

A FEW COMPARATIVE REMARKS ON THE CONCEPT OF FREE ASSOCIATION IN THE SOUTH PACIFIC

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Le modèle institutionnel de libre association des îles Cook et dans une moindre mesure de Tokelau et Niue, avec la Nouvelle Zélande est régulièrement cité en exemple par une partie de la classe politique polynésienne qui y voient une alternative au statut d'autonomie dont est dotée la Polynésie française.

En fait, comme le souligne l'auteur, ce modèle est loin d'être parfait, le système statutaire en vigueur en Polynésie française conférant à cette communauté d'outre-mer, dans certains domaines, une autonomie plus importante que celle dont îles Cook, Tokelau et Niue bénéficient aujourd'hui.

To look after ones own affairs or to be free to control oneself are enduring aspects of the human condition. Aspiring to this seems natural. Children grow up and leave home. They wish to be free to make their own way and to have the benefits and the responsibilities of their actions. And so it is with countries. They too wish to have the freedom to govern themselves and to be able to take individual pride in their achievements

In today's interdependent world self-government will be marked by greater or lesser intensity of links with other groups. Some countries in the Pacific have achieved self-government by developing autonomy within a parent country. Others have become independent and formed a separate state outside the umbrella of a parent country. This paper considers briefly the relationship of free association of each of Niue and the Cook Islands with New Zealand.

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The Commonwealth context in which that relationship has developed is significantly different from that of French Polynesia with France and has affected the manner and the degree of specificity of the expression of the relationship. Tokelau, another Pacific community which is working towards autonomy within the constitutional framework of New Zealand, is also considered. Its current pattern of development is not dissimilar from and may be able to draw inspiration from the example of French Polynesia.

I - FRENCH POLYNESIA

The development of French Polynesia's autonomy, which is well documented in this book, has taken place within the context of the Constitution of the French Republic⁵⁹³. The pattern of development of French Polynesia has been quite different from that of the Commonwealth developments of many of the other countries of the South Pacific region.

A primordial difference is the fact that neither the United Kingdom nor New Zealand has a written entrenched constitution which provides a backdrop to the development of self-government, autonomy or decolonisation, such as that provided by the Constitution of the Fifth Republic. French Polynesia since 1984, and increasingly as a result of the change in laws relating to its status of autonomy through till 2004, has had the advantage of clear and reasonably extensive legislation dealing not only with the matters of local government within the territory but also specifically with matters of interrelationship with the central state. It is on this that there is a marked difference between the situation of French Polynesia and that of the Cook Islands and Niue.

The nature of the laws on the status of autonomy of French Polynesia has gone a long way to obviating many of the causes of tension experienced in other Pacific relations. The division of responsibility between the central state and the territory has been increasingly clearly demarcated and in this sense may be seen as a model pattern of development. Discussion between France and French Polynesia can focus on the detail and implementation of the rules, by contrast with the

⁵⁹³ Constitution of France, Title XII, Articles 72-75.

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case of the Cook Islands or Niue where the debate is often at a much more general level and may concern the broad nature or even the existence of a rule.

II - THE COOK ISLANDS AND NIUE

A. - SELF-GOVERNMENT

The Cook Islands in 1965 and Niue in 1974 became states separate from New Zealand and chose, by way of public vote under the aegis of the United Nations, the status of self-government in free association with New Zealand⁵⁹⁴. Those states then joined New Zealand in the Realm of New Zealand⁵⁹⁵. As the nature of their relationship indicates, the association is free and that freedom is their freedom unilaterally to cease to be associated with the state of New Zealand.

The British pattern has been to allow autonomy to develop by way of practice⁵⁹⁶. In the case of Niue and the Cook Islands, which developed their autonomy in relation to New Zealand broadly following the British pattern, the true nature of that self-government is still, 30 years after the event, being worked out.

New Zealand enacted the constitutions of the Cook Islands and Niue and did so by way of ordinary statute⁵⁹⁷. However, those constitutions have the nature of fully entrenched laws in the associated states. In both cases the constitutions address the government of the new state with particular emphasis on its internal operation.

⁵⁹⁴ The nature of these relationships is considered, inter alia, in Alison Quentin-Baxter "Niue's Relationship of Free Association with New Zealand" (1999) 30 VUWLR 589; Alex Frame "The External Affairs and Defence of the Cook Islands – The 'Riddiford clause' considered" (1987) 17 VUWLR 141; Sage Y-L "Emergence et Evolution du Droit dans les Petits Etats Insulaires du Pacifique Sud Anglophone", in *Contemporary Challenges in the Pacific: Towards a New Consensus*, (S. Levine, A. Powles, Y-L Sage Editors). (2001) RJP (HS1) 23.

