THE COMMON LAW IN NEW ZEALAND AND TOKELAU

A.H. Angelo*

I. INTRODUCTION

A. The purpose of this paper is to discuss, with specific reference to Tokelau, the reception of the Common Law, the feasibility of the use of language other than English in a Common law system and various aspects of the operation of the Common Law. The paper discusses each of these matters in turn: Part II addresses the reception of the Common Law in New Zealand and Tokelau, Part III deals with the language issues, and Part IV considers aspects of the Common Law system.

The paper suggests in the light of some current experiences with the developing law of Tokelau, that the Common Law is not specially suited as a system or body of law for a non-English culture or for functioning in a language other than English.

II. RECEPTION OF THE COMMON LAW

A. *New Zealand*

New Zealand became part of British sovereign territory in May 1840 as part of the Colony of New South Wales. This was made possible by letters patent issued on 15 June 1939 to Sir George Gipps Governor of New South Wales at the time of his reappointment as Governor-in-Chief of the Colony of New South Wales.

In May 1841 New Zealand was declared a separate British colony and, as far as the reception of the Common Law is concerned, appears to have been regarded as a colony acquired by settlement. If there were any doubts that New Zealand was subject to the laws of England, these were settled in 1858 by the English Laws Act[1] of the New Zealand Parliament which provided:

> 1. The laws of England as existing on the fourteenth day of January, one thousand eight hundred and forty, shall, so far as applicable to the cir cumstances of the said Colony of New Zealand, be deemed and taken to have been in force therein on and after that day, and shall continue to be therein applied in the administration of justice accordingly.

The overall effect of the British sovereignty was the abrogation in the medium term of virtually all non-Common Law rules. Specific provision was made in the Treaty of

---

* Professor of Law, Victoria University of Wellington. The author gratefully acknowledges the support of Victoria University of Wellington Internal Research Committee and the assistance of Andie Fong Toy LL.B. in the preparation of this paper.

1. The English Laws Act 1858 was superseded by the English Act 1908. The 1908 Act is a consolidation of certain enactments of the New Zealand Parliament relating to the adoption in New Zealand of certain of the laws of England and of the Acts of the Imperial Parliament.

Waitangi[2] for the protection of certain Maori rights and those rights have received renewed attention in the decisions of the recently established Waitangi Tribunal.[3]

The most important and obvious impact on customary law was in the field of Maori land[4] and that impact is still represented today in the existence of the Maori land court system. There was some provision for recognition of Maori custom in personal law matters.[5] Provision was also made in the New Zealand Constitution Act of 1852 for customary law areas to be declared in New Zealand. That rule[6] is still in force but has never been used.

---

2. Signed at Waitangi in the North Island on 6 February 1840 by Maori chiefs from the North Island and a representative of the British Government. The purpose of the Treaty was to cede the North Island of New Zealand to the United Kingdom, while preserving certain native rights. The Treaty of Waitangi is reproduced in the Waitangi Day Act 1976. *(Reprinted Statutes of New Zealand, vol 8)*

3. Treaty of Waitangi Act 1975

4 The first relevant statute was the Native Reserves Act 1856, the first land tribunal was established by the Native Lands Act 1862 The current statute is the Maori Affairs Act 1953

5 In the field of marriage, s 44 of the Marriage Ordinance of 1847 expressly provided that the provisions of the Ordinance did not apply to marriages between Maoris. This was continued in the successive Marriage Acts until 1951

Since 1951 the marriage of Maoris is to be celebrated in the same manner and its validity shall be determined by the same law, as if each of the parties was a European (s 8 Maori Purposes Act 1951)

Prior to the Native Land Act 1909, Maori adoptions were governed by custom After that Act all adoptions by Maoris were required to be effected by orders of adoption made by the Maori Land Court. (s.162 Native Land Act 1909).

The same law now applies to adoptions by Maoris and Europeans (s 18 Adoption Act 1955)

6. Section 71, New Zealand Constitution Act of 1852 (U K.) (1852-54) 15 and 16 Vict., C.72

And after reciting that it may be expedient that the laws, customs, and usages of the Aboriginal or native inhabitants of New Zealand, so far as they are not repugnant to the general principles of humanity, should for the present be maintained for the government of themselves, in all their relations to and dealings with each other, and that particular districts should be set apart within which such laws, customs, or usages should be so observed:

It is Enacted, LXXI. It shall be lawful for Her Majesty, by any letters patent to be issued under the great seal of the United Kingdom, from time to time to make provision for the purposes aforesaid, any repugnancy of any such native laws, customs, or usages to the law of England, or to any law, statute, or usage in force in New Zealand, or in any part thereof, in anywise notwithstanding.

The considerable interpretative difficulties to which the adoption of the English law formula gives rise are addressed at length in other contexts and will not be dealt with further here [7]

B. *Tokelau*

1. *General*

The particular concern of this paper is with the development and application of the Common Law in Tokelau [8] Tokelau consists of three small coral atolls which are well covered with coconut palms but otherwise relatively desolate and infertile They are occupied by approximately 1800 people who live in one of the single villages on each of the three islands

2 *Political History*

(a) Western Pacific High Commission.

By virtue of the Pacific Islanders Protection Acts (UK) of 1872 and 1875 and of the Foreign Jurisdiction Acts of (UK) of 1843 to 1875, the Western Pacific Order in Council of 1877[9] was made by the Queen in Council on 13 August 1877

This Order in Council was declared to apply to,[10] among other places in the Western Pacific Ocean, the Union Islands The Union Islands are modern Tokelau. The Order in Council established the High Commission for the Western Pacific and gave the High Commissioner's Court jurisdiction over British subjects[11] in the area Article 24 of the

---

7 E G Roberst-Wray op cit supra n 1 (especially 544 547 and 565-567)

8 The three islands of Tokelau are Fakaofo, Nukunonu and Atafu and they are situated between latitude 80 and 100 south and longitude 1710 to 1730 west, at about 550 kilometres north of Western Samoa

Fakaofo the southern most attol is 64 kilometres from Nukunonu, which in turn is 92 kilometres south of Atafu The Tokelau group is geographically and historically considered to include a fourth island, Swains Island now formally part of American Samoa and known locally as Olohega.

