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The Cayman Islands: Paradoxes of Insularity in the Caribbean and Other British Overseas Territories

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Abstract

The Cayman Islands has a population of 63,415 (Cayman Islands Government) and an area of 264 square kilometres, making it the world's twentieth smallest nation or territory by geographical area and 35th smallest by population (United Nations Statistics Division). As a British Overseas Territory in the Caribbean, there exist many connections to other parts of the world that are geographical, legal and socio-political; yet the Cayman Islands and other such territories exhibit traits that may be described as insular or openly international. The British Overseas Territories amount to 14 distinct and effectively self-governing territories that are spread across the globe. Indeed, of the 50 remote islands gazetted by Schalansky (Atlas of remote Islands: Fifty Islands I have never set foot on and never will, Penguin Books, London, 2010), 20 of these islands share a heritage with the former British Empire and, for those with a population and operant legal system, they share the basic underpinning of the English common law [Eight are, or have been, part of a British Overseas Territory; 12 are part of a Commonwealth Nation with the UK monarch as the head of state (aside from Banaba Island in Kiribati which is a presidential republic but still a member of the Commonwealth of Nations)]. Whilst geographically remote, the British Overseas Territories share a direct connection with elements of supervisory governance (as did the now independent Commonwealth Nations) still exercisable by the UK's Government in London, UK. This article will explore the provision of legal education, the diversity of the judiciary and the issues associated with jury size, juror selection and fair, impartial decision making in the Cayman Islands in order to explore the concepts of insularity, internal connectivity and remoteness in law for this particular British Overseas Territory (further references in the text, abbreviated as BOT).

Keywords Remoteness · Cayman Islands · Juries · Judicial diversity · Judiciary · Jury composition

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Imperial Corridors

The British Empire created a number of 'corridors' in which persons, trade and power travelled in various directions to and from the United Kingdom, principally London, as the legal centre of the empire. These corridors linked the most distant and isolated colonies in a hub and spoke model, occasionally with clusters connecting discrete geographical areas together such as the British West Indies. Figure 1 illustrates the locations of Schalansky's 50 most remote islands, accompanied by a visual representation of the 'Imperial corridors' that connect some of them to the UK. The short-lived Federation of the West Indies is a prime example of such clustering of island territories and some connections remain for trade in the format of the CARICOM community. This grouping includes the appellate jurisdictions of the Eastern Caribbean Supreme Court (further references in the text, abbreviated as ECSC) and Caribbean Court of Justice (further references in the text, abbreviated as CCJ) for some of these islands, which will be explored in this paper to identify elements of insularity, remoteness and connectivity.

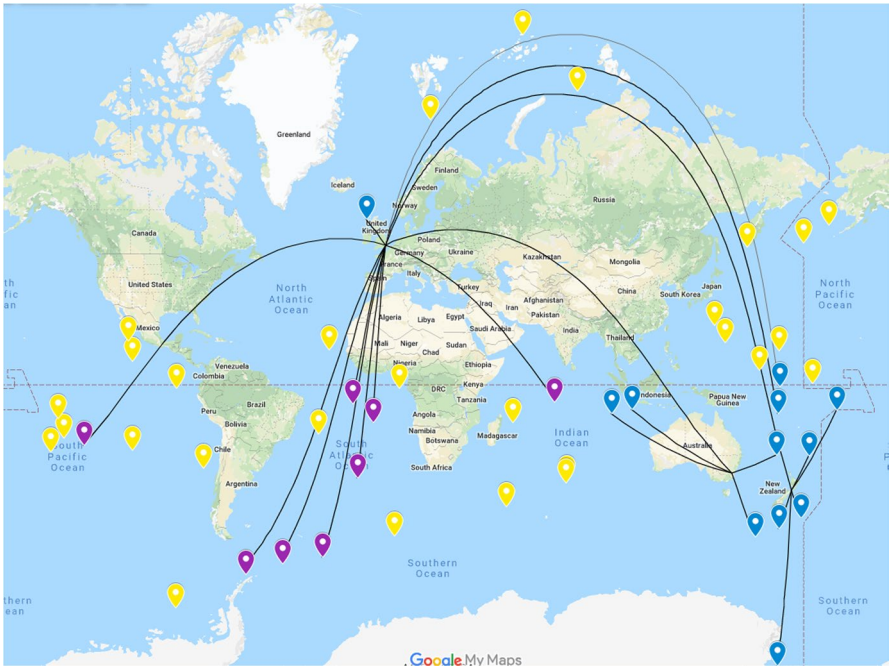

Fig. 1 Imperial Corridors. The 50 most remote islands (Schlansky 2010) coloured purple for current British Overseas Territories, blue for current Commonwealth or former British Empire possessions and yellow for all other islands

