

Pitcairn Island: Sexual Offending, Cultural Difference and Ignorance of the Law

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Ⓛ Abuse of process; Child sex offences; Culture; Ignorance; Jurisdiction; Pitcairn Islands

Introduction

The convictions of six of the seven men so far charged¹ with sex crimes against girls in the British Overseas Territory of Pitcairn Island, a 2½ by 1 mile outcrop in the middle of the Pacific Ocean with a current population of 47, which attracted and held the attention of the world's media, raise the difficult issue of the interface between law and culture. This issue has long been discussed in international human rights literature, for instance in the context of debates within the UN and elsewhere about the validity of the practice of "female circumcision" or "genital mutilation", its opponents' preferred terminology.² Essentially, the argument has concerned the claim of cultural relativists that the supposed universality of human rights norms is an artificial (largely colonial, "Western") construct. The law/culture interface is also the subject of a growing body of literature in Australasian and North American circles dealing with the concept of a "cultural defence".³ This contrasts sharply with the relative neglect of the issue in British academic criminal law circles.⁴ Such neglect is no longer tenable and the aim here is to show that issues raised in the Pitcairn proceedings create challenges for Britain's domestic criminal law.

Central to the media's interest in the Pitcairn case was the island's alleged isolation from the cultural norms (and rights)⁵ expressed in British sexual offences law. Media accounts reported the plea articulated in some quarters outside the courts for recognition of the claims of cultural relativism. The suggestion was that Pitcairners (largely descended from 9 of the British mutineers on Captain

¹ One of the six (Dennis Ray Christian) pleaded guilty; the seventh, Jay Warren, currently the mayor of the island, was acquitted. A further three are currently (2006) being dealt with in New Zealand: see Lord Hope, at [56] of the Privy Council's final judgment in the case (*Christian and others v R.* [2006] UKPC 47 (October 30, 2006)).

² For a summary of this debate, see Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics and Morals* (Clarendon Press, Oxford, 1996), pp.166-255 and brief discussion in Helen Power, "Provocation and Culture" [2006] *Crim. L.R.* 871, at fn.77.

³ See sources cited in Power, *ibid.*, at pp.876-884.

⁴ See generally Anne Phillips, "When Culture Meets Gender: Issues of Cultural Defence in the English Courts" (2003) 66 *M.L.R.* 510.

⁵ Enforcement of the criminal law is recognised under international human rights treaties as an aspect of states' positive obligation to safeguard the rights of those within their jurisdiction.

Bligh's HMAV *Bounty* and the 12 Tahitian women and 6 Polynesian men who accompanied them)⁶ have developed their own distinctively "Pitkern"⁷ sexual culture according to which girls as young as 12 can legitimately expect to be engaging in sex with older boys and men. That under-age sex was common on Pitcairn Island seems to be beyond doubt: it has been attested to both historically⁸ and recently (whether it was "normal" in the sense that it was an accepted cultural norm is, of course, a different matter, an issue returned to below).⁹

However, a cultural defence as such formed no part of the defence case. Rather, the fundamental legal questions raised in the complex pre- and post-trial challenges to the validity of the proceedings were, first, whether the United Kingdom had jurisdiction to prosecute the inhabitants at all (the "legality" issue) or specifically under the Sexual Offences Act 1956¹⁰ (the "promulgation" issue); and, secondly, even if the United Kingdom had jurisdiction, whether the criminal proceedings were legitimate or, as the accused argued, an abuse of process.¹¹ The Privy Council has confirmed the Pitcairn Court of Appeal's rulings¹² to the effect that the United Kingdom did have jurisdiction to enforce the 1956 Act against the men and that there was no abuse of process in so doing (though there was considerable unease expressed by Lord Hope in the Privy Council on this particular issue).¹³ It is the "ignorance of the law" issue (central to the abuse of process arguments) with which this article is concerned, related as it was to the cultural claims raised by the defendants outside court.¹⁴ The only explicit judicial reference to cultural difference was Lord Hope's acknowledgement that the prosecution was partly

⁶ The mutiny of 1789, led by Fletcher Christian, has been the subject of four films, numerous books and thousands of articles. The most recent, extended historical account of the mutiny and the early years on Pitcairn is Caroline Alexander, *The Bounty: the True Story of the Mutiny on the Bounty* (2003). A useful, brief historical account, from the landing on Pitcairn in 1790 of the mutineers to recent events (though not these proceedings), is on the website of the Pitcairn Island Study Center, a library resource maintained by the US's Pacific Union College at <http://library.puc.edu/pitcairn/bounty/index.shtml>. The college is a Seventh Day Adventist institution: the islanders converted to Adventism in the late 19th century.

⁷ The official languages spoken on Pitcairn are English and Pitkern, the latter a patois combining English and Tahitian.

⁸ Nineteenth-century reports by naval captains provide some insight: see *Pitcairn Island: Correspondence Relating to the Condition of the Pitcairn Islanders* (1898).

⁹ See further text below, at fns 55-62.

¹⁰ The Sexual Offences Act, 1956 hereafter referred to as "SOA 1956" or "the 1956 Act". The events giving rise to the charges occurred before the Sexual Offences Act, 2003 came into force (May 2004).

¹¹ To understand the procedural complexity involved and the timetable of hearings in the three courts (Pitcairn's Supreme Court and Court of Appeal and the British Privy Council), see the Privy Council's preliminary decisions of October 28, 2004 [2004] UKPC 52 and November 9, 2005 [2005] UKPC 42.

¹² *Christian & Others v R.* [2006] UKPC 47 (October 30, 2006) (hereafter "PC3") confirming the **pre-trial** decisions in *Queen v 7 Named Accused* [2004] PNCA 1 on appeal from the Supreme Court's *Queen v 7 Named Accused* [2004] PNSC 1 and the **post-trial** decisions in *Christian v R. (No.2)* [2006] PNCA 1 on appeal from *Christian v R. (No.2)* [2005] PNSC 1. Hereafter, the pre-trial decisions of these courts are referred to as "PSC1" and "PCA1" and their post-trial decisions as "PSC2" and "PCA2".

¹³ See text below at fns 96-104.

¹⁴ In brief, the specifically jurisdictional issues were resolved as follows: as to "legality"—the defendants' most audacious argument, all three courts concluded that Pitcairn was a British settlement within the meaning of the British Settlements Act, 1887 and thus the entire panoply of colonial laws—Orders in Council, Ordinances and British law—applied. "Promulgation":

motivated by a desire “to root out the cultural trait [if such it was] once and for all”, a motive he regarded as laudable.¹⁵ In view of the convictions, amounting in effect to findings that the sex was non-consensual (contrary to the not guilty pleas entered by five of those convicted), the cultural claims were something of a “red herring”. Nevertheless, cultural difference was the unacknowledged backdrop to the accuseds’ argument that their ignorance of, and lack of meaningful access to, the 1956 Act brought them within the exceptions to the maxim that ignorance of the law is no defence, rendering their prosecutions unfair and unjust, an abuse of process which offended the fundamental values of the rule of law.

The following account outlines the events giving rise to the proceedings, before turning to consideration of Pitcairn’s allegedly different sexual culture (considered through media accounts and in the light of theoretical difficulties associated with the concept of “culture”). The discussion then focuses on the abuse of process arguments, in particular, ignorance of the law and its exceptions: some doctrinal headway was made by the Privy Council, but it is concluded here that more is needed if the courts, and indeed the British criminal justice system, are to get to grips with the challenge thrown up by alleged cultural differences.

Events leading to the proceedings

Two rape allegations (in 1996¹⁶ and 1999¹⁷) provoked the police investigation by Britain’s Kent Constabulary¹⁸ which eventually led to the legal proceedings providing the focus of this article. After some hesitation in the Pitcairn administration, and informal consultation on the island by the Public Prosecutor (Simon Moore),¹⁹ seemingly the apparent scale and seriousness of the problem ultimately led to the decision to prosecute under England and Wales’ SOA, rather than under Pitcairn’s local laws.²⁰ Section 88 of the Pitcairn Justice Ordinance 1966 makes it an offence for a man to have “carnal knowledge” of a girl of 12–14,

the Governor of Pitcairn was not required to publish on the island each and every British statute—rather, he was required only to *publish* the Ordinances (which declared British statutes as applicable).