9 *Hertslets Treaties*, vol IX, 871

10 Article 5

11 Western Pacific Order in Council 1877, *Hertslets Treaties* vol 14, 871

6 This Order applies to (1) All British subjects for the time being within the Western Pacific Islands, whether resident or not. (2) All British vessels for the time being within the waters mentioned in Article 5 of this Order (3) Foreigners, in the case, and according to the conditions in this Order specified, but not otherwise

Article 7Establishment of High Commission for the Western Pacific There is hereby created and constituted, from the date of this Order, the office of High Commissioner in, over, and for the Western Pacific Islands, and the person from the time being filling that office shall be styled Her Britannic Majesty's High Commissioner for the Western Pacific (and is in this Order referred to as the High Commissioner)

Order gave the High Commissioner power to make regulations for the government of British subjects or 'for securing the maintenance (as far as regards the conduct of British subjects) of friendly relations between British subjects and those authorities and persons subject to them'. The first legislation which was reasonably specific to Tokelau was made under that authority in 1884 and was the Arms Regulation No.1 of 1884.[12]

As far as Tokelau was concerned there was a very low level of legislative activity until 1908. There were only eleven short pieces of legislation and many of those were simply the repeal and reenactment of rules on the same topics - principally arms and liquor control. A somewhat greater variety came at the end of the century with provision for the registration of births, deaths and marriages, the control of contracts made with native peoples, native lands and wireless telegraphy.

During the 19th century the British Government had used its Admiralty jurisdiction to control criminal activities in the area. The significant development was however the Western Pacific Order in Council of 1877. For people within its jurisdiction it had extensive provisions for criminal and civil procedure and in articles 88 and following, dealt also with Admiralty jurisdiction, bankruptcy matters, lunacy jurisdiction, probate and the administration of property on death. Provisions were expressly made for the application of English law to a number of these situations.[13]

Article 12, Establishment of High Commissioner's Court: There shall be a Court styled Her Britannic Majesty's High Commissioner's Court for the Western Pacific (in this Order referred to as the High Commissioner's Court)

Article 17 Jurisdiction of High Commissioner's Court: All Her Majesty's jurisdiction, exercisable in the Western Pacific Islands in criminal and civil matters, shall, subject and according to the provisions of this Order, be vested in and exercised by the High Commissioner's Court.

12. *Fiji Royal Gazette* 1884, 87

13 E g Admiralty Jurisdiction 90 The Court by a judicial commissioner shall be a Court of Vice-Admiralty

Bankruptcy Matters 91 The Court shall be a Court of Bankruptcy, and as such shall, as far as circumstances admit, have, with respect to resident British subjects, and to their debtors and creditors, being either resident British subjects or foreigners submitting to the jurisdiction of the Court, all such jurisdiction as for the time being belongs to the Court of Bankruptcy and the County Courts in England, or to any other judicial authority having for the time being jurisdiction in Bankruptcy in England.

Lunancy Jurisdiction 92.The Court, by a judicial commissioner shall, as far as circumstances admit, have in itself exclusively for and within the Western Pacific Islands, with respect to resident British subjects, all such jurisdiction relative to the custody and management of the persons and estates of persons of unsound mind as for the time being belongs to the Lord Chancellor or other person or persons in England intrusted by virtue of the Queen's signmanual with the care and commitment of the custody of the persons and estates of persons found by inquisition in England, idiot, lunatic, or of unsound mind.

Probate, Administration of Property on Death: 94. The Court, by a judicial commissioner, shall be a Court of Probate, and as such shall, as far as circumstances admit, have for and within the Western Pacific Islands, with respect to the property of deceased resident British subjects, all such

In terms of Common Law principle it is noteworthy that there were many a typical provisions in the Order.[14] Considerable emphasis is placed in the Order on arbitration and conciliation procedures.[15] Article 133 gives a good indication as to the difference of approach in this region from that otherwise to be anticipated in a Common Law system.

> 133. In criminal matters, where all parties concerned are British subjects, the Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings taken for assault or for any other offence not amounting to felony and being of a private or personal character, on terms of payment of compensation or other terms approved by the Court, and may thereupon order the proceedings to be stayed.

Also of interest but perhaps less extreme than Article 133 is the provision for civil conciliation in article 134.[16] The procedure envisaged is certainly not an adversarial one

---

jurisdiction as for the time being belongs to Her Majesty's High Court of Justice in England in cases of probate

14 Refusal of Proceedings 56 The Court may in any case, if it thinks fit, refuse to allow a civil action or proceeding to be brought or taken in the Court if, in the opinion of the High Commissioner, the attendance of the Chief Justice, or of another judge of the Supreme Court, or the appointment of a judicial commissioner for the hearing of the action or proceeding, is impracticable or would be inconvenient - or the place at which the action or proceeding is proposed to be brought or taken would be inconvenient - or there is no sufficient provision for defraying the fees and expenses of the Court

(2) The Court may in any case, if it thinks fit, refuse to allow a civil action or proceeding to be brought or taken in the Court unless security to the satisfaction of the Court is first given, by deposit or otherwise, for the fees and expenses of the Court.

15 Provision for Arbitration 131 The Court may, with consent of the parties, refer to arbitration the final determination of any action pending, or of all matters in difference between the parties, on such terms and with such directions as to appointment of an arbitrator and other things as the Court thinks fit, with or without security from the parties, or any of them, that they will abide by the result of the reference

(2.) In any such case the award shall be final and conclusive

(3.) On the application of any party a decree of the Court may be entered in conformity with the award, and the decree shall not be open to appeal or rehearing.

(132) Every agreement for reference to arbitration or submission to arbitration by consent, between or by British subjects may, on the application of any party, be made a rule of the Court.