The elements that construct a colonial legal system invariably occupy a unidirectional flow in this model from the imperial hub to the colonial spokes, with laws and legal principles being brought to colonies that were either settled or ceded. In the colonialization of the West Indies, Patchett notes the distinction between an 'infant colony' acquired by settlement where colonists carry with them "so much of the English law as is applicable to their own situation" and a colony acquired by conquest or settlement which retains the existing legal system "so far as it is not repugnant to natural justice or until the Crown… makes alternative provisions."[1] Various Caribbean territories were either settled or ceded, with the Cayman Islands occupying an unusual position as it was administered initially from Jamaica, as was the Turks and Caicos Islands. Jamaica was formally ceded from Spain to the UK in the Treaty of Madrid in 1670, but the Cayman Islands were uninhabited at this time and not obviously a part of Spanish Jamaica. The islands were later settled under authorisation of the Crown in the terms of the Royal Instruction issued in 1662 to the Governor of Jamaica, with full recognition of British Colonial Status given in the Act for the Government of the Cayman Islands, 1863 establishing the islands as a dependency of Jamaica. Following the break-up of the Federation of the West Indies in 1962, the islands lost this particular connection with Jamaica, which became an independent sovereign nation, and remains, along with other remnants of the empire, a British Overseas Territory.

The remoteness of the Cayman Islands, as a dependency of a colony, has been reduced upon Jamaican independence by bringing the islands up to full colonial status, albeit named in the present era as an overseas territory in its own right, dependent instead upon the UK directly rather than through an intermediary. Double insularity during this period has led to some interesting effects upon the present legal system, which will be explored.

Yusuf and Chowdhury argue that there persists still an element of modern colonial constitutionalism amongst the BOTs, ranging on a spectrum from those with more constitutional autonomy such as Bermuda at one end, and the less populated yet more constitutionally colonised territories at the other.[2] Insularity, or independence, can therefore be thought of in non-geographic terms as well as physical isolation. In a broad sense, post-colonial theory may suggest that some BOTs, and the Cayman Islands in particular, are able to exercise decisive economic and monetary control in an independent sense. However, the persistence of colonialism in law, referred to as colonial continuity or inheritance by Burra, by which the UK can still exercise power over domestic and external affairs indicates that the Imperial corridors are still in effect and still operate unidirectionally.

[1] Patchett (1973: 17–35).

[2] Yusuf and Chowdhury (2019).

Patchett further describes the extent to which the common law is received in the Caribbean and the suitability for local circumstances.[3] By operating as separate legal systems, based upon the English legal system, each territory results in an adaptation that maintains a sense of connection to the UK, but each adapting independently and in isolation of each other. Indeed, it was identified back in 1828 that

"hardly any two of the colonies can be named which have the same law; and in the greater number the law is wholly unlike our own. In some Settlements, it is the Dutch law; in others the Spanish, in others the French, in others the Danish".[4]

Whether acquired or settled, each outpost was to a certain extent unique and contained its own customs, practices and legal jurisprudence. This diversity, however, still has an overarching unity and high degree of similarity with the English legal system and so each colony is at once both remote and highly connected, in both a geographical and legal sense.

The unity of the Privy Council as the final court of appeal for the BOTs reduces an element of insularity as the decisions of the Judicial Committee of the Privy Council[5] (further references in the text, abbreviated as JCPC) are not only binding upon the jurisdiction from which a relevant appeal came, but also on all other jurisdictions subject to the JCPC's jurisdiction in so far as the same point of law can be applied.[6] The paradox is that the JCPC is located in London in a jurisdiction where it holds no general appellate jurisdiction and in the modern day consists of judges drawn from the UK's Supreme Court, which itself is not technically bound by JCPC decisions. Historically, up until the passing of the Appellate Jurisdiction Act 1876, the final courts of appeal for the UK and for the Empire were not only overseen by different judges, but the JCPC had a broader sense of "reliance on plain justice and common sense unfettered by technicalities."[7] These concepts of plain justice and common sense were seen as the two commodities that were the same across the Empire, irrespective of any local technicalities imposed by the process of colonial settlement or acquisition. Indeed, Mitchell posits that the JCPC judges had significant colonial experience and were not, in comparison to the English judiciary, even necessarily well-known or "household names" in the legal sphere.[8] This practice, however, ended with the coterminous House of Lords bench, latterly superseded by the more recently formed UK Supreme Court. The JCPC does, however, still retain some strategic skills to avoid criticism of remoteness, for example by taking

