SHORTER ARTICLE

A CRIMINAL CODE—LESSONS FROM THE ISLE OF MAN?

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The Manx experience of codification.

1 Before 1736, Manx criminal law was stated almost entirely by the judicial process. In comparison with the English law of the period, there were very few statutory provisions dealing with the criminal law. The law and procedure enforced by the criminal courts were to be found, in almost every case, in custom and the declarations of the Courts and of Tynwald.

2 By the early 18th century there was dissatisfaction with the law-making powers of the Deemsters. In 1726, the Lord of Man attempted to cancel all unwritten laws, but was thwarted by the protest of the Keys to the Privy Council.[1] In 1730 the Lord responded to complaints caused by the uncertainty of the criminal law[2] with a promise to require trial by jury before imposition of corporal punishment.[3] The stage was set for a change in Manx laws, arising from the special situation on the Island, which would radically alter the balance between legislative and judicial law-making.

3 In 1736 as part of a programme of law reform,[4] it was enacted—

> "That no court, judge or magistrate within this Isle whatsoever shall have power for the future to inflict any fine or punishment upon any person or persons within the said Isle, for or on account

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[1]The initiative was simply dropped, and so the case never reached the stage of judgment—see Moore, "The Romance of Manx Common Law" (1927) *Ramsey Courier* 11 November.

[2]The exact cause of these complaints is unclear from surviving materials. It appears probable that some *cause célèbre* brought matters to a head, but it is not possible to provide details of this.

[3]See the letter of Lord Derby to the House of Keys, 1730 [MMA].

[4]See the preamble to the Criminal Law Act 1736.

> of any criminal cause whatsoever, until he . . . be first convicted by the verdict or presentment of four, six, or more Men as the case shall require, upon some statute law in force in the said Island."[5]

4 It was unsuccessfully argued in *Bold v Roper*[6] that the Act of 1736 abrogated all laws not in writing that day, and that the courts were thereafter to administer the laws as in England. The 1736 Act was clearly seen as a limit on some prosecutions. In 1797, Tynwald passed an act against, *inter alia*, forgery and perjury.[7] In the preamble, based upon an earlier opinion of Governor Atholl,[8] it was stated that "the crime of forgery and perjury, and subornation of perjury were by the common law of the said Isle, punishable with fine, imprisonment and corporal punishment" but that the act of 1736 required a statute law to be in force if the said crimes were to be punished. Treasons and felonies were not, however, barred by the 1736 Act.[9]

5 The 1736 Act, thus, limited the role of the judiciary in relation to misdemeanours to the interpretation of the small number of existing statutes. This contributed to the failure of Manx criminal law to meet the rapidly changing needs of the period. The situation could have been remedied by an active legislature, but Tynwald was notably torpid following the Revestment of 1765, a torpor aggravated by "impediments . . . repeatedly thrown in the way of every act of the Insular legislature".[10] By the beginning of the 19th century, commentators were criticising Manx criminal law for its failure to "provide against many offences committed in the present time".[11] These problems led to the passage by Tynwald of the Criminal Code 1817, an Act of Tynwald which had, however, been closely scrutinised and finally approved by the Imperial authorities.

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[5]Criminal Law Act 1736.

[6]*Bold v Roper* [1822] *Mona's Herald* 30 August.

[7]Forgery, Perjury and Cheating Act 1797.

[8]See Stowell to Governor Atholl, 28 May 1796 [Atholl Papers, 102/2nd/21]; Address of Governor Atholl to Tynwald Court, 7 June 1796 [Atholl Papers, Bk 90 at 4].

[9]Criminal Code 1817.

[10]Lieutenant-Governor Dawson to Lord Sidney, 30 June 1787, transmitting a memorial of the Keys [Letterbooks 1,105].

[11]Feltham, *A Tour through the Isle of Man* (1798). See also letter of Lieutenant-Governor Smelt to Lord Sidmouth, 7 December 1815 [Letterbooks 2,173]; Bullock, *History of the Isle of Man* (London, 1816) at 312–313.

