

THE NEW CONSTITUTION OF PITCAIRN: A PRIMER

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I. INTRODUCTION

The purpose of this note is to introduce and provide an overview of the Constitution of Pitcairn of 2010. This paper considers the Constitution and its structure (Part II), provides commentary on selected matters of interest in the Constitution (Part III), and concludes in Part IV with a comparative note by way of summary.

Pitcairn¹ is the United Kingdom's (UK) last colony in the Pacific. It received a new Constitution in March 2010 in the form of a Schedule to the Pitcairn Constitution Order 2010.² The Pitcairn Constitution Order 2010 was made under the British Settlements Acts 1887 and 1945, s 1 of the Judicial Committee Act 1844 and all other powers enabling Her Majesty.³ The 2010 Constitution Order revoked the previous constitutional instruments for the territory.⁴ It also amended the Pitcairn (Appeals to Privy Council) Order 2000.⁵ Particular features of the 2010 Constitution that distinguish it from the preceding Constitution are a fundamental rights chapter, constitutional provision for the Island Council, an obligation for the Governor to consult with the Council on draft legislation, an Attorney General, a guarantee for the independence of the public service, establishment of an independent financial audit, and provisions for an Ombudsman.

II. STRUCTURE

Relative to the size of Pitcairn the Constitution is long. The text itself has 66 sections and a Schedule which occupy 23 close-typed A4 pages. Many provisions in it are familiar to Pitcairn but are presented in a new way. The

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1 Pitcairn, Henderson, Ducie and Oeno Islands.

2 The Pitcairn Constitution Order 2010 (SI/244) has 10 sections and 2 Schedules. The document designated as the Constitution of Pitcairn appears in Schedule 2 to the Order.

3 Those other powers include principally the prerogative powers of the Queen. Also exercised under the Colonial Laws Validity Act 1865 in *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2006] EWHC1038; [2006] ACD81. That case challenged the legitimacy of the forced removal of people from the Chagos Archipelago and the subsequent refusal to allow them to return. This was implemented by the British Indian Ocean Territory (Constitution) Order 2004, which denied Chagossians a right of abode or the right to enter and remain in the territory without authorisation.

4 Royal Instructions to the Governor of Pitcairn dated 30 September 1970; Pitcairn Order 1970 (SI 1970/1434, amended by SI 2000/1340 and 2002/2638); Pitcairn Court of Appeal Order 2000 (SI 2000/1341, amended by SI 2004/2669).

5 SI 2000/1816, amended by SI 2009/224.

Constitution has 8 parts: Part 1 sets out the partnership values that shall apply to the relationship of Pitcairn and the UK; Part 2 deals with fundamental rights and freedoms; Parts 3 – 7 deal with the organisational structure of Pitcairn: the organisational structure is subdivided into laws for the Governor (Part 3), for the Executive power (Part 4), for the Legislature (Part 5), for the Judiciary (Part 6) and for the public service (Part 7); Part 8 sets up an audit of the public accounts; and Part 9 establishes the office of Ombudsman.

III. COMMENTARY

A. Partnership Values

This is an innovation for Pitcairn. Section 1 describes the nature of the relationship between Pitcairn and the UK as one of partnership. The partnership values listed in s 1 establish a bond through a set of principles, which are characteristic of the relationship: eg good faith, the rule of law, good government and sound financial management and impartiality of the courts and public service. These partnership values are consistent with the responsibilities of the UK as set out in art 73 of the Charter of the United Nations. In the context of the development of self-government of a non-self-governing territory, an administering state must ensure political economic and social development with due respect for the culture of the people concerned and take due account of the political aspirations of the people.

It may be doubted whether the statement of the partnership values is necessary for a small community such as Pitcairn. However, its inclusion is based on the White Paper for British Overseas Territories Partnership for Progress and Prosperity 1999, which stated that the relationship of the UK to the Overseas Territories was one of partnership:⁶

the new relationship would be a modern partnership tailored to the needs of both sides, and based on four fundamental principles:

- self-determination;
- mutual obligations and responsibilities;
- freedom for the territories to run their own affairs to the greatest degree possible;
- a firm commitment from the UK to help the territories develop economically and to assist them in emergencies.