[3] The Common Law is derived from custom and judicial precedent, rather than statutes, and typical of the Anglo-American and English-speaking jurisdictions. Colonial settlements would operate on the existing Common Law as understood in England & Wales, but each settlement could, and would, diverge from that point onwards according to subsequent localised decisions or accepted customs and practice.

[4] Brougham in HC (1828: 154).

[5] In the broadest sense, the Privy Council is the Sovereign's advisory body which performs a wide range of functions such as the issue of Royal Charters (such as city status or special status for incorporated companies) and matters relating to the accession of a new Monarch. The Judicial Committee was the court of final appeal for the entirety of the British Empire but also considers some domestic matters such as ecclesiastical appeals and disciplinary appeals from the Royal College of Veterinary Surgeons.

[6] Mance and Turner (2017).

[7] Williams in HC (1870).

[8] Mitchell (2016: 38).

on judges of certain superior courts in Commonwealth nations, who are appointed Privy Counsellors for the purpose of sitting in the JCPC.[9] Other more visual or even cosmetic tactics such as displaying the relevant flag on the court building's flagpole or even, on a limited number of occasions, by sitting in the relevant jurisdiction itself have also been employed to temper any perceptions of remoteness.[10]

The JCPC operates, however, as a final court of appeal across the BOTs, and more widely across a limited number of relatively small, independent Commonwealth Nations, so it does not, therefore, consider a particularly high number of appeals or points of law. The mid-level Cayman Islands Court of Appeal (further references in the text, abbreviated as CICA) has, since 1984, dealt with a higher volume of cases than the JCPC for this particular jurisdiction. It can therefore be described perhaps as more influential, operating on a local insular level, on the Cayman Islands legal system. Prior to 1984, the route of appeal lay with the Court of Appeal of Jamaica, a relic of the former days of dependency and double insularity. The success of the JCPC, as argued by Mitchell, lay in its ability to overcome both geographical and legal remoteness by appearing to move closer to the jurisdiction in each case, using language and terminology appropriate to the particularities of the local legal system.[11]

Judicial Diversity

Whilst there is no discernible difference between the current Justices on the bench of the UK Supreme Court and the JCPC, it might be expected that the jurisdictionally specific, mid-level courts of appeal for the BOTs are more symbolic of the individual territory. Within the Caribbean, there are 5 BOTs within fairly close proximity geographically to each other plus Bermuda, physically in the Atlantic rather than the Caribbean Sea. The smaller Eastern Caribbean nations and territories have formed an economic union with a common currency and also the ECSC as their first appellate level court. The judiciary for this regional court is also drawn from the 6 independent nations and 3 territories. The first instance High Court Judges are assigned to a particular territory, not infrequently a different jurisdiction to where they were first called to the bar, and occasionally reassigned elsewhere as a resident judge or elevated to become a Justice of Appeal.

Therefore, an appellate bench may comprise 3 or more judges with a broad sense of experience and practice across differing jurisdictions. The ECSC is not a hub and spoke model in the sense of colonial rule or supervision, but rather an arrangement of interdependence to negate the lack of economies of scale or vulnerabilities to external shocks that each jurisdiction has alone, due to its size. Table 1 illustrates the

[9] For example, former judges from Jamaica and New Zealand have sat, in examples given by Mance (2017: 11).

[10] This has occurred in The Bahamas (on four occasions; and heard appeals from nearby Bermuda and Turks & Caicos) and Mauritius (on three occasions), according to Mance (2017: 12).

[11] Mitchell (2016: 49).

constituent members of this regional court and the appellate courts for other Caribbean territories. The Cayman Islands do not form part of this collectivity and are therefore insular from a significant pooling of knowledge and resources amongst other relatively small jurisdictions. Neither do Turks & Caicos Islands form part of this grouping, the only other Caribbean BOT not to be a member of the ECSC and both are notable not only as being geographically further west in the Greater Antilles but also both are former dependencies of the Colony of Jamaica. Each, therefore, now has their own Court of Appeal which has the advantage of being bespoke and peculiar to that jurisdiction, but perhaps lacks the pooling of interjurisdictional resources on the face of it.

