THE EMPIRE STRIKES BACK:

HUMAN RIGHTS AND THE PITCAIRN PROCEEDINGS

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Author's Note:

The information contained in this paper is correct as at 24 September 2003. However, this is an emerging issue and, as such, is susceptible to change caused by future events and ongoing developments, which may not have been foreseen at the time this paper was written.

I INTRODUCTION

On the evening of 15 January 1790, Fletcher Christian first spied the rugged coast of Pitcairn Island. It was for him, a refuge from the reaches of Mother England and British colonial justice, which he knew would search exhaustively for him and his mutinous counterparts as a result of their actions on the HMS *Bounty*. For Christian, Pitcairn offered a chance at new beginning in a "new" land, absent the rigid imperial fetters against which he had rebelled. Therefore it is somewhat ironic that a little over 200 years later the same British justice that Christian sought refuge from is now seeking to impose its laws upon the inhabitants of Pitcairn – many of them, direct descendants of Christian and his comrades. A Pitcairn court sat at Adamstown, Pitcairn Island, on 4 April 2003 for the first time in over 100 years. There are no past precedents or practice that can be referred to guide judicial decision-making; every discussion and decision creates a precedent, in these history-making proceedings – as Magistrate Cameron himself pointed out in an April hearing on the island.[1] Pitcairn law, discussed in more detail below, is an untested hybrid of local and United Kingdom law fraught with issues of applicability, justiciability, constitutionality and relevance.

The current allegations are based on claims of endemic sexual abuse amongst members of the island community predominantly involving young teenage girls. 64 complaints, all but one laid indictably, have been made in respect of nine defendants (seven permanent residents of Pitcairn and two others residing abroad); with all the charges historical in nature – none are more recent than five years, while some date back as long ago as forty years.[2] The justice Fletcher Christian escaped is now about to confront his descendants after over three and a half years of investigation. The trials are almost certain to be held, at least in part, in New Zealand under Pitcairn law – made possible by the passage of the*Pitcairn Trials Act 2002* (NZ). This paper seeks to examine the proceedings from a human rights perspective, taking into account issues of procedure, fairness, constitutionality and custom as applied to the unique situation that is the Pitcairn proceedings. Part II provides a brief primer on Pitcairn law – including human rights laws and their applicability to the Pitcairn jurisdiction. Part III examines specific human rights issues in relation to the proceedings, asking whether they can be applied under Pitcairn law and, if so, how. Part IV looks at Pitcairn custom and its applicability to the proceedings both as part of an overall right to self-determination as well as whether or not traditional customary practice can provide a defence to the charges faced by the accused. Finally, Part V concludes with some thoughts on the future direction of these proceedings, viewed in light of the issues examined in the preceding sections of this paper, asking whether the direction sought by the United Kingdom government is appropriate for Pitcairn, based on notions of justice in the twenty-first century.

A The *Pitcairn Trials Act 2002* (NZ)

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The *Pitcairn Trials Act*, introduced into the New Zealand Parliament at the request of the British Government,[3] was the product of a New Zealand-United Kingdom bilateral agreement preceding the drafting of the legislation,[4] which itself has as its key purpose the implementation of New Zealand's obligations under that agreement. The passage of the Act clears the way for the Supreme Court of Pitcairn – with a bench comprised exclusively of New Zealand jurists – along with other Pitcairn judicial bodies, to sit in New Zealand. The Act also provides, inter alia, for the transfer and detention of defendants and prisoners into and within New Zealand. Ultimately, the Act is more of a formal, facilitative document than anything else. Most of the details relating to its implementation were clearly negotiated during the drafting of the agreement. Therefore the entire purpose of the Act is simply to enable the practical application of these provisions in New Zealand by incorporating them into the statutory law of New Zealand. It is however unique in that it provides for a foreign court to sit in New Zealand, something that was notably absent from the law prior to the enactment of this statute. It is also important as the legislative enactment

inextricably linking New Zealand into the Pitcairn debate by providing the United Kingdom government with the means to conduct these proceedings in a manner it deems most desirable.

II PITCAIRN LAW

The law of Pitcairn comprises domestic law, in the form of Ordinances and Orders in Council – the latter promulgated by the United Kingdom Executive – as well as the law of the United Kingdom as at 1 January 1983 (the date of reception, as fixed by local ordinance)[5] including common law, and any later statutes that have been extended to include the islands within the scope of their application. However, United Kingdom law only applies as far as is permitted by local circumstances, and is subject to any existing or future Ordinance.[6] Under the law of the United Kingdom, Pitcairn is classed as a "settled colony" (notwithstanding the highly dubious allegiances of its settlers) and as such, is ultimately subject to United Kingdom law,[7] depending not on whether that law is suitable or beneficial, but rather on whether is it capable of application.[8] Pitcairn ordinances are issued by the Governor of Pitcairn, Henderson, Ducie and Oeno Islands (being the official name of the territory, although only Pitcairn is inhabited) who is also the British High Commissioner to New Zealand, under the authority delegated to him by the Pitcairn Order 1970 (UK) to, inter alia, "...make laws for the peace, order and good governance of the Islands."[9] The United Kingdom executive can also make laws for Pitcairn by way of an Order in Council under the powers created by the British Settlements Acts 1887 and 1945. A considerable number of such orders have been made over the course of the last two to three years and, the relevance of these will be elaborated on later in this paper.

A Justice and Judicature Law

In order to understand the Pitcairn trials, familiarisation with the Pitcairn judicial system is a prerequisite. The Pitcairn judicature consists of an Island or Magistrate's Court, for hearing minor matters, as well as for preliminary hearings of other matters – including for the purposes of determining whether a prima facie case exists; and a Supreme Court, for hearing more serious matters. Additionally, allowances have recently been made for both Courts to "sit in the islands or at such other country or place as may be permitted by any law," obviously for the purposes of assisting with the implementation of the *Pitcairn Trials Act*.[10] Additionally, there are two levels of appeal within the Pitcairn judicial system: the Pitcairn Court of Appeal, as the highest "local" court (here the term "local" is used extremely loosely); and (with leave) the right of ultimate appeal to the Privy Council. However, members of the judiciary have only been appointed to these courts within the last six months, the Pitcairn judiciary having formerly existed on paper alone. Furthermore, while the Magistrate's and Supreme Courts have their basis in the *Pitcairn Judicature (Courts) Ordinance*,[11] and originally date back to the disestablishment of the British High Commission for the Pacific, under which the Supreme Court of Fiji had jurisdiction over most British South Pacific colonies, the latter two were established by Orders in Council in 2000.[12] Before the proclamation of these Orders, no appeal lay from any decision of the Supreme Court. Evidently, faced with the looming possibility trials resulting from the investigations, the British Government decided it would be prudent to establish an appeal structure for Pitcairn – in accordance with contemporary human rights norms, as discussed later in this paper. The *Judicature (Appeals in Criminal cases) Ordinance* sets out the structures and processes for appeals to the Supreme Court (from the Magistrate's Court) and to the Court of Appeal (from the Supreme Court), with some provisions regarding appeals to the Court of Appeal having been inserted by Ordinance No. 17 of 2002 – these will be discussed further on in this paper. Interestingly, the *Pitcairn Court of Appeal Order* (which establishes the Court of Appeal) also makes provision for that Court to sit in places other than the islands – as determined by its President.[13] In the same year, the *Pitcairn (Amendment) Order* was issued,[14] allowing Pitcairn courts to sit outside of the islands – although in the case of that Order, the decision of venue is to be made by the Governor acting on the advice of the Chief Justice.[15] The question that these allowances raise is whether the British

government, and its Governor, knew that charges were definitely going to be laid against some or all of the individuals under investigation at the time. This point will be elaborated on later in this paper when the human rights issues surrounding the trials are discussed in depth.