(2.) The Court shall thereupon have authority to enforce the agreement or submission and the award made thereunder and to control and regulate the proceedings before and after the award, in such manner and on such terms as the Court thinks just

16. 134. In civil matters, the Court and its officers shall, as far as there is proper opportunity, promote reconciliation among persons over whom the Court has jurisdiction, and encourage and facilitate the settlement in an amicable way, and without recourse to litigation, of differences among them.

and the aloofness or remoteness of the typical Common Law Judge from the parties is certainly not a feature contemplated by this piece of legislation. Theoretically the Order did not affect Tokelauans unless they came voluntarily within the jurisdiction of the High Commissioner's Court by virtue of a provision such as article 145.[17]

The Pacific Order in Council, 1893 repealed and replaced the 1877 Order; it also applied to Tokelau. By 1893 there had been formal declarations of protectorate status made in each atoll[18] and the system of 1877 by and large was continued after 1893 in a stronger form. Some of the procedural flexibility of the 1877 Order was lost but the main thrust of the new Order was similar to that of the 1877 one.[19]

Through to 1909 it appears that the general spirit of the protectorate system was still being honoured in respect of Tokelau and the main area of operation of the Western Pacific High Commission legislation was in respect of British subjects and matters of particular concern to the British administrators such as merchant shipping, quarantine, arms and liquor control.

(2.) When a civil proceeding is pending, the Court may promote reconciliation among the parties thereto, and encourage and facilitate the amicable settlement thereof.

17. 145. Where a foreigner desires to bring in the Court an action against a British subject, - or a British subject desires to bring in the Court an action against a foreigner, - the Court shall entertain the same, and shall hear and determine it.

18. In 1889 Commander Oldham of H.M.S. "Egeria," landed at each of the three northern atolls and officially raised the Union Jack, declaring the group to be a protectorate of Great Britain:

Report on the Administration of Tokelau by the Minister of Island Territories to both Houses of the General Assembly, 1948, New Zealand Appendix to the Journals of H. of R. Vol. 1, 1948 A-4A.

19. E.g. Article 34: The Court may promote reconciliation, and encourage and facilitate the settlement in an amicable way of any suit or proceeding pending before it.

The Court may, with the consent of the parties, refer to arbitration the final determination of any suit or proceeding pending before it, or of all matters in difference between the parties, on such terms and with such directions as to appointment of an arbitrator and other things as may seem fit, and may, if it thinks fit, take from the parties, or any of them, security to abide by the result of the reference.

In any such case the award shall be final and conclusive.

On the application of any party a decree of the Court may be entered in conformity with the award, and such decree shall not be open to any appeal or rehearing whatever, except on the ground that it is not in conformity with the award.

Every agreement for reference to arbitration or submission to arbitration by consent may, on the application of any party, be made a rule of a Court having jurisdiction in the matter of the reference or submission, which Court shall thereupon have power and authority to enforce the agreement or submission and the award made thereunder, and to control and regulate the proceedings before and after the award in such manner and on such terms as may be just.

(b) Gilbert and Ellice Islands Protectorate

A step to a new law future was taken by the Gilbert and Ellice (Union Group) Regulation No.7 of 1909.[20] This regulation extended all existing Gilbert and Ellice Islands legislation to Tokelau and provided that for the future all Gilbert and Ellice Islands Protectorate Regulations should also apply to Tokelau.[21] The fate of Tokelau and the Gilbert and Ellice Islands Protectorate was in terms of legislation then a common one until the forming of the Gilbert and Ellice Islands Colony on 12 January 1916.[22] On 5 May 1916 a further Order in Council added the three atolls of Tokelau to the Gilbert and Ellice Islands Colony.[23]

The volume of legislation of Tokelau and the Gilbert and Ellice Islands Protectorate increased markedly in the period between 1909 and 1916. The law continued to be concerned with British interests and revenue and shipping but extended into new areas such as plant import regulation, protection of birds, and sale of food. Perhaps the most interesting development of this period was the publication in 1914 of the *Native Laws of the Union Group 1912* by the Government Printer in Fiji. This followed the earlier publication of native laws for the Gilbert Islands and for the Ellice Islands.[24]

Whether these rules were ever law for Tokelau is a moot question. They were, however, more important than any other published rules of Tokelau, because they were bilingual, English and Samoan,[25] and they dealt with the customary system of the atolls. They reflected to a small degree the administrative presence of the British but did not reflect the Common Law. The rules recognized the native customary authorities as the prime authority for internal government, they provided for an administrative link between the head on each island and the British authorities, and also set up a rudimentary court system to deal with criminal offending and civil matters. A village clerk was required to keep books and accounts, and the meetings of the elders and the holding of courts were provided for a broad outline. A rudimentary criminal procedure was also established; the procedure was an inquisitorial one.[26] Following the constitutional clauses of the text

---

20. *Fiji Royal Gazette* 1909, 1065.

21. The effect was to make the following law for Tokelau - The Gilbert and Ellice Islands Protectorate (Consolidation) Regulation 1908, No.3 of 1908; The (Merchant Shipping) Fees Regulation 1909, No.3 of 1909; The Distillation (Prohibition) Regulation 1909, No.5 of 1909; The Gilbert and Ellice (Quarantine) Regulation 1909, No.6 of 1909.

22. Gilbert and Ellice Islands Order in Council 191 S.R. and O 1948 Volume IX, 655.

23. Order in Council Annexing the Union Islands to the Gilbert and Ellice Islands Colony S.R. and O. 1948 volume IX, 661.

24. 1894.

25. The missionary language of Tokelau.

26. **VII. THE HOLDING OF COURTS.**

1. The Magistrate and Vaipuli may hold a Court at any time and decide a case.

2. Small offences committed during the month may stand over for punishment until the monthly meeting.

there was a brief criminal code. The offences listed were murder, assault, theft, adultery, rape, fornication, exchanging wives, carrying fire, threatening or abusive language, slander, drunkenness, wrongful dealing with coconut palms, restrictions on boarding visiting steamers, possession of firearms without a licence, observance of the Lord's day and school attendance. The punishments, which had a particular local flavour, were also listed. In most cases male offenders had to perform community work and female offenders were employed in the making of various handicraft artifacts. Fines could be paid according to an established comparative rate, by way of coconuts.[27] The rules also required obedience by the people to the elders[28] and good land use.[29]

Beyond the fact that the Native Laws envisaged the promulgation of rules and an ordered system, there was nothing very unTokelauan about the rules of principles themselves. The obvious legal features were those common to any legal culture and certainly would

---

3. No case shall be decided in the absence of the person charged.

4. The policemen shall see that the person complained of, the person complaining, and the witnesses, attend together before the magistrate.