⁵⁹⁵ Letters Patent on the Constitution of The Office of Governor-General of New Zealand, SR 1983/225, clause 1.

⁵⁹⁶ Or, in common law jargon, by convention. The constitutional development of New Zealand is a good example.

⁵⁹⁷ Cook Islands Constitution Act 1964 (NZ) and Niue Constitution Act 1974 (NZ).

In the case neither of the Cook Islands nor Niue is the detail of the relationship between it and the state of New Zealand clearly enunciated by treaty or otherwise. Within the constitution of those countries⁵⁹⁸ there is a very brief statement about the interstate relationship⁵⁹⁹. That brief statement does little more than indicate that there is a continuing link, between New Zealand and the Cook Islands on the one hand and Niue and New Zealand on the other, in respect of matters of foreign affairs, defence and citizenship. The expression of the nature of the link is elliptical, conditioned by feudal conceptions of the state, and expressed in the passive voice or impersonally.

⁵⁹⁸ Which is also legislation of the state of New Zealand.

⁵⁹⁹ Cook Islands Constitution Act 1964 (NZ):

“5 Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after the consultation by the Prime Minister of New Zealand with the Premier of the Cook Islands.

6 Nothing in this Act or in the Constitution shall affect the status of any person as a British subject or New Zealand citizen by virtue of the British Nationality and New Zealand Citizenship Act 1948.”

Niue Constitution Act 1974 (NZ)

“5 Nothing in this Act or in the Constitution shall affect the status of any person as a British subject or New Zealand citizen by virtue of the British Nationality and New Zealand

Citizenship Act 1948.

6 Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the

Queen in right of New Zealand for the external affairs and defence of Niue.

7 It shall be a continuing responsibility of the Government of New Zealand to provide necessary economic and administrative assistance to Niue.

8 Effect shall be given to the provisions of sections 6 and 7 of this Act, and to any other aspect of the relationship between New Zealand and Niue which may from time to time call for positive co-operation between New Zealand and Niue, after consultation between the Prime Minister of New Zealand and the Premier of Niue, and in accordance with the policies of their respective Governments; and, if it appears desirable that any provision be made in the law of Niue to carry out these policies, that provision may be made in the manner prescribed in the Constitution, but

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While it would seem clear that at the time of self-determination by the Cook Islands and Niue there was some general public understanding of the nature of the future relationship of the states to New Zealand⁶⁰⁰, the passage of time has shown that there are some marked differences of opinion about the nature of the relationship and the precise meaning of those short clauses in the constitution. It is practice which has given meaning to the relationship, and the nature of that relationship is still being worked out on a day by day basis⁶⁰¹. The defined nature of the relationship of French Polynesia and France may be an advantage of French Polynesia in comparison with the Cook Islands and Niue.

B. - FOREIGN AFFAIRS AND DEFENCE

There is provision for intergovernment communication in both constitutions – specifically in the Cook Islands for external affairs and defence⁶⁰², and more generally for Niue in the Niue Constitution Act 1974⁶⁰³.

On one view, and perhaps the better view given that these states are free to cut their links with New Zealand at any time, the relationship with the state of New Zealand in respect of foreign affairs and defence matters may be expressed as the right of the small states to call on and even to expect from New Zealand assistance in respect of foreign affairs and defence and that when so called upon there is a duty on the state of New Zealand to assist. An alternative reading of the provisions would be that there is a right in the state of New Zealand to take responsibility for the foreign affairs and defence of the states. It is clear since 1988, by virtue of the declaration by New Zealand to the United Nations⁶⁰⁴, that New Zealand will not be responsible for the international affairs of the Cook Islands or Niue except at their request and with their approval.

not otherwise.”

⁶⁰⁰ See above n 2 for discussion.

⁶⁰¹ Both countries have diplomatic representation in New Zealand (these are High Commissions, following the Commonwealth pattern), and in Niue it is a constitutional requirement (s 9) that the “...New Zealand Representative shall be stationed in Niue, and shall be the representative of the government of New Zealand in Niue.”

⁶⁰² Cook Islands Constitution Act 1964, s 5.

⁶⁰³ Section 8. Y-L Sage, “Remarques sur la représentativité des îles Cook dans les rapports internationaux“, RJP, vol 1, 1994, p.183.

⁶⁰⁴ UNGA LE 222 NZ.