The members of the Pitcairn judiciary are all New Zealanders,[16] with Magistrate Gray Cameron, an Auckland barrister, presiding at the preliminary hearings for the nine accused (three of whom were absent) in the Magistrate's Court at Adamstown on Pitcairn.[17] The appointment of the entirety of Pitcairn's judiciary, as well as that of Simon Moore – the Crown Solicitor at Auckland – as Public Prosecutor, and Paul Dacre – an Auckland barrister – as Public Defender, have been made quietly by the British government over the last two years. At a time of considerable furore amongst the New Zealand public at the expected simultaneous appointment by the Attorney General of the entire bench of the proposed Supreme Court,[18] it is somewhat ironic that the simultaneous appointment of the entire Pitcairn judiciary by the governor has raised scarcely a murmur – even in legal circles – outside of the wider Pitcairn community! The Supreme Court of Pitcairn sits without a jury but may sit with assessors when it considers it expedient and practicable to do so.[19] Those summoned to act as assessors – "not less than two nor more than four"[20] – in the Supreme Court must be "indifferent persons subject to the jurisdiction of the Court and of good repute".[21] Their role is somewhat similar to that of a jury but is advisory rather than determinative – they may retire to deliberate following the conclusion of the proceedings, and are each required to state their opinion orally, but their decision is not binding upon the presiding judge.[22] This aspect of Pitcairn judicature law will be elaborated on shortly.

B Human Rights Law

As stated before, British law applies, subject to applicability to local circumstances, where domestic Pitcairn law is silent. Human rights law is one such area. The three major human rights documents which therefore apply to Pitcairn are the *Human Rights Act 1998* (UK), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights and Fundamental Freedoms (ECHR). The first and the third of these are interrelated, the former giving effect to the rights under the latter in the United Kingdom. Whether the Act has been specifically extended to apply to British Overseas Territories is unclear on its face, however as Halsbury's Laws of England notes:[23]

[I]n the ordinary course enactments by the Crown or Parliament in the United Kingdom are extended to the dependencies... when the legislative scheme has extra-territorial applications... or when reciprocity of administrative or judicial arrangements in the United Kingdom and its dependencies... is desirable. It is a general principle that legislation of the United Kingdom will not lightly be held to extend to dependencies as part of their law.

Based on its extra-territorial applications, and its effect upon administrative and judicial arrangements (both of which are discussed below), the *Human Rights Act 1998* (UK), and subsequently the ECHR are clearly compatible with criteria set out in Halsbury and therefore, extend to Pitcairn. Further, the importance of human rights legislation and the right of all British subjects to equality, add weight to this point – Pitcairners are entitled to be extended the same rights as those living in the United Kingdom itself. Similar logic also allows for the extension of international treaties to Pitcairn as a dependency – through its ratification of the ICCPR the Executive has signalled its intention to abide by the rights contained within it and thus, the entitlement of all British subjects to those rights. However, while the United Kingdom Parliament has ratified the ICCPR, it has not been incorporated into any legislation in the same way as the ECHR and is therefore not part of the formal law – although that is not to say that it is completely irrelevant. Furthermore, the United Kingdom is not a signatory to the Optional Protocol to the ICCPR, which allows litigants to bring disputes involving a State party before the United Nations Human Rights Committee. Therefore, the rights under the ICCPR are arguably less enforceable than those

provided under the ECHR, although it should be noted that the two conventions are not dissimilar in the substance of their provisions. The main advantages afforded by the ECHR however, are the provision for a law to be judicially declared incompatible with the rights under the convention by the Privy Council[24], along with the right of final appeal to the European Court of Human Rights[25] – an avenue which defence counsel in the Pitcairn trials may well utilise in challenging the constitutionality and legitimacy of the charges, the trials and the courts themselves.[26]

III SPECIFIC HUMAN RIGHTS ISSUES RAISED

A Right to a Fair Trial

The right to a fair trial is enshrined in human rights legislation and documents throughout the world, including the New Zealand *Bill of Rights Act 1990*,[27] the Canadian Charter of Rights and Freedoms,[28] the Constitution of the United States of America,[29] the ECHR,[30] and the ICCPR.[31] However variances in legal systems and methodology can alter the way in which this fundamental right is interpreted. There can be no doubt however that the right is a fundamental one and cannot be denied to the people of a free and democratic society. Therefore, following on from the discussion above on the applicability of such legislation, the question to be answered is not whether the right applies to the people of Pitcairn but*how* it applies, including where complaints can be taken – to Adamstown, to London (that is, to the Privy Council) or to Strasbourg (that is, to the European Court of Human Rights).. This section of the paper examines several aspects of the right to a fair trial, looking at how this umbrella right can be best interpreted in order for it to be applicable to Pitcairn, in light of the issues raised by the current proceedings.

1. Trial by jury

> Each jury is a little parliament... The first object of any tyrant... would be to make parliament utterly subservient to his will; and the next to overthrow or diminish trial by jury, for no tyrant could afford to leave a subject's freedom in the hands of twelve of his countrymen... [T]rial by jury is more than just an instrument of justice... it is the lamp that shows that freedom lives.[32]

The words of Sir Patrick (later Lord) Devlin are probably the most often quoted argument for the sanctity of the right to trial by jury in the adversarial system. Those sentiments were also echoed by Justice Kennedy of the United States Supreme Court, who observed that "[t]he primary purpose of the jury... is to stand between the accused and the powers of the State. Among the most ominous of those is the power to imprison."[33] The right is not absolute, its availability is generally not extended to those facing only minor charges, however its applicability to the charges faced by the Pitcairn accused is indisputable - a jury is required "in all cases in which issue is joined between the Crown and a person charged upon indictment,"[34] - even if its applicability to the jurisdiction is not nearly as clear.

As stated before, the right to trial by jury is a fundamental part of the Common Law tradition and is explicitly stated in Bills of Rights from a number of Common Law jurisdictions – including New Zealand[35], Canada,[36] and the United States of America.[37] The right to trial by jury has ancient roots in the authoritative tradition of the English common law and its history is almost as old as the English legal system itself.[38] In his Commentaries, Blackstone refers to it as "...that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter."[39] The "great charter" is the Magna Carta of 1297, which, in chapter 29, provides what is perhaps the most celebrated and one of the earliest references to this right in British constitutional law: [40]

No freemen shall be taken or imprisoned, or be disseised of his freehold, or liberties or free customs, or be outlawed, or exiled or in any other wise destroyed; nor will we not pass upon him nor [condemn him] but by lawful judgement of his peers, or by the law of the land. We will sell to no man, we will not deny or defer to any man either justice or right.

Further reference can also be found in the English Bill of Rights of 1688, which declares, "that jurors ought to be duly impanelled [sic] and returned."[41] It is important to note however, that although these documents are historically significant, they are not immune from change by the ordinary process of legislation and are only of persuasive value in law.[42]

The importance of allowing accused a trial by jury also has a basis in the notion of equality. This is also a fundamental principle of justice, dictating equal treatment for individuals charged with the same offence. The absence of provisions for trial by jury in Pitcairn law offends against this principle of justice. Pitcairners are British citizens, entitled to the same rights as those living in the United Kingdom[43] – especially given that the charges against the accused have been laid under what is essentially United Kingdom law (albeit in the guise of Pitcairn law).[44] Moreover, a trial before the Supreme Court of Pitcairn should be no different to a trial before its mainland equivalent and Pitcairners are entitled to be treated no differently from any person charged with similar offences in mainland Britain although, allowances obviously have to be made for local circumstances.

During consideration of the Pitcairn Trials Bill by the Foreign Affairs, Defence and Trade Committee of the New Zealand Parliament, the committee were advised, inter alia, that:[45]

[A]ll accused will have all the relevant rights guaranteed under the *Human Rights Act 1998* (UK)... Although some might see advantages in having the offences determined by a jury of Pitcairners, Pitcairn law does not provide for trial by jury, nor is it required to under the... ICCPR... [T]he United Kingdom Government considers that the arrangements made are consistent with its international obligations, including those under the ICCPR.