5. The Magistrate and Vaipuli shall first hear what the complainant, or the policemen, with the witnesses, may have to say.

6. The Magistrate shall then ask the person charged what he has to say, and, if he wants anyone who has not already given evidence to speak, the Magistrate shall then hear that person if he knows anything of the matter.

7. The Magistrate may question the witnesses as he thinks proper.

8. Having heard all the evidence, and the person charged, and consulted with the Vaipuli the Magistrate shall give his decision.

Vaipuli = Faipule.

27. Laws No.XIV - FINES.

2. When a Magistrate is satisfied that a person convicted of an offence cannot pay the fine inflicted in money, he may order that it be paid in coconuts at the following rates:-

75	Coconuts are equal to	One shilling (25 cents)		
3000	"	"	"	Four shillings (1 dollar)
6000	"	"	"	Eight shillings (2 ollars)
9000	"	"	"	Twelve shillings (3 dollars)
1500	"	"	"	One Pound (5 dollars).

3. This is the rate at which coconuts may be taken as fines; it is not a rate for trading between foreigners and natives.

$ = Chilean dollar.

28. LAW No.XIX.

29. LAW No.XVIII.

not be seen to reflect a specific Common Law influence. Speculating as to the source of the various rules it might be said that many of them reflect the strong Christian influence in the atolls and the existing nature of the village administrative system and power structure.

Until 1916, Tokelau had therefore a minimal contact with law in the Western sense and for language and cultural reasons the law of the protecting power was irrelevant to daily life.

(c) Gilbert and Ellice Islands Colony

The Order in Council which established the Gilbert and Ellice Islands Colony gave specific legislative power for the Colony but did not provide for the general extension of English Law to the Colony. The provision was in fact to the opposite effect. There was power for the Government to legislate in all areas but there was to be specific respect for native laws and customs. That is to say legislation was to be made compatibly with the local conditions and only to the extent necessary for the proper administration of the colony.[30]

Tokelau remained in the Gilbert and Ellice Islands Colony until 11 February 1926.

During that colonial period, laws were made with significant local impact - there were laws for jails and prisons, there were weights and measures laws, a licensing system was introduced, as was a capitation tax, control of medical practitioners, restriction on the importation of dogs, liquor control, currency control, regulation of native passenger traffic, guano control, prohibition of use of explosives, exclusion of undesirables,

---

30. Gilbert and Ellice Islands Order in Council 1915, *S.R and O* 1948, vol. IX, 655.

> VIII. In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may, amongst other things, from time to time, by Ordinance, provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of the Colony, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace Provided as follows -
>
> (1) That nothing in any such Ordinance or Ordinances contained shall take away or affect any rights secured to any native in the Colony by any treaties or agreements made on behalf or with the sanction of Her late Majesty Queen Victoria, His late Majesty King Edward the Seventh, or of His Majesty, and all such treaties and agreement shall be and remain operative and in force, and all pledges and undertakings therein contained shall remain mutually binding on all parties to the same.
>
> (2) That all laws, King's Regulations, By-laws, and Regulations of whatsoever nature in force in the Gilbert and Ellice Islands at the date of the commencement of this Order shall continue in force in the Colony until repealed, revoked, or amended by or in pursuance of any Ordinance passed by the High Commissioner.
>
> (3) That the High Commissioner, in making Ordinance, shall respect any native laws and customs by which the civil relations of any native chiefs, tribes, or populations under His Majesty's protection are now regulated, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction, or clearly injurious to the welfare of the said natives.

divorce, and provision for the reciprocal enforcement of judgments, the protection of native lands, death and fire inquiries, and the immigration of aliens.[31]

(b) New Zealand Administration

In 1926 political control over Tokelau shifted to New Zealand. New Zealand administered Tokelau on behalf of the British Government through the Administrator of Western Samoa who was based in Apia. The relevant Order in Council of 1926[32] provided for the continuance in force of the existing laws and gave the Governor-General of New Zealand the power to legislate for the peace, order, and good government of Tokelau. Still, for reasons of local culture, language and geographical isolation, there was no impact of Common Law within the territory. During the period of New Zealand administration there were only five pieces of legislation promulgated, none of them advanced the Common Law role in any way and while some, such as the Declaration of the Port of Apia as the port of entry for Tokelau,[33] had administrative importance, there was no great significance in any of the others.[34]

(c) Tokelau - Part of New Zealand.

The latest step in the development of the situation in Tokelau occurred on 1 January 1949 when by virtue of an agreement between the United Kingdom and New Zealand, and the effect of the Tokelau Act 1948, Tokelau became part of New Zealand.[35] Tokelau was at

---

31. E.g. Gilbert and Ellice Islands (Consolidation) Ordinance, 1917.

32. Union Islands (No.2) Order in Council, 1925. New Zealand Gazette, 11 February 398.

> **II.** The Governor-General in Council is hereby authorized and empowered to make all such laws, rules, and regulations as may lawfully be made by His Majesty's authority for the peace, order, and good government of the said Islands, and it shall be lawful for the Governor-General in Council to delegate the said authority and power to the Administrator of the Territory of Western Samoa or some other fit officer, as the Governor-General in Council may determine.
>
> **III.** The said Administrator or other officer shall exercise the authority and power delegated to him as aforesaid, subject to any instructions which he may from time to time receive from the Governor-General in Council, and any laws, rules, or regulations made by him in pursuance of such delegated authority and power shall be subject to disallowance by the Governor-General in Council.
>
> **IV.** All laws in force in the Union Islands at the time when this Order shall take effect shall continue in operation until repealed or altered by laws, rules, or regulations made as herein provided, and all powers and authorities which by such laws as aforesaid are vested in the High Commissioner for the Western Pacific and officers appointed by him shall be vested in and exerciseable by the Governor-General and the officers appointed by him.

33. Port of Apia Deemed Port of Entry for Union Islands Ordinance, *Western Samoa Gazette* Supplement, No.1 4 March 1941, 805.