The obligations of the United Kingdom are to defend Pitcairn, to encourage sustainable development and to look after the interests of Pitcairn internationally. In return, Britain has the right to expect the highest standards of probity, law and order, good government and the observance of Britain's international commitments. Although this sounds as if Britain and Pitcairn are on a par with each other the reality must be very different considering

6 Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty *Partnership for Progress and Prosperity* (1999) <<http://www.ukotcf.org/pdf/charters/WhitePaper99full.pdf>>.

the number of people (50) affected by it. Nevertheless s 1 sets out the basis on which the Constitution was constructed and indicates the spirit of the Constitution. The partnership values create no “legally enforceable rights or obligations”.⁷

One aspect of development for an isolated country is affordable transport. In order to fulfil development needs, transport should be available to inhabitants of Pitcairn to and from the island. The UK Government provides a boat connection between Pitcairn and Gambier Island, the airport in French Polynesia closest to Pitcairn. The boat runs once every three months. This connection costs a Pitcairn passenger NZ\$1,500⁸ each way. In order to travel to New Zealand, or indeed anywhere other than Gambier Island, flight fares have to be added. Incomes are not high on the island. People often do several jobs and on average earn approximately NZ\$3000 per person per year. The average monthly wage of a family is currently NZ\$520. Additional income is made from sale of souvenirs on cruise ships, varying from NZ\$2000 to NZ\$6000 per family per year. There is a total work force of 31 people (islanders), of whom only 13 earn the average wage or more. On these figures it is hard to imagine that islanders would travel for holiday reasons. All this is very restrictive. Arguably the UK could do more to make travel reasonably possible for the Islanders.

B. Fundamental Right and Freedoms

Codified human rights are an improvement for Pitcairn. An individual can vindicate their clearly set out rights in a Pitcairn Court. The rights are closely based on the European Convention of Human Rights (ECHR), but are said to have been adapted to “meet the circumstances of Pitcairn”.⁹ The aim was stated to be to accommodate the special situation of Pitcairn.¹⁰ Clearly this reasoning may be questioned when comparisons are made with the Constitutions of other British Overseas Territories.¹¹ It is apparent that the human rights set out at the beginning of all Constitutions of the British Overseas Territories are like two peas in a pod!

One possible example of an adaptation to the Pitcairn situation is the provision in s 4 that “public work” is not regarded as forced labour.¹² However such adaptations are not of a substantial nature and therefore it is difficult to maintain that the Bill of Rights specifically “meets the circumstances of Pitcairn” unless the circumstances of Pitcairn are the same as those in all the

7 Section 1(3) of the Pitcairn Constitution.

8 Tourists pay NZ\$2,500. A return fare for a Pitcairner to New Zealand is therefore at least NZ\$6,000. Pitcairn Tourist Homepage <www.visitpitcairn.pn>.

9 Consultation Document for Constitutional Review at [4] <<http://www.government.pn/Consultation%20document%20for%20constitutional%20review.pdf>>.

10 Ibid.

11 Under the British Overseas Territories Act 2002.

12 This provision is not in the other Constitutions. It directly reflects Art 8 of the Universal Declaration of Human Rights.

other British Overseas Territories. The fundamental rights and freedoms are part of the Constitution, and therefore cannot be weakened or removed by Ordinances.

Before the Constitution of March 2010 individuals living in Pitcairn had access to the Human Rights Act 1998 (UK) as an English statute of general application. The question arises, whether individuals living in Pitcairn would have been better off if the Human Rights Act 1998, and – as a consequence – the rights of the European Convention on Human Rights (ECHR) had been directly applied to Pitcairn.