However, the members Select Committee were perhaps unaware of why the right to trial by jury is absent from the provisions of the ICCPR. Like the ECHR, the ICCPR was drafted with the two major world legal systems in mind – the common law and the civil law, systems founded on English law and Roman law respectively. Trial by jury is not part of the civil law tradition and so therefore it is not surprising that neither convention provides an explicit right to this.[46] It is also notably absent from the*Human Rights Act 1998* (UK), partly due to the fact that this act simply serves to incorporate the ECHR into United Kingdom law, although it is unclear why the United Kingdom legislature did not utilise the opportunity to provide a statutory restatement of this right. While the *Juries Act 1974* (UK) consolidates the previous statutory law in this area as well as providing a restatement of the common law with regard to the appointment, conduct, and regulation of juries, it does not however include any references to a right to trial by jury.

Having established the moral and legal authority for the right to trial by jury, the next question is whether the right can be applied to Pitcairn. Halsbury notes that the question of applicability is one that has to be decided pragmatically, that is, whether the law is can practically be applied to the territory – "applicability depends not upon whether the court considers the rule suitable or beneficial for the colony but upon whether it is capable of application in the colony."[47] While the *Pitcairn Judicature Ordinance* does not include any provision for juries, it does provide for the appointment of assessors to sit in criminal cases in the Supreme Court.[48] However, in its consideration of the use of lay assessors as an alternative to a jury, the New Zealand Law Commission stated that this would, in effect, "...lead to the judge receiving expert evidence in private and without the parties having the opportunity of cross examination."[49] Arguably

jurors could be appointed in a manner similar to that prescribed for assessors, their names being drawn from the island electoral roll,[50] thus fulfilling an analogous function – albeit appropriately amended to reflect a jury's role as the tryer of fact. Although the number of jurors is normally set at twelve, by virtue of ancient tradition in the common law,[51] there is no actual requirement in the law of the United Kingdom for this number to be strictly adhered to.[52] Indeed there is precedent from the Isle of Man for allowing a trial by six jurors.[53] This is one way in which the law could be interpreted consistently with human rights as well as in a way that is practically applicable to Pitcairn.

However, any persons selected to serve as jurors (or as assessors for that matter), would have to be transported to where the Pitcairn Supreme Court was sitting (most likely Auckland) – even if the option of a so-called hybrid trial, with a video link with Pitcairn, was utilised. The reasons for this are twofold; firstly, it would be more appropriate for them to sit in the physical presence of the judge given that they would be fulfilling a judicial role (not to mention the fact that the Pitcairn court house is ill-equipped for a jury trial, lacking a jury box and room). Secondly, given the intimacy (both physical and social) that inherently exists between residents of Pitcairn, it would be extremely difficult, if not impossible, to avoid any inadvertent (let alone deliberate) contact with, or consequential tainting of, the jurors by those involved with or interested in the proceedings (which is just about all 47 residents of Pitcairn). This relocation would likely prove stressful for those selected and would also be likely to cause them and their families to suffer undue hardship. Indeed, given the close-knit environment that characterises the Pitcairn community, the distinctions made by selecting some as jurors would inevitably create both inter and intra-familial divisions and consequently, disharmony amongst the members of the community. All of this assumes of course that two to four indifferent persons can in fact be found amongst those subject to the jurisdiction of the Supreme Court of Pitcairn![54]

An alternative to the above could be the selection of potential jurors from amongst those normally eligible for to be summoned for service in New Zealand. While such a scenario has not be provided for in the provisions of the *Pitcairn Trials Act*, an amendment would be all that would be required to enable this to happen. However, more important are the wider issues of fairness to the accused and the ability of the members of the jury to effectively discharge their role. It is almost certain that any New Zealanders selected as jurors would not have any experience or knowledge whatsoever of Pitcairn culture or way of life. Indeed, such a vast separation of culture and geography would conflict with the traditional notion of trial of a person before "a jury of their peers."[55] While practice has become significantly distanced from this traditional notion over the course of the last century or more due to the growth in diversity amongst populations, most jurors can be said to be "linked" to the accused in at least some way - if only by their residence in the same country, if not the same town, city or region. Obviously this connection would be sorely lacking in any trial of Pitcairners by a jury of New Zealanders, raising doubts as to the ability of the jurors to effectively deliver justice and consequently, questions as to the fairness of the proceedings. Having said this however, it is necessary to point out that none of those appointed to the Pitcairn judiciary – with the notable exception of Magistrate Cameron – have actually visited the island, nor can any of them claim to be acquainted with life and culture on the islands.

Finally, the absence of local provision for trial by jury is not necessarily an insurmountable impediment. As Halsbury points out: [56]

Any colonial law which is repugnant to any Act of Parliament extending by express words of necessary intendment to the territory to which such law relates... is void to the extent of the repugnancy. Hence the validity of colonial laws is subject to examination by the courts of the dependent territory and the Judicial Committee of the Privy Council.

This limitation by repugnancy also includes legislation by Her Majesty in Council.[57] Therefore if it were

to be decided that trial by jury could be applied to Pitcairn, the force of the common-law right (in the absence of any specific statutory provision) to trial by jury could supersede any local legislation to the contrary (such as the limitations placed on the weight of assessors decisions). Indeed, the issue is certainly justiciable by the Pitcairn courts as well as by the Privy Council, although it would be up to the judiciary of those courts to decide the issues of applicability and repugnancy as they relate to the current proceedings. However, the role of the judiciary in these proceedings is made exceedingly difficult by the absence of any case law in the Pitcairn jurisdiction – as noted at the beginning of this paper, the Pitcairn courts sat in April for the first time in over 100 years. Additionally, as Halsbury notes, "the meaning of the term 'repugnant to' (and of similar terms such as 'inconsistent with') is not settled."[58] In the end, the decisions to be made regarding questions of applicability of this right to the Pitcairn jurisdiction, as well as the repugnancy of any local laws contrary to this right, are for the members of the judiciary to decide and it is likely that proceedings on these issues may reach the Privy Council, given their fundamental importance and constitutional significance. Proceedings may even advance further to the European Court of Human Rights, under the provisions allowing for this in the*Human Rights Act 1998* (United Kingdom). A decision on this question would undoubtedly probe new legal ground in this area and would be also be determinative of the shape and direction of the proceedings, as well as being the subject of extensive legal debate and scholarship for years to come.

2. Undue delay

Like trial by jury, the right to be tried without undue delay is a fundamental aspect of the umbrella right to a fair trial. It is explicitly stated in the ICCPR[59] and several national rights documents – including the Canadian Charter of Rights and Freedoms[60] and the New Zealand*Bill of Rights Act 1990*.[61] It is expected that this issue will be one of the most vigorously pursued and contested amongst all of the issues raised by the current proceedings due to the length of time the investigation took before charges were laid – approximately three and a half years.[62] When the length of delay becomes too great it lies within a Court's inherent jurisdiction to by stay the proceedings. As the High Court of Australia noted in*Walton v Gardiner*:[63]

The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exists to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness.

The rationale underlying the right is multifaceted, although the primary concern is fairness – individuals under investigation cannot prepare an adequate defence (or get on with their lives) until it is known whether or not they will be charged. As Lord Goff stated in *Mungroo v R* (a case under the Jamaican Constitution): [64]

The right to a trial "within a reasonable time" secures, first that the accused is not prejudiced in his defence by delay and, secondly, that the period during which an innocent person is under suspicion and any accused suffers from uncertainty and anxiety is kept to a minimum.

Understandably the family of the accused, as well as those around them – in this case, the entire island population – are also affected by this uncertainty. To quote one anonymous Pitcairn woman: "[e]very Pitcairn person, whether guilty or innocent, has been involved in this thing and life has been hell."[65] Other Pitcairners have expressed similar sentiments, which can be summed up in the simple statement "justice delayed is justice denied."[66] A number of factors need to be considered in determining whether the continuation of proceedings would amount to an abuse of process, among these are:[67]

1. The length of the delay;

2. The reasons for the delay;

3. The accused's responsibility for and past attitude to the delay;

4. Proven or likely prejudice to the accused;

5. The public interest in the disposition of charges of serious offences and the conviction of those guilty of crime.

The Supreme Court of Canada have also given these factors careful consideration as well as considering the competing issues that underlie such cases – as McLachlin J said in *R v Morin*: [68]

[S]imply listing factors does not resolve the dilemma... What is important is how those factors interact and what weight is to be accorded to each... The interest of society in bringing those charged with criminal offences to trial is of constant importance. The interest of the accused, on the other hand... varies with the circumstances. It is usually measured by the... prejudice to the accused's interests in security and a fair trial.