¹⁵ PC3 at [75]. Lord Hope was the only Law Lord who sat in all three of the hearings in the Privy Council.

¹⁶ Claire Harvey, “Paradise Lost for Pitcairn”, *The Times Online*, October 26, 2004 (this particular media account—one of hundreds—of the sequence of events in the police investigation is the fullest located by the author). Shawn Christian, son of the island’s then-mayor, Steven Christian, “admitted consensual sexual intercourse with the [12-year-old girl] on six occasions before and after her 12th birthday” (PC3 at [50]). Even if consensual, this could have been charged under SOA 1956 s.5—unlawful sexual intercourse with a girl under 16—or s.6—unlawful sexual intercourse with a girl under 13: consent is irrelevant under both sections. Indeed an indictment was initially drawn up charging these offences: see PC3 at [50] and [51] (Lord Hope).

¹⁷ By a New Zealander in his early 20s: see Tim Watkin, “Trials of a Faraway Island,” *New Zealand Herald Online*, May 10, 2003.

¹⁸ “Operation Unique”. This apparently involved interviews with all women who had lived on the island from 1950 onwards: Ed Caesar, “Pitcairn: the Island of Fear”, *Independent*, November 19, 2006.

¹⁹ See Dea Birkett, “Paradise on Trial”, *Guardian*, September 18, 2004. Paul Dacre was appointed as Public Defender.

²⁰ British Foreign Office papers, quoted in the courts’ decisions, indicate some ambivalence on the part of the Pitcairn Administration about criminal proceedings: see Lord Hope at PC3 [51], [52] and [72]–[75].

whilst s.82 criminalises assaults aggravated in a number of ways; both offences carry up to a maximum of 100 days' imprisonment on the island.²¹ There ensued a flurry of law-making in the United Kingdom and New Zealand to plug legal gaps so as, inter alia, to permit criminal proceedings by New Zealand lawyers before New Zealand trial judges appointed to Pitcairn's Supreme Court (PSC), and to create a right of appeal to a newly created Pitcairn Court of Appeal (PCA).²²

The defendants in these proceedings were numerically a substantial portion of the island's population (a third of the adult males), and in particular, that portion of the adult male population which was said to control the island's affairs. Steven Christian (the then-mayor) was described by the investigating officers²³ (and by Simon Moore in court)²⁴ as the "leader of the pack", a group known on the island as "the boys"²⁵ and described by another journalist as "among the stalwarts of the community"²⁶ in a reference to their apparent political, social and economic grip on the island.²⁷ A total of 55 charges of rape (s.1), indecent assault (s.14) and incest (s.10) were laid; the victims included women who had been very young children when the offences were committed.²⁸ The subject-matter of the charges represented what Lord Hope referred to as "almost certainly the tip of the iceberg,"²⁹ namely "child sexual abuse on a grand scale".³⁰ The trials before the PSC took place in

²¹ s.88: "Any male person who shall have carnal knowledge of any female child [under 15] of or over the age of twelve years shall be guilty of an offence . . ." Section 82: "Any person who without lawful excuse assaults any other person shall be guilty of an offence . . ." The aggravating factors are "the youth, condition or sex of the person assaulted" or "the nature of the weapon used" or "the violence with which the assault has been committed".

²² The law-making process was referred to in the proceedings as the "late constitution" issue and formed part of the argument that enforcing the 1956 Act against the islanders amounted to an abuse of process. Numerous ordinances were made, from 2000 onwards, under the 1970 Order in Council: see PSC 2 at [83] for a complete list. A UK/NZ treaty—Agreement between the UK and New Zealand concerning Trials under Pitcairn Law in New Zealand and Related Matters (Wellington, October 11, 2002, Cm.5944 (2003))—led to NZ's Pitcairn Trials Act, 2002. See Anthony Trenwith, "The Empire Strikes Back: Human Rights and the Pitcairn Proceedings" [2003] 7 *Journal of South Pacific Law* (available online at <http://www.pacii.org/journals/jfjSPL>) and A.H. Angelo and Andrew Townend, "Pitcairn: A Contemporary Comment" [2003] 1 *New Zealand Journal of Public International Law* 229.

²³ "Trouble in Paradise", *Channel 4 TV*, November 23, 2006 (hereafter, "C4, 23.11.2006"). Kathy Marks, one of the accredited journalists present on Pitcairn, described Christian as having "run Pitcairn like a personal fiefdom" ("Jail Terms 'Tailored to Pitcairn'", *New Zealand Herald*, October 30, 2004).

²⁴ "Second Islander Admits Sex Assault", *Edinburgh Evening News*, October 8, 2004.

²⁵ Claire Harvey, "The Pitcairn Paradise, or Island of Depravity?", *New York Times*, October 20, 2004.

²⁶ Birkett, fn.19 above.

²⁷ Steven Christian was said to have "initiated" young girls into sex: "[o]nce he had led the way, other men on the island would follow." (Harvey, fn.16 above). According to D.C. George, one man "admitted that he tried to get girls of 10 or under, because Christian got them when they were 12, so he had to go younger" (Caesar, fn.18 above).

²⁸ The defendants were Steven Christian, Christian's son Randall, Christian's cousin Dennis, Christian's father-in-law, Len Brown, his son and Christian's brother-in-law, Dave Brown, Carlisle Terry Young and Jay Warren, the current mayor. For the details of the charges, see Lord Hope's judgment at [53] and [54].

²⁹ PC3 at [56]. During the police investigation, according to the officers who led it (Detectives Robert Vinson and Peter George of Kent Constabulary), 31 men were accused by 32 women, but many later withdrew their complaints: C4, 23.11.2006.

³⁰ PC3 at [48].

September–October 2004 on the island, with the court consisting of three judges (sitting without a jury).³¹ Eight women living off the island testified (by video-link) that the prevailing culture was sexually abusive and predatory, with girls learning to expect to be available for sex whenever it was demanded of them—which it allegedly was, frequently and casually.³² By contrast, the defendants argued that the incidents were consensual.

The convictions by the Supreme Court sitting in New Zealand in May 2005³³ were upheld by the PCA and, following the Privy Council's rejection of the appeals in October 2006, most of the men are currently serving their sentences in the island's newly-constructed jail, though they are permitted to work outside, under supervision, in manning the longboats said to be vital to the island's economic survival.

Pitcairn's sexual culture: media accounts

“Bringing culture into the picture is like building on quicksand. Who has a special culture and who doesn't? How many people have to share a set of values and norms for it to be a culture? Where is the borderline of admissibility?”³⁴

There is, as cultural theorists have noted, a fundamental problem in trying to identify a “culture” in the sense of a collective entity of distinctive practices, values, beliefs and so on.³⁵ Cultural anthropologists point to alleged defects, said to include “holism, localism, totalization, coherence, homogeneity, primordialism, idealism, ahistoricism, objectivism, foundationalism . . .”³⁶

³¹ The decision not to make provision for a jury was said to be the impossibility of finding 12 islanders able to deal with the allegations impartially, a difficulty acknowledged by the Supreme Court: see PSC1 at [196]–[206], concluding that the absence of a right to trial by jury was not unlawful (and not required by Art.6 of the European Convention on Human Rights (ECHR)). The issue was not dealt with in PCA1.

³² One complainant testified that she was sexually assaulted every time she went for firewood: “World will Keep an Eye on Pitcairn” (editorial), *New Zealand Herald Online*, October 27, 2004. The victims testified that in many instances they were forcibly held down, but they did not speak out at the time, thinking their complaints would not be taken seriously (and some testified that they were instructed by their attackers not to tell anyone): see Dea Birkett, “Island of Lost Girls”, *New York Times*, October 29, 2004.