34. E.g. Tokelau Nomenclature Ordinance, 1946. *Western Samoa Gazette* Supplement, 1946, 967.

35. Section 3, Tokelau Act 1948: The Tokelau Islands are hereby declared to be part of New Zealand.

that stage still living under custom and a limited amount of legislation from the Gilbert and Ellice Islands Colony era. Without doubt the most important piece of legislation from that era was the native Laws Ordinance of 1917;[36] its significant features were the embodiment in legislation of the constitutional system of the villages themselves, not the granting of a peculiarly Common Law system to Tokelau.

The new status of 1949 did not outwardly make any great change in the system of government of Tokelau, and there was no great change in the volume of legislation for Tokelau or in the range of the legislation that was made. In 1949 the Tokelau Administration Regulations[37] provided for administrative control by the Government over the islands. There were census regulations[38] provided in 1951 and emigration controls[39] and copra production regulations in 1952.[40] Customary adoptions procedures were abrogated in 1966[41] and a registration system for adoption put in their place - the regulations show some taking of account of local circumstance and include the power for an adoption to be cancelled. The Tokelau Amendment Act 1967 saw the establishment of a service commission for civil servants working for the Tokelau Administration, and also the move from subsidiary legislation to the Tokelau Act of the protection of all Tokelau land and the reservation of decisions, on the determination of rights over the land, to the customs and usages of the Tokelauan inhabitants of Tokelau.[42]

The Common Law had no impact for anyone in Tokelau. It was only with the Tokelau Amendment Act 1969 that there was theoretically a change in the position. By virtue of that Act a new section[43] was added to the Tokelau Act. Its precise relation to the other sections in the Act relating to sources of law was not then, nor at any subsequent time, indicated. The most obvious and likely effect was that it reduced section 5 of the Act[44] - that may well have included the customary laws of Tokelau - from a provision of great importance to one of very little importance. Section 4A was introduced into the Tokelau

---

36. *Western Pacific High Commission Gazette* 1917, 39. It repealed The Gilbert and Ellice Islands (Native Laws) Regulation 1912.

37. Current regulations are the Tokelau Administration Regulations 1980, SR 1980/189.

38. Current regulations are the Tokelau Census Regulations 1961, SR 1961/88.

39. Tokelau Departure Regulations 1952, SR 1952/21.

40. Tokelau Copra Regulations 1952, SR 1952/43.

41. Tokelau Adoption Regulations 1966, SR 1966/160.

    3. Adoption by Tokelauan custom invalid - No adoption by Tokelauan custom, whether made before or after the making of these regulations shall be of any force or effect, whether in respect of intestate succession or otherwise.

42. Section 20, Tokelau Amendment Act 1967, (reprinted in *N.Z Statutes* 1976, vol.5.)

43. Section 4A.

44. 5. Existing Laws to continue in force - No adoption by Tokelauan custom, whether made before or after the making of these regulations shall be of any force or effect, whether in respect of intestate succession or otherwise.

Act 1948 by a reform move which was said to be motivated by a desire to make Tokelau the same as New Zealand in respect of its basic law.[45] Section 4A[46] says:

> The law of England as existing on the 14th day of January in the year 1840 (being the year in which the Colony of New Zealand was established) shall be in force in Tokelau, save so far as inconsistent with this Act or inapplicable to the circumstances of Tokelau:
>
> Provided that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said 14th day of January in the year 1840 shall be in force in Tokelau, unless and except so far as it is in force in New Zealand at the commencement of this section.

In November 1970 the Tokelau Amendment Act 1970 was passed and it provided in section 12, among other things, for the repeal of the Native Laws Ordinance 1917. The Amendment Act provided additionally for a specific court structure for Tokelau and was complemented, by the time it came in force on 1 December 1975, by the Tokelau Crimes Regulation 1975 and the Tokelau Divorce Regulations 1975.

Customary law had, by 1975, been abrogated in all significant areas other than land matters. There was therefore by 1975, as a result of the 1969 and 1970 Amendment Acts, great theoretical scope for the operation of Common Law in Tokelau. That was not to be the effect however. The same reasons that had militated against the application of Common Law in a real sense, in Tokelau, at earlier stages in its contact with European powers, continued to operate - geographical isolation, the lack of access to the law (whether legislation or case law) and the strength of a customary system within a homogeneous community.

Since 1975 there has been very little change in the legal situation at a theoretical level. There have been very few pieces of subordinate legislation made for Tokelau and only a handful of New Zealand statutes extended to Tokelau.[47] The last decade has however

---

45. Clause 3 puts the laws of the Tokelau Islands on the same footing as the laws of New Zealand. It provides that where no specific provision is made in the Tokelau Islands laws then the law of England is applicable according to the particular circumstances and evidence available. The equivalent New Zealand law is contained in section 2 of the English Laws Act 1908.

    Speech by Hon. J. Hanan. (Minister of Island Affairs) N.Z. Parliamentary debates vol.360, 1969; p.481.

46. Section 4A provides for the law of England to be a source of law for Tokelau. In order of importance s.4A provides for three elements: The statute law of England, and secondly Common Law and Equity. Several criteria need to be satisfied for s.4A to be effective. The first is that the law of England applicable is the law of England of 14 January 1840, secondly that law must not be inconsistent with the Tokelau Act 1948, thirdly it must not be inapplicable to the circumstances of Tokelau. Fourthly, in the case of an English statute an Imperial Laws Application Bill is currently before Parliament. It is almost inconceivable that any English Act of pre-January 1840 vintage should be enforced in Tokelau; it would be inapplicable to the circumstances of Tokelau - three small isolated communities whose daily life was unaffected by law.

47. Most of them in rather specific constitutional or commercial areas (e.g. the Royal Titles Act 1974, the Trade Marks Act 1953 and the Patents Act 1953.

seen a number of changes in Tokelau which have the potential to greatly affect legal attitudes. English is now being taught in the schools and is therefore widely known and understood by members of the younger generation. And transport and communication has improved to the point where relatively large numbers of Tokelauans travel outside of the islands.[48] Contemporaneously with the opening up of the communities to the outside world there has been greater access to many of the material advantages of the Western cultural system - improved building systems, good health services, a comprehensive education system; and there has been a flow of money which has markedly increased the speed of the move from a subsistence to a money economy.