Her Honour also gave consideration to the best method of approach for courts to take when dealing with such cases:[69]

[T]he task... may usefully be regarded as falling into two segments. The first step is to determine whether a prima facie or threshold case for unreasonable delay has been made out. Here such matters as length of delay, waiver and the reasons for the delay fall to be considered... If this threshold or prima facie case is made out, the court must proceed to a closer consideration of the right of the accused to a trial within a reasonable time, and the question of whether it outweighs the conflicting interest of society in bringing a person charged with a criminal offence to trial.

There are three separate forms of delay that need to be considered – complainant delay, pre-indictment delay and, pre-trial delay – and each of these three will be considered in turn.

(a) Complainant delay

Delay of this sort is not normally sufficient grounds in itself to warrant a stay of proceedings. That does not mean however, that the power to stay proceedings can never be applied to delay on the part of a complainant. Delays of this kind were the subject of an application to the High Court for a stay of proceedings in the New Zealand case of *R v The Queen*,[70] where the allegations made against the accused dated back twenty years. In his judgement, Tipping J said that the ultimate question in cases such as these was "whether the delay has caused prejudice to the extent that a fair trial is no longer possible."[71] His Honour further stated that there were two aspects that needed to be considered in relation to this question: firstly, whether any trial can be conducted fairly as regards the accused's legitimate rights; and secondly, whether it is fair to put the accused on trial at all.[72] In that case, Tipping J decided both aspects of the question in the affirmative.

However, absent any express statutory limitations there remains no alternative to a case-by-case approach in order to achieve a satisfactory balance of the accused's interests with those of the public and of the complainant. Deciphering where the balance lies in any given case can often be a matter of some difficulty – as acknowledged by the Supreme Court of Canada.[73] It is also important to bear in mind the conflicting emotions and loyalties that sexual-abuse complainants face and the importance of them being psychologically prepared to come forward and face the consequences before they can be criticised for not

doing so. This point was also highlighted by the Supreme Court of Canada in *R v L (W.K.)*: [74]

It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse... If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting... [D]elay is reporting sexual abuse is a common and expected consequence of that abuse... Establishing a judicial statute of limitations would mean that sexual abusers would be able to take advantage of a delay which they themselves, in many cases, caused. This is not a result which we should encourage.

Loss or lack of memory is also an issue but it is rare that this alone will be sufficient to warrant a stay. Obviously in any trial held years after a crime has allegedly been committed, the memories of witnesses are likely to have worsened. However, in cases of sexual abuse it is more often than not simply the complainant's word against that of the accused. Sometimes, delay can in fact be beneficial to an accused; there is authority in England that where an accused claims a loss of memory, the jury should be directed that if they accept the claim is genuine, then that may make it more difficult for them to find guilt proved beyond reasonable doubt as they have only heard on side of the case.[75] Nevertheless, a finding of guilt is still possible notwithstanding delays of extreme lengths; although, as Tipping J observed in *R v The Queen*:[76]

[While] Parliament must be regarded as accepting that it is prima facie fair for people to face trial on old allegations whatever the delay... [this] way of looking at the matter should not be pressed too far. *Parliament can hardly have contemplated a delay as extreme as say 50 years. The line must be drawn somewhere*.

(b) Pre-indictment delay

Delay in conducting an investigation of a complaint or between conclusion of the investigation and the laying of charges would not normally be considered to be prejudicial to an accused – or, as one Justice of the United States Supreme Court put it, "[t]here is no constitutional right to be arrested."[77] The exception to this would be where the abuse has arisen through the manipulation or misuse of the process of the court in order to deprive the defendant of a protection provided by the law; or where the delay has impaired the ability of the accused to prepare a defence and consequently, their right to a fair trial has been prejudiced. Ultimately, there has to be something more than just delay in charging an accused to constitute an abuse of process in order to trigger the courts to intervene through the use of their inherent jurisdiction. Short of this, the Supreme Courts of both the United States[78] and Canada[79] have held that pre-indictment delay does not amount to a breach of an accused's constitutional rights, although not without some degree of reservation. For example, as Douglas J noted in*United States v Marion*: [80]

At least some of [the] values served by the right to a speedy trial are not unique to any particular stage of the criminal proceeding... Undue delay may be as offensive to the right to a speedy trial before as after an indictment of information. The anxiety and public concern may weigh more heavily upon an individual who has not yet been formally indicted or arrested for, to him, exoneration by a jury of his peers may be only a vague possibility lurking in the distant future. Indeed the right to a speedy trial may be denied when a citizen is damned by clandestine innuendo and never given the chance to properly defend himself in a court of law... To be sure, '[t]he right of a speedy trial is necessarily relative. It is consistent with delays and depends on circumstances.'

In considering the circumstances relevant to the Pitcairn proceedings, obviously allowances have to be made for the remote location of the Islands, their inaccessibility, and the unique and unprecedented nature of these proceedings. However, such factors cannot serve to excuse any attempts to take unfair advantage

of the delay. Most of the pre-existing Pitcairn Ordinances have been overhauled within the last three years – including an extensive reworking of both the Justice and Judicature Ordinances – while new Ordinances and Orders in Council have been promulgated and continue to be promulgated up to the present day.[81] Part of the rationale behind these actions has been a desire to construct an effective and workable judicial system to fill what was essentially a pre-existing void. However, there is a high risk that this shaping of the judicial system may well be tainted by a bias towards resolving the proceedings in a specific way, preferable to the government but not the accused, thus jeopardising their right to a fair trial by subjecting them to a bespoke system, without consideration of whether this is in fact the best method of resolution in these very unique circumstances.

(c) Pre-trial delay

While there are no statutory provisions in United Kingdom law relating specifically to delay in the commencement of criminal proceedings – other than the *Habeas Corpus Act 1816,* which is irrelevant to the Pitcairn proceedings – a person is entitled under the norms of human rights to be promptly informed of the charges against them and to be brought to trial without delay. Where this right is not met, and the consequences would be sufficient to deny the accused(s) the right to a fair trial, a power of remedy the wrong lies within the court's inherent jurisdiction to prevent an abuse of its processes or general unfairness to an accused.[82] Although there is no power under the law of the United Kingdom for a judge to direct that a prosecution must not proceed, or to quash an indictment (as can be done in the New Zealand jurisdiction under s 347 of the*Crimes Act 1961*), in *Connelly v DPP,* Lord Templeman observed that: [83]

There can be no doubt that a court which is endowed with a particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and to defeat any attempted thwarting of its process.

Therefore it lies within the scope of the Court's inherent power to effectively dismiss a case in which undue delay has lead to an abuse of process such that any trial of the accused would necessarily be unfair, or the continuation of the proceedings oppressive. The method most likely employed for this purpose would be a direction to acquit by the trial judge. However such a result is not automatically created by delay – the delay must have resulted in an unfair level of prejudice to the accused. As noted in decisions of the New Zealand Court of Appeal[84] and Supreme Court of Canada[85] on this issue, there are no simple tests for determination of this issue. Rather, judicial determination requires the consideration of a range of factors, including the length of time involved, the reasons for the delay (including consideration of the actions of the accused and Crown) and the prejudice to the accused. In addition to this, s 8 of the*Human Rights Act 1998* (UK) gives a court the power to grant such remedy or relief for a breach of a person's rights under the ECHR as it considers appropriate. Lord Hope of Craighead highlighted the operation of this section in the recent decision of the Privy Council in the Scottish case *HM Advocate v R*:[86]

The ordinary remedy which our domestic law provides where an unlawful act is in prospect or is still continuing is to pronounce an order whose effect will be to... bring [that act] to an end... In criminal cases it will do so by pronouncing an order suspending the proceedings which it finds to be unlawful. This will involve upholding a plea in bar of trial... It would not be in accordance with our practice... to allow [an] unlawful or invalid act to happen or to continue with a view to providing a remedy... by way of a reduction in sentence afterwards.