6 The first Code consisted of 61 sections. The vast majority of these were definitions of criminal offences, or penalties, rather than general principles. The Code was also ambivalent as to whether it was a complete statement of criminal offences. The preamble attempted to repair the damage done to customary offences by the Act of 1736, while the Code contained a list of offences so extensive as to minimise the need for customary offences. Additionally, the Code contained a broad clause to rectify the possible problems of an exclusive Code. By s 46 it was provided that—

> "all unlawful, indecent and scandalous actings and doings, not hereinbefore specified, to the disturbance of the public peace, and against good order and morals; or to the evil example of the subjects of our Lord the King are, and shall be held to be, misdemeanours."[12]

7 The provisions of the earlier Code, as would be expected from the legislative history of the measure, were largely based upon the English common law of the time, rather than extrapolation of principle found in existing Manx cases, combined with sections to deal with problems unknown to Manx precedential law. To increase the extent to which the Code marked an adoption of English law, while the Code was initially treated as a full definition of Manx law in the areas covered,[13] by 1869 it had become supplemented by a gloss of English case-law.[14]

8 After the first Code, amendments were made to the criminal law piecemeal. Eventually, with the first Code growing increasingly elderly and unsuitable, the legislators decided to replace it. Elements of the second Code, as finally enacted in 1872, date from 1853,[15] and it could fairly be said that it had been before the Manx legislature, albeit intermittently, for upwards of 20 years.[16] Serious interest in reform of the Manx criminal law, which eventually resulted in the new Code, revived in 1865.

9 On 7 March that year, Lieutenant-Governor Loch wrote to the Home Office, stating that he wished to introduce a Bill to amend the Manx

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[12] Code 1817, s 46. For an instance when use of this section was considered, see Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

[13]See, for instance, Kelly [1824] *Mona's Herald* 24 March.

[14]See, for instance, Colle [1869] *Mona's Herald* 15 February.

[15]See Attorney General Gell to Lieutenant-Governor Loch, 24 July 1871 [Letterbooks 19,158].

[16]Lieutenant-Governor Loch to Undersecretary of State (Home Office), 12 March 1872 [Letterbooks 20,259].

criminal law. He was "anxious to assimilate the law as far as possible with that existing in England" and requested copies of 24 & 25 Vict. c.95–100. These English statutes later formed the bulk of the Code of 1872.[17] The Lieutenant-Governor then directed Deemster Drinkwater to prepare "a Criminal Code to assimilate the law here with that which exists in England, modified only so far as the peculiar character of our courts might render necessary". The Code first sent for Assent, as Lieutenant-Governor Loch pointed out, was "to a certain extent a Codification of the English criminal law . . . made applicable to the existing practice of the insular courts".[18] After a tortuous process, complicated by the variety of Imperial stakeholders who had objections to aspects of the draft bill, the Code received Royal Assent in 1872.

10 The Code of 1872 was vastly more detailed than its predecessor. This was partly due to greater consideration of general principles of liability and procedure, though not even this Code could claim to be anything like comprehensive in those areas. It was more due to the verbose drafting style of the day—a style which had been copied from English statutes. A typical example is s 71 of the Code which provides—

> "every woman, being with child, who with intent to procure her own miscarriage, shall unlawfully administer to herself any poison, or other noxious thing, or shall unlawfully use any instrument or other means whatsoever with the like intent, and whosoever, with intent to procure the miscarriage of any woman, whether she be or not be with child, shall unlawfully administer to her, or cause to be taken by her, any poison or other noxious thing, or shall unlawfully use any other instrument or other means whatsoever with the like intent, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the Court, to be kept in penal servitude for life, or for any term not less than five years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement."

11 The Code was "to a certain extent a codification of the English criminal law, a good number of the clauses taken from English Acts

[17]Lieutenant-Governor Loch to H. Waddington, 7 March 1865 [Letterbooks 10,616].