Had the Human Rights Act 1998 been directly applicable to Pitcairn that would have clarified the situation about the status of that Act during the rape trials.¹³ In these cases the question arose whether the UK Human Rights Act 1998 was a law of general application and whether or not the ECHR applied to Pitcairn. The Pitcairn Supreme Court accepted that the Human Rights Act and the ECHR were relevant and applicable to Pitcairn.¹⁴ The Court of Appeal, however, disagreed because neither the Human Rights Act 2008 nor the ECHR have been specifically extended to apply to Pitcairn.¹⁵ Even if the ECHR does not specifically apply to Pitcairn it could be argued that the Human Rights Act is an English statute of general application and would apply to Pitcairn under the Judicature (Courts) Ordinance 2000 of Pitcairn.¹⁶ If this were the case then not only would the provisions of the Human Rights Act apply but so also would the broader jurisprudence of the ECHR. This is because, under s 2 of the Human Rights Act 1998 European human rights jurisprudence is significant in determining the human rights of British subjects.¹⁷ However, a problem with this interpretation is that the purpose of that section is to give effect to the United Kingdom's obligations under the ECHR in domestic law. It could therefore be concluded that an individual can only bring a complaint under the Human Rights Act if he or she would have been similarly able to bring a complaint to the European Court of Human Rights in Strasbourg under the ECHR. Where the ECHR has not been expressly extended to those outside the United Kingdom, this *locus standi*

13 *The Queen v 7 Named Accused* [2004] PNCS 1; *Queen v 7 Named Accused* [2004] PNCA 1; *Christian and Others v The Queen* [2006] UKPC 47.

14 [2004] PNCS 1 at [161].

15 [2006] PNCA 1 at [99].

16 <<http://www.government.pn/Laws/Ordinances/index017.htm>>.

17 Section 2(1) of the Human Rights Act states:

A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any

(a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights,

(b) opinion of the Commission given in a report adopted under Article 31 of the Convention,

(c) decision of the Commission in connection with Article 26 or 27(2) of the Convention, or

(d) decision of the Committee of Ministers taken under Article 46 of the Convention,

whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.

might be lacking.¹⁸ Pitcairn is not on the list of overseas territories to which the United Kingdom's obligations under the ECHR have been extended.¹⁹ But the Pitcairn Islands are listed as a British Overseas Territory in Sch 6 of the British Nationality Act 1981, which established that Pitcairn islanders are British subjects. Therefore it can be argued that Pitcairnians should be treated with the same regard to their fundamental rights as other British subjects. Also, the actual control exercised over Pitcairn by Her Majesty through the Governor of Pitcairn suggests that Britain's territorial obligations under the ECHR include Pitcairn under the principle, established in the jurisprudence of the European Court of Human Rights, that contracting states may be held responsible for acts outside their national territory if the acts of their authorities produce effects outside their own territory.²⁰ It remains unclear whether the fundamental rights for Pitcairn are to be interpreted in the light of ECHR jurisprudence in accordance with the Human Rights Act 1998 (UK) and whether Pitcairn Islanders could sue UK before the European Court of Human Rights under the ECHR.

C. The Governor

The Governor is the representative of the British Crown in Pitcairn²¹ and is appointed by Her Majesty. The Governor has such powers as are given by Pitcairn law or by Her Majesty. In terms reminiscent of other Constitutions²² "the executive authority is vested in Her Majesty", and the executive authority of Pitcairn shall be exercised on behalf of Her Majesty by the Governor.²³ Additionally the Governor is responsible for the appointment of the Attorney General and the Ombudsman, may appoint, dismiss and discipline officers in the Public Service, and is responsible for arranging the audit.²⁴

The Governor continues to have the power to make laws for Pitcairn²⁵ subject to similar restrictions²⁶ in regard to subject matter as those that applied before March 2010. Since March 2010 the Governor must consult

18 Sue Farran "The Case of Pitcairn: A Small Island, Many Questions" (2007) 11(2) J South Pacific Law 124 at 129.

19 Council of Europe "List of the declarations made by: United Kingdom" (as of 27/10/2010) <<http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?PO=UK&NT=&MA=3&CV=0&NA=&CN=4&VL=1&CM=5&CL=ENG>>.

20 See *Drozd and Janousek v France and Spain* (1992) 14 EHRR 745 and *Cyprus v Turkey* (2002) 35 EHRR 731.

21 In some circumstances the Head of State is represented in the territory by the appointee. The law is clear for Pitcairn that the Governor represents the British Crown. On this point see Kenneth Roberts-Wray *Commonwealth and Colonial Law* (London: Stevens, 1966) at 308, 338.

