

## **Healthy, wealthy and wise**

### ***The national government of Tokelau after 150 years***

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#### **Introduction**

In former times, the records as far as they go would indicate that the people of Tokelau were healthy, wealthy and wise.<sup>1</sup> They were certainly no less healthy than they are at present, and the ailments that did exist are not those of the present time.

Tokelau, until recently, has been a subsistence economy.<sup>2</sup> Wealth, in terms other than land holdings and free use of the natural resources, did not exist. However, the resources were sufficient to support the people. Records, even in relatively recent times,<sup>3</sup> indicate that Tokelau was able to support its own needs. Wisdom was the attribute of age, and the people of Tokelau and their elders were well attuned to the environment within which they lived. In a very direct sense, they lived by their wisdom.

In the last 150 years there has been contact with outside influences, the impact of which has, in population and numerical terms, been disproportionate. Few non-Tokelauans have ever lived in Tokelau. Access remains difficult—there are no airstrips and no ports, and there have been no resident governors. The influence of the missionaries, however, is everywhere evident and in recent times the hospitals, schools and radio rooms indicate the impact of external cultures. One is also aware, not least in the use of some family names, of the presence in the community, in the past, of resident European traders.<sup>4</sup> In terms of influence on the life of the people

of Tokelau, the impact reflected in the situation there today is more like that on an isolated atoll of the Pacific (perhaps Ontong Java or Penrhyn) or village of a Pacific state, rather than as in a country such as Niue.

The Europeans also imported their form of wisdom—law. The varying degrees of influence caused by the introduction of that new intellectual tool form the topic of this paper.

## **Adoption of European law in Tokelau**

### ***By Tokelau***

In a broad sense, it can be said that European law, and in particular the common law of England, was adopted in Tokelau. The distinction to be made is perhaps between what was adopted *by* Tokelau and what was adopted *for* Tokelau. Specifically, however, Tokelau alone, of its own volition and by its own devices, adopted no foreign law until 4 November 1996 when for the first time it exercised its national legislative power to create two statutory corporations, TELETOK and TRANSTOK.<sup>5</sup> Since there was no concept of artificial legal personality within Tokelau culture, the power exercised on 4 November 1996 adopted the European fiction of corporate law to enable Tokelau to proceed in an efficient manner with internationally oriented business matters affecting its telephone system and maritime transport.

Tokelau might also be said to have adopted European law indirectly through its request for the grant of legislative power, and through its request for a rationalising of the sources of law that apply in Tokelau. In particular in relation to the sources of law, Tokelau requested the New Zealand Government to change the Tokelau Act 1948 and provide for sources of law in accordance broadly with the pattern adopted in Western Samoa.<sup>6</sup>

### ***For Tokelau***

By way of contrast, European law was adopted for Tokelau in a number of areas. In the first instance, this was done by way of exception, until 1969.<sup>7</sup> Following the Protectorate era,<sup>8</sup> during which there was no power to legislate for Tokelau,<sup>9</sup> the constitution of the Gilbert and Ellice Islands Colony provided that the Government could legislate for Tokelau (Union

Islands), but to the minimum extent consistent with the maintenance of local customs and traditions.<sup>10</sup>

Until 1969 there were laws made that related to the international community, and also some that were of internal concern. As far as Tokelau was concerned, the only ones of any possible consequence were those with the potential to operate internally, and these existed in the fields of public order, taxes, sea traffic and civil status registers.<sup>11</sup>

In the period after 1969, the theoretical situation was that in the absence of legislation the common law of England was the basic law of Tokelau. Technically this meant the abrogation of customary rules in a number of areas. In this period, there was also legislation dealing with external matters<sup>12</sup> and legislation that had internal impact. The matters of internal concern and matters that were largely known about within Tokelau were the legislation for the public service,<sup>13</sup> the civil status registers,<sup>14</sup> the marriage and divorce rules<sup>15</sup> (which were dysfunctional until the 1980s),<sup>16</sup> the public order provisions<sup>17</sup> (still dysfunctional), the land law<sup>18</sup> (which interestingly enough preserves the custom and tradition of Tokelau but does so by means of the introduction of the feudal concepts of English land law),<sup>19</sup> courts and judges,<sup>20</sup> and the sources of law themselves.<sup>21</sup>