All these things, whether necessary or otherwise, have led to a call for law. The communities have been surprised to learn over the last five years that in fact there is a body of law which applies to them. Most surprising of all for them is the fact that it has existed without their knowing of it, that much of it is contrary to their daily habits and their desires, and further that the much vaunted superiority of law over custom, appears to be contradicted by the fact that most of the laws which apply to Tokelau[49] are not in a legislative form but are in a very inaccessible state. Many of the problems experienced by Tokelau with custom concern dealing with people from outside communities. Custom is by its unwritten and inaccessible nature inadequate to deal with such a situation. The law that is being presented to them - the Common Law - is just as inaccessible.

Because of section 4A of the Tokelau Act 1948 and because Tokelau is part of New Zealand, Tokelau is presumably categorised as a Common Law jurisdiction. That description is inaccurate at any other than a nominal level. In metropolitan New Zealand the Common Law can be seen to be a functioning reality, that is, it provides the system and the body of rules which regualte the lives of the citizens. In Tokelau, the sources and rules of the Common Law are not known and the rules that do function there are those that reflect the local culture .

III. THE LANGUAGE OF THE LEGAL SYSTEM

A. *General*

The fact that the Common Law is not functioning in Tokelau does not of course prove its lack of suitability to the Tokelauan situation. It may well be argued that whatever legal cultural system was imported from outside might be ineffective because of the strength of custom. The cultural gap in a community like Tokelau is in respect of the concept of law itself. If law is seen to mean, in a Western positivist sense, a system of present rules which are justiciable in case of challenge before an independent tribunal, then there is little or no understanding of that concept.

Once over the hurdle presented by the Western concept of law there is the hurdle of language and though the English language, the vehicle of the Common Law, is in world terms one of the most accessible languages, it is not, by comparison for instance with a language like French, an easy law language. It is replete with words and meanings for words which are accessible only to those who are specially trained in the law. If these first two hurdles - the concept of law and Law English - are successfully cleared, the

48. Principally to Western Samoa and New Zealand.

49. By virtue of s.4A of the Tokelau Act 1948.

third one is the fact that the Common Law itself is not accessible.[50] How does a person in Tokelau discover what the Common Law of England is at any time, let alone 14 January 1840? The Common Law of the cases is voluminous and scattered. And the relationship of the case law to legislation is such that legislation is typically confined to very narrow subject areas and expressed in detailed language.

The English language and the Common Law go hand in hand. The experience of the Tokelau Law Project[51] since 1981 with the Tokelau system would suggest that the Common Law cannot be readily dealt with in a language other than English. The success of the Common Law in a non-English language setting depends very much on who is seen to be the audience for the law. If it is the community at large then the law is likely to be unsuccessful. If however the law is primarily the concern of the administrators then there are a number of examples which would suggest that the Common Law can survive in the foreign environment. As a basic requirement it would seem that the Common Law should be supported by an English speaking governing elite and possibly by a professional group of people who have a commitment to the maintenance of the Common Law system. The Common Law will then be functional by sheer force of status and will, with a receptive non-English speaking community, eventually be absorbed into the language and culture of that community.[52]

In the case of Tokelau the administrators were English speaking but they were expatriate and for the most part non-resident. If there had therefore been a need to apply Common Law there would have been nobody there to do it. As far as local administration was concerned, there was some impact through texts like the Native Laws Ordinance 1917 but that was through the use of the Samoan language and in respect of matters which did not bear a specific Common Law flavour. As far as the bulk of the people were

---

50. The notion of translating a law conjures up the idea of a legislative or other text that is a pure statement of law. Translating a decision of the House of Lords is of a different nature.

51. The Tokelau Law Project began in 1981 under the aegis of the Tokelau Administration. Its terms of reference were:

    1. To prepare a statement of the law presently in force in Tokelau.

    2. To provide, by way of commentary or otherwise, the basis for a consolidated edition of the legislation in force in Tokelau; to indicate any legislative change of way of repeal, amendment, or addition necessary for the legislation -

    (a) accurately to reflect the present constitutional and legal structure of Tokelau;
    (b) to be internally consistent.

    3. To report on the revision and reform of the Tokelau legislation with a view to the production of a systematic text in the nature of a revised Laws of Tokelau for the ready reference and use of those concerned with Tokelau law.

    4. To investigate Tokelau custom with a view to its recognition by or incorporation in legislation where appropriate.

52. E.g. Mauritius.

concerned, Tokelauan was the vernacular and the only set of rules accessible in that language was village custom.[53]

The law of Tokelau still has a distinctive folk quality. The Common Law role is insignificant; culturally the community goes its own way. With an accepted need for law in Tokelau there has been a desire over the last five years to provide rules in legislation. Where the rules are promulgated in English (as to date they all have been) there is a political necessity to translate some Common law concepts into Tokelauan.

If the goal is communication then the task is an almost impossible one simply because the English legal ideas are very specific to their English historical context and the development of the Common law itself. A prime example of this is of course the notions of trust and Equity. Even at the level of functional equivalence, which is the current translation goal in Tokelau, the task is exceedingly difficult and in most cases the elders have chosen to develop new rules specific to Tokelau which are understood and which can be administered easily by them rather than to seek to grapple with an alien idea which has no cultural link with the territory.

Trust and Equity are matters of difficulty which have not yet arisen. More commonly encountered problems are in the field of property generally and in matters of procedure and evidence. The Common Law attitude to property and rights in property do not fit easily into a community where individual ownership of land is not known and the individual ownership of chattels of value is only coming to be known. Tokelau does not have a jury system and as a consequence does not have the highly developed system of evidence and proof of the Common Law and equally has no range of language with which to describe the complex ideas of the Common Law rules of evidence. The Common Law would be much easier to translate if its language were less specific to the English situation.

Another feature of the translation of the Common Law is the nature of the official text. If there is an official English text the law will be good for the elite who understand it but will not communicate or relate to the non-English speakers. On the other hand if the text

---

53. E.g. the Native Laws Ordinance 1917 provided for incest *(holikaiga)* in Law No.7: The punishment for incest is imprisonment with hard labour for not less than two years and not exceeding five years.