The CICA consists of a pool of nine judges who in practice are drawn from outside the territory and are exclusively male, all of whom were born, educated and practised in the UK, bar one from Jamaica. The recruitment statistics[12] for the most recent vacancies on the CICA continue to show the dominance of retired, male and English Court of Appeal judges appointed in this jurisdiction. This trend is not, however, a product of persistent colonialism as the Judicial and Legal Services Commissions who make the recommendation of appointment to the Governor are independent from both domestic government and UK government. The only remaining effect of the imperial corridor is that the judges of the Court of Appeal shall be appointed for such period as may be specified in their respective instruments of appointment, as per the Cayman Islands Constitution. That Constitution is manifested in a Privy Council Order, namely the Cayman Islands Constitution Order 2009.

Whilst there is a general preference for judicial appointments to be either permanent or until a fixed retirement age in order to promote judicial independence, some smaller jurisdictions have no alternative but to seek judges who are prepared to serve in the higher and appellate courts on a fixed-term basis. Fixed-term appointments to a constitutional court are acceptable if they are for a long period and not renewable, according to a Compendium and Analysis of Best Practice from the Commonwealth Secretariat.[13] The appointment of judges on fixed-term contracts requires special justification. For example, fixed-term appointments may be more attractive to individuals who are not prepared to commit to a life-long judicial career in a particularly small jurisdiction, or to non-nationals who may be prepared to accept a part-time travelling post of a limited time period only. Indeed, provision is sometimes made for judges to be appointed for a single case where, for various reasons, the existing judiciary may all be recused from hearing a case. There is a positivity in fixed term appointments for small jurisdictions such as Cayman Islands, as change brings the potential for a more varied bench that may serve to reduce insularity, but other small benches (such as the twelve member UK Supreme Court or indeed the nine member US Supreme Court) are appointed until retirement or for life.

Indeed, the ultimate jurisdiction of the JCPC over any of the BOTs, whether they form part of the ECSC collective or have their own court of appeal, unifies the legal systems of the territories and reduces remoteness or insularity, but promulgates or at

[12] Judicial and Legal Services Commission (2019).

[13] Commonwealth Secretariat (2015).

Table 1 British Overseas Territories and Commonwealth Nations within the Caribbean region and their respective courts of appeal

Name	Status	ECSC	JCPC	CCJ
Anguilla	BOT	X	X	–
Antigua & Barbuda	Nation	X	X	–
British Virgin Islands	BOT	X	X	–
Dominica	Nation	X	–	X
Grenada	Nation	X	X	–
Montserrat	BOT	X	X	–
Saint Kitts & Nevis	Nation	X	X	–
Saint Lucia	Nation	X	X	–
Saint Vincent & the Grenadines	Nation	X	X	–
Barbados	Nation	–	–	X
Belize	Nation	–	–	X
Cayman Islands	BOT	–	X	–
Jamaica	Nation	–	X	–
Guyana	Nation	–	–	X
The Bahamas	Nation	–	X	–
Trinidad & Tobago	Nation	–	X	–
Turks & Caicos	BOT	–	X	–

least continues colonial continuity or inheritance. This colonial continuity remains in effect for the BOTs but also for the Commonwealth Realms where the monarch of the UK remains as the head of state and more notably for the independent Commonwealth Republics of Dominica, Kiribati, Mauritius and Trinidad & Tobago, and for the monarchical Sultanate of Brunei.

As an alternative to the JCPC, the CCJ located in Trinidad & Tobago has become the final appellate courts for the four Commonwealth Nations of Barbados, Belize, Dominica and Guyana. The remoteness of Privy Council's ultimate judicial power caused political concern locally, calling for total judicial independence and the end of colonial continuity for the legal systems of these nations. The CCJ website holds that

"the laws of the region […] should mirror the collective social ethos of our peoples and, to be relevant and responsive, should be interpreted and applied by Judges who will understand our societies, our culture and our values".