³³ The trial judges did not enter convictions, pending the outcome of the legal challenges to the validity of the prosecutions. The Supreme Court, in PCS2, made their findings on these challenges and accordingly entered formal verdicts. Steven Christian: convicted on five counts of rape; Randall Christian: four counts of rape, four of indecent assault; Len Brown: two offences of rape; Dave Brown: six indecent assaults (and pleaded guilty to a further two); Carlisle Young: rape and six indecent assaults; Dennis Christian pleaded guilty to indecent assault and incest. For the sentences, see Lord Hope's judgment, PC3 at [53] and [54]. All but two of the six convicted—Dave Brown and Dennis Christian, who received 400 and 300 hours' community service respectively—received custodial sentences.

³⁴ Frank Bovenkerk and Yucel Yesilgöz, “Crime, Ethnicity and the Multicultural Administration of Justice” in Jeff Ferrell *et al.* (eds), *Cultural Criminology Unleashed* (2004), p.81 at p.95.

³⁵ See David Garland, “Concepts of Culture in the Sociology of Punishment” (2006) 10 *Theoretical Criminology* 419 in which he discusses two concepts of culture—culture as a distinct factor amongst others in shaping institutions, and culture as a collective entity, each of which has its uses but is nevertheless problematic.

³⁶ R. Brightman, “Forget Culture: Replacement, Transcendence, Reflexification” (1995) 10 *Cultural Anthropology* 509 at p.512, cited in Garland, fn.35 above, at p.429. Sociologists of

We can see traces of some of these tendencies in the media's attempts to identify Pitcairn's "authentic" culture—it is striking how often Pitcairn's primordial nature, its founding myth (the *Bounty* mutiny) and its simple lifestyle are referred to. Time and again, Pitcairn is "tiny", "isolated", "remote", "claustrophobic", "close-knit", "unique" and "strange", and the islanders' alleged pride in their heritage, stressed alongside the simplicity of their local economy and lack of access to material wealth, is linked to the dashing, romantic figure cut by Fletcher Christian.³⁷ Thus distanced and differentiated, in one of the narratives traceable in media accounts, Pitcairn became a culture that simply should not be judged by "us". Thus:

"The lost world of Pitcairn is a moral throwback. They go to Church, are conservative and law-abiding, but when it comes to sex, it's a free-for-all . . . Child sex is common, with girls made available at 12 or 13. This has probably been the way of things for 200 years . . . Who are we to judge? What is the point of applying our laws to Pitcairn?"³⁸

Dea Birkett, a journalist who lived on the island for four months in 1991,³⁹ said of the daily reality of life on the island:

"It's like being trapped upstairs on a bus for your whole life and being forced to marry and have children with one of the other passengers. Starved of real choices, Pitcairners develop relationships considered unacceptable elsewhere. Sisters share a husband. Teenage girls have affairs with older men. Women have children by more than one man, often starting as young as 15. But, when faced with such limited choices ourselves, would we act differently?"⁴⁰

Some of the island women in the early stages of the trials called a press conference in the home of Olive and Steve Christian to put their view:

"[F]emale residents claimed it was customary for girls on the island to have sex as young as 12. Some alleged victims of abuse had been coerced into testifying, they said . . . The wives, daughters, sisters and mothers of some of the accused . . . have insisted that while under-age sex was a traditional part of island life, it was consensual."⁴¹

The coercion of victims alleged here was identified with the outside world: it was all the fault of their exposure to Western values, picked up by living in New Zealand, Australia and the United Kingdom. Journalist Claire Harvey:

". . . with the trials underway and the defendants insisting their accusers are exaggerating and most of the women standing by their men, the case has raised questions, in many of the islanders' minds, at least, whether the West's

law have also noted the problematic nature of the concept of "culture": see, e.g. R. Cotterrell, "Law in Culture" (2004) 17 *Ratio Juris* 1.

³⁷ The continuing fascination with the primordialism of Pitcairn, as evidenced in, inter alia, William Golding's *Lord of the Flies*, is discussed by Joseph Bockrath, "Law on Remote Islands: the Convergence of Fact and Fiction" (2003) 27 *Legal Studies Forum* 21.

³⁸ Jeanette Winterson, "Who's Guilty of Teenage Sex?", *Guardian*, May 15, 2001.

³⁹ Birkett's book, *Serpent in Paradise* (1997), was the product of that stay.

⁴⁰ Dea Birkett, "How Paradise Island became Outcrop of Hell", *Sunday Independent*, August 24, 2003.

⁴¹ "Pitcairn Women Blast Sex trials", *BBC News*, September 29, 2004.

fundamental legal standards have a place in one of the world's strangest places."⁴²

Meralda Warren (sister of the acquitted defendant, Jay Warren), trained by Kent Constabulary's WPC Gail Cox when Warren was the island police officer in 1997, claimed on camera that, "we are Polynesian" and that the age of consensual sex was 12 or 13: "in Polynesia, we grow up very quickly."⁴³ Carol Warren (Jay's wife) was reported elsewhere as saying that there had never been a rape on the island, and that she had had sex at 12: "I went in fully knowing what I was doing and I wasn't forced."⁴⁴ Olive Christian agreed that there was under-age consensual sex on Pitcairn, but no rape.⁴⁵

It was also reported in Channel 4's documentary that "outsiders"—including the Seventh Day Adventist pastors who ministered to the islanders—were aware of what was occurring: the pastors were warned before they went to the island to keep a careful eye on girls going out alone on the island. Indeed, one such pastor, Neville Tosen (who spent two years on Pitcairn), is reported elsewhere as having realised some three months into his stay, on the basis of "worrying signs such as inexplicable mood swings", that children on the island were being abused, but when he brought the matter before the Island Council, he was told by a councillor, "Look, the age of consent has always been twelve and it doesn't hurt them".⁴⁶ Tosen is reported as saying that "[m]others and grandmothers were resigned to the situation, telling him that their own childhood experience had been the same; they regarded it as just a part of life on Pitcairn".⁴⁷ Tosen claimed to be the first pastor to have spoken out about the abuse from the pulpit, having asked his predecessors on his return about their silence and been told by them that they chose to give the islanders the benefit of the doubt.⁴⁸ Another of the regular "outsiders", New Zealander Sheils Carnihan, who served as the island's school teacher and a government adviser for two years, reportedly witnessed the taken-for-granted nature of sex with young girls on the island. She claimed to have overheard a playground conversation between a 13-year-old and a newly-turned 12-year-old: "I overheard the older girl say to the younger, 'You know, you'll be old enough for it'."⁴⁹ As D'Antal reported:

"According to Carnihan, among others, the Pitcairners have for years interpreted Polynesian mores as it suited the island's men. Many who have lived and worked here insist that, until the police arrived, it was generally accepted that any girls from the age of 12 upwards were 'fair game'.⁵⁰

⁴² "The Pitcairn Paradise, or an Island of Depravity?" *New York Times*, October 20, 2004.

⁴³ C4, November 23, 2006. This was broadcast in the UK after the men had exhausted their appeals when they lost in the Privy Council. In fact, the age of consent in French Polynesia is 15. See Vanessa Smith, "Pitcairn's 'Guilty Stock': the Island as Breeding Ground" in Rod Edmond and Vanessa Smith (eds), *Islands in History and Representation* (Routledge, 2003), at pp.116–132. Smith notes the early 19th-century British naval reports of the islanders' rejection of their Polynesian heritage (pp.129 and 131).

⁴⁴ Sue Ingram, "Sex Trial on Pitcairn Island", *CBS News*, October 30, 2004.

⁴⁵ C4, November 23, 2006.

⁴⁶ Wikipedia, http://en.wikipedia.org/wiki/Pitcairn_sexual_assault_trial_of_2004.