While, the New Zealand Court of Appeal has held that the issue of whether or not an accused would be able to receive a fair trial is irrelevant to the question of whether the right to trial without undue delay has been breached, this issue is nevertheless significant in determining the appropriate remedy in the

circumstances.[87] Similarly, as Lord Rodger of Earlsferry noted in*HM Advocate*: [88]

In a system which aims to provide effective remedies for breaches of convention rights, seeing a practical distinction between the length of the proceedings and the proceedings themselves might appear almost as curious as seeing the grin without the Cheshire cat... The hearing may be fair, and the tribunal may be impartial, but that does not mean that the proceedings in which that hearing by the tribunal takes place do not involve a violation of the guarantee of a hearing within a reasonable time.

Also of significance for comparative purposes is the restrictive provision under the law of Scotland preventing the trial of an accused on indictment for any offence unless the trial is commenced within 12 months of his or her first appearance in respect of that offence.[89] Failure to adhere to this limitation results in the mandatory release of the accused "for ever free from all question or process for that offence."[90] Similarly, an accused who is committed for any offence cannot be detained for more than 80 days without an indictment being served, or more than 110 days without the trial being commenced. These statutory limitations serve to provide other courts in the common law jurisdiction – including the Pitcairn courts – with an indicator to follow in determining at what point the delay incurred in any particular case will become unreasonable. Obviously this does not mean that a court will always, or should always adhere to these limits. Each case has to be decided on its own circumstances; for a court to impose any fixed limit in the absence of express parliamentary provision would amount to legislating.[91]

B The Right to an Appeal

As discussed above, the Pitcairn appeal structure is a relatively recent creation. However, the right to an appeal against conviction, sentence, or both is a long standing common law right, which is restated in the ICCPR[92] and the *New Zealand Bill of Rights Act 1990*.[93] Unusually, this right is absent from the ECHR, although its history as a freestanding right is indisputable, being personified by the existence of Courts of Appeal, and the almost unfettered allowance for appeals to those courts, in the United Kingdom jurisdiction and beyond. Under Pitcairn law, the right to an appeal is provided by the*Judicature (Appeals in Criminal Cases) Ordinance* (originally promulgated in 2000), from both the Magistrate's and Supreme Courts, to the Court of Appeal, itself created by the *Pitcairn Court of Appeal Order 2000* (UK). The aspect of appellate procedure most relevant to this paper however, is the ability for the Pitcairn Court of Appeal to decide appeals on the papers, without hearing any oral arguments from counsel.[94] Furthermore, the decision to summarily dismiss an appeal in this manner may be made by a single judge alone. This practice, as conducted by the New Zealand Court of Appeal was emphatically denounced as being contrary to natural justice by the Privy Council in *Taito v R*.[95] What makes this issue even more interesting, is that the procedure for deciding what mode of hearing should be employed – as detailed in the *Judicature (Appeals in Criminal Cases) Ordinance* – is the same (word for word in fact) as that in use in New Zealand at the time of the decision in *Taito*.[96] The relevant section in Pitcairn law reads:

35A - (1) An appeal or application for leave to appeal must be dealt with by way of a hearing involving oral submissions unless the Judge or Court making the decision on the mode of hearing determines, on the basis of the information contained in the notice of appeal, notice of application, or other written material provided by the parties, that the appeal or application —

(a) can be fairly dealt with on the papers; and

(b) either has no realistic prospect of success or clearly should be allowed.

(2) In determining whether an appeal or application can be fairly dealt with on the papers, the Judge or Court may consider any matters relevant to the decision on the mode of hearing, including such matters as

(a) whether the appellant has been assisted by counsel in preparing the appeal or application:

(b) whether the appellant has been provided with copies of the relevant trial documentation:

(c) the gravity of the offence:

(d) the nature and complexity of the issues raised by the appeal or application:

(e) whether evidence should be called:

(f) any relevant cultural or personal factors

As Lord Steyn put it in *Taito* case, delivering the advice of their Lordships,[97]

The context is one of access to justice and it calls for what Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328G, described as "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' ". The substance must match the form. *What is required is a collective judicial decision on the merits of the appeal by a division (three members) of the Court of Appeal, sitting together, and arrived at after a hearing in open Court...*

Ordinance No. 17 of 2002, which amended the *Judicature (Appeals in Criminal Cases) Ordinance* by inserting the above provision, is (as stated before) a carbon copy of the corresponding provision in New Zealand law, as amended shortly before the hearing before the Privy Council in *Taito*, and still in force today. It is unclear whether the Governor was aware of the decision in *Taito* and, in particular, the passage quoted above, when he promulgated this Ordinance. Although the same procedure involving the hearing of appeals on the papers is still used by the New Zealand Court of Appeal, questions have been raised about the validity of this procedure, based on the above speech of Lord Steyn in *Taito*. As the authors of the latest treatise on the *New Zealand Bill of Rights Act 1990* put it:[98]

By contrast with the clear and absolute endorsement in *Taito* of a criminal appellant's right to a hearing conducted orally and in open court, s 329A of the *Crimes Act* may create a significant inroad on the guarantee codified in s 25(h). Indeed if the Privy Council is correct regarding the scope and substance of the right to appeal, Parliament has arguably passed a statute breaching the *Bill of Rights*... [T]he next appeal taken to the Lords may well involve the exercise of the Court of Appeal's prerogative to dispense with oral hearings under s 329A.

While the nature of these trials makes it highly likely that any appeals will be heard orally before a full bench of the Court of Appeal this is not guaranteed – particularly in relation to pre-trial and interlocutory matters. In the event that a full hearing was not allowed them, the appellants could always seek leave to appeal to the Privy Council with the aim of securing a similar outcome to that in *Taito*!

IV CUSTOMARY PRACTICE AND CULTURAL DEFENCE

If Pitcairners are to be judged by any law, then it should be their own, based on their customs and way of life. Even in proceedings conducted under Pitcairn and United Kingdom law, customary practice may well

provide the accused with the basis of a defence to the charges faced by them, which, as mentioned in the introduction to this paper, predominantly involve complaints of sexual intercourse with underage girls. Custom is an integral part of modern law, and issues relating to custom are often advanced before the courts including, as is the case in this situation, as a defence to criminal charges.

The primary function of modern judicial analysis is to examine the nature and reality of existing customs, which do not derive their inherent validity from the authority of the court – the sanction of the court is declaratory and not constitutive.[99] Customs are, by definition, local variations on the general law and are limited in their application to a particular class or persons or to a particular place. As Sir Carleton Allen points out, these two rules are simply restatements of the same thing – a custom applying to all persons is not a custom in the legal sense, it is the common law.[100]

However, such judicial declaration as to the existence of a particular custom is dependent on certain restrictions. Firstly, a custom cannot be set up against to a positive rule of statutory law, nor can they be set up against a fundamental rule of common law[101] – when this happens, the custom will invariably fail the test for judicial recognition. Custom must also have some historical foundation for its origins – the traditional test is having "existed from time immemorial," although as Allen points out this is a relative term used to establish continuous existence in order to differentiate between "a settled custom and a passing vogue."[102] Antiquity is for the person who sets up the custom to prove, and this may be a very difficult burden to discharge. However, in the case of Pitcairn custom, the unique isolation of the island and its people, in addition to the research of outsiders (some of which is considered below) may well prove of assistance to defence counsel seeking to establish the existence of certain Pitcairn customs relevant to these proceedings.