This can be interpreted at a removal from the jurisdiction of culturally remote JCPC judges, not on the grounds of sovereignty as the CCJ is supranational in the same manner as the JCPC, but for a cultural and regional disconnect. Furthermore, in relation to geographic remoteness, the CCJ also states:

"to be far removed from the immediate environment of social interaction to which the law applies would facilitate a dispassionate analysis of human events and judicially objective decisions but only to the detriment of desirable social behaviour and social cohesion".[14]

[14] Available at: https://www.ccj.org/about-the-ccj/faqs/ (Accessed on December 15, 2019).

Table 2 Current Population of Overseas Territory and Jury Size

Overseas Territory	Population est[a]	Electorate[b]	Jury size[c]
Bermuda	63,779 (2016)	34,060 (2017)	12
Cayman Islands	61,466 (2017)	21,228 (2017)	12 or 7
Turks & Caicos Islands	51,430 (2016)	7,732 (2016)	12 or 7
Gibraltar	32,462 (2017)	23,278 (2015)	12 or 9
British Virgin Islands	31,758 (2018)	13,585 (2015)	12 or 7
Anguilla	14,860 (2017)	10,908 (2015)	9
Sovereign Base Areas of Akrotiri & Dhekelia	14,000 (approx. 7000 non-military)	N/A	N/A
Saint Helena, Ascension & Tristan da Cunha	4534 (2016) 806 (2016) 293 (2016)	2213 (2015) 526 (2016) 213 (2019)	8
Montserrat	5177 (2017)	3858 (2019)	9
Falkland Islands	3398 (2016)	6067 (2017)	12 or 7
Pitcairn Islands	50 (2018)	42 (2013)	N/A
British Antarctic Territory	None permanent (40–250 temporary)	N/A	12 or 7 if heard in Falkland
British Indian Ocean Territory	None permanent (military personnel only)	N/A	N/A
South Georgia & the South Sandwich Islands	None permanent (approx. 30 temporary)	N/A	12 or 7 if heard in Falkland

[a]Data drawn from Hendry and Dickson (2015): 315–381

[b]Data drawn from Caribbean Elections. Available at: https://www.caribbeanelections.com (Accessed on December 15, 2019)

[c]Data drawn from Foreign & Commonwealth Office (2009): 2–17

The vision of the CCJ may be to act as the court of final appeal for a greater number of Caribbean jurisdictions, but this is unlikely ever to include the BOTs whilst remaining direct dependency status of the UK, irrespective of the degree of autonomy that may be provided. At present, the mechanism of judicial appointment is solely on merit, rather than any attempt to have representational coverage from each individual jurisdiction, which also serves as a concern for future potential shift from the jurisdiction of the JCPC. Thus, the position seems likely to remain in that Cayman will continue to exhibit strong traits of remoteness and connectedness in its legal system, judicial appointments and appellate hierarchy.

Issues with Juries

Whilst judges and the legal system itself may have aspects of geographical diversity and connectivity, a jury is, by way of trial by peers, necessarily a locally constituted and insularised group. Whether the accused person is a national or from overseas, the jury will always remain representative of the resident population and in most common law jurisdictions are drawn typically from the electoral register. Trial by jury, in criminal law, has been a hallmark of the English legal system since 1219 and has typically comprised 12 persons which is a practice going even further back to the time of King Alfred (871–886).[15] Although some jurisdictions do diverge from this unexplained number, most notably Scotland which has a significantly larger jury size of fifteen persons despite being a smaller jurisdiction in terms of population and geography. There is a tendency in the colonialization of the British Empire's territories to adopt the 12-member jury out of habit or tradition. This is in keeping with Patchett's theory of colonial settlement and the importance of retaining the jury per se and keeping the size of the jury equivalent to the English jury, certainly across the larger dominions.[16]

In comparison, even access to, or the right to trial by jury in the smaller BOTs is often a qualified right unlike the right to elect for trial by jury in cases described as 'either way' offences. Hendry and Dickson note that the size of a jurisdiction where trials cannot be moved to another location and the small number of people eligible to sit on juries present special problems.[17] The constitutions of Cayman Islands, Gibraltar, Pitcairn, St Helena, Ascension and Tristan da Cunha, and the Turks and Caicos Islands have no established right to jury trials, instead local legislation provides for such matters and in the constitution of Montserrat, the right is qualified. These examples illustrate the practical issues that Patchett notes as tailoring the requirements of English law as to the local circumstances. Indeed, across the 14 BOTs, the size of the jury appears to be broadly linked to the population, with the smaller territories having smaller juries. Table 2 illustrates the general trend of

[15] Hostettler (2004).