22 For example, the Constitution of Niue, art 1 and 2.

23 Section 33 of the Pitcairn Constitution.

24 Part 7 of the Pitcairn Constitution. The Governor appoints subordinate judicial officers and appoints superior court judges on instructions. The terms and conditions (including remuneration) of all judges and judicial officers are set by the Governor (ss 52, 53). Tenure of judges is protected by s 54.

25 Section 36 of the Pitcairn Constitution.

26 Section 38 of the Pitcairn Constitution.

with the Island Council before making laws. If the Governor acts contrary to the advice of the Council, Council members have the right to submit their views to the Secretary of State. This requirement to consult introduces a more democratic element into the Pitcairn law-making process. This is consistent with the general British pattern of development of self-government.²⁷ It is, however, more usual for a Governor to be advised by a local Executive Council (appointed or elected). In the case of Pitcairn, recourse for the purpose of consultation, has been made to the existing elected local government body.

In the context of Pitcairn an important power of the Governor relates to immigration control. The Immigration Control Ordinance 2006 provides guidelines for the exercise of the discretion by the Governor in relation to immigration to the Colony.²⁸ Ultimately entry and residence in the Colony is a matter for the Governor's discretion.²⁹

D. Land

Section 30 has the marginal note "Power to dispose of Crown land". "Crown land" is not defined and the expression is not one familiar to Pitcairn.³⁰ At first sight, this provision is confusing. "Crown land" could refer solely to the other islands of Pitcairn and exclude Pitcairn Island itself, because the Land Tenure Ordinance 2001 states that all land on Pitcairn is owned by the Island Council.³¹ Therefore "Crown land" can only mean land on Pitcairn that has been allocated to the Crown (similarly to private land titles) and possibly the land of the other islands.³²

Or it may be that Government of Pitcairn believed that "Crown land" is a standard feature of a British Overseas Territory, and ignored the individual situation of laws concerning the land in Pitcairn. Then in order to (falsely) align Pitcairn with the constitutions of other colonies, "Crown land" was inserted in the marginal note of s 30 as the right of the Governor to "dispose of Crown land, which is standard in other Overseas Territories."³³ However, this reasoning is unconvincing given that the wording of other constitutions of British Overseas Territories³⁴ is identical except that the marginal notes refer to "land" not "Crown land". Does the

27 Roberts-Wray, above n 21 at 318, 319.

28 Section 12(3)(f) of The Immigration Control Ordinance 2006 <<http://www.government.pn/Laws/Ordinances/index229.htm>>.

29 It is to be noted that the population of Pitcairn of about 45 Pitcairners has remained static for a number of years. Some locals would wish that there was an increase in population to provide a greater sense of community and a wider environment for children growing up there.

30 For detailed analysis of land issues on Pitcairn see Kiritapu Allan "Pitcairn Land Tenure Reform Ordinance 2001" (forthcoming RJP).

31 Under s 2 (public land) or s 5 (private land) of the Land Tenure Reform Act. The Island Council is a body corporate under s 8 of the Local Government Ordinance 2009.

32 Above n 30.

33 Above n 9.

34 St Helena: art 31; Falkland Islands: s 78.

wording indicate a special interpretation? The Interpretation and General Clauses Ordinance of Pitcairn³⁵ is silent on the role of marginal notes.³⁶ In the absence of statutory provision, the general Common Law rule, that marginal notes are not to be read as part of the legislation and cannot be used for interpretation, applies.³⁷

The marginal note of s 30 makes no change to the law relating to land; it does not create Crown land. The section serves only to confer capacity on the Governor to dispose of any land held by the Crown.³⁸ This aligns the powers of the Governor of Pitcairn with those in other British Overseas Territories.

E. Island Council

The Constitution declares that there will be an Island Council for Pitcairn and that its composition and functions will be prescribed by law. That law is the Local Government Ordinance.³⁹ By s 11 of the Ordinance the Island Council is a body corporate with a number of powers, including a power to make regulations for matters typically of a local body nature.⁴⁰ The power to make regulations is “subject to the orders and directions of the Governor”. The broad description of the law-making power is “for the good administration of the Islands, the maintenance of peace, order and public safety and the social and economic betterment of the islanders”.⁴¹ It is to be noted that the law making power extends to the four islands of Pitcairn and that the constitutional formula for conferring full legislative power (peace, order and good government) is expressly avoided. The Island Council, either directly or through its members, has an important role in relation to the land on Pitcairn.⁴²

The important new constitutional role is in s 36 of the Constitution of Pitcairn 2010, which requires the Governor to consult with the Council before making any Ordinance for the Colony.

