

## THE CASE OF PITCAIRN: A SMALL ISLAND, MANY QUESTIONS

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### INTRODUCTION

The subject of this article is the recent trials of a number of Pitcairn islanders charged with rape and indecent assault under the *Sexual Offences Act 1956* (United Kingdom)<sup>1</sup> (*Sexual Offences Act*). Although essentially a criminal case, the procedures and laws put in place to facilitate trial of the accused, gave rise to a number of human rights challenges, notably: the right to a fair trial,<sup>2</sup> the right to be protected against any retrospective effect of criminal law,<sup>3</sup> the right to be protected from inhuman and degrading treatment and the right to enjoy fundamental rights without discrimination.<sup>4</sup>

Many key questions were raised in the course of the pre-trial and trial hearings which attracted academic and press comment.<sup>5</sup> Ultimately the case went to the final appeal court for Pitcairn, the Judicial Committee of the Privy Council in England,<sup>6</sup> which was asked to consider the validity of the laws under which the accused were charged and tried. The Privy Council confirmed the Pitcairn Court of Appeal decision, dismissing suggestions that Pitcairn was not a British territory or that the people of Pitcairn were not British subjects and confirming that the English *Sexual Offences Act* was applicable in Pitcairn and that therefore the accused had been correctly charged. One of the notable features of the Privy Council judgment however, is the scant attention given to the human rights issues which had been raised at various points in

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<sup>1</sup> The words United Kingdom are used for convenience. In fact much law passed by the Westminster Parliament only applies to England and Wales. There is remarkably scant reference in the published judgments to the sections under which the accused were charged but s 1 of the *Sexual Offences Act* provides for the offence of rape and s 14 for indecent assault on a woman. Charges could also have been brought under s 5 intercourse with a girl under 13, s 6 intercourse with a girl between 13 and 16 and s 10 incest by a man but this is not clear from the law reports whether these sections were used and the media coverage is contradictory. Under the *Sexual Offences Act* there appears to be no offence of indecent assault of a girl who is not a woman – i.e. over 16 but under 18.

<sup>2</sup> As enlarged in Article 6 of the *European Convention on Human Rights and Fundamental Freedoms* (*ECHR*). *The European Convention on Human Rights and Fundamental Freedoms* (Entered into force 3 September 1953; the United Kingdom became a signatory in 1950) ETS No 5.

<sup>3</sup> As found in Article 7 of the *ECHR*.

<sup>4</sup> As found in Article 3 and 14 of the *ECHR*.

<sup>5</sup> See for example, Tony Angelo, 'Pitcairn – The Saga Continues' (2006) *New Zealand Law Journal* 249; Fran Wright, 'Pitcairn – The Saga Continues' (2005) *New Zealand Law Journal* 295; Tony Angelo and Fran Wright, 'Pitcairn: Sunset on the Empire?' (2004) *New Zealand Law Journal* 431; Anthony Trenwith, 'The Empire Strikes Back: Human Rights and the Pitcairn Proceedings' (2003) 7 (2) *Journal of South Pacific Law* <http://www.paclii.org/journals/fJSPL/vol07no2/3.shtml> (Accessed 19 November 2007); Tony Angelo and Andrew Townend, 'Pitcairn: a Contemporary Comment' (2003) 1 *New Zealand Journal of Public International Law* 229; Jan Corbett and Tony Stickley 'End of a Legend as Pitcairn Island Meets the Modern Law' *New Zealand Herald* (Auckland, New Zealand) 30 June 2001 [http://www.nzherald.co.nz/section/story.cfm?c\\_id=2&objectid=197547](http://www.nzherald.co.nz/section/story.cfm?c_id=2&objectid=197547) (Accessed 11 October 2007); Alan Watkins 'Pitcairn Court Asked to Rule Out its Own Existence' *New Zealand Herald* (Auckland, New Zealand) 9 May 2003 [http://www.nzherald.co.nz/section/story.cfm?c\\_id=1&objectid=3500954](http://www.nzherald.co.nz/section/story.cfm?c_id=1&objectid=3500954) (Accessed 26 April 2006).

<sup>6</sup> [2006] UKPC 47.

proceedings. There was also no consideration of whether or not the *European Convention on Human Rights and Fundamental Freedoms* (ECHR) applied to Pitcairn or whether the United Kingdom's own *Human Rights Act 1998* (Human Rights Act) was a law of general application in Pitcairn. This article takes up the debate following the latest decision, focussing in particular on the human rights dimension of the case, critically examining the interpretation and application of the law by the Supreme and Appeal Court of Pitcairn with a view to highlighting alternative possible approaches which, it is suggested, the Privy Council ought to have considered.

The rights questions raised by the Pitcairn case are significant for other countries of the Pacific region for several reasons. First, the bills of rights or statements of fundamental rights found in many countries of the region are modelled on those considered in the Pitcairn case. For example, in Fiji Islands, Kiribati, Nauru, Samoa, Solomon Islands and Tuvalu the statements on fundamental rights and freedoms are modelled on those found in the ECHR and the *Universal Declaration of Human Rights*.<sup>7</sup> Second, a limited number of countries still have a right of appeal to the Judicial Committee of the Privy Council which gave the final ruling in the Pitcairn case. Third, a number of countries have strong constitutional or economic and social links with New Zealand, which, as will be seen, played a major role in the Pitcairn saga.

More broadly the Pitcairn case illustrates some of the challenges experienced in observing and protecting fundamental rights. On the one hand there are considerations that fundamental human rights are of universal application, on the other there is the possibility that these should be applied relatively taking into account local circumstances, cultures, beliefs and context. If the first approach is adopted then Pitcairn islanders – whether victims, the accused or other islanders – should be afforded the same fundamental rights as other British subjects. If the second approach is adopted then there needs to be great attention to what it is that may make Pitcairn islanders' circumstances unique. In considering the rights in issue in the Pitcairn case this article illustrates how neither a relative nor universal approach was adopted, and that the case in fact provided a vehicle for exercising colonial control over Pitcairn, perhaps at the expense of the very survival of these island people.

## **PITCAIRN ISLAND AND THE BACKGROUND TO THE CASE**

Pitcairn is one of a group of islands known collectively as the Pitcairn Islands, which lie midway between New Zealand and Chile in the southern Pacific Ocean.<sup>8</sup> In the late eighteenth century its very remoteness made it attractive to certain fugitives from justice, notably a small group of mutineers from a British ship, the *HMS Bounty*, who settled on the island in 1790 with their Tahitian women.<sup>9</sup> Search parties looking for the mutineers failed to find them and it was not until 1814 that the British navy caught

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<sup>7</sup> Paris, 10 December 1948; UN Treaty Series 2 (1949) Cmnd 7226.

<sup>8</sup> The geographic coordinates for the islands are 25 04 S, 130 06 W. (*CIA The World Factbook – Pitcairn Islands* <http://www.cia.gov/cia/publications/factbook/geos/pc.html> (Accessed 24 April 2006)). Pitcairn Island is approximately 2.5 miles long and 1 mile wide.

<sup>9</sup> Nine mutineers, twelve Tahitian women, six Tahitian men and a baby girl settled on Pitcairn.

up with them. By that time only one of the original mutineers was still alive and he was allowed to remain on the island.<sup>10</sup>

Thereafter, apart for the occasional passing ship, Pitcairners were left to live on the island largely ignored by the outside world. At the end of the twentieth century, however, this changed. In 1999 this small Pacific place made international headlines when British police, seconded to the island to investigate certain complaints, uncovered a number of incidents of sexual abuse of women and underage girls that had been taking place over an extended period of time without criminal conviction. Nine men were charged – seven residents of Pitcairn and four living abroad. Six were convicted and are now serving sentences ranging from community service to imprisonment.

This in itself would not provoke much comment except that the steps taken to bring the accused to trial were unprecedented in the history of Pitcairn and raised a number of issues of significance beyond the boundaries of this remote island.

### **THE HISTORY OF THE CASE**

An isolated complaint of sexual abuse was initially made in 1996 and investigated by a British police officer. No charges were made. In 1999 similar allegations were made, investigated by officers seconded from the British police, and dropped.<sup>11</sup> Later in the same year two further complaints were made leading to a much wider investigation by British police which culminated in sixty-four separate criminal charges being brought against nine accused – twenty-one of these were for rape; forty-one for indecent assault and two for gross indecency with a child under 14.<sup>12</sup> These charges were heard by a Pitcairn court sitting in Adamstown, the capital of Pitcairn, on 4 April 2003.<sup>13</sup> In June 2003 thirty-two further charges were made including four of rape, against Pitcairn men living in New Zealand.<sup>14</sup> Seven of the accused were committed for trial before the Supreme Court of Pitcairn Islands on 4 July 2003, and arraigned before the court sitting in Adamstown on 22 August 2003. Separate trials of the accused before single judges were held on Pitcairn Island between 29 September and 24 October 2004. One of the accused was discharged but the charges against the remaining six were found to have been proved and sentences were indicated. However convictions were stayed because the Public Defender applied to the Supreme Court for a stay of the criminal proceedings on the grounds of abuse of process, denial of justice and delay. As these were fundamental questions of law which would affect all the accused, a consolidated trial before three judges sitting in New Zealand as the Supreme Court of Pitcairn Islands, was held in April 2005.<sup>15</sup> The Supreme Court declined to stay the trials on the grounds of abuse of process.

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<sup>10</sup> The official website of the Pitcairn government reports: ‘the astonished British commanders were charmed by the physique, simplicity and piety of the islanders. Favourably impressed by Adams and the example he set, they agreed it would be “*an act of great cruelty and inhumanity*” to arrest him’. <http://www.government.pn/Pitcairnshistory.htm> (Accessed 26 April 2006).

<sup>11</sup> Jan Corbett and Tony Stickley, above n 5.

<sup>12</sup> Angelo and Townend, above n 5, 230.

<sup>13</sup> *Re: Complaints made by the Public Prosecutor against 9 named defendants* (Unreported, Magistrate’s Court, Pitcairn Islands, 10 April 2003, Magistrate Cameron). According to Trenwith (above n 5) this was the first time in 100 years that the court had sat.

<sup>14</sup> Angelo and Townend, above n 5, 231.