[18]Lieutenant-Governor Loch to Secretary of State of the Home Office, 1 November 1870 [Letterbook 18,542].

and also from recent Acts of Parliament".[19] Once again, the Code did not categorically exclude customary law offences. One section in particular, however, suggests that their obsolescence was envisaged. By s 347 it was provided—

> "Whosoever shall do any other act or thing (not hereinbefore or in any other unrepealed Act of Tynwald or bye-law made by the authority of an Act of Tynwald, specified or referred to or otherwise provided for by law) in contempt of God or religion, or in contempt of the Queen's Government, or against public justice, or against public trade, or against the public health, or to the disturbance of the public peace, or injurious to public morals, or outraging decency, shall be guilty of a misdemeanor."

12 I am unaware of any prosecution for a customary offence after the passage of the Code. There is some evidence that, while the second Code was being discussed, the Attorney General was under the impression that only statutory offences could be successfully prosecuted, since in at least one case he strained, unsuccessfully, to find a statutory offence to deal with unacceptable behaviour prohibited under the English common law.[20]

13 From inception the Code of 1872 was interpreted in the light of English case-law. The clearest, and most authoritative, example of this is the case of *Frankland and Moore*, heard before the Judicial Committee of the Privy Council.[21]

14 There was considerable revision of the statutes relating to criminal law and procedure after 1872. This revision did not, generally, take the form of amendments to the Code of 1872. Instead, the bulk of the Code was repealed, and the areas dealt with by the Code dealt with individual statutes, almost invariably based on a similar English statute. Thus, the provisions of the Criminal Code relating to theft and similar offences against property were repealed and replaced with statutes based on the English Larceny and later Theft Acts. The Code was dismembered. The only provisions of the Code which remain in effect today are those based on statutes which remain in force in England, such as 24 & 25 Vict. c.100; and statutory formulations of English common law offences such as murder. In both cases, no convenient English statutory update is available.

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[19]Lieutenant-Governor Loch, 1 November 1870 [PRO–HO 45/9319/16550].

[20]See Attorney General Gell to Lieutenant-Governor Loch, 3 June 1869 [Letterbooks 15,429].

[21] *Frankland and Moore v R* 1987–89 MLR 65.

Lessons from the Manx experience

15 There are, perhaps, a number of lessons from the Manx experience which may be useful for Jersey, as it considers codification.

16 First, drafting needs to be integrated, even if it reduces the extent to which foreign models can be used. The drafting of both Manx criminal codes was profoundly flawed. The earlier Code at least has the virtue of brevity. The 1872 Code was a massive compilation of some of the wordiest English criminal law statutes of the day. Even taking the Code as a code of offences, rather than a true Code, it is striking how mechanically the provisions of these different statutes were put together. This led to inconsistencies such as that picked up during the passage of the Code, where theft of a letter containing property was subject to a lower maximum penalty than theft of a letter not containing property. The reliance upon legislative precedents from a non-codified, dominant, legal hegemon contributed substantially to this problem. Foreign models will obviously be relevant to any codification process in Jersey, but they need to be used with care, and attentiveness to the final integration of the Code.

17 Second, there needs to be a commitment to a dynamic criminal Code. From an early period, the Manx legislature was comparatively unengaged with criminal legislation, and when it did so, adopted English statutes relating to criminal law. Both codifications encountered the problems of a foreign model ossifying within a small jurisdiction whose legislature had a very wide range of business. Having set criminal law firmly on a statutory basis, the legislature was then obliged to actively engage with criminal law to ensure that it met the changing needs of the jurisdiction—an obligation it frequently failed to meet.

18 Third, the relationship of the Codes to English law was unnecessarily complex, in part because it was not an issue addressed in the Codes themselves. The Manx jurisdiction, more than that of Jersey, has a tradition of citing English authorities as of very strong precedential value in resolving novel points: particularly, but not exclusively, when engaged in interpretation of statutes based on English models. The extent to which legal professionals, and then judges, should make use of foreign precedents when interpreting their own Code could usefully be dealt with explicitly within the Code itself.

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