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C. - CITIZENSHIP

Citizenship is a central element of the relationship between New Zealand and the Cook Islands and Niue. In both cases a significant number of the members of the cultural community (and therefore of family groups) live in New Zealand. Apart from the security given to the associated states by the citizenship link with a larger established state, it is an important political and cultural matter that members of their communities have the ability to move freely between the associated state and New Zealand.

Citizenship is, in a sense, a more difficult matter than foreign affairs or defence. There is only one citizenship; that is the citizenship of the state of New Zealand⁶⁰⁵. There is at the present time no citizenship of the Cook Islands or of Niue. The agreement of free association between these states and New Zealand is that the people of the Cook Islands and Niue will acquire citizenship and will be able to enjoy the benefits of it such as the freedom to enter and to work in New Zealand. However, citizenship is a matter totally within the control of the New Zealand government, and it is also totally within the control of the government of the Cook Islands or of Niue to establish a local citizenship. To date the understanding of the free association has worked well and the peoples of Niue and of the Cook Islands benefit directly from the New Zealand citizenship law⁶⁰⁶.

The peculiarly national nature of citizenship in this context is highlighted by the fact that the total administration of citizenship and of the passport law is in the control of the government of New Zealand⁶⁰⁷. There has been no delegation of authority or administrative function in these matters. The citizenship is the citizenship of the state of New Zealand and is a matter of the domestic law of the state of New Zealand. The privilege of bearing that citizenship has by virtue of the association arrangements been extended to the Cook Islands and Niue.

A closely related question is immigration control. The immigration laws of the three countries are of purely domestic significance, but the immigration laws of the three countries are different. There are,

⁶⁰⁵ Citizenship Act 1977(NZ). See also the Cook Islands Constitution Act 1964, s 6 and the Niue Constitution Act 1974, s 5.

⁶⁰⁶ This is expressly stated in the Citizenship Act 1977(NZ), s 29.

⁶⁰⁷ Passports Act 1992 (NZ).

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therefore, at certain points interesting areas of interaction between the immigration laws of these countries and the citizenship law of New Zealand. For instance, to the extent that citizenship rights may flow from an extended period of residence in a country, the access to the country and the conditions of entry are governed independently by the law of New Zealand⁶⁰⁸ for the state of New Zealand, the law of the Cook Islands⁶⁰⁹ for the Cook Islands, and the law of Niue⁶¹⁰ for Niue.

D. - ECONOMIC SUPPORT

Behind all this is the vital issue for small states of budgetary support. New Zealand is a major supporter of the economy of both the Cook Islands and of Niue⁶¹¹. There is no specific provision in the laws for economic support for the Cook Islands. There is however provision in the Constitution of Niue⁶¹² for continuing economic and administrative support for Niue by New Zealand. The absence of rules, or the absence of clarity in the existing rules, has led to much discussion over the years particularly as to the level and nature of economic support⁶¹³, but also more generally about the nature of the relationship between New Zealand and the Cook Islands and Niue.

In the Cook Islands, some steps were taken at the time of the centennial celebrations of the relationship of the Cook Islands and New Zealand to clarify formally the relationship of the two states. The resultant document is the centennial declaration⁶¹⁴. As an initiative to clarify the situation between the two states it should be commended. It may nevertheless be queried whether the document is any significant

⁶⁰⁸ Immigration Act 1987 (NZ).

⁶⁰⁹ Entry, Residence and Departure Act 1971-1972 (CI).

⁶¹⁰ Entry, Residence and Departure Act 1985 (Niue).

⁶¹¹ The Cook Islands has received a constant figure of \$6.2 million as project support from New Zealand since budget support ended in 1997. "The 2003/2004 indicative total amount of bilateral NZAID support provided to Niue is NZ\$8.250 million, of which NZ\$5.750 million is for budget support, \$1.25 million for Niue's economic initiatives and NZ\$1.25 million for project support." <<http://www.mfat.govt.nz/foreign/regions/pacific/country/>>.

⁶¹² Niue Constitution Act 1974, s7.

⁶¹³ Eg whether the money is provided by New Zealand as budget support without ties or as project aid.

⁶¹⁴ Joint Centenary Declaration of the Principles of the Relationship between New Zealand and the Cook Islands (11 June 2000).

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advance on understanding and further whether the consequence of its existence may in some way limit the autonomy of the Cook Islands more than celebrate that autonomy.

Niue is a much smaller state and its financial and demographic situation is very fragile. Niue has no statement of understanding with the state of New Zealand such as that which exists between the Cook Islands and New Zealand.