### **‘Extension’ of law**

The difficulties of these adoptions for Tokelau become clear when an analysis is made of the critical sections of the Tokelau Act 1948 as they stood before August 1996. Section 4A<sup>22</sup> introduced to Tokelau ideas that are not unusual within the common law world, but whose meaning was far from clear. Roberts-Wray, for instance, discusses at least four possible meanings of the key phrases of section 4A.<sup>23</sup> In addition to the difficulties of interpretation, there are also practical questions relating to consistency with the Tokelau Act and applicability to the local circumstances, and there is also the historical task of discovering precisely the laws to which section 4A makes reference.

Section 6 of the Tokelau Act also provides for adoption, and appears on the face of it to be clear.<sup>24</sup> However, the expression ‘expressly extended’ proves in practice to raise difficult interpretation issues. Does ‘express’ require specific words indicating the extension, or is it sufficient that the

words and context generally indicate the extension? The difficulties are accentuated by the fact that the formula is often neglected,<sup>25</sup> and there are, of necessity, New Zealand laws that are relevant or apply to Tokelau where there is nothing expressed, but the necessary implication of Tokelau being part of New Zealand is that the laws must apply.<sup>26</sup>

Section 7, which deals with amendments and substitutions, brings problems of its own.<sup>27</sup> The first difficulty is: what is 'substitution'? Is it a piece of law that simply follows or takes the place of a previous piece of legislation,<sup>28</sup> or is it a piece of legislation that deals with the same topic and is intended to serve the same general or specific purpose as the first enactment?<sup>29</sup> There is also with this provision the difficulty of what is appropriate to the circumstances of Tokelau.<sup>30</sup> This leaves a very broad discretion to administrators and judges.

Another problem, thrown in sharp relief by the grant of the legislative power in 1996,<sup>31</sup> is the meaning of 'an Act in force in Tokelau'. Some Acts have been expressly extended by Parliament, but an equal number have been extended to Tokelau by way of regulation made under section 4 of the Tokelau Act. Do subsequent amendments extended by regulations to the Acts by the Parliament of New Zealand become law for Tokelau or, can changes in Tokelau law be made only by amendment of the regulation? The use of the section 4 power would typically provide a readier means of legislating for Tokelau, and also provide the opportunity for specific adaptation to local circumstance (as was done in a number of instances).<sup>32</sup>

Very frequently legislation is changed by Parliament without express thought being given to the needs of Tokelau.<sup>33</sup> In the case of Acts of Parliament expressly extended, this sometimes means rather curious results for the law of Tokelau, and in the case of Acts designated as applying in Tokelau by regulation, the result is that the content of a law in Tokelau becomes different with the passage of time from the content of what is ostensibly the same statute in New Zealand.<sup>34</sup> A clearer instance of this same phenomenon is provided by the laws of the Cook Islands and Niue, where New Zealand statutes apply, but have taken on a local life from the date of independence.<sup>35</sup>

The doctrine of separation of powers came to Tokelau with the adoption of the English law.<sup>36</sup> This has been most notable in the context of the judiciary. The notion is, however, largely inoperative in the Tokelau context, and the difficulties are reflected in the Tokelau Act by the relatively

high frequency of amendments relating to the judiciary<sup>37</sup> as the Government has sought to align the imported notion of separation of powers with the practice on the atolls. The law is that there is technically a separation of powers and judicial offices are independent.<sup>38</sup> The result, however, is something different and in Tokelau life, judicial functions are typically performed by the elders along traditional lines.

