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SHORTER ARTICLES

THE STRANGE CASE OF THE *MALADIES SECRÈTES* ORDINANCE OF 1912

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This article uses the example of the Ordonnance provisoire ayant rapport aux maladies secrètes *of 1912 to examine the fate of provisional Ordinances in Guernsey after the passing of the 1948 Reform Law, and to illustrate several wider points of interest.*

Introduction[1]

1 At the end of the nineteenth century, prostitution and venereal disease were significant problems in Guernsey, especially in St Peter Port. French prostitutes in particular appear to have been attracted to the Island in relatively large numbers by the St Peter Port garrison, an establishment which in this period had an average strength of some 500 soldiers. Newspaper editorials were written about "the social evil" that the prostitutes represented, and the military authorities were becoming alarmed by the levels of sexually transmitted diseases among the men.

2 It was against this backdrop—and most immediately, it seems, in response to pressure from the military—that primary legislation was prepared to address the problem and, on 15 January 1897, Queen Victoria approved and ratified a *Projet de Loi* entitled *la Loi Rélative aux Maladies Secrètes.*[2] The Report from the Committee of the Council for the Affairs of Guernsey and Jersey recorded that—

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[1] The author is indebted to Dr Darryl Ogier for referring him to Rose-Marie Crossan's interesting discussion in *Guernsey 1814–1914: Migration and Modernisation*, published by the Boydell Press in 2007, from which most of the historical detail in this Introduction is taken and to which the reader is referred for further detail; and for his comments on the issues raised by this article.

[2] *Ordres en Conseil* Vol III, p 56.

> "Secret Diseases, not unfrequently [sic] introduced by foreign prostitutes would appear to be prevalent in that Island [*ie* Guernsey] . . . such diseases sap the foundation of public health and affect injuriously not only those who by their own misconduct have incurred them, but even generations yet unborn . . ."

3 The Preamble to the Law itself was even more dramatically expressed, referring to the risk of "*un avenir funeste* [a disastrous future] *pour la jeunesse de cette Ile*" if action were not taken.

4 The Law is effectively what we would now call an enabling Law, empowering the Royal Court to make—

> "*tels réglements qu'elle jugera nécessaries pour prevenir et réprimer* [repress] *les maux résultant de l'introduction dans cette Ile de maladies Secrètes . . .*"

It goes on to refer in particular to the compulsory medical examination and detention in hospital and the expulsion of foreign prostitutes. These wide powers were redolent of the repressive Contagious Diseases Acts that had been repealed in 1886 after a long campaign on the mainland, most notably, perhaps, by the feminist campaigner Josephine Butler. Despite the evident problems being posed by prostitution in the Island, the Law appears to have been introduced in the face of significant public opposition, with a 22 foot-long petition presented against it.

5 The only provision made under it appears to be an Ordinance made by the Royal Court in January 1912—some 15 years later, which would seem indicative, despite the doom-laden tenor of the Law, of a certain lack of urgency. Containing powers of the sort described above to examine, detain and expel, and entitled "*Ordonnance provisoire ayant rapport aux maladies secrètes*",[3] it was (as the title indicates) a provisional Ordinance, as many Ordinances were at that time; meaning that it was expressed to be in force for a defined period only, though susceptible to extension. In this case its last sentence provides—

> "*Et sera la présente Ordonnance en force jusqu'aux Chefs-Plaids d'après Noël prochain . . .*"

6 The Law and Ordinance provide an interesting Channel Islands gloss on the well-trodden themes of late Victorian and Edwardian attitudes towards women and sex and, more specifically, the perceived need to assert control over them. In particular, while it is beyond doubt that there were significant numbers of French prostitutes in St Peter

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[3] Provisional Ordinance No 41.

Port in this period, the emphasis in the legislation on the threat to youth and health posed specifically by outsiders is still striking. The purpose of this article, however, is neither historical nor sociological, but rather to use the Ordinance briefly to explore the quirks that can result from the working of the legislative reforms of 1948 in a specific case.