Hunstman and Hooper 'The Descecration of Tokelau Kinship' (1976) 85 *J Poly. Soc.* 257, 271-272 describe how the Tokelauan and Common Law concepts of incest differed:

Incest, translated as *mataifale* in the Samoan version of the laws which reached the Tokelaus, was made punishable by imprisonment with hard labour for between two and five years. Although the Ordinance did not define *mataifale* the legal situation was that Common law prevailed, prohibiting "carnal connection" between parent and child, brother and sister and grandparent and grandchild.

The extent to which this legal situation was known in the atolls is uncertain. According to some informants the Ordinance during the early years following its promulgation was interpreted locally as preventing marriages between kinsmen related *i te tolu o tupulaga* 'in the third generation'; that is, second cousins. But however much this interpretation might have accorded with the contemporary ideology of *kaiga*, it cannot have been common for many years, since a number of still extant marriages between second cousins date from the early 1920s. (According to other contemporary informants the Ordinance was interpreted as preventing marriages only between those related as first cousins or closer.)

is official, or solely, in some language other than English, the rule is likely to take on a different content influenced by the language connotations of the target language. To take the example of assault: if the functional equivalent of the English word assault is a word which describes an action or an event which is characterised by physical contact and physical hurt or damage,[54] there is either a substantive loss in the law or, in addition to the provision for assault with that bodily harm connotation, another offence (new in the target language) will have to be created or established to provide for the English connotation not covered by the first translation.

There are many historical examples of the adoption into a foreign language and culture of a Western legal system. Some of those examples are more dramatic than others.[55] Success in each case would seem to depend on the degree of conviction and persistence of the ruling authorities. This is evidenced not only by the societies where there is the Common law in a language other than English but also negatively by the absence of any jurisdiction whether English speaking or not where the Common Law is the ruling legal culture by virtue of the free choice of the community.[56]

In Japan in the 19th century the endeavours of Mitsukuri provide an example of one pattern of translation of foreign law for a different culture. The result of that exercise was that Japan had to learn a new language. At the time of the translation, the legal texts with their new words, new concepts and new methodology were as foreign to most Japanese citizens as if they had been written in a foreign language.[57]

A more recent and interesting example is that of the move towards increased "Malayanisaiton" of the legal system in Malaysia. There the government is using the Common Law but dealing with it in Malay. A study of the statutes shows that in a large number of cases there has been no real translation of the English terms into Malay but rather a Malay adaptation of the English concepts, and the presentation of them in the Malay text as Malay words. The lawyers are bilingual and are trained in the Common Law. For them the Malay text is comprehensible, but it is comprehensible not because they speak Malay but because they speak English and understand the English legal system. It will conceivably be several generations before the English words take on a true life in the foreign language. Their content is determined for the time being by the Common Law in English.

A similar pattern was adopted in New Zealand in 1858 with the publication of the bilingual text of *The Laws of England compiled and translated into the Maori Language by direction of His Excellency Colonel Thomas Gore Browne, the Governor of New Zealand.* According to the Preface the book was prepared with a view to:

> [P]lacing in the hands of Her Majesty's subjects of the Maori Race such information, with respect to the Laws and Institutions of the Nation into which they have been incorporated, as may be found practicably useful in their present stage of civilisation.

---

54. In Tokelauan *fakaokolim* means hurt or damage resulting from physical contact but does not encompass the English law notion of emotional disturbance unaccompanied by external injury.

55. E.g. Turkey.

56. E.g. Japan and Ethiopia had a choice but chose Romanist models.

57. See Y. Noda, *Introduction to Japanese Law* (University of Tokyo Press, Tokyo, 1976) 43-44.

> From the nature of the subject treated it was only to be expected that considerable difficulty would be found in the attempt to present in an intelligible manner the precise definitions, nice distinctions, and technicalities of the Law, through the medium of a rude language, which, though far from poor in expression or defective in structure, is better adapted for narration or description of natural objects, than for dealing with abstract subjects The plan of placing the Maori and English in opposite pages, making the paragraphs correspond with each other, has been adopted for this reason among others, - that in case of obscurity in the Maori, a reference to the English, on the opposite page, may at once afford the means of correcting misapprehension, by shewing what was intended to be conveyed

The difficulties were acknowledged What help the Maori speaker would get by referring to the English to resolve the ambiguities created by the text in the Maori language is hard to fathom A casual glance at some of the entries shows the cultural gap between the two systems The lawyer described in paragraph 24 is, in Maori, the *Roia,* and the supreme court is the *Kooti Hupirimi* and criminal is *Kirima,* the sheriff is *Heriwhi* and the coroner *Korona,* a jury *Huuri* and the registrar *Rehita* And so the list went on [58] The words were defined but all in very short space It is difficult to imagine that this text could take the average Maori reader very far It is equally difficult to imagine that the Common Law system would survive in these circumstances without a strong governmental commitment to the system [59]

B. *Tokelau*

The first instance of non-English language legislation in Tokelau was the *Native Laws of the Union Group 1912* However the language used was not Tokelauan but Samoan The 1912 laws were based on custom and were therefore not a translation of the Common Law

The Native Laws Ordinance 1917 was trilingual, translations from English were in Samoan and Gilbertese

---

58 E g *Apatakihana* (Abduction), *Akihehori* (Accessory), *Apiha* (Officer), *Arahona* (Arson), *Awhirei* (Affray), *Eketohiana* (Extortion)

59 Today the Maori language is a major political concern The latest decision of the Waitangi Tribunal *(supra* n 3) is its finding on te reo Maori *(Finding of the Waitangi Tribunal relating to Te Reo Maori and A Claim Lodged* Government Printer Wellington, 1986) The claimants argued that the Crown has failed to protect the Maori language (te reo Maori) and that this is a breach of the promise made in the Treaty of Waitangi The Tribunal found that by the Treaty the Crown did promise to recognise and protect the language and that the promise had not been kept The Tribunal recommended that te reo Maori should be restored to its proper place by making it an official language of New Zealand, with the right to use it on public occasions, in the Courts, in dealings with Government Departments, with local authorities and with all public bodies The Tribunal also recommended that the language should be widely taught from an early stage in the educational process The Crown's response is Te Pire Mo Te Reo Maori (Maori Language Bill 1986 - No 20) The Bill does three things It declares the Maori language to be an official language, it confers and delimits the right to use the Maori language in legal proceedings and it establishes, and specifies the functions and powers of, a Maori Language Commission