⁴⁷ *Ibid.*

⁴⁸ Stephen D'Antal, "That's What Girls are for", *The Times*, May 9, 2001.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

It was this narrative on which some commentators based their plea for recognition of a different, distinctly Pitcairn, sexual culture which should have stayed the hand of the colonial authorities (British and New Zealand). Herbert Ford, director of the Seventh Day Adventist Pitcairn Islands Study Center at Pacific Union College in the United States, argued that a process of restorative, rather than adversarial, justice should be used:

“a formal court trial that meets London standards will not recognize . . . the cultural differences of Pitcairn from much of the outside world . . .”⁵¹

Gordon McLaughlan, writing shortly after the guilty verdicts were returned, lambasted the “aloof colonial ineptitude” which permitted the potential destruction of the community, but saved his real ire for the New Zealand Government for having acquiesced in it:

“Didn’t someone in [the NZ] cabinet say, . . . ‘Why destroy one of the most remote communities in the world when we could perhaps do some healing here, support any people who feel they’ve been misused, and take steps to make sure women are not being preyed on, even if it is part of the longstanding mores of this society?’”⁵²

Thus diminished, depersonalised and degendered, the victims’ interests should clearly have taken second place to the more important economic, social and political interests of the beleaguered island community.⁵³

It has been suggested that the attempt to identify the distinctiveness of a culture:

“downplay[s] the importance of individual action and events, the extent of intracultural variability and fragmentation and the inevitability of disorder, contradiction and contestation.”⁵⁴

However, here there was an alternative narrative constructed (often appearing in the same media piece), in which Pitcairn’s cultural variability, fragmentation and entrenched male power were laid bare. This stressed the “pathology” of the island—that whilst under-age sex was common, it was not morally or culturally sanctioned. For instance, Emily Fielden, who spent time on Pitcairn (living with Steven and Olive Christian) in 1998 filming a documentary, rejected the notion that “all the under-age sex . . . was some kind of cute Pitcairn tradition . . . The moral standards of the Pitcairners are no different from mine”. She continued:

“We frequently discussed the rights and wrongs of Pitcairn’s blood-soaked heritage^[55] . . . I’d bet my bottom dollar that the adult men on Pitcairn have

⁵¹ “Academic Calls for ‘Restorative Justice’ for Pitcairn Island”, News Release, July 7, 2004, Pitcairn Islands Study Center, <http://library.puc.edu/pitcairn/>. There are numerous other news releases on this site supportive of the view that the prosecutions, and the introduction to the island of New Zealand social workers, exemplified a heavy-handed, authoritarian colonialism. See also Angelo and Townend, fn.22 above, at p.242.

⁵² *New Zealand Herald*, October 2, 2004.

⁵³ Like cultural defences in adversarial proceedings, some forms of restorative justice can do a disservice to female victims: see Robert Weisberg, “Restorative Justice and the Danger of ‘Community’” [2003] *Utah Law Review* 343.

⁵⁴ Garland, fn.35 above, at p.429.

^[55] The “blood-soaked heritage” is presumably a reference to the island’s early history in the aftermath of the landing in 1790: see Alexander, fn.6 above, Ch.13, “Latitude 25^{deg} S,

always known that under-age sex was wrong—particularly as there was, and presumably still is, such a strong puritanical feel to the island: it is, after all, a religious place.^[56] All these pieces about us butting out of someone else's culture are nonsense: no-one in Pitcairn seriously thinks that having sex with a seven—or for that matter 11—year old girl is OK."⁵⁷

It was reported that some of the women present at the press conference called by Olive Christian:

"sat silent and looked sullen, giving reporters the impression that they had been coerced by their families to speak up for their menfolk, and one of the women, who refused to identify herself, subsequently e-mailed a newspaper to dismiss Olive Christian's claims as 'nonsense.' Speaking outside the . . . courtroom the next day, two island women angrily rejected the other women's claims that sex typically begins early on Pitcairn."⁵⁸

A complainant was reported as testifying, in answer to a question from Paul Dacre, the defence lawyer, as to why she had not reported her allegations at the time, "That's the way it is on Pitcairn. You get abused, you get raped. It's a normal way of life on Pitcairn"⁵⁹ Similarly, Harvey reports one of the complainants as saying of her repeated rapes since she was 11:

" 'It just seemed to be the normal way of life back on Pitcairn, how the girls are treated as though they are a sex thing,' she said. That, according to prosecutors, exposes the whole point of this trial. This is not about free Polynesian love, or an inevitable adaptation to life in isolation. Instead, the prosecutors believe, this is the story of a tiny community where power, intimidation and silence have fed upon each other."⁶⁰

As to the island's allegedly patriarchal culture:

"Asked why the six guilty men did what they did, one source replies, 'Because they could. Because that's the way it was. There was a power base of influential men, and no-one was going to go against them.' At the centre of that power base was Steve Christian, head of a so-called 'inner circle' of men who . . . have run the island between them. Nothing happens without the say-so of 'the boys' . . ."⁶¹

There are suggestions of "collusion" by some of the island women in the abuse of young girls:

Longitude 130^{deg} W". It may also be a reference to Harry Christian's execution in 1898 for the murder of his wife and her child: "Pitcairn Islander Sentenced to Death", *The Times*, November 8, 1898.

^[56] Tosen, the Seventh Day Adventist pastor already quoted, would contest this: "It's not a Seventh Day Adventist island. That's a misconception. There were eight who attended church regularly and only one or two who were sincere." (fn.48 above). There is footage in the C4 documentary showing many more than eight in the congregation.

⁵⁷ "He Knew it was Wrong", *Guardian*, October 27, 2004.

⁵⁸ *Ibid.*

⁵⁹ Kathy Marks, "Rape Routine on Pitcairn", *New Zealand Herald*, October 1, 2004.

⁶⁰ See fn.42 above.

⁶¹ Kathy Marks, "Guilty: the Verdicts that Shamed Pitcairn Island", *Independent*, October 26, 2004.

“A few parents, it is said, even pushed their daughters in the direction of the influential men . . . While the men abused, the women—including the mothers of some victims—colluded . . . [I]t was the girls who were blamed for speaking out rather than the men who abused them. One middle-aged woman calls her daughter, who was allegedly raped at 12 by a man in his 30s, a ‘silly idiot’ for making a complaint. ‘She knew what she was doing,’ the mother says, ‘she wanted it as much as him’.”⁶²

What conclusions, if any, can we draw about Pitcairn’s sexual culture? Even if we accept that it was historically supportive of under-age sex, the trials, which expressed the refusal of some Pitcairn women any longer to tolerate it, and the voices of some of the women still living on the island, were themselves a manifestation of cultural fragmentation and change.

Advocates of culture serving an excusatory purpose in adversarial criminal proceedings⁶³ downplay the tendency of the process to produce an essentialising, reifying, monolithic and reductive stereotype which “irons out” differences and silences dissent.⁶⁴ As feminists and others have argued, in relation to criminal proceedings for domestic homicide and sexual assaults, it is typically women’s and children’s dissent which tends to be silenced: “[g]ranting a certain exemption for cultural offences generally has the effect of reinforcing traditional power relations in the ethnic community . . .”⁶⁵ Superficially, then, it might have been expected that a New Zealand defence team, called upon to defend some of the most powerful men on Pitcairn, would mount such an argument—after all, New Zealand (along with Australia and Canada) is a world leader in giving recognition, in its criminal justice system, to the cultural claims of indigenous peoples.

That, however, would be to overlook significant differences between this case and those in which indigenous defendants (or, as in the United States, minority ethnic, immigrant defendants) mount a cultural defence. First, in indigenous cases, defence lawyers tend to call on the “elders”, or, in immigrant cases, on the “pillars of the community”, to provide an “authentic” account of the culture:

“When culture is being invoked [in immigrant cases] it alludes back to the Great Tradition in the country of origin, the official conception in the native country, the holy books, unwritten law . . .”⁶⁶

⁶² *Ibid.* It is the narrative of Pitcairn as pathological that was endorsed by two anthropologists consulted by *The Times* reporter, D’Antal, for his 2001 piece (fn.48 above). Karen Keeney, who spent over three months on the island in 1998 researching her masters thesis, compared the island’s children to those in Golding’s *Lord of the Flies* had there been girls present: “It’s a bit like how Pitcairn men treat Pitcairn women—they are slaves, whether domestic slaves or sex slaves.” Dr Susan Benson, a Cambridge social anthropologist, was reported as believing “that . . . Pitcairn is similar to a dysfunctional family: ‘The island’s utter isolation and unusual history make it a one-off.’” Keeney “agrees that the Pitcairn community is dysfunctional, and speaks of a lack of affection and an emotional immaturity born of the limitations of lives lived on a tiny volcanic rock where survival is the paramount order of . . . [the] day” (The author tried, unsuccessfully, to locate Keeney and her thesis).