<sup>15</sup> *R v Stevens Christian* [2005] LRC 745; [2005] PNSC 1 <http://www.pacilii.org>.

Appeal against the criminal convictions of the Supreme Court was made – unsuccessfully – to the Pitcairn Court of Appeal in early 2006<sup>16</sup> and to the Judicial Committee of the Privy Council in July 2006, culminating in the judgment of the Privy Council in October 2006.<sup>17</sup>

In the interval between the initial investigation and trial there was a period of considerable law-making ostensibly directed at facilitating the trial of the accused. Of the fifty one new laws many were procedural and included such matters as provision for legal aid, the regulation of evidence, guidelines for sentencing, the admission of legal practitioners, the role and appointment of the Public Defender and provision of a prison.<sup>18</sup> This extraordinary legislative activity gave rise to various pre-trial challenges which were heard by the newly established Supreme Court of Pitcairn Islands in November 2003 and February 2004. Further appeal to the Court of Appeal of Pitcairn Islands on some of these pre-trial matters was heard in July 2004. In late 2004 an unsuccessful application was made to the Supreme Court of Pitcairn for a stay of proceedings and severance of the charges. Special leave of appeal to the Privy Council was sought. This was granted and a further application for a stay of all proceedings was sought. In September 2004 the criminal trials commenced. A month later, in October 2004 the Privy Council refused to grant a stay of proceedings holding that it would be in the best interests of justice for the Pitcairn Supreme Court to hear the evidence; proceed to verdict; and consider sentence.<sup>19</sup> The Privy Council indicated that it would hear the legality issue *after* the criminal hearings. The Supreme Court concluded the criminal trials at the end of October 2004. In February 2005 the Public Defender acting for the accused made a further unsuccessful application to the Supreme Court of Pitcairn Islands for dismissal of the charges on the grounds of abuse of process.<sup>20</sup> A further application to the Privy Council to reconsider the scope of its hearing and the timetable for doing so was made in November 2005. By that time the criminal charges were subject to appeal to the Court of Appeal of Pitcairn and further pre-trial questions regarding the promulgation of the law and the late constitution of the courts of law had been raised. This inclined the Privy Council towards a consolidated hearing of appeals against conviction and the preliminary issues *after* the Court of Appeal of Pitcairn had delivered its verdict both on the appeal and the new matters now being raised. It was recognised that this Privy Council hearing would not be likely to be held before early 2006.<sup>21</sup> On 2 March 2006 the Pitcairn Court of Appeal sitting in the High Court of Auckland, New Zealand, heard the criminal appeal and also heard various new and rehearsed arguments relating to pre-trial issues. The appeal was not upheld.<sup>22</sup> Leave to appeal to the Privy Council was granted for consideration of the validity of the laws creating the offences and the question of whether there had been an abuse of process.<sup>23</sup> The

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<sup>16</sup> *Christian v R (No 2)* [2006] PNCA 1 <http://www.paclii.org>.

<sup>17</sup> *Christian and Others v The Queen* [2006] UKPC 47 <http://uk.westlaw.com>.

<sup>18</sup> A full table of these can be found in *R v Christian and Others (No 2)* [2005] LRC 745 [83].

<sup>19</sup> *Christian v The Queen* [2004] UKPC 52 <http://web.lexis-nexis.com>. By the time this decision was given four of the trials had already commenced.

<sup>20</sup> *R v Stevens Christian* [2005] LRC 745.

<sup>21</sup> [2005] UKPC 42 <http://www.paclii.org>.

<sup>22</sup> 'Pitcairn Island: Convicted Islanders Now to appeal to Privy Council' [http://pinanius.com/news/publish/article\\_3927.shtml](http://pinanius.com/news/publish/article_3927.shtml) (Accessed 11 October 2007).

<sup>23</sup> Despite the prior undertakings of the Privy Council to consider both pre-trial and appeal matters on the conclusion of trial there seems to have been no appeal against conviction as such, though had the other matters on appeal been successful then the conviction would have had to be set aside.

Privy Council heard argument in July 2006 and issued its decision in late October 2006.<sup>24</sup> This appeal was unsuccessful and sentences ranging from 6 years imprisonment to 300 hours of community work were upheld.

## QUESTIONS FROM PITCAIRN: THE RELEVANCE OF HUMAN RIGHTS

While it seems unlikely that there will be any further appeals in this case a number of the issues raised in respect of human rights remain unsatisfactorily answered, notably whether there have been breaches of certain rights protected under the *ECHR* and the *Human Rights Act*. Related to these questions are issues under the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights*,<sup>25</sup> which have not been sufficiently addressed, as well as the broader question of Pitcairn's right to participatory local government and self-determination.<sup>26</sup>

The Pitcairn Supreme Court accepted that the *Human Rights Act* and the *ECHR* were relevant and applicable to Pitcairn subject to local conditions and the limits of local jurisdiction. However, the Court of Appeal, hearing appeal against conviction, adopted the view that the *ECHR* does not apply to Pitcairn because it has not been specifically extended to apply to the Pitcairn Islands.<sup>27</sup> Even if the *ECHR* does not specifically apply to Pitcairn it could be argued that the *Human Rights Act* is an English statute of general application and would apply to Pitcairn as statute of general application in force in and for England 'for the time being' under the *Judicature (Courts) Ordinance 2000* (Pitcairn Islands). This Ordinance, similar to a number of previous Ordinances dating back to 1961, provided that English statutes of "general application" together with principles of common law and equity, would apply in Pitcairn. If this were the case then not only would the provisions of the *Human Rights Act* apply but also the broader jurisprudence which informs the interpretation of the human rights provided for by the Act. This is because, under s 2 of the *Human Rights Act* European human rights jurisprudence is significant in determining the human rights of British subjects.<sup>28</sup> A difficulty presented to Pitcairn islanders however is the purpose of the *Human Rights Act*. This is to give effect to the United Kingdom's obligations under the *ECHR* in domestic law. Consequently, it can be argued that an aggrieved individual can only bring a complaint under the *Human Rights Act* if he or she would have been similarly able to bring a complaint to Strasbourg under the

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<sup>24</sup> *Christian and Others v The Queen* [2006] UKPC 47. See coverage in the *New Zealand Herald* (Auckland, New Zealand) July 11 and 12, October 31 2006 <http://www.nzherald.co.nz> (Accessed 3 November 2006).

<sup>25</sup> *International Covenant on Civil and Political Rights* (Entered into force 2 March 1976; ratified by the United Kingdom 20 August 1976) UN Treaty Series 2 (1949) Cmnd 7226.

<sup>26</sup> See for example, the *Declaration on the Granting of Independence to Colonial Countries and Peoples*; Article 73 *United Nations Charter*; and United Nations General Assembly Resolution 55/146 (8 December 2000) declaring 2001-2010 to be the Second International Decade for the Eradication of Colonialism.

<sup>27</sup> [2006] PNCA 1 [99].

<sup>28</sup> Section 2 states: (1) A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,  
(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,  
(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or  
(d) decision of the Committee of Ministers taken under Article 46 of the Convention,  
whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

*ECHR*. Where the *ECHR* has not been expressly extended to those outside the United Kingdom this *locus standi* might be lacking. Whether a Pitcairn islander could in fact sue the United Kingdom for a breach of the Articles of *ECHR* before the European Court of Human Rights remains unclear.

Even if the *Human Rights Act* did not apply to Pitcairn this would not mean that Pitcairn Islanders would be denied any fundamental rights. Once it was established that Pitcairn Islanders were British subjects who took the common law with them, then the fundamental rights found in English common law and principles of equity would apply in Pitcairn. These common law rights are not insignificant, and indeed for a long time provided one of the arguments for not having a bill of rights in the United Kingdom. Similarly they have been relied on in Australia to defend the absence of a bill of rights – although that position is now gradually changing.<sup>29</sup> These common law rights are also integral to the principles of common law and equity introduced into other countries of the Pacific region, including those countries which are now independent, but were formerly under direct or indirect British influence and administration. Rights such as those conferred under the *Magna Carta 1215*, the *Petition of Right 1627*, the *Bill of Rights 1688*, parts of the *Act of Settlement 1700* and the principles of *Habeas Corpus* find a place in the laws of Pacific island countries. For example, in New Zealand it was presumed that these early British enactments were part of the inheritance of New Zealand.<sup>30</sup> The schedules of the *Imperial Laws Act 1988* (New Zealand), an Act which is the definitive statement of which British statutes apply to New Zealand, lists the *Magna Carta 1215*, the *Petition of Right 1627*,<sup>31</sup> the *Bill of Rights 1688*,<sup>32</sup> parts of the *Act of Settlement 1700* and the *Habeas Corpus Acts 1640, 1679 and 1816*,<sup>33</sup> as British laws applying in New Zealand. Indeed in New Zealand in 1976 the *Bill of Rights* was relied on by the Chief Justice to declare that the Prime Minister had acted illegally in purporting to abolish a superannuation scheme before Parliament has passed legislation to that effect.<sup>34</sup> In Tonga and Vanuatu, the *Magna Carta* applies as it is referred to in the notes to section 6 of the *Civil Evidence Act 1968* (United Kingdom) which was incorporated as a law of general application into the legal systems of each country. The same Act also refers to the *Bill of Rights 1688*. Elsewhere the courts have made reference to these principles in cases coming before them. For example, reference to the *Magna Carta* has been used to support the principle that any fines levied on an offender should be within that offender's ability to pay; that no courts can be created except by law;<sup>35</sup> and that ordinarily arrests should not be made without the sanctity of a warrant.<sup>36</sup>

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<sup>29</sup> The Australian Capital Territory, for example, now has a *Human Rights Act 2004*.

<sup>30</sup> Philip A Joseph, *Constitutional and Administrative Law in New Zealand* (2<sup>nd</sup> ed, 2001) 18.

<sup>31</sup> 3 Cha 1 c 1.

<sup>32</sup> 1 Will & Mar Sess 2 c 2.

<sup>33</sup> The *Habeas Corpus Act 2001* (New Zealand) now makes specific New Zealand provision for habeas corpus.

<sup>34</sup> *Fitzgerald v Muldoon and Others* [1976] 2 NZLR 615.