### **Impact of external law**

Much law adopted for Tokelau has an external aspect and most of that has functioned without difficulty, perhaps because its effect is external, and perhaps also because those external aspects are looked after by authorities outside Tokelau. There are, however, increasing concerns in Tokelau about treaty obligations: There have been repeated expressions of concern about the Treaty of Tokehega<sup>39</sup> since its ratification, and there are continuing concerns about the international human rights documents. The rights concerns mainly arise from uncertainty about the meaning and impact of these alien notions. As the flow of information improves, Tokelau seems largely content with the international norms, but has indicated that it is not happy that the first Optional Protocol to the International Covenant on Civil and Political Rights extends to Tokelau.<sup>40</sup> Such a role of an external authority is viewed as incompatible with the traditional system of government, and the role of elders within the Tokelau context.<sup>41</sup>

There have also been a number of external rules adopted for Tokelau, perhaps unknowingly by both Tokelau and New Zealand. One example is the use of the radio spectrum, which is largely unregulated in Tokelau,<sup>42</sup> while the New Zealand laws on the matter,<sup>43</sup> which comply with international requirements, do not expressly extend to Tokelau. Another example relates to the law of the sea, which has had significant impact on Tokelau albeit without being an express part of Tokelau law.<sup>44</sup>

### **The future of law**

The focus for the post-1996 era is to restore to Tokelau its freedom of government, and to return to a greater concentration of power than has been the experience at a national level in the recent past. The current mood—one

that is consistent with devolution in the development of self-government—favours the return, as far as possible, to Tokelau ideas.<sup>45</sup> This mood is evident everywhere—in current ceremonies, which are ever more frequently and proudly drawing on pre-European tradition; in the localising of personnel in government services; and in the response to challenges provided by the introduction of a telephone system. In this case, Tokelau rejected options that involved the ownership or management of the system by external authorities in favour of facing the challenge of operating the system with their own personnel resources.<sup>46</sup>

In the field of legislation, the goal is to clear the slate of inherited legislation that has never operated in Tokelau, that is unknown to the people of Tokelau, or that is inappropriate to the needs of Tokelau. There is a marked disinclination at present to adopt foreign rule systems or precedents unless the adoption is done with the full understanding of the nature of the import, and in no case is the adoption likely to be done without adaptation to meet local needs.

The law of the books shows very little legislation in terms of quantity, and most of that relates to administrative matters with, in some areas such as the law relating to persons and land, reference to custom. The remainder of the law is technically the common law of England.

The law in practice is something quite different; it is the custom of the villages in respect of most things. There is very little adopted law operating except in the field of administration. The Tokelau Public Service is run on an external model,<sup>47</sup> but beyond the legislation for the structure there is very little legislation governing it. The Service runs largely on the basis of administrative instructions from the State Services Commissioner.<sup>48</sup>

The future is likely to see legislation in the field of public order influenced by earlier adopted criminal laws and Tokelau experience. There is also likely to be no torts; personal injury by accident does not give rise to compensation in Tokelau custom, defamation is regarded as a matter of public order and therefore criminal, and trespass (with a different content from that of the common law) is regarded as a land matter and therefore governed by custom.

There is also likely to be legislation of minimum standards in a number of areas. These minimum standards are likely to adopt international criteria and will operate in the fields of health, safety and employment.

The adoption of foreign law is seen at this stage to be needed in those areas where there is contact with outsiders—for instance, with telephones and transport and the contracts that are necessary for their operation.<sup>49</sup> The communal exchange system of Tokelau tradition is not appropriate, and ill-adapted to deal with contracts needed in modern commercial life. It is foreseeable, therefore, that contracts legislation in the medium-term future will override the underlying common law, and provide basic rules in a simple and accessible form.<sup>50</sup>

There will also be a revision of the laws relating to financial matters, and an increase in sophistication of the laws in the fields of banking and audit.

## **Conclusion**

In the post-European era, the goal will be to restore Tokelau to a situation of health, wealth and wisdom. This requires an adjustment to the impact of some 150 years of external influences. There is a need to regulate diet and exercise in the new social environment, to balance budgets (money is needed to support health and education programmes), and to develop and maintain the technical skills needed to manage the new physical and government environment.