The raising of customary as a defence in relation to charges of a sexual nature is not unique; different cultures and societies have varying degrees of norms and taboos relating to this area. What is perhaps unique is the raising of the defence by a group of people living in near-isolation (in so far as this is possible in the 21st-Century world) from external influences. This is not a subset of another culture, or culture within a culture – like Samoans, Māori, or Tongans in New Zealand; but a single, unique culture preserved and refined by over 200 years of isolation. It is in the context of Pitcairn culture, that the allegations and corresponding cultural defences have to be judged. Obviously those best equipped to do this are the Pitcairners themselves. In order to do this, it is first necessary to briefly explain the nature of Pitcairn culture, and their way of life.

Pitcairners are British in name only – notwithstanding their recently restored status as British citizens, they have little in common with the motherland rejected by their mutinous ancestors over 200 years ago. Everything about them is different: their genealogy, their way of life, their social norms, and even their language, *Pitkern* (a unique mixture of old English and Polynesian languages). In his thesis on Pitcairn Islanders, written in 1970, Ian Frazer succinctly described the islander's cultural mentality, saying: "[t]he fact of being a Pitcairner is a fundamental conceptual distinction recognized by all Pitcairners and those in contact with them."[103] Their isolation is one of the core facets of their identity, and Frazer identifies how this, combined with interaction made possible through migration, has impacted upon the islanders' psyche:[104]

The inevitable comparison at first hand... between the island way of life and the standard of living in other countries, has led to a certain self-consciousness and humility on the part of many Pitcairners... many times the island's morals, values and manners have come under critical attack, being considered inferior and wanting in improvement.

This observation helps to understand why Pitcairners are likely to be self-conscious and secretive (at least in the view of outsiders) about their way of life – especially when it is being held up for scrutiny against

another, more "developed" society such as New Zealand. Such scrutiny fails to realise the obvious, that Pitcairn is not Parnell or Porirua, and therefore Pitcairn society, by definition, cannot and should not be expected to emulate that of New Zealand. Perhaps one of the most intimate and controversial aspects of Pitcairn life is the promiscuity of Pitcairners. As one islander quoted candidly put it – "People on Pitcairn are only interested in three Fs – fishing, food, and [you know the rest]".[105] In contrast to their perceived piety (from an outsider's point of view) and association with the Seventh Day Adventist Church, the history of Pitcairn is a history of intermarriage and promiscuity – both pre-marital and post-marital – as Frazer identified in his research: "To the islanders themselves promiscuity is the norm and illegitimacy and adultery outcomes which are not condemned but accepted... except in the presence of strangers."[106] This assertion is also reinforced by Ian Ball's observations regarding the Pitcairn way of life:[107]

In each compartment of human activity, there is a detectable interaction between an *Anglo* lifestyle, which must now be broadened to include influences from the United States, New Zealand and Australia as well as Britain, and the enduring Polynesian ways. Each cultural force has shaped of tempered its rival one. In most areas, the victor has been the *Anglo* side. Yet in that most dominant of human interests and activities – sex – the Polynesian ways would appear to have won the day, or at least to have exerted the greater influence.

Bell goes on to put this observation in context, noting: "[t]he phrase 'sleeping around' is not used on Pitcairn, but that is how many of the young pass their evening leisure hours."[108] As one of the island men pithily commented to Ball, "[w]hen it comes to sex, and young people are involved, we are Polynesian first and whatever else second."[109]

These attitudes and approaches to the subject of sexual intercourse are likely to form the keystone of any cultural defence raised in relation to the Pitcairn proceedings – especially when it comes to arguments over the age of consent on Pitcairn. In any society, the age of consent to sexual intercourse is determined by the public interest – that is, below what age would it be contrary to the public interest to allow persons to consent to sexual intercourse. This then leads to the setting of an age limit, below which sexual intercourse will be illegal regardless of whether or not the minor party consents. This age limit varies internationally, but for Pitcairn the "official" limit is 15[110] – a year younger than in New Zealand[111] and the United Kingdom.[112] However, this limit is evidently not adhered to, nor enforced, in practice; with some islanders claiming the limit is actually 12,[113] while others claim that there is no specific age of consent.[114]

Regardless of the age, a lower age of consent, either statutory or customary, should not be perceived as being reflective of the moral standards of the jurisdiction to which the age applies, but rather of what the members of the public in that jurisdiction consider appropriate, and of course what is "appropriate" in one jurisdiction may well be inappropriate in another. For example, in Canada the age of consent is 14,[115] while in the United States of America, in the State of Arizona, the age of consent is 18.[116] This does not however mean that the people of Arizona are any more moral than those in Canada, nor does it mean that a 16 year-old who engages in sexual intercourse in Canada should feel that they were "raped" based on an Arizonian perception. Rather, it means that the people of Arizona determined that it would not be in the public interest for persons under the age of 18 to have sexual intercourse, whereas in Canada the age of 14 was preferred. The same rationale is also true of Pitcairn – a person there should not feel, nor should it be insinuated, that they were raped based on a New Zealand or British perception of the "proper" age of consent. The standard set by any given jurisdiction can not be evaluated by comparison with another jurisdiction – each standard must be viewed as discrete and distinct from any and all other jurisdictions.

Nevertheless this does not appear to have happened with Pitcairn, based on erroneous speculations reported by the international media. In *The New Zealand Herald*, journalist Tim Watkin quotes an

anonymous outsider as saying of the islanders: "[w]hile [they] travel and are aware of modern sexual mores, they have secretly continued a tradition of adultery and under-age sex."[117] While in the *Guardian*, columnist Jeanette Winterson makes the unattributed and unsubstantiated assertion that "...girls are offered to passing sailors and tourists to boost income lost from stamp collecting."[118]

As stated above, the public interest is determinative of where age of consent should lie in any given jurisdiction. What may be considered "child sex" in one jurisdiction may be perfectly acceptable in a neighbouring jurisdiction.

Furthermore, the age of consent for Pitcairn is not set by statute, as is the case in New Zealand, but rather by the Justice Ordinance, itself delegated legislation made by the Governor. If customary law or practice conflicts with the provisions of a statute, the latter prevails. However the situation is not nearly as simple when the conflict is with delegated legislation – as is the case with Pitcairn. Whether the ordinance should prevail over custom, or vice versa, is an extremely fraught and complex issue. Law and society are expected to co-exist in a mutualistic relationship, each influencing the other. When the two become alienated from each other, the continued existence of the law must be called into question. In the case of a statute, the task of repeal remains the exclusive preserve of the legislature. But delegated legislation may be struck down by the courts as ultra vires. Pitcairn Ordinances that conflict directly with established custom could, in the author's submission, be considered to be ultra vires on the grounds that they do not promote "good order and the maintenance of peace" on the island – the task for which the power to make laws was originally given.[119] It is not uncommon for statute law to be repealed, and acts decriminalised, in recognition of an existing social reality; and delegated legislation is even more adaptable to change by virtue of its nature and purpose.

The importance of traditional customary practice on Pitcairn cannot be understated, and another way in which this custom could be used is as a "cultural defence" to the charges. Courts frequently take cultural and customary factors into account when dealing with criminal offences. Indeed, the courts of the Solomon Islands and Vanuatu are explicitly empowered to do so within limits.[120] In a recent journal article, Sita Reddy analyses the rationale behind the use of culture as a defence, citing a number of examples from cases in the United States.[121] Reddy identifies a number of examples in which cultural evidence has been expressly approved by appellate courts in some states, with other states indicating "...some initial acceptance of the*premise* behind cultural defence."[122] However, unlike the in examples cited by Reddy, the relevant culture in this case is the predominant culture of not just those who seek to use it as a defence, it is the predominant culture of the society itself. The conflict that arises is with British culture, and although it is foreign to them, it is an inherent part of the law under which the defendants are to be tried. While this does not negate any arguments in favour of a cultural defence, it is nevertheless yet another unique argument – that is, the use of majority culture as a defence to criminal proceedings under laws imposed by a "foreign" culture. Such an argument would undoubtedly justify extensive scholarship by themselves, well beyond the limits of this paper. Certainly the possibility of culture providing a successful defence is by no means a dead letter.