<sup>35</sup> *Qalo v Qaloboe* ([2004] SBCA 5), in which the Court of Appeal of Solomon Islands held that s 10(8) of the *Constitution of Solomon Islands* was designed to give effect to the rule recognised in *Re Lord Bishop of Natal* ((1864) 3 Moo PC 115 and 42 Edw 3, c 3) which confirmed the *Magna Carta* and the provision that 'not man be put to answer without presentment before the justices of matter of record, and by due process and original writ, according to the ancient law of the land'.

<sup>36</sup> *Repmar v Waltz* [1987] MHSC 12, in which it was held by the Supreme Court of the Marshall Islands that arrests without a warrant by Local Government Police were unauthorised and unlawful on the grounds that ancient common law rights going back to the *Magna Carta* applied in Marshall Islands in the absence of any national provision.

Similarly the principles of *habeas corpus* are found and applied in the region.<sup>37</sup> Taken together these common law principles are intended to protect the individual against the arbitrary exercise of power by the state and in particular – given their historical significance – against the arbitrary exercise of the royal prerogative. Had they been raised in the Pitcairn case there might have been rather closer scrutiny of the exercise of prerogative law-making powers, particularly the making of Ordinances. These however, were not argued.

## **WHICH RIGHTS WERE RAISED?**

It became evident early in the course of events leading up to trial that there was a fairly limited judicial system in Pitcairn – at least if compared to the more complex systems of New Zealand and the United Kingdom. Therefore a number of Ordinances under law-making powers exercisable under Orders in Council were passed in a very short space of time to facilitate the trial of the accused.<sup>38</sup> An agreement between the United Kingdom and New Zealand was reached whereby Pitcairn courts could sit in New Zealand and this was given effect through legislation.<sup>39</sup>

In the criminal trial before the Supreme Court, it was emphasised that all the Ordinances passed to facilitate the trial were ‘designed to establish a fair trial process conforming to accepted human rights standards.’<sup>40</sup> In particular the *Judicature (Appeals in Criminal Cases) Ordinance 1999* (Pitcairn Islands) provided for two further levels of appeal – to the Court of Appeal of Pitcairn and by leave, to the Privy Council.<sup>41</sup> It is therefore, within the ambit of due process, that the major rights issues were raised. These are issues which, under the *ECHR* are covered by Article 6. Equivalent provisions can be found in many of the Pacific region constitutions.<sup>42</sup>

However there were also issues concerning the actual law under which the accused were charged, the *Sexual Offences Act*. This was held to be a statute of general

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<sup>37</sup> See for example, Clause 9 *Constitution of Tonga* and Article 2 section 7, *Marshall Islands Constitution*; *Vanuatu Civil Procedure Rules 2002*, Rule 16 (3) and (4), *Papua New Guinea National Court Rules 1983*; and case law, for example, *Aika v Uremany* [1976] PNGLR 46, *Yasmin Ali Shah v Attorney-General* [1988] SPLR 144, *Taalili v Commissioner of Prisons* [1994] WSSC 28, *Amiri v Director of Police* [2004] NRSC 1.

<sup>38</sup> In fact between 1999 and 2005, 513 such Ordinances were passed (compared to seven in the period 1952-1972) many of them directed at procedural issues as well as to provide for the consequences of the trials. These are tabled in *R v Christian and Others (No.2)* [2005] LRC 745 [83].

<sup>39</sup> The *Pitcairn Trials Act 2002* (New Zealand) came into force in March 2003 as a result of the *Pitcairn Trials Act Commencement Order 2003* (New Zealand) and the *Judicature (Amendment) Ordinance 2003* (Pitcairn Islands).

<sup>40</sup> [2005] LRC 745 [3].

<sup>41</sup> Appeal to both was established under Orders in Council: *Pitcairn (Court of Appeal) Order 2000* (No. 1341) and *Pitcairn (Appeals to the Privy Council) Order 2000* (No.1816). In fact the latter was probably not necessary as it has been held that appeals to the Judicial Committee of the Privy Council are in the nature of a petition to the royal prerogative and do not require any legislative sanction. (*Attorney General for St Christopher and Nevis v Rodionov* [2004] 1 WLR 2796 per Lord Bingham [17]). An appeal to Her Majesty in Council is available unless expressly or impliedly excluded or renounced (*Attorney General of Ceylon v Perera* [1953] AC 200, reiterated in *Grant v the Queen* [2004] UKPC 27). See in any case s 1 *Judicial Committee Act 1844* which would have applied to Pitcairn.

<sup>42</sup> For example, Article 10 of the Protection of Fundamental Rights and Freedoms in the *Constitution of Nauru*; Articles 6 and 9 of the Fundamental Rights in the *Constitution of Samoa*; Section 10 Protection of Fundamental Rights and Freedoms of the Individual, *Solomon Islands Constitution*.

application which applied in Pitcairn, but questions were raised as to whether the Pitcairn accused were being charged under a law of which they were ignorant and which was effectively applied retrospectively because until the court ruled that the Act was indeed a law of general application applying in Pitcairn it would not have been so. These concerns give rise to issues which would fall under Article 7 of the *ECHR*, which relates to the concept that laws should not apply retrospectively.<sup>43</sup>

There are also two further human rights questions, which, while not raised before the various courts should perhaps have been considered. Firstly, whether there are issues under Article 14 of the *ECHR* – freedom from discrimination, and secondly, whether there have been breaches of Article 3 of the *ECHR* which provides for freedom from inhuman and degrading treatment.

## **Article 6**

This Article provides for the right to a fair trial. It encapsulates a number of the fundamental rights principles of common law as well as those of international law. Article 6(1) establishes general guidelines for a fair hearing whereas Article 6(3), which should be read with the former section, provides specifically for criminal charges and indicates the *minimum* human rights expectations where a person is charged with a criminal offence.

In the Pitcairn case there were two main issues raised under Article 6(1). The first was the question of whether the tribunals established by law were impartial and independent, and the second was whether there was undue delay in prosecuting the accused. There was also the initial question of whether Article 6 applied to committal proceedings as opposed to a hearing on the merits. The Supreme Court accepted the Public Prosecutor's view that Article 6(1) did not apply, on the grounds that the requirements for a fair trial referred not to procedural or administrative matters but to substantive matters.<sup>44</sup> The court relied on the case of *X v UK* where it was held that the issue of the appointment of a legal aid lawyer fell outside the Article.<sup>45</sup> Such reliance was uncritical. This is a disputed area. *X v UK* is authority for the principle that proceedings which are ancillary to a charge fall outside Article 6. So the initial investigations by police in 1999 might not fall under the Article. However it has been held that Article 6 applies from the moment that 'the official notification has been given to an individual by the competent authority of an allegation that he has committed a criminal offence'.<sup>46</sup> In the Pitcairn case it is not clear when this moment was. It is however apparent that serious allegations had been made by 1 May 2000,<sup>47</sup> although criminal charges were not laid against the men living in Pitcairn until April 2003. Further charges against Pitcairn men living in New Zealand were made in June 2003, by which time the machinery of justice had been put in place. However, it must have been apparent (especially in a small and close-knit community) for some time before this that there were allegations of serious criminal offences; otherwise there would have been no need for either the police operation or the legislative activity that

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<sup>43</sup> See equivalent provisions in the rights statements of regional Constitutions, for example, Clause 20 Tonga; Section 10(4) Kiribati; Article 2 Section 8 Marshall Islands.

<sup>44</sup> *Queen v 7 Named Accused* [2004] PNSC 1 <http://www.paclii.org> [177 – 179].

<sup>45</sup> (1982) 5 EHRR 273.

<sup>46</sup> *Eckle v Germany* A 51 (1982) 5 EHRR 1, 33.

<sup>47</sup> This is highlighted in the Supreme Court case [2005] LRC 745 [109].

took place between 1999 and 2003. Indeed there is evidence that cautions were issued in September 1996.<sup>48</sup> If this was so then Article 6(1) would be applicable from 1996. It should also be pointed out that Article 6 is essentially concerned with providing procedural guarantees so that to argue that procedural matters fall outside the ambit of the Article undermines the very purpose of the Article. Indeed it can be argued that where new and unfamiliar procedures are rapidly put in place the effective protection of due process rights becomes even more important and that a liberal rather than restrictive interpretation of those rights should be applied.

*An independent and impartial tribunal*

One of the fundamental requirements of Article 6(1) is that the tribunal or court hearing a matter should be 'independent' from the Executive and from the parties.<sup>49</sup> Indeed it has been held that '[T]o be truly independent the tribunal must be independent of the Executive in its functions and as an institution'.<sup>50</sup> Factors which may be taken into account – although these are not exclusive – are: the process of appointment of the members of any court or tribunal; the terms of their office; and the guarantees against outside influence.<sup>51</sup> These aspects must be considered subjectively and objectively.<sup>52</sup>

The accused were committed to trial at first instance before a Magistrate sitting as the Magistrate's Court on Pitcairn. The Magistrate was appointed by the Governor of Pitcairn located in New Zealand, under powers conferred on him by section 7 of the *Pitcairn Order 1970*. Such appointees hold their office during Her Majesty's pleasure. The nature of this tenure was challenged on the grounds that as these Magistrates did not have security of tenure they could not be considered to be an 'independent and impartial tribunal' as required under Article 6(1) of the *ECHR*. This was a matter on which there had been case law in Scotland which concluded that temporary sheriffs – the equivalent to English magistrates – do not constitute an independent and impartial tribunal.<sup>53</sup>

This line of reasoning was rejected by the Supreme Court on the grounds that an appointment during Her Majesty's pleasure is distinguishable from the temporary appointment of Scottish sheriffs.<sup>54</sup> The former do not depend on the Executive for security of tenure but are indefinite appointments made under the exercise of the Crown's prerogative exercised through the Governor.<sup>55</sup> This fails to acknowledge the

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<sup>48</sup> [2005] LRC 745 [177] point 4. These cautions – issued by the British police – were for offences under the *Sexual Offences Act* although the court had not yet ruled that this Act applied.

<sup>49</sup> *Bentham v Netherlands* (1985) 8 EHRR 1.