The 1948 Reform Law and the Legislation Committee's 1949 Report

7 As is well known, art 63 of the Reform (Guernsey) Law 1948[4] provided that "the powers and functions of a legislative nature theretofore exercised by the Royal Court whether sitting as a Court of Chief Pleas or otherwise" would, from the date of the Christmas 1948 sitting of Chief Pleas, be vested in the States of Deliberation (or in cases where immediate or early enactment of legislation was necessary or expedient in the public interest, the new Legislation Committee, now the Legislation Select Committee, established by art 65). It also provided for enactments to be construed accordingly, so that the 1897 Law, which is still in force, is now to be construed as vesting the power to make "*règlements*"—which would now be construed as an Ordinance-making power—in the States.

8 In addition, and crucially for these purposes, it effectively provided for the ending of provisional Ordinances. Article 70 provides—

> "**Permanent and Provisional Ordinances existing at Chief Pleas after Christmas, 1948.**
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> **70**. On and after the day following the date of the holding of the Chief Pleas after Christmas, 1948, Ordinances of the Royal Court—
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> (1) which after receiving the approval of the States, have before that day been made Permanent Ordinances by the Royal Court and are still in force, shall, until repealed, continue in force;
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> (2) which by virtue of the provisions of any Order in Council are Permanent Ordinances and are still force, shall, until repealed, continue in force;
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> (3) made before that day which are Provisional Ordinances and are still in force, shall, unless previously repealed, continue in force as Provisional Ordinances until the 1st day of

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[4] *Ordres en Conseil* Vol XIII, p 288. It has been amended many times.

January, 1950, and shall thenceforth become Permanent Ordinances of the States;

PROVIDED that the Committee shall review all such Provisional Ordinances as are referred to in paragraph (3) of this Article and shall report to the States thereon and if, at any time during the calendar year 1949, the States resolve that any such Provisional Ordinance shall be annulled, the same shall cease to have effect as though it had been repealed but without prejudice to anything previously done thereunder."

9 In a Report dated 10 October 1949,[5] the Legislation Committee recommended that the States exercise its power of annulment under art 70 in respect of six provisional Ordinances only, one of which was the 1912 Ordinance. By 1948, other legislation had been enacted in respect of *maladies secrètes*, and the Committee noted in its report that "In view of the existence of later legislation it appears inappropriate that this Ordinance should continue in force."

10 It is thus clear that the Committee was of the view that as of October 1949, the 1912 Ordinance was still in force. This is no doubt because it was aware that the Ordinance had been renewed annually at Chief Pleas since being made, most lately at Chief Pleas on 17 January 1949,[6] when it was renewed until 1 January 1950 (the court being aware that on that date, if appropriate, the s 70(3) machinery would come into effect).

11 In the author's experience, it is generally thought, by those who have an interest in these things, that this recommendation that the six Ordinances be annulled was accepted and acted upon. But this is not the case. Instead, the following articles [V–X] in the same *Billet* were draft Ordinances repealing each of the six provisional Ordinances recommended for annulment; in each case the Ordinance was preceded by a note saying—

"On the 10th day of October, 1949, [*ie* the same day as the above Report] the States Legislation Committee reviewed the draft Ordinance hereunto annexed and requested that it be transmitted to the States for their consideration."

There is no explanation for this belt-and-braces approach by the new Committee; perhaps they wished to give the States a choice of method by which to kill off the six provisional Ordinances on legislative death row. In any event, the decision on the Report (art 4) reads—

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[5] *Billets d'État* July–December 1949, p 917.

[6] Greffe *Ordonnances* 32/138. The author thanks Dr Ogier for this reference.

> "The States having decided to deal first with Articles V, VI, VII, VIII, IX and X and having approved the repealing Ordinances therein referred to, rendering unnecessary any Resolution on Article IV, the President, with the consent of the States, withdrew this Article."