The development of self-government, particularly in the last few years, has brought a period of rapid change in Tokelau to adapt and develop the necessary skills and knowledge to enable the nation to cope with being itself again. Tokelau has realised and accepted that law of the imported variety is part of that context, but does not accept that law exactly as it was inherited from the colonial powers. Because the law adopted for Tokelau by the colonial powers is not extensive and has had little impact, the focus of the government in the 21st century can, in Tokelau, be more directed to this question of the role of imported law than is possible in most other Pacific nations.

*Leo*, in traditional Tokelau villages, was the voice of the elder speaking for the whole village to the ‘world’ beyond the polity, including to outsiders.<sup>51</sup> Amidst the changes facing Tokelau, it may be said that there is indeed now a new voice for the nation of Tokelau: a voice that speaks for all the people to the outside world. Hitherto, the microphone and sound system have been provided by New Zealand. From now on, New Zealand will be supplying the power source, but the sound will be coming from Tokelau.

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**Notes**

- 1 A Hooper, *Aid and dependency in a small Pacific territory* (University of Auckland, Department of Anthropology, Working Paper no. 62, 1982) p9.
- 2 AF Nessen (ed) *Migration and health in a small society: The case study of Tokelau* (Clarendon Press, Oxford, 1992) p50.
- 3 NZPD vol283, 1948: 3117–3119.
- 4 Perez, Pereira, and Pedro.
- 5 Telecommunication Tokelau Corporation Rules 1996, and the Telecom Transport Corporation Rules 1997.
- 6 The Constitution of Western Samoa 1960.
- 7 Tokelau Amendment Act 1969, No.3.
- 8 Tokelau was a British Protectorate, 1889–1916. In 1916 it became part of the Gilbert and Ellice Islands Colony, until 1926 when its administration was delegated to New Zealand.
- 9 The Pacific Order in Council, 1893.
- 10 Gilbert and Ellice Islands Order in Council, 1915.
- 11 Marriage Ordinance 1931, Tokelau Adoption Regulations 1966, Tokelau Copra Regulations 1952 and Tokelau Labour Ordinance 1935.
- 12 For example, the Commonwealth Countries Act 1977, Consular Privileges and Immunities Act 1971 and Diplomatic Privileges and Immunities Act 1968.
- 13 Tokelau Amendment Act 1967, No.38.
- 14 Tokelau Births and Deaths Registration Regulations 1969.
- 15 Tokelau Marriage Regulations 1969, Tokelau Divorce Regulations 1975.
- 16 Because jurisdiction was vested by Tokelau in the High Court by Tokelau law, but there was no such jurisdiction in the courts of Niue. See s3 of the Tokelau Amendment Act 1986.
- 17 Tokelau Crimes Regulations 1975.
- 18 Tokelau Amendment Act 1967, Part II.
- 19 S20 Tokelau Amendment Act 1967.
- 20 Tokelau Amendment Act 1986.
- 21 Tokelau Islands (New Zealand Laws) Regulations 1975.
- 22 The Tokelau Amendment Act 1969, No.3
- 23 Sir K Roberts-Wray, *Commonwealth and Colonial Law* (Stevens and Sons, London, 1966) p546.
- 24 Section 6 ‘Statute law of New Zealand not applicable to Tokelau— Except as otherwise expressly provided, the statute law of New Zealand, whether enacted before or after the commencement of this Act, shall not be in force in Tokelau.’

25 See the Tokelau Amendment Act 1948 itself, which does not expressly provide that it applies to Tokelau.

26 For example, the Constitution Act 1986.

27 Section 7 ‘When Act in force in Tokelau, amendments and regulations to be in force also—When any enactment of the Parliament of New Zealand is in force in Tokelau, every existing or future amendment of that enactment and all existing or future regulations, rules, Order in Council, and other acts of authority in force under any such enactment, and every Act passed in substitution for any such enactment shall, so far as applicable and with all necessary modifications, be or become also in force therein, except where otherwise expressly provided.’