35 [Cap 1] <<http://www.government.pn/Laws/Ordinances/index003.htm>>.

36 Unlike, for instance, the New Zealand’s Interpretation Act 1999.

37 *Chandler v DPP* [1964] AC 763; *R v Kelt* [1977] 1 WLR 1365 CA; P St J Langen Maxwell on the Interpretation of Statutes (12th ed, Sweet and Maxwell, London, 1969) at 42; William Feilden Craies *Craies on Statute Law* (6th ed, Sweet and Maxwell, London, 1963) at 196. If argued that the “marginal note” of s 30 is in fact a heading, the general rule for using headings for interpretation is that where the provision is clear, the heading does not affect the otherwise clear meaning. The confusion of s 30 only appears because of the heading – the provision is otherwise clear. The result is that “Crown land” as heading cannot change the meaning of the provision itself.

38 This interpretation is consistent with colonial practice; see Roberts-Wray, above n 21 at 340.

39 [cap11] <<http://www.government.pn/Laws/Ordinances/index195.htm>>.

40 Section 7 of the Local Government Ordinance.

41 Ibid.

42 Above n 30.

F. Attorney General

The appointment of an Attorney General is a new development. The Attorney General replaces the Legal Adviser of the past. The Attorney General is the principal legal adviser to the Government of Pitcairn,⁴³ and is responsible, among other things, for deciding whether criminal proceedings should be instituted or stayed.

The Attorney General of Pitcairn is an officer of the Pitcairn Public Service and the role is therefore a legislatively and contractually defined one unlike, for example, the Attorney-General of New Zealand, which is an independent constitutional office of prerogative origin. The Constitution provides that in the exercise of powers the Attorney General of Pitcairn “shall act independently and shall not be subject to the direction or control of the Governor, the Island Council or any other person ...”.⁴⁴ Independence of office is also protected by s 35 of the Constitution.

G. Pitcairn Courts

The court system of Pitcairn is maintained in the Constitution. In descending order of importance the Courts of Pitcairn are:⁴⁵ (a) the Judicial Committee of the Privy Council; (b) the Pitcairn Court of Appeal; (c) the Supreme Court of Pitcairn; and (d) the Magistrate’s Court. The main principles of the Court system have been raised to constitutional level with matters of less importance provided in the Judicature (Courts) Ordinance. Constitutionally this is a major advance in relation to the status of the judiciary compared with the situation of a decade ago.

H. Audit

General provision is made in s 58 of the Constitution “for the audit of the public accounts of Pitcairn and of all courts of Pitcairn and all authorities and offices of the Government of Pitcairn”. This provision is interesting for a number of reasons; not least for its inclusion in the Constitution. However, although it is a valuable and typical provision in a constitution, it lacks specificity in that the audit follows from “appropriate arrangements” made by the Governor. Therefore, whether there is an annual audit or ad hoc audits, and to whom the auditor reports, are at the discretion of the Governor. The other point to note is that both in law and in practice, the audit provision does not apply to the Island Council. The Island Council is not “an authority or office of the Government of Pitcairn” – a clear distinction is made in the Constitution between activities relating to the government of Pitcairn (eg the Island Council) and the Government of Pitcairn referring to the Governor and

43 Section 35 of the Pitcairn Constitution.

44 Section 35(8) of the Pitcairn Constitution.

45 Sections 43 to 55 of the Pitcairn Constitution.

the institutions of the administering power. Additionally, the Pitcairn Island Office budget is also scrutinised annually by Department for International Development (DFID) in the course of UK budgetary aid negotiations.

