as part of the reasoning process in a way that would have been impossible even a generation ago. In some jurisdictions, this use of foreign sources has been controversial,[186] and has brought with it certain methodological and practical challenges.[187] The practice and approach of the Channel Islands legal systems provide an interesting lesson for the forensic use of comparative law within the context of an extremely open legal system.

From the perspective of sources, we have already seen above the way in which the Jersey law of contract has been formed by resort to hybrid sources, predominantly Norman customary law, supplemented in recent times by French and English law. Over and above such an approach, there has also been a broader resort to comparative law in contract law cases. Examples are legion, with references made *in extenso* to foreign sources as a matter of course in many cases. One example may be found in the case of *Attorney General v Foster*,[188] which although a case concerned with *criminal fraud* has been influential in contract cases concerning the *vice de consentment* of *dol*. In that case, in a sophisticated comparative analysis, reference was made to a series of legal systems which derived from the common sources of Roman law, including Scottish and South African law.[189]

Another unusual, albeit not unique, feature of the Jersey system is the approach to doctrinal writers. As we have already seen, reference to local commentators is commonplace. More surprising, however, is the extent to which the courts

[185] *O'Brien v Marett* [2008] JCA 178. See pp 46–47 below.

[186] See in particular J Resnik, 'Constructing the "Foreign": American Law's Relationship to Non-Domestic Sources' in M Andenas and D Fairgrieve (eds), *Courts and Comparative Law* (Oxford, OUP, 2015).

[187] See generally T Kadner, 'Is it Legitimate and Beneficial for Judges to Use Comparative Law?' (2013) 3 *ERPL* 687.

[188] *Attorney General v Foster* 1989 JLR 70. Upheld by the Court of Appeal: 1992 JLR 6.

[189] *Attorney General v Foster* 1989 JLR 70, 83.

have resorted to civil law writers such as Pothier or Domat. Whilst it might seem unusual that commentators from a different era and from a different legal system should be relied upon so heavily, we have examined the intellectual and legal foundations for the use of such sources in Jersey above.[190] Moreover, this approach accords well with the civil law roots of the system, reflecting the traditional receptiveness of civil law cultures to *la doctrine*.[191] It is also illustrative of the porous and open-textured approach to both norms and sources of law in Jersey, so that even secondary sources have contributed to shape the law in this hybrid legal system.

This outward-looking mindset, combined with the 'organic' development of the law noted above, has meant that Jersey customary law has developed over time by making use of ideas, concepts or principles regardless of their provenance in a remarkably open-minded way. This feature is perhaps a product of the fact that Jersey is a small jurisdiction, and also reflects the open economic and recent history of the island.[192] Distinctive training also perhaps plays a role—with Guernsey lawyers attending as part of their training an academic stage provided by the University of Caen so as to acquire the Certificat d'Etudes Juridiques Françaises et Normandes;[193] as well as the more recent creation of an Institute of Law in Jersey which provides training for aspiring Jersey advocates followed by a series of exams on Jersey law topics.[194]

D. The Appropriate Role of the Judge

Many of the issues of *mentalités* which we have broached so far have been general and transversal, but a final consideration is one which, to some extent, is specific to contract law. This issue concerns the appropriate role of the Jersey courts in reviewing the content of the contractual agreement, and this is perceived somewhat differently in Jersey to that in a common law context.

It is well known that the English courts are very reluctant to intervene to review the fairness of a contract between commercial parties. The approach in Jersey is somewhat different. It is established case law that the Jersey courts will intervene, in specific circumstances, to remedy the economic imbalance in a contractual bargain. We will thus see that, by means of the ancient customary law doctrine of *déception d'outre moitié de juste prix*, certain types of real estate transaction may be challenged where the price agreed is less than 50% of the real market value at

[190] See p 15 above.
[191] See eg J Bell, *French Legal Cultures* (Butterworths, London, 2001) 78.
[192] On this, see generally Bailhache (n 94).
[193] See the description by Gordon Dawes in his dedication to Terrien, *Commentaires du Droict Civil tant public que privé Observé au Pays & Duché de Normandie* (Guernsey Bar, 2010) 53.
[194] For further details, see the website of the Institute of Law: www.lawinstitute.ac.je/

the time of sale.[195] Under this doctrine, the courts are thus in effect authorised to unravel bad bargains. Another example of this phenomenon is the notion of *cause*. As we shall see,[196] the notion of *cause* in Jersey grants the courts a potential tool for evaluating, in specific circumstances, the adequacy of reciprocal arrangements between the contracting parties, and thus provides the courts with a potentially intrusive tool for scrutinising the contractual bargain between the parties. Other examples of judicial interventionism may be cited. In the sphere of penalty clauses, the recent decision of the Royal Court in *Doorstop Ltd v Gillman and Lepervier Holdings Ltd*[197] illustrates the high-water mark of judicial intervention in this sphere, where in the context of a *commercial* loan for the purpose of completion of a property development, various aspects of the interest level attached to the loan were considered by the court to be excessive and thus the level of interest in relation to the loans was capped.[198]

These examples illustrate how, in a number of spheres of contract law, the Jersey judiciary are prepared to undertake a more interventionist role than would be readily assumed in a common law context. Whilst it is difficult to assign specific reasons for this difference in approach, it may well be reflective of broader differences in philosophy in contract law,[199] with Jersey law allowing for a more paternalistic and interventionist role of the judge. It is also possible to point to contextual factors as supporting the more prominent role of the judge in reviewing contractual bargains—such as the need to take account of fairness within a small island jurisdiction.[200] It may also be linked to broader societal concerns, and interestingly, one commentator has identified the distinctive *esprit* of Norman customary law, including an attachment to family lineage and protection of family property or *patrimoine*.[201] Whilst this may be now of predominantly historical interest, it does set a counterpoint to the historical origins of English contract law. The language of the law is also revealing in this respect: it is striking how prominent the occurrences are in Jersey contract law to terms including a moral quotient, such as *dol*,[202] good faith,[203] *équité*[204] or *bonnes moeurs*.[205]

[195] See Chapter 5, pp 113–120.

[196] See Chapter 4 below, pp 73–82.

[197] *Doorstop Ltd v Gillman and Lepervier Holdings Ltd* [2012] JRC 199.

[198] The Royal Court held that it would be 'unconscionable to give judgment for interest rates which are not moderate or reasonable': *Doorstop Ltd v Gillman and Lepervier Holdings Ltd* [2012] JRC 199, [40].

[199] In one comparative law study, it has been argued that 'French contract law is both more "moral" and more dogmatic; English contract law is both more "economic" and more pragmatic' (D Harris and D Tallon, 'Conclusions' in *Contract Law Today: Anglo-French Comparisons* (Oxford, Clarendon Press, 1989) 386.

[200] From a comparative perspective, see the discussion in Harris and Tallon, ibid, 386.

[201] see eg S Poirey, 'L'Esprit of Norman Customary Law' in Bailhache (n 110) 17.

[202] See Chapter 5 below, pp 90–97.

[203] See Chapter 3 below, pp 49–58.

[204] See Chapter 7 below, pp 157–159.

[205] See pp 33 and 36 below.