28 For example, the Civil Aviation Act 1964 was expressly extended to Tokelau. It was repealed and replaced by the Civil Aviation Act 1990, which made no express reference to Tokelau, but did take the place of the previous legislation.

29 For example, the Official Secrets Act 1951 was expressly extended to Tokelau. However, can the Official Information Act 1982 (which was not expressly extended to Tokelau) be regarded as substituting the former?

30 End of s7.

31 Tokelau Amendment Act 1996, No.31.

32 See the Tokelau (New Zealand Laws) Regulations 1969 and 1975, Tokelau Crimes Regulations 1975 and the Tokelau Commissions of Inquiry Regulations 1991.

33 For example, the Official Information Act 1982 cannot operate in Tokelau, because the Ombudsman Act 1975 is not Tokelau law.

34 The Sea Carriage of Goods Act 1940 was extended to Tokelau by Tokelau (New Zealand Laws) Regulation 1969. Since then this Act has been repealed and replaced in New Zealand by the Maritime Transport Act 1994, without mention of Tokelau.

35 Article 77 of the Cook Islands Constitution Act 1964 and s71 of the Constitution of Niue 1974 provide that the New Zealand laws in force on the date of independence continue. Consequently legislation that originated from New Zealand now has three existing versions. For example, Niue has the 1974 version of the New Zealand Acts Interpretation Act 1924, which includes their own amendments, and some New Zealand amendments approved under s36 of their constitution. The Cook Islands have the 1964 version, with their own amendments and possibly some New Zealand amendments before they repealed their equivalent of s36. And New Zealand has its current version, last amended in 1996.

36 Tokelau Act 1948, s4B.

37 Tokelau Amendment Act 1970, Tokelau Amendment Act 1986 and Tokelau Amendment Act 1996.

38 Tokelau Amendment Act 1986 and 1996.

39 Most recently the matter was raised with the United Nations during the Visiting Mission in May 1994. See R Gordon, *Tokelau: A Collection of Documents and References Relating to Constitutional Development* (Tokelau Administration, Apia, 1995) p240.

40 This was the preliminary view expressed by the Special Constitutional Committee at its meeting at Nukunonu in March 1996.

41 The traditional view is that the final arbitrators on social norms within Tokelau culture are the elders. It is therefore not acceptable that an external authority should pronounce on, for instance, what is 'cruel and unusual punishment' in Tokelau.

42 See Tokelau Post Office Regulations 1991 as amended by Tokelau Post Office Amendment Rules 1996

43 The Telecommunications Act 1987/116 and the Radio communications Act 1989/148.

44 The Maritime Transport Act 1994 is not part of Tokelau law, but the *Tutolu* (a ship that runs between the atolls) is registered in New Zealand, so it is subject to certain sections under the Act.

45 United Nations Visiting Mission: Tokelau's Voice 'New Wind, New Water, New Sail—The Emerging Nation of Tokelau', in R Gordon, *Tokelau: A Collection of Documents*, (see note 39 above), p234.

46 A Angelo, 'Telephones and Law-making for Tokelau', [1997] *Canter LR*.

47 Tokelau Amendment Act 1967.

48 Section 8(2) Tokelau Amendment Act 1967. In 1993 the Commissioner delegated powers under s7 to two Tokelau public service commissioners.

49 For instance, the telephone system is managed by a corporation established on a standard international pattern, under the Tokelau Telecommunication Rules 1996. In respect of transport see Tokelau Transport Interim Board Rules 1996 and the Tokelau Shipping (Salvage) Regulations 1992.

50 For instance, the United Nations Convention on Contracts for the Sale of International Goods 1980 and the United Nations Commission on International Trade Law (UNCITRAL) or perhaps even the Australian Contract Code proposed by the LR Commission of Victoria in Discussion Paper No.27 (Melbourne, Australia, 1992).

51 Judith Huntsman 'Ghosts of hierarchy II: Transformations of the wider Tokelau polity' *History and Anthropology* (1994) 321–338, 322.

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