<sup>50</sup> *Campbell and Fell v UK* (1984) Series A Vol 80 [137-139].

<sup>51</sup> Helen Fenwick, *Civil Liberties and Human Rights* (3rd ed, 2002) 61.

<sup>52</sup> *Pullar v UK* (1996) 22 EHRR 391.

<sup>53</sup> *Starrs v Ruxton* [2000] SLT 42; 2000 JC 208, followed by *Miller v Dickson* [2002] 1 WLR 1614 (PC). Under s 57 of the *Scotland Act 1998* no member of the Executive may act in such a way which is incompatible with any of the articles of the *ECHR*. Sheriffs are appointed by the Executive.

<sup>54</sup> For comment see Sue Farran (2007) 'Conflicts of Laws in Human Rights: Consequences for Colonies' (2007) 11(1) *The Edinburgh Law Review* 121.

<sup>55</sup> *Queen v 7 Named Accused* [2004] PNSC 1 [171]. It is a Crown prerogative to make appointments to the judiciary. In practice however the appointments are routed through the Prime Minister or his representative. Security of tenure for magistrates and other judicial officers was subsequently provided for by the 2003 Ordinance ([180]).

reality that the prerogative of the Crown in making appointments is exercised through the offices Crown's Ministers of State – the Executive.

This same matter was raised before the Court of Appeal. In addressing the issue the court disclosed that

[s]ome days before the hearing of the applications to the Supreme Court were made an amending Ordinance was made which guaranteed tenure to the Judges until age 65 and provided (a) for non-reduction of salaries during office and (b) for machinery for removal of Judges only on the grounds of disability or misconduct.<sup>56</sup>

The motive for this amendment was not revealed but on the face of it, it appears to be directed at addressing the very point raised in the Scots case law. The consequence was that in the matters leading up to the applications to the Supreme Court, the judges held office during Her Majesty's pleasure but at some point thereafter did not.

The Court of Appeal relied on the cases of *Campbell and Fell v UK*,<sup>57</sup> *Findlay v UK*<sup>58</sup> and *Eccles, Mc Phillip and McShane v Ireland*<sup>59</sup> to support their finding that the Magistrate appointed under s 11 of the *Judicature (Courts) Ordinance 1999* (Pitcairn Islands), was independent and impartial. The Court was not concerned to consider whether both objectively and subjectively this would be seen to be the case, especially by Pitcairn islanders.

The issue is not only one of independence of judicial tenure, but also whether there is a sufficient distinction between policy makers and rights determination. In the United Kingdom this has been raised in a number of civil litigation cases involving the exercise of planning policy decisions by the Secretary of State for the Environment.<sup>60</sup> If there is sufficient judicial review of the legality of decisions made by policy makers then a breach of Article 6(1) may be avoided.<sup>61</sup> If, however, the Executive is seen as having too much influence on the judiciary or panel members of a tribunal, or there is insufficient apparent independence then there may be a breach of Article 6.

In criminal law the application of Article 6 must necessarily be more rigorous than civil litigation given that a person's liberty may be at stake and that the individual is confronted by the power and machinery of the State. In the case of Pitcairn clearly there was a policy decision to implement a number of measures to bring the accused to trial. The appointment of judicial officers was part of the implementation of this policy. The agreement between England and New Zealand was a foreign policy matter. Members of the New Zealand legal profession at a number of levels, including as judges, were involved in the process. The concern is whether there was sufficient

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<sup>56</sup> [2004] PNCA 1 [74].

<sup>57</sup> (1984) 7 EHRR 165.

<sup>58</sup> (1997) 24 EHRR 221.

<sup>59</sup> (1988) 59 DR 212, E Comm HR.

<sup>60</sup> See for example, *R v Secretary of State for the Environment, Transport and the Regions, ex parte Holding & Barnes plc and others* [2001] 05 EG 170.

<sup>61</sup> *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions and other cases* [2001] UKHL 23.

distance between the appointment procedure of judges and counsel and the implementation of an agreed foreign policy?

The Court of Appeal further held that until such time as the Supreme Court judges actually heard the applications they were acting in an administrative capacity and not a judicial capacity. The significance of this was that Article 6 rights did not apply to preliminary hearings and matters of procedure. Reliance was again placed on *X v UK*.<sup>62</sup>

However a broader consideration of the case law on Article 6 indicates that in civil cases, pre-trial matters may be included such as: the right of access to a court;<sup>63</sup> and the right to a fair hearing in pre-trial procedures.<sup>64</sup> In criminal matters the 'reasonable time' requirement 'may start to run from a date prior to the seisin of the trial court'.<sup>65</sup> As previously indicated, Article 6(1) is essentially concerned with procedure so that matters of procedure which are directly linked to eventual trial are more likely to fall within the scope of Article 6 rather than outside it. Moreover even if the judges were acting in an administrative capacity they were still acting in their roles as judges and not as civil servants or lay persons. Indeed the Court of Appeal appears to have accepted that the decision by the Magistrates to commit the accused to trial was a judicial one.<sup>66</sup> It is suggested therefore that the Court of Appeal adopted an artificial distinction.

### *Trial by Jury*

A further challenge under Article 6 related to the right of the accused to trial by jury. This is a right enjoyed by persons charged in criminal proceedings in the United Kingdom and, it was argued, part of the common law tradition. The legislation applicable to Pitcairn – the *Judicature (Courts) Ordinance 1999* (Pitcairn Islands), and the *Justice Ordinance 2001* (Pitcairn Islands) makes no express provision for jury trials (nor does it expressly exclude them). The Supreme Court acknowledged the relevance of both the principles of the *Magna Carta* and the *Act of Settlement* (mentioned above). However it chose to follow a line of reasoning adopted in another island case (the Chagos Islands): *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs and Another*.<sup>67</sup> Here it was stated that

the principle that fundamental or constitutional rights might not be abrogated by a subordinate instrument made pursuant to legislation cast in general terms ... did not apply to colonial laws which by virtue of sections 2 and 3 of the Colonial Laws Validity Act 1865, were only void if and to the extent that they were repugnant to an Act of the United Kingdom Parliament applicable to that colony ...<sup>68</sup>

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<sup>62</sup> (1983) 5 EHRR 273.

<sup>63</sup> *Golder v UK* (1975) Series A, Vol 18 – refusal of a prisoner to have access to a solicitor to bring a civil case was a breach of an element inherent in the right stated in Article 6(1) [35 -36]. Followed in *Hilton v UK* (1988) 3 EHRR 104.

<sup>64</sup> *McMichael v UK* (1995) Series A Vol 308, Article 6(1) applies to care proceedings prior to a children's hearing and the Sheriff Court.

<sup>65</sup> *Golder v UK* (1975) Series A Vol 18 [28-32].

<sup>66</sup> [2004] PNCA 1 <http://www.pacli.org> [89].

<sup>67</sup> [2001] QB 1067.

<sup>68</sup> Quoted in *Queen v 7 Named Accused* [2004] PNSC 1 [204].

The court did not pause to consider whether the *Colonial Laws Validity Act 1865*, applied to Pitcairn;<sup>69</sup> whether Pitcairn could be described as a colony;<sup>70</sup> or whether a better approach might be to recognise that the subordinate legislation should be read together with those fundamental rights conferred by the *Magna Carta* and the *Act of Settlement*, which were the general principles of common law.

It is true that Article 6 does not require trial by jury, and a number of countries which are signatory members of the *ECHR* do not have juries in criminal trials.<sup>71</sup> It is also true that most Pacific island countries do not have jury trials although there is provision for such trial in some of them, for example Tonga and Marshall Islands.

In accommodating divergences of approach among countries, the *ECHR* permits consideration of national differences through the concept of “the margin of appreciation” afforded to signatory states. The United Kingdom has frequently relied on this in seeking to avoid being found in breach of its *ECHR* obligations. In allowing a “margin of appreciation” the European Court of Human Rights considers whether the aim of any interference with the right is reasonable and proportional to the nature of the interference. In the Pitcairn case this margin of appreciation could have been used in one of two ways. First, it could have been used to add a gloss to the minimal provision of Article 6 to hold that under English law the right to a fair criminal trial includes the right to trial by jury. Secondly, and alternatively, it could have been used to justify the denial of a right to trial by jury on the grounds that the domestic/national context made this inappropriate. This latter approach is the one adopted by the Supreme Court. In particular the Court relied on the *Colonial Laws Validity Act 1865* (United Kingdom) which permits the abrogation of fundamental rights in respect of colonies.<sup>72</sup> One can only speculate whether the outcome would have been the same or different had trial by jury been allowed, and how that jury would have been composed.

#### *The Composition of the Court*

A further challenge was made before the Pitcairn Court of Appeal as to the validity of constituting a Supreme Court of three judges.<sup>73</sup> The issue arose because under the *Judicature (Courts) Ordinance 1999* (Pitcairn Islands) the Supreme Court of Pitcairn Islands exercises the same jurisdiction as the High Court and Crown Court of England. Under the *Supreme Court Act 1981* (United Kingdom) the jurisdiction of the High Court in England is exercised by a single judge and that of the Crown Court by a single judge or a single judge sitting with justices of the peace. Moreover s 9(1) of the *Judicature (Courts) Ordinance 1999* (Pitcairn Islands) provides that trials before

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<sup>69</sup> Even if it does apply, it does not exclude judicial review of the exercise of power by the Executive.

<sup>70</sup> *Queen v 7 Named Accused* [2004] PNSC 1. At [130] the Supreme Court considered two different types of acts of State: 1. the acts of settling a country as a colony; 2. enactments by the Sovereign for the governance of a country. It found that the Orders in Council of 1952 and 1970 fell into this second category. Throughout the case Pitcairn is referred to as a settlement and in the summary as a (British) territory ([215]). In international law its status is that of a non-self-governing territory under the administration of the United Kingdom: Tony Angelo and Andrew Townend, above n 5, 230.

<sup>71</sup> It is not therefore very surprising that a European convention which must provide for a variety of legal systems and procedures does not stipulate this as one of the minimum requirements for a fair trial.

<sup>72</sup> [2004] PNSC 1 [204-206].