⁶³ See, e.g. Alison Dundes Renteln, *The Cultural Defense* (2004) and sources cited in Helen Power, fn.2 above (discussing the North American and Australasian literature on cultural defence).

⁶⁴ Power, *ibid.*

⁶⁵ Bovenkerk and Yesilgöz, fn.34 above, p.95.

⁶⁶ *Ibid.*, p.94.

On Pitcairn, the “elders” themselves were on trial, and any attempt by them to give an account of the “Great Pitcairn Tradition”, exonerating themselves, would hardly have appeared plausible, let alone authentic. Secondly, and relatedly, Bovenkerk and Yesilgöz note, in the context of “ethnically specific crime” in Holland, that occasionally:

“[c]riminals [can] use their culture creatively and manipulate it to get what they want. When they refer to laws or legal conceptions in the countries they come from, they might well have long since ceased to exist, if they ever existed at all . . . [—a] strategic use of their essentialised culture.”⁶⁷

On Pitcairn, however, the “country of origin” was on the doorstep and there were witnesses readily available who could testify to the contestability of the culture being asserted.

A third, possibly crucial, but admittedly speculative, difference, relates to the complainants in the Pitcairn trials. Whereas the victim in an indigenous or immigrant case in Australasia or North America lives *within*, is *of*, the culture against which she is testifying, the complainants in the Pitcairn trials were all living off the island (and had been for some time), a fact which it might have been felt lent greater legitimacy to their claim to be judged against the mores of the dominant culture—in the crude shorthand adopted by Harvey (above), the “Western” legal system. Despite the best efforts in some quarters to depict these proceedings as the last gasp of an Empire bullying its colonial dependents, the uncomfortable fact remained that these were one-time “insiders”, asserting their rights to autonomy and dignity.

Finally, and again crucially, there was the law itself: unlike the Australasian and North American legal systems, the British legal system (in common with others in Europe) has barely acknowledged culture in its substantive criminal law.⁶⁸ As Bovenkerk and Yesilgöz put it (referring to the Dutch system), “[j]udges tend to cling to the rules and generally hold their tongue”.⁶⁹ It is hardly surprising, then, that no attempt was made by the defence to make any *formal* use of a cultural defence. The judges in all three courts dealing with this case signally omitted to make any reference to the alleged specificity of Pitcairn’s sexual culture—except, as we have seen, Lord Hope in the Privy Council. How interesting, then, that it was he who appeared to have the greatest struggle with the defence argument that the defendants’ cultural isolation and colonial neglect left them ignorant of British criminal law and thus to prosecute them was an abuse of process. It is to the abuse of process arguments that the discussion now turns.

Abuse of process: ignorance of the law⁷⁰

Closely tied to the ignorance of the law ground was the argument concerning the lack of an effective police presence on the island. The local officer’s training

⁶⁷ *Ibid.*, p.86.

⁶⁸ See, generally, Phillips, fn.4 above.

⁶⁹ See fn.34 above, p.91.

⁷⁰ The other major abuse of process argument was that the delay in mounting the proceedings was unreasonable, a breach of ECHR, Art.6, (providing for the due process rights to a fair trial by an independent and impartial tribunal within a *reasonable period*). All three courts found as a fact that there was no unreasonable delay: see PSC2 at [234] and [235], PCA2 at [123] and PC3 at [25] (Hoffmann). See *HM Advocate v R.* [2004] 1

was limited to enforcement of the laws administered by the Island magistrate (ss.88 and 82 of the 1966 Ordinance): had there been present a properly trained British, or overseas officer, it would have been clearer to the islanders that English criminal law applied and would be enforced. As it was, no islander had been prosecuted for an indictable crime since Harry Christian's conviction in 1898 for the murder of his wife and her child; this, coupled with the lack of accessible publication of English criminal law, led the defence to ask how it could be "foreseeable, particularly to a young or youthful islander, that he was at risk of prosecution under English law"⁷¹—in short, "the absence of any English police presence on Pitcairn further compounded the problems associated with the failure to publish English law intelligibly on the island".⁷² It was acknowledged by the courts that the standard of policing had varied over the years, but the PSC's broad conclusion, endorsed by the courts above it, was that:

"We do not accept the suggestion that Pitcairn may in some way be an anarchic or lawless society. Over the years the roles of the Island police officer and the Island Magistrate have frequently been of high profile and the law, and enforcement of the law, has loomed large in Pitcairn affairs . . . [S]uccessive police officers were given instructions as to how to carry out their duties and responsibilities by legal advisers attached to the Pitcairn Island Administration . . ."⁷³

The Court of Appeal concluded that:

"[t]he presence of a professional police officer would not have any influence on the basic understanding about serious sexual crimes amongst what was essentially a law-abiding community."⁷⁴

In any event:

"There is no estoppel in criminal law. Once it is accepted that the law was in force and sufficiently promulgated, then the lack of a police presence is irrelevant . . . The lack of an English police presence did not mean that the appellants could not and did not receive fair trials. Lack of policing could not possibly immunise serious offenders from prosecution."⁷⁵

The central strand of the accuseds' claim was the key argument that, as they were ignorant of the SOA 1956, they could not fairly be subjected to its prohibitions.

A.C. 462, PC (a finding of unreasonable delay in bringing a charge to trial would in itself breach Art.6 and would require the discontinuance of a prosecution); and *Attorney-General's Reference (No.2 of 2001)* [2004] 2 A.C. 72, HL (*HM Advocate* wrongly decided though not overruled—a finding of unreasonable delay only requires a stay if continuing is unfair). For the chronology and time-scale, see PSC2 at [177], quoting in full a statement of facts agreed between the Public Defender and the Prosecutor. See, further, PCA2 at [122]. The PC was silent on Art.6 as such: by the time the PCA dealt with the post-trial challenges, it was clear that the ECHR did not apply to Pitcairn: see, ECHR, Art.56. The Law Lords' ruling in *R. v Secretary of State for Foreign & Commonwealth Affairs Ex p. Quark Fishing Ltd* [2005] UKHL 57, that the ECHR has to be applied specifically to signatory states' overseas territories, came after the Pitcairn trials and the decision in PSC2.

⁷¹ PSC2 at [112].

⁷² PCA2 at [127].

⁷³ *Ibid.*, at [118] and [124].

⁷⁴ PCA2 at [132].

⁷⁵ *Ibid.*, at [133]–[134]. See also PC3 at [23] and [24].

It was this issue, above all, which most discomfited all three courts: the evidence of the islanders' state of relative legal ignorance and official neglect in terms of the provision of legal advice could not be ignored.⁷⁶

As every law student is said to know, "ignorance of the law is no defence"—traditionally, "[t]he law is charitable to defendants whose ignorance is factual, but, generally, is uncharitable to those whose ignorance is legal".⁷⁷ There are growing signs of the courts moving away from this hard-line position,⁷⁸ by giving greater emphasis to the maxim's being conditional on the law in question being accessible and of sufficient clarity to enable those within its scope to foresee (with legal advice if necessary) when they might breach its provisions.