V CONCLUSION

The future of the Pitcairn proceedings is almost as unclear as it was before the Public Prosecutor laid the charges against the accused islanders at Adamstown on 4 April. Despite two hearings – the second being held in chambers at Auckland on 8 May[123] – minimal progress has been made towards addressing issues such as those raised in this paper. Much remains uncertain, and every twist and turn the proceedings take will raise new issues and more questions than answers.

The unenviable task of discerning the answers to the multitude of questions already raised (as well as the multitude that have yet to arise) will fall to the newly-appointed members of the Pitcairn judiciary. Despite

their collective wealth of experience, the issues they will be required to address will be a unique experience for them too. In every facet of its nature, Pitcairn is unique and these proceedings are no different – as illustrated by the Public Defender's recently request for the Magistrate's Court to rule out its own existence.[124] In many ways, without losing sight of the victims' interests, such a Cartesian ruling would be for the best.

The legal basis for these proceedings has been hurriedly rushed into existence over the past three years, creating judicial processes and structures where none existed before. How long will it be before the hastily constructed façade crumbles, exposing the rudimentary reality that existed before? Pitcairners have judged themselves, almost without exception,[125] for over two hundred years based on their own notions, standards and conceptions. Every society has its own methods of resolving conflicts and imposing sanction upon those who breach its norms.

The law that the United Kingdom seeks to impose is a foreign one; those subject to it have had little or no say in its creation, and will have almost no say in its implementation. Yet they are the ones who stand to lose the most – able-bodied men, such as those charged, are needed to man the longboats which form an integral part of Pitcairn's lifeline for re-supply. Without them, the island cannot survive. Recognition of the right to self-determination is more noticeably absent from these proceedings than any other right. Pitcairn is a unique place and as such can only be judged fairly by those who know it best – its own people. However, a unilateral declaration of independence may be the only may to ensure this – such as suggestion has recently been made by one expert,[126] and Pitcairn certainly meets the criteria for statehood under international law.[127] How the British government would respond to such a latter-day mutiny is unknown – would they be willing to let some of their last colonials loose, or would they refuse to recognise the rogue state?

Like their mutinous forbears, Pitcairners long to be free and to be allowed simply to get on with life – doing what survival has demanded for over 200 years, and what they continue to do despite the sword of Damocles which threatens their survival. Ultimately, this is what characterises Pitcairn – a resilience that can only be described as the psyche of the place.

Appendix **Judicial Bodies and Persons of Pitcairn**

Court of Appeal	President:	Hon John S. Henry
	Justice:	Hon Sir Ian Barker
	Justice:	Hon Justice Paul Neazor
Supreme Court	Chief Justice:††	Hon Justice John Blackie
	Puisne Judge:	Jane Lovell Smith
	Puisne Judge	Russell Johnson
Magistrate's Court	Magistrate:	Gray Cameron
		D Knight
		R Hawke
		H Fulton

ENDNOTES

[*] *BA, Auckland. The author would like to thank Paul Rishworth of the Faculty of Law, University of Auckland, for his supervision; Bernard Brown, also of the Faculty of Law, for his insight and guidance; and Leon Salt and an anonymous "Friend" for their invaluable contributions.*

[1] *Re: Complaints made by the Public Prosecutor against 9 named defendants* (Unreported, Magistrate's Court, Pitcairn Islands, Magistrate Cameron, 10 April 2003) [14].

[2] Ibid [7(d)].

[3] "Sex trial would destroy Pitcairn, says Mayor" *The New Zealand Herald* (Auckland, New Zealand) 31 March 2003, http://www.nzherald.co.nz/storydisplay.cfm?storyID=3003430 (at 10 May 2003).

[4] Sch 1, "Agreement between the government of New Zealand and the government of the United Kingdom of Great Britain and Northern Ireland concerning trials under Pitcairn law in New Zealand and related matters," *Pitcairn Trials Act 2002* (NZ).

[5] S 14(1) *Judicature Ordinance* (Pitcairn).

[6] S 14(2) *Judicature Ordinance* (Pitcairn)

[7] Butterworths, *Halsbury's Laws of England*, (4th ed), vol 6 [1101].

[8] Ibid, [1101], n 4.

[9] S 5(1), *Pitcairn Order 1970* (UK) (no. 1434)

[10] S 15A, *Judicature (Courts) Ordinance* (Pitcairn). This section was inserted by Ordinance No. 14 of 2002, itself promulgated *before* the *Pitcairn Trials Act 2002* (NZ) - the date of assent being 24 December 2002.

[11] Ss 5, 10 *Judicature (Courts) Ordinance* (Pitcairn).

[12] *Pitcairn Court of Appeal Order 2000 (No. 1341)* (UK); *Pitcairn (Appeals to the Privy Council) Order 2000 (No. 1816)* (UK).

[13] S 4(3), *Pitcairn (Court of Appeal) Order 2000* (UK).

[14] Sub-s 2B, *Pitcairn (Amendment) Order 2000* (UK).

[15] Sub-s 2B, *Pitcairn (Amendment) Order 2000* (UK).

[16] See Appendix One.

[17] *Re: Complaints made by the Public Prosecutor against 9 named defendants* (Unreported, Magistrate's Court, Pitcairn Islands, Magistrate Cameron, 10 April 2003).

[18] Cf: Editorial, "Vote essential on replacing Privy Council", *the New Zealand Herald* (Auckland, New Zealand) 14 May 2003, http://www.nzherald.co.nz/storydisplay.cfm?storyID=3501645 (at 25 September

2003).

[19] S 9(1) *Judicature (Courts) Ordinance* (Pitcairn).

[20] S 9(2) *Judicature (Courts) Ordinance* (Pitcairn).

[21] S 9(2) *Judicature (Courts) Ordinance* (Pitcairn).

[22] S 9(3) *Judicature (Courts) Ordinance* (Pitcairn).

[23] Halsbury, above n 7, [1104].

[24] S 4, *Human Rights Act 1998* (UK).

[25] Art 34, 213 UNTS 221.

[26] Tim Watkin, "Pitcairn court asked to rule out its own existence" *The New Zealand Herald* (Auckland, New Zealand) 9 May 2003, http://www.nzherald.co.nz/storydisplay.cfm?storyID=3500954 (at 20 May 2003).

[27] S 25(a).

[28] *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11(d).

[29] *United States Constitution* amend VI.

[30] *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 04 November 1950, UNTS 221, Art 6, 213 (entered into force 3 September 1953).

[31] *International Covenant on Civil and Political* Rights, opened for signature 19 December 1966, ILM 368, Art 146 (entered into force 23 March 1976).

[32] Sir Patrick Devlin *Trial by jury* (1971) 164.

[33] *Lewis v Accused* 518 US 322, 335 (1996).

[34] Butterworths, *Halsbury's Laws of England*, (4th ed), vol 26, '7 Juries' [245].

[35] S 24 (e) *New Zealand Bill of Rights Act* 1990 (NZ).

[36] *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11(f).

[37] *United States Constitution* amend VI.

[38] See: Devlin, above n 32, 5-14.

[39] William Blackstone *Commentaries on the Laws of England* (1st ed), vol 4, ch 27, 342, [V].

[40] 25 Edw 1.

[41] 1 Will & Mar sess2 c 2.

[42] See: Butterworths, *Halsbury's Laws of England* (4th ed), vol 8(2), [1], n 13.

[43] See the *British Overseas Territories Act 2002* (UK) – this Act restored full British citizenship to residents of Overseas Territories. Its importance, for the purposes of this paper, is largely symbolic although it does serve to eliminate any residual distinction between those living in the United Kingdom mainland and those residing in Overseas Territories.

[44] Although details relating to the charges faced are largely suppressed, it is likely that the charges have been laid under the provisions of the *Sexual Offences Act 1956* (UK).

[45] Foreign Affairs, Defence and Trade Committee, Parliament of New Zealand, *Report on the Pitcairn Trials Bill* (2002) 5.

[46] However, the European Court of Human Rights has previously stated that "Article 6 [of the Convention] does not specify trial by jury as one of the elements of a fair hearing in the determination of a criminal charge." See: *X and Y v Ireland* (1980) Eur Com HR 8299/78 [19].