<sup>73</sup> All of these judges were New Zealanders appointed for the purposes of this case.

the Supreme Court exercising its civil or criminal jurisdiction should be before ‘a judge alone’, although that single judge *may* sit with assessors. The Court of Appeal held that it was competent to hear a pre-trial appeal issue directed at the lack of jurisdiction of the Supreme Court but could not interfere with the exercise of the Supreme Court’s inherent jurisdiction where there was no statutory restriction on the Court sitting as a three judge – as opposed to single judge – court. The Court of Appeal held that the *Supreme Court Act 1981* (United Kingdom) could only apply in so far as the structure of the courts were the same in Pitcairn and England and therefore as certain sections of the English Act did *not* apply, the Supreme Court could invoke its inherent jurisdiction.<sup>74</sup> Even if the United Kingdom Act did apply, the *Judicature (Courts) Ordinance 1999* (Pitcairn Islands) provided that

no process or proceeding shall be quashed, set aside, or held invalid by any Court or quasi judicial authority by reason only of any defect, irregularity, omission or want of form unless the Court or authority is satisfied that there has been a *substantial miscarriage of justice*.<sup>75</sup>

This section is based on a similar one from the *Summary Proceedings Act 1957* (New Zealand). However the New Zealand provision is broader, referring to ‘a miscarriage of justice’ (which by implication need not be “substantial”) and only applies to criminal proceedings in a district court.<sup>76</sup> The difference in wording did not however, prevent the Court of Appeal from considering New Zealand authorities on the point. The Court held that any defect or irregularity in the composition of the court was excluded under s 16(3).

The composition of the courts and the Ordinances passed to facilitate the trials was also raised during the criminal appeal to the Court of Appeal. It was argued that the accused, as British subjects, had the right to be tried by British judges and that the laws made to facilitate this process should have been based on English not New Zealand laws. The Court of Appeal was quick to dismiss this claim as being without merit, on the grounds that not only had the Governor of Pitcairn acted *intra vires* but also that it was not unusual to have judges drawn from other jurisdictions sitting on appeal courts in the region.<sup>77</sup> This is an experience with which Pacific islanders are familiar, especially with Courts of Appeal. This point was also considered by the Privy Council which summarily dismissed it with the comment ‘[i]t is hard to take any of these points seriously.’<sup>78</sup>

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<sup>74</sup> The Ordinance does not refer directly to the United Kingdom Act nor does it limit the cross-reference to the High Court and Crown Court of England, by words such as ‘in so far as local circumstances permit’. It is not clear if the *Supreme Court Act 1981* (United Kingdom) is regarded by implication as ‘a statute of general application’ under s 16 (1). If it is then it may be limited by local circumstances: s16 (2).

<sup>75</sup> Section 16(3). Emphasis added.

<sup>76</sup> Section 204 *Summary Proceedings Act 1957* (New Zealand). See also s 11 *New Zealand Insolvency Act 1967* (New Zealand) (proceedings not to be annulled unless a person is injuriously affected) and s 418 *Insolvency Act 2006* (New Zealand) which refers to ‘a person prejudiced by the defect’.

<sup>77</sup> [2006] PNCA 1 [74-89].

<sup>78</sup> [2006] UKPC [26].

*Reasonable time and delay*

One of the early matters raised in the case was the delay of three and half years prior to the matter coming to trial. In chambers hearings in May 2003 the Pitcairn Public Defender sought to have the matter struck out.<sup>79</sup> The issue of delay in this trial process has been extensively commented on by Trenwith who highlights in some detail the different component parts of the case which may be relevant.<sup>80</sup> In considering the question of delay the Supreme Court considered the complexity of the case, the conduct of the defendant, and the manner in which the case had been dealt with by the administrative and judicial authorities.<sup>81</sup> The court was not convinced that there had been unreasonable delay at any point.

The concern of Article 6 is ‘to put an end to the insecurity of the applicant who is uncertain of the outcome of the civil action or charge against him or her rather than with the deprivation of liberty’.<sup>82</sup> The question of delay therefore is not just the passing of time but the uncertainty that accompanies it. In the Pitcairn case it could be argued that the postponement of the Privy Council’s decision on pre-trial matters until *after* the criminal trial and its appeal violates this right. The period of time in question runs until the highest court has given its ruling (here the Privy Council). Each case, therefore, must be judged on its own merits and there is no set time which is deemed to be reasonable. In criminal cases this period of time starts to run from ‘the stage at which the situation of the person concerned has been substantially affected as a result of a suspicion against him’.<sup>83</sup> This means that time can start to run before formal charges have been made. In the Pitcairn case this was certainly in 1999 if not before,<sup>84</sup> especially given the small and intimate nature of the Pitcairn community.<sup>85</sup>

The Privy Council has previously held that where a breach on this ground has been established then the remedy is that the proceedings can no longer continue.<sup>86</sup> The Supreme Court however preferred the English House of Lords approach where it has been held that a hearing should not be discontinued in the case of breach.<sup>87</sup> The Supreme Court’s rationale for adhering to the House of Lords ruling was that ‘this court applies English law ... [therefore] it is bound by the ruling in the House of Lords...’<sup>88</sup> The Court of Appeal also appeared to approve the English House of Lords approach rather than that of the Privy Council. Given that appeal from the Pitcairn Court of Appeal is to the Privy Council *not* the House of Lords, this line of reasoning is perverse. As the Privy Council agreed with the Supreme and Appeal Courts of Pitcairn, that the length of time taken to establish the framework for prosecution did

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<sup>79</sup> Alan Watkins, above n 5.

<sup>80</sup> Anthony Trenwith, above n 5.

<sup>81</sup> Support for this approach is found in *Konig v Federal Republic of Germany* (1978) 2 EHRR 170.

<sup>82</sup> Helen Fenwick, above n 51, 61.

<sup>83</sup> *Neumeister v Austria* Judgment of 27 June 1968 (1979-80) 1 EHRR 91.

<sup>84</sup> This could be as early as 1996 when two officers of the Kent Constabulary were appointed as Pitcairn Island police officers following a request by the Foreign and Commonwealth Office to investigate allegations of sexual offending.

<sup>85</sup> The Supreme Court acknowledged that during 2000 it was generally known on Pitcairn that a major investigation into sexual offending was being conducted ([2005] LRC 745 [177] point 35.

<sup>86</sup> *R v HM Advocate* [2002] UKPC 3.

<sup>87</sup> *A-G’s Reference (No 2 of 2001)* [2004] 5 LRC 88.

<sup>88</sup> *R v Christian (no 2)* [2005] LRC 745 [233].

not amount to a delay of sufficient length so as to make the prosecutions an abuse of process,<sup>89</sup> there is no indication from this case whether the Privy Council will adhere to its previous approach on the consequences if an unreasonable delay is found. This means that there is now some uncertainty for those countries having a right of final appeal to the Judicial Committee of the Privy Council.

### **Article 7**

This Article essentially provides that there shall be '[n]o punishment without law.' It consists of a number of parts:

- (1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
- (2) This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

#### *No retrospectivity of criminal laws*

This Article applies specifically to the criminal law so that a citizen can sufficiently foresee the consequences which a given action may entail and thereby regulate his or her conduct.<sup>90</sup> It applies to statute law and the common law developed through case-law. Both procedurally and substantively there was the question whether Pitcairn Islanders were subject to retrospective laws. All the post-2000 Ordinances were passed to facilitate the trial of offences which had taken place prior to their enactment. However it was held that retrospectivity as prohibited by this Article did not apply in the case of procedure or practice and that a changed system was not therefore precluded from determining matters which had arisen previously.<sup>91</sup> This is, of course, provided that such procedural changes do not jeopardise or prejudice a fair trial.

There is also however the question of retrospective substantive – rather than just procedural – law. In the revised *Pitcairn Constitution* of 1904, Law 2 made it an offence to seduce a girl under the age of 14. Law 3 of the same *Constitution* stated that questions of adultery and rape had to be referred to the High Commissioner's Court for the Western Pacific (at that time in Fiji). This *Constitution* remained in force until 1940. In 1940 new Pitcairn government regulations were promulgated.<sup>92</sup> No reference to rape, murder or other serious sexual offences was made in these regulations although a general provision reserved jurisdiction for matters not within the jurisdiction of the Island Court to the High Commissioner's Court for the Western

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<sup>89</sup> [2006] UKPC 47 [25].

<sup>90</sup> See *Sunday Times v UK* (1978) Series A, Vol 30 [49].

<sup>91</sup> [2005] LRC 745 [187-190].

<sup>92</sup> These were later held to be *ultra vires* the High Commissioner's power but were re-issued following the *Pitcairn Order in Council 1952* which empowered the Governor of Pitcairn to make such regulations.

Pacific as previously. The *Judicature Ordinance 1961* (Pitcairn Islands) declared that the law of Pitcairn was to be the law in force in England to the extent that local circumstances permitted and the *Justice Ordinance 1966* (Pitcairn Islands) conferred jurisdiction in criminal matters on the Island Court.<sup>93</sup> There was no specific reference in the *Justice Ordinance 1966* to serious crimes – such as rape or murder. Section 88 of this *Ordinance* stated that:

[a]ny male person who shall have carnal knowledge of any female child of or over the age of twelve years shall be guilty of an offence and liable to imprisonment for one hundred days.

Clearly this only applied to a limited class of sexual abuse, and would not apply to abuse of children under the age of twelve and possibly – although this is not so clear, to a female person who was considered to no longer be a child.<sup>94</sup> Other offences would therefore fall either under general principles of common law or statutes of general application.<sup>95</sup> The only authority referred to in the Supreme Court judgment of 2005 was a letter written by Commissioner Reid Cowell in 1965 to the then Island Magistrate noting that ‘if any male person should have carnal knowledge of a female child under the age of 12 years, that male person would be liable to be prosecuted under the English law of rape’.<sup>96</sup> In practice this does seem to have happened. For example, although prosecutions had been brought under s 88 in 1955, the prosecutor had not been required to refer the more serious offenders to trial before the High Commissioner’s Court.<sup>97</sup> That s 88 remained the prime vehicle for prosecutions for unlawful sexual behaviour was reinforced even after the presence of British police officers on the island. For example, in 1999 a Pitcairn resident was charged under this section for an offence against a 15 year old girl.