Until 2004, Pitcairn financed itself – mainly through the sales of stamps, coins and handcrafts.⁴⁶ But that income dwindled and the Pitcairn account with the Crown Agents in London fell into deficit. Pitcairn funds paid the salaries of the staff working in the Pitcairn Islands Office (situated in Auckland) and its rent. Since 2004, UK has provided budget support for Pitcairn of between £1 - £2 million a year, which amounts to about 90 per cent of the islands' funds.⁴⁷

The current financial situation is that Pitcairn has an annual budget of NZ\$ 4 million per year. Expenditure falls into four broad categories: (1) maintaining a scheduled shipping service; (2) contracting off-island professionals (teacher, doctor, police officer, family and communities adviser); (3) the budgets of the Divisional Managers on the island; and (4) the costs of the Pitcairn Island Office. The locally generated income of the Government of Pitcairn is less than 5 per cent of the recurrent costs and is derived mainly from landing fees, stamps, coins, domain name sales and the honey trade. Consequently, significant development funds have been allocated for infrastructure projects on Pitcairn by the UK DFID and by the European Union.⁴⁸ The direct funding recipient of this aid money is the Pitcairn Island Office.⁴⁹

The provision of the Constitution concerning the audit speaks of “public accounts” but does not define those accounts. The financial audit provision of the Constitution is taken to refer to the Pitcairn Island Office accounts.⁵⁰ The major part of the general administration of Pitcairn is conducted from the Pitcairn Islands Office, which is run by a Commissioner appointed by the Governor. Pitcairn Islanders manage their internal affairs through the Island Council, which was established by the Local Government Ordinance 1964. The Ordinance conferred on the Council the duty to provide among other things for the economic advancement of the Islanders.

The constitutional provision for audit will help to provide a better overview of the finances of Pitcairn. The provisions for audit could be greatly strengthened by more legislative detail either in the Constitution itself or in

46 Pitcairn produces honey sold by exclusive food retailers Fortnum and Mason in Piccadilly, London and Partridges in Sloane Square, London, famously known as “the Queen’s grocers”, which provides another source of income for Pitcairn; see TalkingRetail “Honey creates a buzz for Pitcairn’s 50 residents” (2010) TalkingRetail.com <<http://www.talkingretail.com/products/product-news/honey-creates-a-buzz-for-pitcairns-50-residents>>.

47 Overseas Territories Department (DFID). Personal communication to Ricarda Kessebohm.

48 Despite financial support from the UK and the EU, Pitcairn needs to use the support to establish a regime that is self-affording in order to secure its existence. A business plan of 2004 mentioned the building of an airstrip and accommodation in order to create eco- and adventure tourism opportunities. But there are as yet no developments of these undertakings.

49 Above n 47.

50 The author is grateful to acknowledge the provision of this information to the author by DFID.

a specific Ordinance dealing with matters of finance and audit. Such detail could for instance, require annual audits, could define public accounts and could require audit of not only the accounts of the Government of Pitcairn but also of all institutions involved in the governance of Pitcairn.

I. Ombudsman

Section 59 provides for the Office of Ombudsman. An Ombudsman will be appointed by the Governor “to investigate ... any complaint of maladministration in the government of Pitcairn”. The procedures to be followed by an Ombudsman and the powers of an Ombudsman are to be prescribed by Ordinance. As of October 2010 no Ordinance has been promulgated.

The Ombudsman is the same as a Complaint Commissioner of the Falkland Islands or of St Helena. The wording of the articles in three Constitutions is the same apart from the designation of the officer.

The office of Ombudsman is in fashion – a modern Constitution should have one! However, it is hard to believe that 50 people will get any great advantage from this office. Pitcairn is very small; the people are often related to each other or know each other well or have interrelated interests. Consequently an Ombudsman from within Pitcairn may not be very effective. If an Ombudsman were from outside, the questions arise, whether people would ask the Governor for an Ombudsman for a particular purpose and, if so, whether the Governor would appoint an Ombudsman. Given the logistics and the delays likely to be involved, it may simply not be very practicable. Though the Ombudsman “shall act independently and shall not be subject to the direction and control of the Governor, the Island Council or any other person”, it is a matter of concern that an Ombudsman will be appointed ad hoc, is appointed by the Governor, and may be removed from office by the Governor. The Governor’s powers are subject to conditions but there is no protection for an Ombudsman of the kind that is in place for judicial officers. That threatens the effectiveness of the office. The Constitution has a special system for removal of the Attorney General.⁵¹ The same or a similar procedure could have been provided for the Ombudsman.