[47] See above n 7, [1101] n 4.

[48] Ss 9(1) – 9(3) *Judicature (Courts) Ordinance* (Pitcairn).

[49] New Zealand Law Commission, *Juries in Criminal Trials*, NZLC R69 (2001) [111].

[50] S 9(2) *Judicature (Courts) Ordinance* (Pitcairn).

[51] See above, n 32, 7-8.

[52] See s 26 *Juries Act 1825* (UK). This statute originally laid down the requirement for a jury of 12 men. However this was subsequently repealed by s 64(2) *Criminal Justice Act 1974* (UK).

[53] See [1910] AC 197 (PC).

[54] S 9(1) *Judicature (Courts) Ordinance* (Pitcairn).

[55] See above nn 32, 34.

[56] Halsbury, above n 7, [1029].

[57] Ibid n 1.

[58] Ibid n 2.

[59] Art 146, ILM 368, 3(c).

[60] *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) c 11(b).

[61] S 25(b).

[62] Jan Corbett and Tony Stickley "End of a legend as Pitcairn Island meets the modern law" *The New Zealand Herald* (Auckland, New Zealand) 30 June 2001, http://nzherald.co.nz /storydisplay.cfm?storyID=197547 (at 28 April 2003).

[63] (1993) 177 CLR 378, 392-393.

[64] [1991] 1 WLR 1351, 1352.

[65] "Islanders fight back on sex abuse claims" *The New Zealand Herald* (Auckland, New Zealand) 24 August 2002, http://www.nzherald.co.nz/storydisplay.cfm?storyID=2351064 (at 28 April 2003).

[66] Ibid. See also: TVNZ, 'Pitcairn Island prepares for sex trial' *Holmes*, 5 June 2003, <http://203.98.20.20/www-g2/tvnz/tvone/holmes/pitcairn_050603.rpm> (at 5 June 2003).

[67] *Jago v District Court of New South Wales* (1989) 168 CLR 23, 60. See also: Scott Henchliffe, "Abuse of process and delay in criminal prosecutions – Current law and practice" (2002) 22 *Australian Bar Review* 18.

[68] (1992) 71 CCC (3d) 1, 30 (SCC).

[69] Ibid.

[70] [1996] 2 NZLR 111.

[71] Ibid, 112.

[72] Ibid, 113.

[73] *R v Morrin,* (1992) 71 CCC (3d) 1, 20, 29 (McLachlin J).

[74] [1991] 1 SCR 1071, 1100, 1101.

[75] Broadhurst v R [1964] AC 441, 458 (PC).

[76] *R v The Queen* [1996] 2 NZLR 111, 113 (emphasis added).

[77] *Hoffa v United States*385 US 293, 310 (1966).

[78] See: *United States v Marion* 404 US 307 (1971).

[79] See *R v L (W.K.)* [1991] 1 SCR 1071.

[80] 404 US 307, 330-331 (1971).

[81] The Ordinances of Pitcairn were extensively revised, amended and added to in 2001. In addition to this, a number of new Ordinances and Orders in Council have been promulgated since then and continue to be promulgated.

[82] *Connelly v DPP* [1964] AC 1254 (HL).

[83] Ibid at 1300. Cited with approval in *Hui Chi-ming v R* [1991] 3 All ER 897 at 912 (HL).

[84] See especially: *Martin v Tauranga District Court* [1995] 2 NZLR 419; *R v The Queen* [1996] 2 NZLR 111; and *R v Coghill* [1995] 3 NZLR 65.

[85] See for example: *R v Morrin,* (1992) 71 CCC (3d) 1, 13 (Sopinka J); and *R v L (W.K.)* [1991] 1 SCR 1071.

[86] [2003] 2 WLR 317, 338.

[87] *Martin v Tauranga District Court* [1995] 2 NZLR 419, 426 (Richardson J).

[88] [2003] 2 WLR 317, 366-367.

[89] S 101, *Criminal Procedure (Scotland) Act 1975* (UK), (as amended in 1980).

[90] *Martin v Tauranga District Court* [1995] 2 NZLR 419, 434 (McKay J).

[91] *R v The Queen*[1996] 2 NZLR 111, 113.

[92] Art 14(5) ILM 368

[93] S 25(h).

[94] Ss 35A - 35B *Judicature (Appeals in Criminal Cases) Ordinance* (Pitcairn).

[95] (2002) 19 CRNZ 224.

[96] Cf: s 392A *Crimes Act 1961* (NZ).

[97] *Taito v R* (2002) 19 CRNZ 224, 236 [12] (emphasis added).

[98] Paul Rishworth et al (eds), *The New Zealand Bill of Rights Act* (2003) 716. See also *R v Hiroti* [2002] NZCA 384/01 (Unreported, Keith , McGrath , Anderson JJ, 25 September 2002).

[99] C K Allan, *Law in the Making*, (7th ed, 1964) 129, 130.

[100] Ibid, 130.

[101] Ibid, 131, n 6. Allen defines this as “a rule of the common law which, in the opinion of the court, is definite as settled beyond any reasonable doubt or argument.”

[102] Ibid, 133, n 1.

[103] Ian Frazer, *Pitcairn Islanders in New Zealand* (MA Thesis, University of Otago, 1970) 60.

[104] Ibid, 69.

[105] Jan Corbett and Tony Stickley, above n 62.

[106] Frazer, above n 103, 69.

[107] Ian M. Ball, *Pitcairn: Children of Mutiny* (1973) 214.

[108] Ibid.

[109] Ibid, 215.

[110] See: Ss 2, 88 *Justice Ordinance* (Pitcairn).

[111] Cf: s 134 *Crimes Act 1961* (NZ).

[112] Cf: s 14(2) *Sexual Offences Act 1956* (UK).

[113] See: Tim Watkin, "Lonely Island Weathering a Storm" the *New Zealand Herald* (Auckland, New Zealand) 25 August 2002, http://www.nzherald.co.nz/storydisplay.cfm?storyID=2351005 (at 10 May 2003).

[114] See above n 3.

[115] Cf: *Criminal Code* RSC 1985, c 46, s 150.1(1) (Can).

[116] See: 13 ARIZ REV STAT § 13-1405 (Ariz.).

[117] Cf: s 14(2) *Sexual Offences Act 1956* (UK).

[118] Jeanette Winterson, "Who's guilty of teenage sex?" *Guardian* (London, United Kingdom) 15 May 2001, http://www.guardian.co.uk/women/story/0,3604,490962,00.html (at 10 May 2003).

[119] S 5(1), *Pitcairn Order 1970* (UK) (no. 1434).

[120] Jennifer Corrin Care, Tess Newton, and Don Paterson, *Introduction to South Pacific Law* (1999) 142.

[121] Sita Reddy, "Pathologising cultural difference in American criminal courts" (2002) 24 *Sociology of Health and Illness* 667.

[122] Ibid, 675 (emphasis in original).

[123] Tim Watkin, "Pitcairn court asked to rule out its own existence", above n 26.

[124] Ibid.

[125] In 1897, Harry Albert Christian was tried for the murder of his wife and child by a British judge, and (possibly) a Pitcairn jury, on board HMS *Royalist*. Found guilty, he was taken to Suva and hanged. See Kim Griggs, "The Pitcairn Code" *Listener* (Wellington, New Zealand) 17-23 August 2002, 27.

[126] See: Kim Ruscoe, "Pitcairn asks UN to remove British Police," *Dominion Post* (Wellington, New Zealand) 30 May 2003, <http://www.stuff.co.nz/stuff/0,2106,2510045a12,00.html> (at 5 June 2003).

[127] As set out in Article 1, *Montevideo Convention 1933*, these criteria are: (a) a permanent population;

(b) a defined territory; (c) government; and (d) capacity to enter into relations with other states. See: Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, (7th ed, 1997) 75.

† Information supplied by Pitcairn Islands Administration Office, Auckland.

†† It is unclear whether the Chief Justice is a member of the Court of Appeal *ex officio*.