Significantly, the Privy Council signalled a willingness to concede that ignorance of the law might afford a ground for staying proceedings as an abuse of process,⁷⁹ following the lead provided by the House of Lords in *Rimmington*, where Lord Bingham pointed to ECHR, Art.7:

"Article 7 . . . sustains [the] contention that a criminal offence must be clearly defined in law, and represents the operation of 'the principle of legal certainty' . . . The principle enables each community to regulate itself *'with reference to the norms prevailing in the society in which they live. That generally entails that the law must be adequately accessible—an individual must have an indication of the legal rules applicable in a given case—and he must be able to foresee the consequences of his actions, in particular to be able to avoid incurring the sanction of the criminal law.'*"⁸⁰

As the Pitcairn Court of Appeal put it:

⁷⁶ PSC2 at [145]. The islanders' situation came close to that envisaged by Ashworth in his discussion of how the criminal justice system ought to respond to officially-induced mistakes of law: Andrew Ashworth, "Testing Fidelity to Legal Values: Official Involvement and Criminal Justice" in Stephen Shute and A.P. Simester (eds), *Criminal Law Theory: Doctrines of the General Part* (2002, Oxford), p.299 at pp.302–310. Ashworth's broad conclusion is that positively officially-induced errors should trigger a stay of proceedings (as opposed to founding a defence or justifying the exclusion of evidence at trial).

⁷⁷ Douglas Husak and Andrew von Hirsch, "Culpability and Mistake of Law" in Stephen Shute, John Gardner and Jeremy Horder (eds), *Action and Value in Criminal Law* (1993, Clarendon Press), p.157.

⁷⁸ In England and Wales, this is due in no small part to the influence of the ECHR, exerted of course via the Human Rights Act 1998. For the traditional position, see, e.g. *Esop* (1836) 173 E.R. 203; *Bailey* (1800) 168 E.R. 651 and cases discussed by Ashworth, fn.76 above, at pp.302–304. See, generally, Ashworth, *Principles of Criminal Law* (3rd edn, 2003), pp.237–242 and A.P. Simester and G.R. Sullivan, *Criminal Law: Theory and Doctrine* (2nd edn, revised 2004), pp. 555–559.

⁷⁹ "Their Lordships would accept that the fact that a law had not been published and could not reasonably have been known to exist may be a ground for staying a prosecution for contravention of that law as an abuse of process." (Lord Hoffmann at [24]. See also Woolf at [44]).

⁸⁰ [2006] 1 A.C. 459 at [30], quoting *SW & CR v United Kingdom* (1996) 21 E.H.R.R. 363 (author's emphasis). The signs were there even before *Rimmington*—as Ashworth noted in 2002, "In England, the judicial decisions are no longer all in one direction." (fn.76 above, p.302).

“[t]he concepts of accessibility and foreseeability run together. If a person has no sensible access to the law then it is not foreseeable that the law will be applied to that person. That is where the unfairness or injustice may lie.”⁸¹

The history of the relations between the islanders, their local governance institutions (particularly the Island Council, magistrate and police officer) and the Crown (the governor’s Pitcairn Administration in New Zealand) was clearly crucial, to determine whether the islanders had effective notice of the law. The Supreme Court found as a fact that English law was never published on the island and implicitly accepted that the islanders had no knowledge of the minutiae of sexual offences law.⁸² Nevertheless, drawing on the extensive historical, documentary evidence before it, the PSC concluded that:

“[A]t all relevant times Pitcairn was a developed society in which rape and various sexual offending were known to be criminal. There is no reason to doubt that this knowledge of rape extended to sexual offending generally, including indecent assault and incest . . . Pitcairn was left in no doubt that if there was any matter not covered by the law of Pitcairn, the law of England could be invoked . . . It was made clear . . . to the Island Council that the Island Court did not have jurisdiction in cases of rape . . .”⁸³

Moreover, even though they were understandably ignorant of the details of the 1956 Act, “[a]ll Pitcairn islanders had access to the law”⁸⁴ if they chose to avail themselves of the opportunity of seeking advice from the governor’s office (as they frequently did in relation to other legal matters).⁸⁵ This, the PSC concluded, was sufficient to satisfy the rule of law. The defence had cited Fuller, Finnis and Rawls⁸⁶ in support, but these theorists’ remarks:

“indicate that in order to meet the requirements of the rule of law with regard to promulgation, governments must ensure adequate publication of the fact that law which applies to citizens exists, so that those citizens are able to know the law by accessing its content should they wish to. This interpretation of the philosophical position taken by the three theorists is the only one compatible with the fundamental legal principle that ‘ignorance of the law is no excuse’ and cases that state that the law must be accessible and foreseeable.”⁸⁷

Apart from expressing doubt about the adequacy of the arrangements for giving the islanders legal advice, the Court of Appeal adopted the PSC’s ruling as to the requirements of the rule of law and their having been met here:⁸⁸ “[t]here can

⁸¹ PCA2 at [111].

⁸² PSC2 at [95] and [155]. No copy of *Halsbury’s Statutes* was made available to islanders until 1997.

⁸³ *Ibid.*, at [108].

⁸⁴ *Ibid.*, at [147].

⁸⁵ *Ibid.*, at [145]. Note that the PCA was less happy than the PSC with the islanders’ only access to legal advice being that provided by the governor’s office.

⁸⁶ Lon Fuller, *The Morality of Law* (1969), John Finnis, *Natural Law and Natural Rights* (1980) and John Rawls, *A Theory of Justice* (1999): see PSC2 at [149]–[154].

⁸⁷ *Ibid.*, at [155].

⁸⁸ PCA2 at [108].

be no doubt that the inhabitants were aware that for serious criminal offending English law applied.”⁸⁹ The court concluded that:

“[f]aced with this factual situation it becomes unreal to contend that it was unfair or unjust to commence these prosecutions because the 1956 Act or a summary of its provisions had not been separately published locally.”⁹⁰

Lords Woolf and Hope were more fulsome than Lord Hoffmann in their endorsement of the relevant principles. Lord Woolf:

“[I] 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, which in the criminal law reflects the need for legal certainty . . . [G]overnments must ensure adequate publication or at least reasonable access to the criminal laws which they wish to enforce.”⁹¹

Whereas the PCA doubted the adequacy of the islanders’ access to legal advice because it was via the governor’s office, Lord Woolf regarded this fact as being “of the greatest significance”.⁹² He compared the islanders’ relative legal ignorance with that of inhabitants of England:

“The sheer volume of the law in England . . . creates real problems of access even to lawyers unless they are experts in the particular field of law in question. The criminal law can only operate on Pitcairn, as elsewhere, if the onus is firmly placed on a person, who is or ought to be on notice that conduct he is intending to embark on may contravene the criminal law, to take the action that is open to him to find out what are the provisions of that law.”⁹³

Like the rest of their Lordships, Lord Woolf accepted that the PSC was right not to stay the proceedings here: the appellants “were aware . . . that their conduct was contrary to the criminal law.”⁹⁴ This being so, prosecution did not prejudice the appellants in any way.⁹⁵

Lord Hope’s approach to this issue was tied to his conclusions on the “promulgation” issue, on which he dissented from the majority ruling that the 1956 Act *was* effectively promulgated on the island. He reasoned that the United Kingdom’s *jurisdiction to prosecute* under the Act was rescued by the fact that, rather than creating new offences, the 1956 Act was simply building on the common law, which undoubtedly had been incorporated when the mutineers and Polynesians

⁸⁹ *Ibid.*, at [114]. One of the facts drawn on to support this conclusion was the conviction and execution of Harry Christian in 1898: see fn.55 above.

⁹⁰ *Ibid.*, at [116].

⁹¹ *Ibid.*, at [40].

⁹² *Ibid.*, at [41].

⁹³ *Ibid.* See text below at fns 108–110 below for discussion of this notion of the citizen’s duty to discover the law.