On appeal to the Court of Appeal it was argued that the *Justice Ordinance 1966* (Pitcairn Islands) amounted to a code covering sexual misconduct and that therefore the *Sexual Offences Act* did not apply because there was sufficient local provision. This claim was supported by reliance on other sections which could be used to deal with sexual misconduct, and which could be taken to include indecent assault.<sup>98</sup> The Court of Appeal rejected this argument holding that indecent assault was a separate form of assault and was not covered by the *Justice Ordinance 1966* (Pitcairn Islands). Therefore the *Sexual Offences Act* applied, if not in whole – because of the overlap of s 88 with similar offences in the Act – at least in part.

While various Pitcairn ordinances from 1961 onwards amended the relevant point of time for the applicability of statutes in force in England to be regarded as statutes of general application in Pitcairn – so far as local circumstances allowed – the Supreme Court acknowledged that

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<sup>93</sup> Expressly excluded from the Island Court jurisdiction were offences referred to in s 7 of the *Judicature Ordinance 1961* (Pitcairn Islands).

<sup>94</sup> In 1997 the Government Advisor Leon Salt indicated that the age of consent on Pitcairn was 16 (under British law) and that ‘British law applied to females under 12; s 88 (Pitcairn law) applied to females between 12 and 16’ [2005] LRC 745 [104].

<sup>95</sup> See Tony Angelo and Fran Wright, above n 5, 431.

<sup>96</sup> [2005] LRC 745 [79].

<sup>97</sup> [2005] LRC 745 [122].

<sup>98</sup> Notably s 89 – indecent behaviour in a public place; s 89 – adultery; s 90 – unmarried cohabitation and s 82 – assault including aggravated assault.

[a]t no time during the currency of the accused's offending was English law itself published on the islands. There was no despatch of statutes, legal texts or such compendium publications as Halsbury's Laws of England...<sup>99</sup>

Further, the *Sexual Offences Act* was never expressly extended to Pitcairn. It was not until 2004 that the Supreme Court ruled that this Act applied as a statute of general application. This, as pointed out by Angelo is an act of judicial legislation and offends a fundamental principle that 'there should be no crime without a law and that a person should not be punished for an act which was not criminal at the time of its commission'.<sup>100</sup> In considering the appeal against criminal conviction the Court of Appeal rejected this argument holding that 'there can be no question but that the 1956 Act is a statute of general application' and that to suggest that each English statute required specific adoption would be contrary to the general provisions of the Ordinances.<sup>101</sup>

Much of the case law relied on by the Public Prosecutor to support the prosecution predates the United Kingdom's commitment to the *ECHR* and the United Kingdom's own *Human Rights Act*. Given the new obligations imposed on courts under that Act, today it might be argued that the State and its representatives have a greater responsibility to publicise laws which criminalise certain activities to ensure that Article 7 is not breached, and to ensure that the law is both accessible (in its authentic form) and foreseeable.<sup>102</sup>

The Supreme Court, however, was content that

[t]he law demands not that citizens have express awareness of the content of the law, nor that the law is promulgated to that extent, but that the law needs to be accessible in order that people can regulate their conduct by it.<sup>103</sup>

While the Court of Appeal was unsure whether accessibility through a government agency would be sufficient it was persuaded that in a general sense the appellants were 'sufficiently aware of the unlawfulness of their conduct and its consequence'.<sup>104</sup>

In considering whether or not ignorance of the law should be an excuse the Privy Council<sup>105</sup> has held that

the maxim that ignorance of the law was no excuse could not be relied upon where there was no provision for publication of an order of the kind made in that case, or any other provision designed to enable a man by appropriate enquiry to find out what the law was.<sup>106</sup>

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<sup>99</sup> [2005] LRC 745 [95].

<sup>100</sup> Tony Angelo and Fran Wright, above n 5, 432.

<sup>101</sup> [2006] PNCA 1 [48]. There is oblique reference to 'some academic writing' and the observation that this was not 'advanced in any substantive way before us' ([50]).

<sup>102</sup> *R (on the application of L) v Secretary of State for the Home Department* [2003] EWCA Civ 25 per Lord Phillips at 1069.

<sup>103</sup> [2005] LRC 745 [168].

<sup>104</sup> [2006] PNCA 1 [118].

<sup>105</sup> *Lim Chin Aik v R* [1963] AC 160.

<sup>106</sup> [2006] PNCA 1 [107].

The question of sufficient publication and awareness was a key issue in the Privy Council's decision on whether or not there had been an abuse of process in the Pitcairn case. Referring to the case of *Regina v Latif*,<sup>107</sup> the Privy Council accepted that a court had discretion to stay proceedings if the integrity of the criminal justice system was in question due to an abuse of process amounting to 'an affront to the public conscience'.<sup>108</sup> Had the law not been published and therefore could not reasonably be known by the accused this would point to an abuse of process justifying a stay of prosecution. However, in the Committee's judgment, delivered by Lord Hoffman, the Privy Council expressed itself satisfied that the Supreme Court and the Court of Appeal of Pitcairn had exercised their discretion appropriately in balancing the public interest in bringing criminals to justice with the need to avoid giving the impression that the end justifies the means.<sup>109</sup> The impression of whom or the interest of which public was not clarified.

Nevertheless the question of publication and knowledge troubled Lord Woolf and Lord Hope – both of whom gave separate judgments. Lord Woolf pointed out that

[i]t is a requirement of almost every modern system of criminal law that persons who are intended to be bound by a criminal statute must first be given either actual or at least constructive notice of what the law requires. This is a requirement of the rule of law...<sup>110</sup>

His Lordship was however more easily persuaded than Lord Hope that there had been sufficient publication and knowledge on the part of the accused. Lord Hope was not convinced that there had been sufficient publication of the *Sexual Offences Act* under which the charges were brought. He found that

[n]o steps were taken to bring to the notice of the island's Council or its inhabitants ... any of the laws of England that might be invoked on Pitcairn to deal with any serious criminal matter not covered by the (Justice) Ordinance (1966).<sup>111</sup>

Indeed the only way in which Lord Hope could persuade himself that the accused would have been aware of the criminal nature of their conduct was by finding that the *Sexual Offences Act* created no new offences but simply incorporated into statute offences already known to the common law. As, following general principles established by Blackstone, it was presumed that the original Bounty settlers of Pitcairn took the common law with them,<sup>112</sup> the accused were charged with an offence of which they would already be aware.<sup>113</sup> While this may have been a very convenient way of extending jurisdiction over far flung settlements where colonial

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<sup>107</sup> [1996] 1 WLR 104.

<sup>108</sup> [2006] UKPC 47 [19].

<sup>109</sup> [2006] UKPC 47 [19] and [24].

<sup>110</sup> [2006] UKPC 47 [40].

<sup>111</sup> [2006] UKPC 47 [70].

<sup>112</sup> Lord Hope relied on Blackstone, *Commentaries on the Laws of England* (4<sup>th</sup> ed. 1770) Vol 1, 107.

<sup>113</sup> Had charges been brought under the common law however they may have failed due to the period which had elapsed between commission and charge.

administrators had yet to exert any control or influence in the mid-eighteenth century, it is an assertion that is open to question in contemporary jurisprudence. Even if the mutineers had taken with them this invisible mantle of the common law, it has been recognised, especially by Lord Denning, that common law transplanted to a foreign soil may develop differently.<sup>114</sup> To hold that present day Pitcairners had the same common law as the Bounty settlers seems to ignore the passage of over two hundred years of living in a small and very isolated community.

### *Penalty*

The penalty under the *Justice Ordinance 1966* (Pitcairn Islands) was 100 days. Under the *Sexual Offences Act* the penalty is potentially heavier. Within the Pitcairn context even 100 days may have been viewed as heavy, especially where it meant the confinement of an able-bodied man in a community where all hands were needed to handle long boats meeting ships or to assist in communal projects. Even if, therefore, Pitcairn islanders were aware of the offence of rape or indecent assault beyond the provisions of the *Justice Ordinance 1966* (Pitcairn Islands), it would still be a breach of Article 7 if the penalty was heavier than the one which was known to be applicable at the time of the offence.

This was a point pursued by Lord Hope in the Privy Council and caused him considerable ‘unease’.<sup>115</sup> However the common law – which provided for similar offences prior to legislation – had no limits on penalties, and if, as Lord Hope was persuaded, the *Sexual Offences Act* did no more than incorporate the existing common law offences into statutory form, there was no disadvantage to the accused. The question whether Pitcairn islanders would have been aware of the potentially unlimited scope of penalties under the common law (compared to the knowledge they may have had of the penalty administered under the Pitcairn law) does not appear to have contributed to Lord Hope’s unease.

### *General principles of law recognised by civilised nations*

It is arguable that even if there was no specific Pitcairn law regarding sexual abuse of children under twelve and over the age of maturity and even if Pitcairn islanders were unaware of the specific English laws which applied as statutes of general application to Pitcairn, nevertheless Pitcairn islanders would have known that they were infringing general principles of law recognised by civilised nations. In the Supreme Court appeal of May 2005 much was made of international provisions which might be generally applicable. Attention was drawn to the Preambles to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights*, and the *Convention on the Rights of the Child*.<sup>116</sup> Although none of these instruments relate specifically to sexual rights there was no consideration of whether this omission of sexual rights is deliberate because in an international arena different cultures have very different mores and taboos regarding acceptable sexual conduct, or

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<sup>114</sup> *In Nyali Ltd v Attorney-General* [1957] 1 QB 1, at 16, he said: ‘Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England’.

<sup>115</sup> [2006] UKPC 47 [82].