[16] 12 member juries were, and are still, used in what were the larger and more autonomous Dominions of the British Empire such as Australia, Canada and New Zealand.

[17] Hendry and Dickson (2015): 168.

retaining the full 12-member jury for the trial of more serious offences (typically murder or other homicides) but broadly adapting the jury size to a smaller number for other offences.

When the territories with a non-permanent population are discounted, there are 3 broad groupings of BOT jury size. Firstly, Bermuda which retains the full 12-member panel and has both the largest population and the largest potential jury pool. Secondly, the flexible approach using 12 for murder and either 9 or 7 for all other offences, as adopted by 5 jurisdictions. These BOTs typically have a large population and a potential jury pool of at least 50 percent of the population. The outliers here are Falkland, which is statistically closer to the third grouping below, and Turks & Caicos which has a significantly small electorate. Thirdly, are those with a particularly small permanent population, which have a constant single jury size that is less than 12. Montserrat, it must be noted, had a much larger population of approx. 13,000 prior to volcanic eruptions in 1995–1997 causing a significant exodus, but this does not disrupt it from being categorised as a small population at present. The problems associated with the broader issues of conducting trials in St Helena and Pitcairn where the combination of small populations and extreme geographic remoteness compound not only the convening of a jury are discussed in the literature on the allegations or trials of sex abuse in these jurisdictions.[18]

Under local legislation, the composition of the Cayman Islands jury is significantly lower than that of the UK with only 7 members, although the traditional 12-person jury is preserved in statute for murder and treason.[19] A brief spell during 2001–2016 required a jury of 12 specifically for money-laundering cases and a separate provision brought about in a 2002 amendment, that still remains in force, allows for any case where, in the opinion of the judge, the complexity of the case required a jury of 12. This demarcation between the serious offences of murder or treason and other crimes suggests that a larger jury is necessary in certain circumstances. This may either be a tendency to mirror the imperial metropole of English law only for more serious offences, or a recognition of possible inadequacies that may arise when a reduced number of jurors is utilised.

Both options of either retaining the larger 12-person jury or reducing the number of jurors in a given case present a number of difficulties for any small jurisdiction. The diachronic evolution to 7 members may be a pragmatic approach to solve the problem of a reduced jury selection pool. Indeed, of the total resident population, only one third is on the electoral register that is used to identify and call potential jurors. Furthermore, those over the age of 70 on the electoral register are exempt from jury duty, as are the 600+jurors who have served over the past 6 sessions of the Grand Court resulting in a pool of probably less than 20,000.

Equally, the conservative retention of the 12-member jury for more serious offences is compounded further by the relatively close connections that inhabitants have socially, professionally and domestically:

[18] For example, see Farran (2007).

[19] Judicature Law (2017 revision), s.16.

> When four men went on trial in 2016 for the armed robbery of a Cayman National Bank branch, the jury panel of 92 was not enough. In addition to standard questions asked of potential jurors, the judge asked if they, or a family member, worked for Cayman National Bank or any bank in the Cayman Islands. Many potential jurors were excused by the judge because they or a relative worked for CNB or another bank. Others had connections with the police or prison service. Several knew one of the defendants or one of his family members.[20]

Notwithstanding the issues surrounding the jury pool, a 2019 fraud case involving a total of 12 defendants was split into two separate trials "otherwise it would have seen half of the Cayman Islands' entire criminal defence bar tied up for 6 weeks."[21] This illustrates further the constraints of a small, isolated jurisdiction in a practical sense for case management and the accessibility to legal advice and representation, not only for the accused persons in this particular example, but also the broader list of other accused persons being tried at this time or indeed the general population seeking legal advice on any matter.

Writing in 1975, Lempert identifies the problems of jury-size research in the United States. Whilst his conclusions relate to much larger jurisdictions, he suggests that smaller juries such as a 6 member jury are less likely to result in a hung-jury outcome than a 12 member jury and "that in only a fraction of all jury trials would the verdicts of 12 differ from those of 6 […] where verdicts do differ, those of the 12 would, on average, be superior."[22] This provides some empirical evidence to validate the colonial derogation from the 12 person jury as an acceptable local adaption. Evidence also suggested that 12 member juries were more likely to be representative of minority groups and viewpoints, but conversely that a smaller 6 member jury would lead to more inclusive deliberations and greater satisfaction in the decision making process.