⁹⁴ *Ibid.*

⁹⁵ Prejudice being a requirement for the exercise of the discretion to stay proceedings for abuse of process, as all of their Lordships ruled: see Lord Hoffmann at [24], Lord Woolf at [44] and Lord Hope at [84]. See *Latif* [1996] 1 W.L.R. 104, HL: the judge must weigh in the balance “the public interest in ensuring that those who are charged with grave crimes should be tried” against the competing public interest in not conveying the impression that “the end justifies the means” (pp.112–113): see Lord Hoffmann, PC3 at [19].

landed in 1790.⁹⁶ The defendants would have had no answer to the common law, as

“[h]ere we are dealing with conduct which the common law has regarded as criminal for centuries, and the appellants cannot have been in any doubt that what they were doing amounted to criminal conduct”.⁹⁷

Lord Hope’s reason for concluding that the Act’s purported promulgation was ultra vires the governor’s powers is interesting: the governor had failed to consider whether the 1956 Act was for the “peace, order and good government” of the island (as required by Art.5(1) of the 1970 Order in Council):

“There is no evidence that the Governor ever applied his mind to the question whether it was appropriate to apply the [SOA] 1956 to Pitcairn, and if so, which parts of it were appropriate for application there and which not . . . [I]t is one thing for this well-established method of legislating to be used in circumstances, such as in New South Wales or New Zealand, where ample resources existed for finding out what the law was and for obtaining advice about it in case of doubt. It is quite another to use it in the circumstances of a tiny, remote and isolated community like Pitcairn, where at the relevant time these resources were entirely absent.”⁹⁸

Had Lord Hope not been able to turn to the common law, he was in no doubt about what the outcome would have been:

“The requirement of ascertainability is an essential component of the rule of law. But in the case of statutes of general application in force in England, . . . it was incapable of being met on Pitcairn . . . [This, together with the] fact that no attempt was made to reconcile the terminology of the 1966 Ordinance [ss.88 and 82] with that of the 1956 Act, or to explain the circumstances in which the more severe penalties laid down in . . . [that] Act would be invoked would have led me to conclude that it was an abuse of process for these prosecutions to be brought under sections 1 and 14 of the 1956 Act . . .”⁹⁹

The fact that Lord Hope felt able to fall back on the common law left him free to be more frank than the rest of the board about the state of affairs on Pitcairn. He was, for instance, scathing about the fact that:

“no steps were taken to bring to the notice of the Island’s Council or its inhabitants, other than in the most general way, any of the laws of England that might be invoked on Pitcairn to deal with any serious criminal matter not covered by the Ordinance.”¹⁰⁰

The fact that the “scale of offending . . . was tolerated for so long in such a small, isolated and closely knit community” was in itself “an indication of the poor state

⁹⁶ PC3 at [85]–[86].

⁹⁷ PC3 at [84].

⁹⁸ PC3 at [81].

⁹⁹ *Ibid.*, at [83] and [81].

¹⁰⁰ *Ibid.*, at [70].

of supervision exercised over its affairs by the colonial authorities.”¹⁰¹ Noting the PSC’s finding¹⁰² that:

“in a community the size of Pitcairn issues of law and order and of punishment could not have escaped the notice of the community at large, including youths as they grew up”

Lord Hope further implicitly criticised the authorities’ failure to act: “Nevertheless, no steps were taken to deal with these offences until Kent Police began their investigation.”¹⁰³ Moreover, only Lord Hope drew attention to the hesitation in the governor’s office over mounting the prosecutions: he referred, without comment, to the governor’s legal adviser’s view that a compromise might be desirable, not least because:

“it was possible to attribute a degree of responsibility for the unbridled sexual licence of Pitcairn men over past generations to the absence of any meaningful civil authority and actual system of justice representing the guidance and supervision of the colonial power.”¹⁰⁴

Ignorance of the law and cultural difference

In the end, then, the Privy Council (and the courts below it) were satisfied on the facts that the defendants were not ignorant of the law, in so far as they certainly knew that rape and indecent assault were seriously criminal and were aware that they were committing serious crimes of some sort. This latter conclusion would seem to be borne out by the facts as found by the trial courts: certainly the convictions for rape¹⁰⁵ indicated that, contrary to the defendants’ assertions, their victims did not consent and the defendants did not believe they did. Some of the victims specifically testified that their attackers held them down (or, in some of the “gang” rapes, got others to do so whilst each “took turns” with the victim) and, most tellingly, told them to keep silent about their experiences: these are not the actions of people who think they are within the law. Moreover, many of the defendants will presumably have been present at the Island Council meeting in 1970 (or have had knowledge of it) to which all adults and children of 10 and over were invited, at which recent convictions of men for the s.88 Ordinance offence of “unlawful carnal knowledge” were discussed, together with written guidance from the Pitcairn Administration as to the Island magistrate’s lack of jurisdiction in cases of rape.¹⁰⁶

It is, nevertheless, worth exploring what the position might have been had the victims in fact consented, so that the defendants had, instead, been charged simply with unlawful sexual intercourse with a girl under 16 (SOA 1956, s.6), to which

¹⁰¹ *Ibid.*, at [56].

¹⁰² PSC2 at [129].

¹⁰³ PC3 at [56].

¹⁰⁴ PC3 at [73].

¹⁰⁵ The indecent assault convictions are more problematic: the 1956 Act distinguished between rape and indecent assault in the cases of victims under 16; for indecent assault, a person under 16 could not consent, but for rape, consent remained a matter of fact—see now SOA, 2003, which, structurally, assumes that a child under 13 cannot consent: See Michael Allen, *Textbook on Criminal Law* (8th edn, 2005), p.367.

¹⁰⁶ PSC2 at [103].

consent would not have been a defence. The defendants would then have been in a much stronger position, arguing that whilst aware that their actions amounted to the local “unlawful carnal knowledge” crime, they had no idea that it also amounted to the much more serious s.6 offence; moreover, their culturally-based belief that sex with a girl of 12 or more was acceptable merely served to reinforce their legal ignorance. Had this been the—entirely hypothetical—situation, should a defence of ignorance of the law have been permitted?

As the law stands—including as articulated by the majority of the PC in these proceedings—the defendants’ *access* to the law, had they availed themselves of it, would have defeated an “ignorance of the law” defence. This would appear to be because of an assumption, made clear in this case only by Lord Woolf, that if the law is accessible, a person is under a *duty* to discover its contents.¹⁰⁷ This approach appears to be endorsed by Ashworth, who conceives of it as an obligation of citizenship.¹⁰⁸ Husak, however, has taken issue with it, arguing, *inter alia*, that:

“Deciding how much blame persons deserve for being ignorant of law without evaluating the quality of the state’s effort to inform persons of their obligations is like deciding how much blame persons deserve for being illiterate without evaluating the quality of the state’s schools. Good citizens make an effort to learn the law of the state. But duties inhere in both directions. Good states make an effort to teach citizens the law.”¹⁰⁹

For Lord Hope, a s.6 conviction in the hypothetical circumstances being considered here would surely have had to fail: he concluded that there was reasonable ignorance of the 1956 Act on the island and there is no common law equivalent of the s.6 offence. Husak and von Hirsch might well agree. In a discussion which seeks to go beyond the usual, utilitarian reasons for rejecting a plea of legal ignorance¹¹⁰ by exploring its theoretical underpinnings and what might justify its place in criminal law and justice, they summarise their position thus:

“a defendant who is ignorant of the applicable legal rule, *and has a bona fide belief that his conduct is not injurious or wrong*, should ordinarily (1) be excused if his legal mistake was a reasonable one in the circumstances; or (2) have his punishment mitigated if he did not know but should have known of the conduct’s illegality. We say ‘ordinarily’, because some more deviant kinds of beliefs in the propriety of the conduct would not qualify.”¹¹¹

Husak and von Hirsch give the hypothetical example of an Englishman on board his yacht in British territorial waters who, believing that the law still gives immunity

¹⁰⁷ See PC3 at [41], quoted at fn.93 above.

¹⁰⁸ Andrew Ashworth, “Excusable Mistake of Law” [1974] *Crim. L.R.* 652. Ashworth continues to maintain this position: *Principles of Criminal Law* (3rd edn, 2003), p.237.

¹⁰⁹ Douglas Husak, “Ignorance of Law and Duties of Citizenship” [1994] 14 *Legal Studies* 105 at p.115.

¹¹⁰ Which they characterise as crime control and deterrence: “Culpability and Mistake of Law” in Stephen Shute *et al.* (eds), *Action and Value in Criminal Law* (1993), p.157 at pp.159–160. John Austin worried about the impact on the practical administration of justice of a legal ignorance defence: *Lectures on Jurisprudence* (1873), p.498, whilst Oliver Wendell Holmes relied directly on the utility principle—public policy “sacrifices the individual to the general good.” (*The Common Law* (1923), p.48): both cited in Martin Golding, “The Cultural Defense” (2002) 15 *Ratio Juris* 146 at p.153.