<sup>116</sup> *Convention on the Rights of the Child (CRC)* (entered into force 2 September 1990; ratified by the United Kingdom 15 January 1992) Res 44/25.

conduct between the sexes. Age limits for a range of activities vary from one civilised nation to another, just as ages of maturity may vary or definitions of what is deemed to be a sexual act such as rape. Instead it was held, referring to case-law of the European Court of Human Rights,<sup>117</sup> that

where an offence is committed which violates fundamental human rights protected in international law, a perpetrator may be expected to know, as an ordinary citizen, that such an offence is a violation<sup>118</sup>

and

that activities which violate these universally accepted standards may be recognised by the international community's citizens as conduct that is intrinsically wrong.<sup>119</sup>

This assertion deserves some reflection. First, some of the offences with which the accused were charged had been committed prior to the United Kingdom's ratification of these instruments. Second, ratification by itself does not give effect to these rights in domestic law but imposes obligations upon signatory states to give effect to their provisions in domestic law. Third, the assertion is that Pitcairn islanders should have known not just that their conduct was illegal according to Pitcairn law (that is Ordinances passed for Pitcairn and United Kingdom statutes of general application) but also according to international norms. In the criminal trial the Supreme Court found it unnecessary to determine whether the islanders would have actually been aware that the acts complained of were against the law of civilised nations,<sup>120</sup> the assumption being, presumably, that international norms were of universal application and were understood and shared by communities even as remote as Pitcairn. It is, of course, unlikely that Pitcairners were ignorant of the crime of rape if only because of the influence of religion and religious teaching in the community. Moreover, in recent years there had been greater access to overseas media and education. What there had not been, however, was an effective police presence on the island to discourage or prosecute conduct deemed by the international community to be unacceptable.

As has been indicated, under the *ECHR* a "margin of appreciation" is afforded to signatory states for those Articles which are most likely to be influenced by considerations of culture or personal law. This does not mean that certain fundamental rights are abandoned, simply that when it comes to matters such as sex, religion, freedom of expression, and rights to marry, different countries and different cultures may have divergent views. Arguably the unique circumstances of Pitcairn justified – at the very least – a careful consideration of sexual mores, appropriateness of procedures and of punishment even if this did not lead to different conclusions.

Indeed it might seem that consideration of the unique circumstances of Pitcairn and the damaging impact of the trial procedures have been ignored despite the observation by Paul Treadwell, the legal advisor of the Foreign and Commonwealth Office to the

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<sup>117</sup> *K-HW v Germany* (2003) 36 EHRR 59.

<sup>118</sup> [2005] LRC 745 [169].

<sup>119</sup> [2005] LRC 745 [173].

<sup>120</sup> [2005] LRC 745 [174].

Deputy Governor of Pitcairn, that ‘the public interest required that such serious offences ... should be detected and punished, *even though the destruction that might result within the tiny island community seemed incalculable*’.<sup>121</sup>

## **RIGHTS THAT WERE NOT RAISED**

This leads to consideration of two human rights provisions which were not raised in the case but which nevertheless might have been applicable: Articles 14 and 3 of the *ECHR*.

### **Article 14**

This Article is directed at preventing discrimination and thereby affording all people equality under the law. It states:

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

As indicated this Article was not pleaded in the case. Indeed, it is not an Article which can be pleaded in isolation but must be raised in connection with a breach of one of the other Articles. Arguably it could have been raised in connection with either or both Article 6 and 7. However a breach of Article 14 can make unlawful what might otherwise be lawful in terms of the other rights guaranteed by the *ECHR*.<sup>122</sup> The scope of the Article is not limited solely to the grounds set out; these are indicated as examples.<sup>123</sup> Even if they were so limited, Pitcairn islanders could fall under either status or national or social origin. These grounds can be read conjunctively or disjunctively.

The difficulty with this Article is that there must usually be a comparator in order to find that there is discrimination,<sup>124</sup> and further, the discrimination must not have any reasonable and objective justification; that is it does not pursue a legitimate aim or there is no reasonable relationship or proportionality between the means employed and the aim sought to be realised. Treatment will not be deemed to be discriminatory if it has a reasonable and objective justification or the means employed are proportional to the legitimate aim being sought. The fact that Article 14 was not raised by the Public Defender would not prevent a court from considering it in conjunction with those Articles which were raised.<sup>125</sup> The Privy Council could therefore have considered the question of whether the accused Pitcairn islanders were treated differently on account of their status; whether this differential treatment had a

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<sup>121</sup> Emphasis added. Letter of 29 April 2000 referred to by Lord Hope [2006] UKPC 47 [73].

<sup>122</sup> *Belgian Linguistics* (1979-80) 1 EHRR 252.

<sup>123</sup> *Trustees of the late Duke of Westminster's Estate (James) v UK* (1986) Series A, Vol 98 [74].

<sup>124</sup> *Lockwood v UK* (1993) 15 EHRR CD 48 – difference of treatment of prisoners compared to those outside prison not discriminatory because the two groups were not analogous; *Dudgeon v UK* (1981) Series A, Vol 45 homosexuals cannot be compared to male heterosexuals for the purposes of the criminalisation of homosexual conduct.

<sup>125</sup> *Ahmad v UK* (1981) 4 EHRR 126.

legitimate aim; and whether the means employed were proportional and reasonable for the achievement of that aim.

Presumably the aim was to bring the accused to trial in the interests of the administration of justice. Certainly the rapid implementation of legislation, the appointment of foreign lawyers and judges, the location of the courts and the postponement of hearing pre-trial matters until after trial of the action by the Privy Council were markedly different from either the way in which other British subjects would be prosecuted, or the way in which Pitcairn islanders had been formerly prosecuted for crimes. Did the means justify the end? Under the *Pitcairn Order in Council 1952* the Governor of Pitcairn was empowered to make laws for peace, order and good government of Pitcairn and to create courts. In 1970 on the independence of Fiji, the Governor of Pitcairn no longer vested in the Governor of Fiji but became a separate office and the *Judicature Ordinance 1970* (Pitcairn Islands) made provision for the establishment of a separate Supreme Court of Pitcairn – this having previously been covered by the jurisdiction of the Fiji Supreme Court. This Supreme Court was to have ‘all the powers, jurisdiction and authorities of the High Court of Justice in England’.<sup>126</sup> Section 14 of the 1970 Ordinance indicated that

the common law, the rules of equity and the statutes of general application in force in England at the commencement of the Ordinance were in force in the islands ‘so far only as the local circumstances and the limits of local jurisdiction permit’.<sup>127</sup>

Apart from the fact that judges for the Pitcairn Supreme Court were not appointed because the Court was not called upon to sit, everything was in place. Indeed Lord Hope pointed out that a number of the offences could have been charged under existing Pitcairn law.<sup>128</sup> So what was the justification for the executive and legislative activity that erupted in 1999?

According to the Supreme Court in *R v Christian and Others (No 2)* this was ‘to enable trials involving serious crime to be held according to modern requirements’.<sup>129</sup> Perhaps few would quibble with this except of course that “modern requirements” implies a particular perspective which may not have been shared by Pitcairn islanders. Could this process of modernisation have been achieved in a more democratic, less imperial fashion? Historical evidence respecting the development of laws and regulatory mechanisms on Pitcairn points to considerable dialogue and discussion, first with captains of visiting naval vessels and later with emissaries of the Crown. Indeed in the first paragraph of the criminal trial report it is stated

Pitcairn was a developed society ... Pitcairn was not an anarchic or lawless society...[A]lthough concerned to promote and ensure the administration of justice to an appropriate level, successive High Commissioners and Governors had to take into account local circumstances, including the desire of Pitcairn

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<sup>126</sup> Section 5 *Judicature Ordinance 1970* (Pitcairn Islands).

<sup>127</sup> *R v Christian (No 2)* [2005] LRC 745 [81].

<sup>128</sup> [2006] UKPC 47 [72]. Lord Hope referred in particular to ss 82 and 88 of the *Justice Ordinance 1966*.

<sup>129</sup> [2005] LRC 745 [83].

islanders to participate in the management of their own affairs to the greatest extent possible.<sup>130</sup>

This pursuit of collaborative and democratic governance seems to have been completely abandoned in bringing these accused to trial.

It has been held by the European Commission of Human Rights that

the concept of discrimination includes not only overt differences of treatment but also differences in impact or effect: that is, a difference of treatment in the sense that a measure which is neutral on its face has a disproportionate adverse impact or effect upon a particular category of person.<sup>131</sup>

In the Supreme Court it was argued by the Public Prosecutor that the post-2000 Ordinances were all of a general nature and ‘are not designed to secure the convictions of known individuals.’<sup>132</sup> It might be asked however, whether the convictions would have been secured had there not been this demonstration of legal imperialism. After all in 1997 a decision had been taken not to prosecute a suspect under the *Sexual Offences Act* for the very reason that the offender was assumed to be unaware of the terms of the Act and the penalties provided under it.<sup>133</sup> A system that appears to enhance the possibility of a fair trial may not necessarily do so when it is located in an unfamiliar setting in which the actors come from very different environments. While the modernisation of Pitcairn law may be considered to confer benefits on Pitcairn islanders, it might also be asked whether Pitcairn islanders were treated differently by Britain because of who they were, and also because Britain’s neglect of them became increasingly apparent as the scale of criminal activity was exposed. Such singular treatment of the people of Pitcairn might of course be philanthropically viewed as positive discrimination which would bring the administration of justice in Pitcairn in line with that experienced elsewhere in the “civilised” world. This however fails to recognise the distinctiveness which Pitcairn Islanders might wish to assert.

### **Article 3**

The victims of the criminal conduct with which the accused were charged stated that they had been subject to inhuman and degrading treatment. The same might not be said of those found guilty. However if one looks beyond the victims and the accused involved in this case to the wider Pitcairn community, and considers the reaction of the British government, the compliance of the New Zealand authorities and the consequences of the trial procedure, it might be argued that while Pitcairn islanders have not been subject to inhuman and degrading treatment within the ambit of Article 3 of the *ECHR* they have been subject to an assault on their human dignity.

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<sup>130</sup> [2005] LRC 745 [1].

<sup>131</sup> *East African Asians v UK* (1994) 78-AD & R 5, 115.

<sup>132</sup> [2005] LRC 745 [185].

<sup>133</sup> [2006] UKPC 47 [50-51]. Paul Treadwell, legal advisor to the Governor of Pitcairn, had stated that ‘the decision not to prosecute was taken out of concern for the current state of the criminal law on Pitcairn and for its implications for the liberty of Her Majesty’s subjects on the island’.