III - TOKELAU

It is against this background that the developing autonomy of the non-self-governing territory of Tokelau may be viewed. Constitutionally, it may be regarded as in a situation analogous to French Polynesia: Tokelau is an integral part of the state of New Zealand. The Tokelau situation has however the further feature that Tokelau is a non-self-governing territory listed by the United Nations for decolonisation. Tokelau therefore has a certain international law status independent from that of New Zealand⁶¹⁵, and that status is being developed in the context of the development of internal self-government in Tokelau⁶¹⁶.

Tokelau developments are influenced in a negative way by the uncertainty of the arrangements between New Zealand, the Cook Islands and Niue. On the other hand there is the clarity of the model provided by French Polynesia and by the former US trust territories in Micronesia. The true nature of their autonomy and how it may be managed is well exemplified by these countries' arrangements.

The Northern Marianas, the Marshall Islands, the Federated States of Micronesia and Palau all show different ways of developing self-government and of providing for autonomy. Like French Polynesia, they show a pattern of development based on documented and detailed understandings about the nature of domestic government and the relationship between the autonomous country and the country from

⁶¹⁵ General Assembly Resolution 2625 (XXV) Annex, Preamble, Principle 5 – paragraph 6-8.

⁶¹⁶ UN General Assembly Resolution, Question of Tokelau, 23/6/2003, A/AC.109/2003/L.11.

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which it has derived its autonomy or within which it exercises its autonomy⁶¹⁷.

These examples all tend to show the need for local specificity, and all appear to be successful within their historical contexts. It is clear in terms of the United Nations norms on decolonisation that Niue and the Cook Islands have satisfied the self-determination criteria. The pure application of those same principles to the states of Micronesia has however left open some room for debate⁶¹⁸.

Tokelau seeks to learn from the experience of others. It is therefore anxious, before any formal status of autonomy is achieved, to establish to the greatest extent possible not only the rules for its internal self-government but also the rules governing its relationship with the state of New Zealand⁶¹⁹.

Tokelau, in order to meet its needs, has in addition to developments relating to the strengthening of local institutions and the development of domestic infrastructure, elaborated with New Zealand in 2003 a six page document entitled the Principles of Partnership⁶²⁰. This is a very general statement of understandings covering a range of matters. It includes economic support, transparency and accountability, cultural protection, emergency assistance and consultation methods. The intention is that this general statement of principles will, over a period, be elaborated on in supporting documents on each of the main issues. Those supporting documents will spell out the detail of the relationship in terms of what each of the countries may expect of the other over the long term.

Tokelau is developing its internal government arrangements. It is anticipated that those arrangements will eventually come together as a

⁶¹⁷ Eg Compact of Free Association between the United States of America and the Republic of the Marshall Islands.

⁶¹⁸ Horey "The Right of Self-Government in the Commonwealth of the Northern Mariana Islands" (2003) 4 Asian-Pacific Law & Policy Journal 180; Clark, "Self-Determination and Free Association – Should the United Nations terminate the Pacific Islands?" (1981) 21 Harv. International Law Journal 1; Van Dyke et al "Self-Determination for Non-Self Governing Peoples and for Indigenous Peoples" (1996) 18, U. Hawaii L.R. 623.

⁶¹⁹ This all being on the assumption that autonomy eventually would be within the context of an ongoing relationship with the state of New Zealand. *Report on the Constitution and Lawmaking Sessions of the General Fono*, Fakaofu, 17-21 November 2003.

⁶²⁰ Joint Statements of the Principle of Partnership between New Zealand and Tokelau, Fakaofu, November 2003.

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Constitution for Tokelau and cover, though not perhaps in the same manner, the internal government issues that are addressed in the constitutions of the Cook Islands and Niue. In terms of the relationship with an external partner, the anticipation is that, at the time of the decision for autonomy, the Principles of Partnership and the various documents that elaborate on specific issues in the principles will take the form of a treaty between New Zealand and Tokelau and that it will be that treaty which will govern the relationship of the two countries into the future.

IV - CONCLUSION

There is much in the examples of Niue and the Cook Islands which remains uncertain and even somewhat mysterious at least for outside observers. Before self-determination Tokelau is anxious to have as much clarity as possible about the nature and effects of a possible future relationship with New Zealand. It is therefore, in discussion with New Zealand, progressively detailing aspects of that relationship as part of its development of internal self-government. In this stage of the process the example of French Polynesia can be informative.

In the fullness of time Tokelau will chose whether it would prefer autonomy within New Zealand or a status of self-government in free association with New Zealand supported by rules as well defined as those in the autonomy law of French Polynesia.