¹¹¹ *Ibid.*, p.173 (my emphasis).

from prosecution to a man for the rape of his wife, rapes his wife the day after the House of Lords' decision in *R*, which abolished the immunity:¹¹²

“Here, his legal mistake is reasonable. The former marital exemption was well known, and the defendant had no access to the new decision . . . [However, t]he defendant knew his act was injurious or humiliating to his wife; thus he meant to cause injury. Or, if he did not know, his understanding of injury is too deviant to warrant exoneration.”¹¹³

The central difficulty here, as Husak and von Hirsch recognise, is that this invites courts:

“to assess the legitimacy of the defendant's belief in the morality of his conduct . . . Some might argue that . . . [t]he difference between ‘normal’ moral standards on the one hand, and bizarre or deviant standards on the other, is too elusive, and judges should not be required to assume the role of moral philosophers.”¹¹⁴

Moreover, accepting the qualification (a bona fide belief by the defendant that his conduct is neither injurious nor wrong) creates a difficulty:

“Consider . . . [our] yachtsman . . . The injuriousness of such conduct . . . is plainly apparent. Suppose he nevertheless judges his conduct legitimate, because (say) he believes that women appreciate such treatment. Is his belief really an indication of reduced culpability . . .? We cannot bring ourselves to accept this conclusion.”¹¹⁵

Indeed—but what of the situation where the belief is apparently grounded in a *different culture* from that embedded in the law to be enforced as, for instance, in the case of female genital mutilation (to name but one such difficult type of case)? Might it be plausible to suggest that here, the difference between “normal” moral standards (for which, read those of the dominant culture) and “bizarre or deviant” standards (those of the minority culture) is far from elusive, its identification well within the competence of the judges and thus calls for recognition in the enforcement of the law?

The idea that a person should have a defence to a criminal charge when her legal ignorance is a product of her culture has its advocates. Bronitt and Amirthalingam, for instance, discussing Australia's official policy of multi-culturalism, regret the Australian Law Reform Commission's failure to support the introduction of such a defence for native Australians in its report on multiculturalism and the law:¹¹⁶

“. . . where the defendant, due to language or cultural barriers, did not know and could not reasonably be expected to know of the existence of the offence . . ., the law should . . . provide a defence—this is not the creation of a

¹¹² [1992] 1 A.C. 599.

¹¹³ See fn.110 above, p.170.

¹¹⁴ *Ibid.*, p.172.

¹¹⁵ *Ibid.*

¹¹⁶ ALRC, *Multiculturalism and the Law*, Report No.57 (1992).

special multicultural defence, but rather further evidence of our legal system's commitment to the fundamental principle of individual justice."¹¹⁷

As Ashworth says, "from the point of view of the mistaken citizen, it is *as if the conduct did not constitute an offence . . .*"¹¹⁸ So we might say of the Pitcairner who, bona fide, believed that *consensual* sex with a 12-year-old girl was morally acceptable and did not amount either to rape or to indecent assault, and did not know that it amounted to the s.5 statutory offence.¹¹⁹ Admittedly, Ashworth is specifically dealing with legal ignorance resulting from positively wrong official advice which the "good citizen", in pursuit of his duty to find out, has actively sought—a long way, perhaps, from the "passive" Pitcairner whose mistake (assuming for now such a mistake, and in the context of our hypothetical) as to the content of English law has arguably been allowed to develop over a long period of relative colonial neglect (or, in Lord Hope's words, under "a poor state of supervision"). Yet it is worth considering what message Pitcairners might have taken from the Pitcairn Island Administration's failure to pursue to trial the 1996 indictment under the SOA relating to the apparently consensual relationship between the 12-year-old girl and Shawn Christian.¹²⁰ There was also the long-term inaction of the local police and magistrate in the teeth of, as Lord Hope put it, "child sexual abuse on a grand scale," about which, "[i]t is scarcely credible that the population of the island as a whole was unaware . . ." ¹²¹ As we have seen, consensual under-age sex does appear to have been relatively common on Pitcairn for a long time (though, as we have seen, subject to cultural contestation). (In)actions do sometimes speak more loudly than words.

However, there is an important caveat. Cotterrell considers that, in insisting on the values of autonomy and dignity, which he identifies as embedded in liberal conceptions of law, "[l]aw should respect tradition in so far as it gives orientation to people's lives, but *not so as . . . to allow affective relations to become oppressive.*"¹²² So says, of course, international human rights law. Bovenkerk and Yesilgöz, in effect making the same point as does the vast literature on the interface between culture and international human rights law, put the matter pithily:

"[T]he ideas and customs of [some cultures] . . . differ too much from the existing legal rules; polygamy is prohibited and so is female circumcision, compulsory education requirements also apply to girls, supporting a fatwa such as the one against Salman Rushdie is unacceptable, and neither blood feuds nor abduction can be tolerated. General human rights pretty much demarcate the borderline."¹²³

¹¹⁷ Simon Bronitt and Kumaralingam Amirthalingam, "Cultural Blindness: Criminal Law in Multicultural Australia" (1996) *Alternative Law Journal* 56 at p.66.

¹¹⁸ Ashworth, fn. 76 above, p. 307 (emphasis in the original).

¹¹⁹ As the law stood before the Sexual Offences Act 2003, came into force, this was not, in fact, rape (though it was indecent assault, as a girl under 16 could not in law consent to this): for the purposes of the crime of rape as such, consent was a factual issue, no matter what the victim's age.

¹²⁰ See text above at fn.16.

¹²¹ PC3 at [56].

¹²² Roger Cotterrell, "Law in Culture" (2004) 17 *Ratio Juris* 1 at p.12 (my emphasis).

¹²³ See fn.34 above, pp.92–93.

Conclusion

Lord Woolf in the PC had this to say about ignorance of the law:

“It may be . . . that the argument under this head could be freestanding and not based on abuse of process. However if this be so the need for prejudice would still be a requirement. The great majority of criminal offences require *mens rea*. If you do not know and are not put on notice that the conduct with which you are charged was criminal at the time you are alleged to have committed the offence, it can be the case that you do not have the necessary criminal intent. Whether or not this is the situation will very much depend on the facts and in this developing area of criminal law it is undesirable to generalise.”¹²⁴

His Lordship might have had in mind here cases such as *Lim Chin Aik*,¹²⁵ in which the appellant’s conviction under s.6(2) of the Immigration Ordinance 1952 (Singapore) for being an unregistered alien present in Singapore was quashed by the Privy Council. This offence required *mens rea*, which the appellant lacked, being ignorant of the ordinance as it was neither published nor notified to those affected. As Simester and Sullivan say of this decision:

“In its own terms, . . . [it] is entirely satisfactory. Yet by characterising the matter as one of *mens rea*, the broader question of when ignorance of law may excuse is not addressed.”¹²⁶

It is, then, regrettable that Lord Woolf appeared to signal that future development of the law might rest on *mens rea* as the mechanism for admitting a defence of ignorance of the law, and a further pity that the rest of their Lordships did not more fully flesh out the parameters of the defence.¹²⁷ Nevertheless, that they endorsed the approach already adopted by the House of Lords in *Rimmington*¹²⁸ is to be welcomed, as are Lord Hope’s strictures about the colonial power’s neglect of the Pitcairn islanders’ legal education. The British State should take note, lest it finds its domestic criminal law challenged by culturally-based pleas of “ignorance of the law”.

¹²⁴ *Ibid.*, at [44].

¹²⁵ [1963] A.C. 160.

¹²⁶ See fn.78 above, p.558.

¹²⁷ If “defence” it should be: Ashworth makes a powerful case for its operating to trigger a stay of proceedings for abuse of process: fn.76 above, pp.329–330.

¹²⁸ [2006] 1 A.C. 459 at [30].