The doctrine of contempt of court, which exists as a common law and express statutory provision in England & Wales, prohibits jurors from revealing the deliberations of the jury and research into juries has been limited, unlike the comparative rules of the United States. Thomas, in her report commissioned by the Ministry of Justice, notes that specific further research into the fairness of juries is recommended. Furthermore, she highlights the importance of not relying on findings from research in other jurisdictions, which may be misleading for a number of reasons.[23] Whilst a number of suggestions for further research in England is made in this report, these are ostensibly focussed on the jury system for England & Wales and do not address jury size as might be expected in a jurisdiction where jury size is constant and unchanging. The report itself, however, is concerned with the racial composition, bias, conviction rates and comprehension of the process; finding little

[20] Winker (2018).
[21] Cayman News Service (2019), in which there were 12 defendants jurors.
[22] Lempert (1975): 699.
[23] Thomas (2010): 51.

evidence that the jury system is unfair but identifying several areas where improvements in the justice system could be made. There is no statutory provision in the Cayman Islands for contempt that covers disclosure of jury deliberations expressly, but the Penal Code covers offences relating to judicial proceedings and case law illustrates findings of contempt made at common law under the Judges Rules.[24] Further research into the use of 7 member juries in the smaller BOTs, particularly in the Caribbean territories, would be useful to assess the validity of findings elsewhere and provide an overview of the efficiencies or otherwise of a reduced number of jurors.

Alternative Approaches

In the report to the Foreign and Commonwealth Office on the difficulties of selecting an impartial jury, a number of alternatives were presented.[25] The report noted that there was no widespread appetite for the abolition of the jury system, but the option to allow the accused to elect to trial by judge alone and amending the criteria for qualification to serve as a juror to be less restrictive were part of the recommendations. This section will highlight how other remote and less-populous islands have dealt with the concept of trial by jury and the compounded problems of personal connections that undermine the ideology of trial by peers. However, it is first worth noting that within the United Kingdom, the ability to conduct a trial without a jury has been explored in Northern Ireland since the 1970s (known as Diplock Courts) to guard against jury intimidation or perverse verdicts.[26] Whilst this particular jurisdiction's electorate amounts to just over 1.25 million, this safeguard is not purposefully designed to combat a small jury pool. Instead, it is a measure to be taken on cause shown by the prosecution for individual cases and the principal concern is derived from terrorism threats; the adaptation is not based upon the geography or remoteness of the jurisdiction. It does, however, serve as an example whereby the absolute sanctity of jury trials has been eroded and indicates that such a move can also be found, under Sect. 44 of the Criminal Justice Act 2003, more broadly across England & Wales as well in as Northern Ireland, allowing jury-less trials where there is a risk of jury tampering.

The Cayman Islands' Criminal Procedure Code does have provision for the accused to elect to be tried by a judge alone in what would otherwise be a jury trial "if an accused person is of the opinion that, due to the nature of the case or of the surrounding circumstances, a fair trial with a jury may not be possible, he may, at least 21 days before the date of the trial or the date of arraignment, whichever is

[24] Under the Grand Court Rules, O.52: the power of the court to punish for contempt may be exercised by an order of committal to prison. For case law, see for example: *In the matter of the Freedom of Information Law* (2015 Revision) [2017] (1) CILR 257.

[25] Foreign & Commonwealth Office (2009): 14–16.

[26] Lord Diplock (1972) Cmd. 5185.

earlier, elect to be tried by a Judge alone."[27] This provision was enacted in a 1986 amendment to the Code, following a report commissioned by the Commonwealth Secretariat detailing concerns over biased jurors in Falkland Islands, Seychelles and St Helena.[28] Effectively, this acts as a safeguard that the accused can implement against any perceived negative bias arising from a jury trial. It is not used infrequently, with several reported and unreported judgments per annum(stats?). There is no provision for this to be effected by the prosecution, as per Northern Ireland, or by the judge which is a permissible option elsewhere, for example in Ascension whose population is a mere 806 under the Trials Without Jury Ordinance, 2016.