The *Universal Declaration of Human Rights 1948* declares that '[A]ll human beings are born free and equal in human dignity and rights'.<sup>134</sup> This principle is integral to international human rights law. In 1937 the High Commission of the Western Pacific noted that

[t]he Pitcairners appear to be deeply attached to their present system of Government, and it is their desire that Pitcairners, under the High Commissioner, should rule Pitcairn.<sup>135</sup>

As has been indicated, although it might be argued that the sophisticated legal machinery introduced was necessary in order to ensure that the accused were afforded due process of law with full right of appeal, it is no means self-evident that either the existing laws would not enable this or that Pitcairn islanders welcomed this intervention. It is also not self-evident that similar measures could not have been achieved through a participatory, democratic or consultative process. In fact the voice of Pitcairners in the regulation of criminal matters seems to have been silenced. Instead, after centuries of sporadic attention and marked neglect, for the last five years the private lives of Pitcairn islanders have been subject to the scrutiny of outsiders; they have been required to testify against relatives and neighbours; to give evidence in front of strangers; to be represented and judged by foreigners; and now must deal with a community torn by accusation and conviction.<sup>136</sup> Significantly, despite having managed their own affairs for several centuries, they have been denied the opportunity to participate in determining what laws should be put in place to bring the accused to justice, how they should be punished or how victims should be compensated. The reason for this is that the process of law-making used in the case of Pitcairn has been by the exercise of royal prerogative powers under Orders in Council and Ordinances.

In the twenty-first century one might question the justification or acceptability of using Ordinances issued under Orders of Council to introduce such extensive legislation.<sup>137</sup> As sovereign acts of the Crown these are not subject to any democratic process. Indeed until recently it has been held that they are not subject to any scrutiny by the courts.<sup>138</sup> Under the *British Settlements Acts 1887* and *1945*, which provided for law-making in British settlements, the only procedural requirement appears to be that any instruction or instrument made by the Queen or her delegates under the powers conferred by the Acts should be laid before both Houses of Parliament 'as soon as conveniently may be after the making and enacting thereof respectively.'<sup>139</sup>

This denial of democratic involvement of those subject to such laws would appear to be a contradiction of the rights established in instruments such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political*

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<sup>134</sup> Article 1.

<sup>135</sup> [2005] LRC 745 [119] reference to a memorandum (No. 2334).

<sup>136</sup> For example, every female under the age of 19 who had been resident on Pitcairn for any significant period of time before 1980 and 2000 was identified and questioned about her sexual experiences by foreign (British) police.

<sup>137</sup> See Sue Farran, 'Prerogative Rights, Human Rights and Island People: the Pitcairn and Chagos Island cases' (2007) Autumn *Public Law* 414.

<sup>138</sup> *The Queen on the Application of Louis Olivier Bancoult v The Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC 1038 (the Chagos Islands case).

<sup>139</sup> Sections 3 and 5 *British Settlements Act 1887*.

*Rights.* Indeed it might be thought that natural justice in a democratic society demands that those who are to be subject to the laws have a voice in their making. The high-handed use of a plethora of Ordinances issued under Orders in Council to bring Pitcairn islanders to trial resonates with ‘the clanking of mediaeval chains of the ghosts of the past’.<sup>140</sup> At a time when there is international support for self-determination of colonial subjects,<sup>141</sup> as well as greater emphasis on the recognition of unique social groups, the measures taken to ensure prosecution of the accused in the Pitcairn case seem particularly out of step.

If international law is deemed to extend to a colony, as was argued in the case of Pitcairn, then any laws passed for the colony of Pitcairn which were found to be repugnant to these wider principles could be held to be void and inoperative to the extent of that repugnancy.<sup>142</sup> This would mean that measures taken to exercise British jurisdiction over Pitcairn would each have to be scrutinised. The Privy Council did not venture down this path although Lord Woolf did note *obiter* that

(R)ecent developments, mainly in relation to judicial review have demonstrated a greater willingness on the part of the courts to scrutinise the use by the Crown of prerogative powers and so far the limits, if any, of the courts power of review has not been clearly determined. So today it can no longer be taken for granted that the courts will accept that there is any action on the part of the Crown that is not open to any form of review by the courts if a proper foundation for the review is established.<sup>143</sup>

## CONCLUSION

The Pitcairn case illustrates a contemporary exercise of colonial government over a small Pacific island state. In exercising prerogative law making powers over the islanders, the United Kingdom could claim to be enhancing the fundamental rights enjoyed by Pacific islanders by making greater provision for the administration of the law. At the same time however it is clear that the interpretation and application of a range of rights claimed was selective and ultimately not favourable to the accused. If certain fundamental rights are to be held to be universal then they must be applied consistently and even-handedly in all circumstances. If they are to be applied relatively then the unique individual circumstances of the case, the culture and the people must be taken into account and acknowledged. Having established that Pitcairn islanders were British subjects, they should have been treated with the same

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<sup>140</sup> *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, per Lord Atkin at 29, quoted by Lord Roskill in *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374 at 417 and endorsed by Lord Hooper in the Chagos Islands case [158].

<sup>141</sup> See for example the *Declaration on the Granting of Independence to Colonial Countries and Peoples*; Article 73 *United Nations Charter*; and United Nations General Assembly Resolution 55/146 (8 December 2000) declaring 2001-2010 to be the Second International Decade for the Eradication of Colonialism. Note also the agenda of the United Nations Permanent Forum on Indigenous Issues established by the Commission on Human Rights at the International Decade of the World’s Indigenous People, April 2000.

<sup>142</sup> *Colonial Laws Validity Act 1865* s 2.

<sup>143</sup> [2006] UKPC 47 [33]. Lord Woolf did not indicate if he had the Chagos Islands’ case in mind, however this possibility has been strongly endorsed by the English Court of Appeal in *R (On the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2007] EWCA Civ 498.

due regard to their fundamental rights as other British subjects. However it is evident from the case that the nature of rights regime applicable to Pitcairn remains unclear. The Pitcairn Islands are listed as a British Overseas Territory in Schedule 6 of the *British Nationality Act 1981*, but do not appear on the list of overseas territories for which the United Kingdom has responsibility for international affairs and to which the United Kingdom's obligations under the *ECHR* has been extended.<sup>144</sup> On the other hand the actual control exercised over Pitcairn by Her Majesty through the Governor of Pitcairn, amply demonstrated in this case, suggests that Britain's territorial obligations under the *ECHR* include Pitcairn under the principle, established in the jurisprudence of the European Court of Human Rights, that contracting states may be held responsible for acts outside their national territory if the acts of their authorities produce effects outside their own territory.<sup>145</sup>

Uncertainty as to Pitcairn's rights status and lack of clarity as to how such rights are to be interpreted and applied in the case of places such as Pitcairn, leaves it vulnerable to rights abuses. Had the Privy Council paused to consider the rights issues raised in the case, the outcome might not have been different. However, its omission to consider and rule on many of the issues raised before and during trial has been disappointing and on a number of issues open to criticism. As the court of final determination on questions of law for colonies scattered over the globe it is able to draw on case law from a range of jurisdictions. It was the first time in history that the Privy Council had to consider the case of Pitcairn. There were a number of points raised before the Supreme Court and Court of Appeal of Pitcairn which needed to be re-appraised and other broader issues which should have been considered. Any decision of the Privy Council is significant for all those countries which retain appeal to the Privy Council. Its jurisprudence therefore must ensure that justice is seen to be done both objectively and subjectively if it is to be of contemporary relevance to the diverse peoples and nations that fall under its power. Similarly the exercise of prerogative powers in the twenty-first century remains of relevance to those countries still subject to them. The experience of Pitcairn islanders may not be one which other dependent territories envy.

In the light of the findings by British police the Public Prosecutor had to decide whether it was in the "public interest" to bring charges. Clearly he decided that it was, but the grounds upon which this decision was made were never revealed so that one can only speculate on whether he considered the longer term consequences on a community of resurrecting offences, some of which occurred almost forty years in the past.<sup>146</sup> While from a New Zealand or British perspective the rationale for prosecution might seem self-evident, is this the adoption of such a perspective itself a reflection of imperial attitudes? The convicted men represent a quarter of the island's adult male population. The seven New Zealand prison officers now seconded to the

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<sup>144</sup><http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=UK&NT=&MA=3&CV=0&NA=&CN=4&VL=1&CM=5&CL=ENG> (Accessed 24 January 2007). Prior to independence countries such as Tuvalu, Fiji and the Gilbert and Ellice Islands appear on this list.

<sup>145</sup> See, *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 and *Cyprus v Turkey* (2002) 35 EHRR 731.

<sup>146</sup> In August 2002 the Island Secretary was quoted as stating: 'Our very existence is at stake ... none of our people want to see Pitcairn closed down and abandoned... all of us will be affected': Watkins, 'Lonely Island Weathering a Storm' *New Zealand Herald* (Auckland, New Zealand) 25 August 2002 <http://www.nzherald.co.nz/storydisplay.cfm?thesection=news&thessubsection=&storyID=2351005> (Accessed 1 June 2006).

island may find themselves called on to assist in manhandling the long boats which are essential to the survival of the island. Can a legal system and its representatives, nurtured in such a totally different context even begin to understand or experience the life and values of people living in such an isolated environment? Given the many flaws in the legal arguments used to secure a conviction, the exercise of imperial executive and legislative powers to facilitate the process, and the refusal of the Privy Council to even consider the fundamental rights issues raised by the case, there is little to commend the outcome of the case. And while this may be perceived to “root out an evil” of Pitcairn’s past it does little to promise it a better future.

What will now happen to Pitcairn? Will the United Kingdom once again abandon Pitcairn to its own devices or is it to keep a “watching brief” and interfere ever more closely in the affairs of the Pitcairn islanders? If Pitcairn is to be subject to international standards and international customary law then it should also be entitled to international expectations such as a move towards some form of independence either on the basis of its colonial status or as an indigenous nation or both.<sup>147</sup> The Pitcairn case however, appears to have provided the motive and opportunity for strengthening British jurisdiction over Pitcairn so that would appear to make any possibility of self-determination and perhaps even its survival unlikely in the foreseeable future.

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<sup>147</sup> There are some advantages to claiming under the “indigenous” umbrella. Whether Pitcairn islanders – having been categorised as British subjects for the purposes of this litigation, would so qualify is now debateable, despite their Polynesian ancestry.