12 The States had gone for repeal and not annulment. The text of each of the repealing Ordinances was very simple. The Ordinance repealing the 1912 Ordinance provides as follows—

> "**The Venereal Diseases Ordinance (1912) Repeal Ordinance, 1949.**
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> THE STATES, on the representations of the States Board of Health, hereby order:—
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> 1. The *Ordonnance provisoire ayant rapport aux maladies Secrètes*, passed on the 22nd day of January 1912, is hereby repealed.
>
> 2. This Ordinance shall come into force on the 10th day of November 1949."

The fate of the 1912 Ordinance

13 At first blush repeal compared with annulment, in view of the wording of art 70(3)—"the same shall cease to have effect *as though it had been repealed . . .*"—may seem a distinction without a difference. But that is not quite right. The sentence quoted goes on "but without prejudice to anything previously done thereunder." As can be seen, there is no provision to that effect in the repealing Ordinances, and that gap is not filled by the provisions of the (then new) Interpretation (Guernsey) Law 1948.[7] Was it felt to be unnecessary, no prostitute being likely to mount a speculative legal challenge to any action taken under the Ordinance,[8] or was its omission an oversight? There is no explanation in the *Billet*.

14 We also have to consider the position in Alderney. The 1912 Ordinance, like the Law of 1897, was extended to Alderney (with a couple of appropriate modifications) by the Alderney (Application of Legislation) Ordinance 1948 ("the 1948 Ordinance"). It is clear that

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[7] *Ordres en Conseil* Vol XIII, p 355.

[8] Dr Crossan records (*supra*) that "Medical examinations of prostitutes are recorded in registers at the St Peter Port Constables' Office until 1921" (pp 136–137), suggesting that the powers had fallen into disuse after that date; perhaps there were no women still present on the Island who had been subjected to the powers contained in the Ordinance.

the Repeal Ordinance is limited in its extent to Guernsey. So this is, on its face, an example, of another classic trap for those working with Bailiwick legislation: an Ordinance made in Guernsey, then extended to Alderney, then repealed in Guernsey. But of course the Reform Law was limited in its extent to Guernsey, so there is no question of the Ordinance, as it applied in Alderney, being made permanent pursuant to the provisions of s 70(3).

15 The question, then, is whether the Ordinance continues in force in Alderney and, if so, on what basis. The answer to that would appear to lie in the wording of the 1948 Ordinance, which provides at s 1 that the listed enactments shall, subject to the specified exceptions, adaptation and modifications, "have effect in the Island of Alderney *on and after* the 1st day of January 1949". In other words, the 1948 Ordinance itself would seem, in the case of the 1912 Ordinance, to have had the effect of rendering a provisional Ordinance which was shortly to be repealed in Guernsey permanent in its application in Alderney.

16 This little story illustrates another important issue, which is, despite the excellent progress being made in loading legislation on to the Guernsey Legal Resources website,[9] the utter inaccessibility of some older Bailiwick legislation (much of which is clearly, like the 1912 Ordinance, no longer "fit for purpose", though that is a separate issue). This is not just a result of the fact that some of it, like the 1912 Ordinance, is both in French and unpublished, hidden in handwritten volumes in the Greffe; but is also a product of the complexities that can result when extension to other Islands in the Bailiwick is combined with the effect of the reforms of 1948.

17 In his Sir David Williams Lecture in November 2006,[10] Lord Bingham identified eight "sub-rules" into which the implications of the constitutional principle of the rule of law may be broken down. The very first was that "the law must be accessible and so far as possible intelligible, clear and predictable".[11] In this context it is noteworthy that the second clause of the last sentence of the 1912 Ordinance quoted above provides that it "*sera publiée et affichée aux lieux ordinaires afin que personne n'en prétendre cause d'ignorance*". It is a requirement that remains remarkably pertinent today.

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[9] http://www.guernseylegalresources.gg

[10] Lord Bingham, "The Rule of Law" [2007] C.L.J. 67.

[11] See also the judgment of the ECtHR in *Sunday Times v UK* (2 EHRR 245) to which Lord Bingham referred in his lecture; especially para 49—"the law must be adequately accessible".

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