The idea of having an Ombudsman for Pitcairn has the advantage of providing for Pitcairn a potentially powerful mediator vis-a-vis the Government. Realising the potential depends much on the manner in which the constitutional provisions are activated by Ordinance and could be assured by stronger provision for the Ombudsman in the Constitution itself.

51 Section 35 of the Constitution.

J. Sources of law

The sources of law in Pitcairn are (in descending order of importance):⁵²

- UK legislation enacted for or applicable to Pitcairn;⁵³
- The Pitcairn Constitution Order 2010;
- Ordinances made by the Governor of Pitcairn;⁵⁴
- Statutes of general application as in force in and for England for the time being;⁵⁵
- The common law and the rules of equity; and
- Regulations made by the Island Council of Pitcairn.

On a day to day basis the laws of importance are the Constitution, the Ordinances and the Regulations. It is regrettable that the shorthand manner of providing for a legal system – by reference to statutes of general application – has been continued in this Constitution. Prospectively, it is impossible to know in advance of a court’s decision that a statute is one of general application; the effect of such a decision amounts to legislating retrospectively. The constitutional goal should be to provide a clear set of laws for the Colony. Therefore when gaps in the legal system are identified, Pitcairn legislation should be promulgated to address the needs. Reference to statutes of general application should be removed.

The sources of law here identified are effectively carried forward from the previous constitutional regime to the Constitution of 2010. However, in the Pitcairn Constitution Order, s 5 (which provides for the continuity of laws) there is a definition of existing laws:

“existing laws” means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of Pitcairn immediately before the appointed day.

The passage in brackets could confuse. It appears to exclude Acts of the UK Parliament.⁵⁶

Bearing in mind that the Constitution is subordinate legislation, the explicit exclusion of Acts of Parliaments and laws made under them is merely stating the obvious: Acts of Parliament are superior to the Constitution and therefore applicable without more.

52 Section 42 of the Pitcairn Constitution.

53 For example, The British Settlement Acts 1887 and 1945; The Judicial Committee Act 1844.

54 Sections 36-41 of the Pitcairn Constitution. Section 7 of the Local Government Ordinance [cap 11].

55 Application is subject to necessary modifications and adaptation – s 42(2) of the Pitcairn Constitution.

56 In contrast, the Republic of the Fiji Islands explicitly refers to Acts of Parliament: “the existing laws” means any Acts of the Parliament of the United Kingdom, Orders of Her Majesty in Council, Ordinances, rules, regulations, orders or other instruments having effect as part of the law of Fiji immediately before the appointed day but does not include any Order revoked by this Order.”

IV. CONCLUSION

Recently made Constitutions for other British Overseas Territories such as the Constitutions for Saint Helena, Ascension and Tristan da Cunha (2009), Cayman Islands (2009), Falkland Islands (2008), British Virgin Islands (2007), and Turks and Caicos (2006) are all similar in structure.⁵⁷

The wording of the Pitcairn Constitution, the Constitution of Saint Helena, Ascension and Tristan da Cunha and Falkland Islands is almost identical. The Constitution of Saint Helena, Ascension and Tristan da Cunha was used as the template for Pitcairn's Constitution.⁵⁸ There is little evidence that consideration was given to the specific circumstances of Pitcairn, such as its few inhabitants, its organisational structures, its land and its families. The approach seems to have been that "modernising" the Constitution of Pitcairn meant adjusting it to conform with other British Overseas Territories rather than to individualise it. Pitcairn is a very small and special community based on its historical background. The Constitution promoted a modernisation that refers to this special situation. It is a true coincidence that the needs and wishes of all British Overseas Territories are the same! That said, the Constitution of 2010 is an improvement for Pitcairn. The Constitution is a first step towards the creation of a more transparent, relevant and systematised charter of governance for the islands. It needs to be supported by the enactment of a range of complementary legislation.

57 The Cayman Islands Constitution is somewhat different as it has no statement of partnership values but instead an article about institutions to support democracy.

58 Above n 9 at [3].