The Sovereign Base Areas of Akrotiri and Dhekelia have a significant population, which both cover not only a military base but also farmland and residential areas upon which approximately half of the population (around 7,000) resides.[29] The relevant local Ordinance[30] governing the first instance courts provides for a single judge or a panel of 3 judges in criminal cases. The lack of jury trials, even for serious offences[31] may not necessarily be a localised adaptation due to a small population but might be better explained in the Sovereign Base Areas' attempts to mirror, where possible, the local laws of the Republic of Cyprus. Indeed the modern Republic does not have a system of trial by jury, but neither did the Colony of Cyprus during British rule (1878–1960) or the earlier Imperial Ottoman Penal Code which the British found already functioning and in place upon cession.[32] This continuation of pre-colonisation practices fits with the conceptualised model discussed by Patchett, but only in so far as it is not repugnant to natural justice. Whilst there may be an argument that any removal of jury trials would offend the fairness of such trials in common law jurisdictions, the European Convention on Human Rights does not require trial by jury.

Of the territories with a non-permanent population, those with a scientific community based in the Antarctic regions have a particularly interesting solution. Firstly, local magistrates are appointed from amongst the temporary residents which makes for an unusual trial of criminal matters by peers in both a professional and social context. Secondly, there is the power for the the Supreme Court for the Falkland Islands to have jurisdiction to hear and determine any civil or criminal proceedings in respect of matters arising under the law of the British Antarctic Territory or under the law of South Georgia and the South Sandwich Islands.[33] Indeed the Order in Council also provides similar effect for the lower Magistrate's Courts in both territories should the local arrangements not be suitable. In relation to jury trials, then Supreme Court of the Falkland Islands could therefore assume original trial jurisdiction and empanel a jury as they would have had if the proceedings had concerned

[27] Criminal Procedure Code (2019 revision), s.129(1).
[28] As cited by Davies (1989): 173–175.
[29] Hendry and Dickson (2015): 367.
[30] Courts (Constitution and Jurisdiction) Ordinance 2007, s.16.
[31] For example, see the *Attorney General for Akrotiri and Dhekelia v Steinhoff* [2005] UKPC 31.
[32] Kyprianou (2010): 50.
[33] The Falkland Islands Courts (Overseas Jurisdiction) Order 1989 SI No. 2399, as amended, s.3.

matters arising under the law of the Falkland Islands in all matters of procedure or evidence, apply the law, including rules of court, of the Falkland Islands.[34] Such a jury would inevitably be drawn from the local Falkland population and whilst representative of a community, it may be far from representative of the community in which the alleged crime took place, if such an origin in these circumstances may be described as a community as such.

The FCO report did explore the idea of moving trials elsewhere, but only in relation to Anguilla, British Virgin Islands and Montserrat. For reasons of remoteness in geography, this would most likely be a prohibitive expense for the Cayman Islands and elsewhere, and whilst this relocation may address the issues of bias or personal connections with the accused, it does not address the burden upon a small jury pool or fit particularly well with a civic duty to try cases from other jurisdictions. This argument would also follow with the circumstances of trials in the Falkland Islands from their ostensibly nearest neighbours.

Conclusions

Remoteness is a two-directional concept, with the BOTs being remote from the English legal system geographically and the English legal system being, at times, remote legally from the locally adapted legal system in each overseas jurisdiction. Whilst there are elements of connectivity with the overseas territories and the Commonwealth nations more broadly, each has developed in ways to suit the environment uniquely, or in synchrony with others.

Although there have been developments, particularly in the Caribbean, to address remoteness in the form of the Eastern Caribbean Supreme Court and the Caribbean Court of Justice, these have not affected the Cayman Islands. Where other jurisdictions have sought to share an appellate jurisdiction or secession from the Privy Council has removed colonial continuity, the de facto English composition of the Cayman Islands Court of Appeal and ultimate jurisdiction of the Privy Council serves to reduce insularity. Whilst the JCPC can be criticised for being far removed, both geographically and in legal sense, the adaptations made by this particular court serve as a distinction from the UK's Supreme Court.

Whilst the evolution of the jury size for BOTs and other small jurisdictions from 12 to a lesser number may be explained historically through colonial adaptation to suit the size of the population, the result is that there remain inherent difficulties even in an adapted system. Further research into the function and efficiencies of smaller juries for jurisdictions with small populations would be extremely useful to assess whether such adaptations are indeed successful. Also, examining the efficacy of trial by judge alone in these small, remote islands for matters that would ordinarily be tried by a jury in a larger common law jurisdiction may cast some light on the efficiencies of justice. Together, such avenues of research and evaluation may

[34] s.4 and ss.6–7.

indicate how the future of trial by jury may look in small, remote islands and what, if any, adaptations may be necessary.

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