The translation of the law of Tokelau from English into Tokelauan as part of the Law Project began on a large scale in 1984. The translation task highlighted the linguistic and cultural differences between metropolitan New Zealand and Tokelau. The law was framed in metropolitan New Zealand in the context of a culture with a long tradition of writing, the heritage of the Western European conception of law, and the sophisticated range of English language tools with which to work with that law. The Tokelauans for whom the law was framed had on the other hand no tradition of writing and lived in a society ordered by the decisions of the elders and by consensus. To the degree Tokelau was familiar with written tradition it was through the Samoan language and the Samoan Bible. A full scale dictionary of the Tokelau language has only recently been published[60] and there is still no translation of the Bible into Tokelauan.

In some countries the translation of law has proceeded on the basis of the wholesale creation or importation of terms into the target language. For Tokelau the model at the other end of the spectrum was chosen. As far as possible the translation work has been done within the range of the existing Tokelauan language, and the existing language is used or built on to communicate the new ideas. Inevitably there has been some influence from the Samoan Bible, the Constitution of Western Samoa and English, but a positive attempt has been made to minimise those influences where appropriate words were already in Tokelauan usage. The principal consequences of this approach to date have been that the translated text is generally comprehended by those without a special law background or knowledge of English, and that the original English text has been stripped of all technical sophistication that is irrelevant to the Tokelau legal system. The English language text has in effect been simplified. Functional equivalence rather than literal equivalence has been the main goal.[61]

It is submitted that it is much better to have as a model a system whose key principles are set out in a systematic written form, whose ideas are general in the sense that they speak to the common denominator of human experience rather than just the unique English legal history, and whose principles are sufficiently well elaborated to have the capacity to absorb a reasonable level of local cultural content at a functional level.[62]

C. *What is feasible?*

What is feasible[63] in terms of adopting a new legal system is to choose for the adopted system a body of law that is in an ordered and written form, that can be relatively readily translated in the territory's own language and that places emphasis on principle before detail. Also in the Pacific experience, as indicated by the Introduction to the Laws of

60. *Tokelau Dictionary* (Office for Tokelau Affairs, Apia, 1986).

61. *Tokelau Law Lexicon* (Ministry of Foreign Affairs, Wellington, 1986) may give an insight into the nature of the translation aspect of the Tokelau Law Project.

62. E.g. a Romanist system as opposed to the Common Law system. An illustration of the difficulty of the Common Law system is the British Constitution - It "works by a body of understandings which no writer can formulate" *Adegbenro* v. *Akintola* [1963] AC 614, 632. This has given rise to problems, e.g. the role of convention in *Adegbento* v. *Akintola, Reference re Amendment of the Constitution of Canada* (1982) 125 DLR (3d) 1, and *Attorney-General of Fiji* v. *D.P P.* [1983] 2 A.C. 275.

63. Convenient or practical, as distinct from theoretically possible.

England in Maori, there are great difficulties with abstract notions and with fictions. A system therefore with relatively low reliance on fictions and clear reference to observable phenomena and practical problems is one to be favoured.

A territory with a choice is likely to be much better off if it develops its law in its own language[64] as a result of comparative study. The alternative is to seek to tie itself by strained translation to an alien system of law which it must neglect in implementation either by turning the rule totally over to the local language connotations or by constraining the local language for the future to an interpretation of its words that can only be obtained from a reference to an extensive body of English language learning. In Tokelau terms there would be much less difficulty in providing laws for present and immediate future if the governing legal principles were of a Romanist origin rather than the Common Law By and large it would be much easier to work from the Napoleonic codes or some comparable legislative text than to proceed from the equivalent of something like ***Halsbury's Laws of England.***[65] In Tokelau there would not only be the translation - the language - advantage, there would also, as experience to date has suggested at a number of levels, be substantive advantages.

The pattern of trial in Tokelau is well known in Tokelau and highly functional. It involves, at a preliminary level, the interaction of the police officer and the lay judge, and at a second step a trial in the presence of the elders of the village which is conducted by the judge as the sole interrogator and the controller of the procedure and evidence. At the conclusion of the hearing there is typically a discussion between the judge and assembled elders and judgment is given in the presence of the accused after that discussion. This system much more closely resembles the Romanist tradition in its modern form than the Common Law tradition: the approach to the investigation of the criminal behaviour, the inquisitorial nature of the proceedings and the preference for collegiality at the decision-

---

64 This would be consistent with contemporary views on cultural self determination and the place of language in a culture See in relation to this the finding of the Waitangi Tribunal supra. n.58 where it was stated that language is an essential part of the culture and must be regarded as a "valued possession"

In New Zealand there is at present a prohibition on the use of a language other than English in the Courts This decision "is based upon an English statute passed over six hundred years ago, the Pleadings in English Act, 1362 (36 Edw 3, c15) This statute became part of our law by virtue of the English Laws Act 1858 when our legislature adopted all the laws of England that were in force on January 14, 1840 The 14th Century statute seems to have been passed at a time when it was decided that the indigenous language (English) should be preferred and perhaps protected against the incursions of the language or government (Norman-French). It is ironical, say the claimants that over six centuries later the same statute should be invoked to protect the language of government (English) against the indigenous language of New Zealand (Maori). We refrain from comment "

Finding of the Waitangi Tribunal supra n 58

In Niue and Western Samoa English and the local language are both official. In the case of Western Samoa, the Samoan language legislation is a translation of the English draft. In Niue the Niuean and English statutes are drafted separately, each in terms of its own linguistics and culture. Niue sees this method as a way of protecting Niuean from excessive encroachment by English.

65. Cp. The comparative analysis in *Legislative Drafting - a New Approach* (Butterworths, London, 1977)

making level.[66] It is further observable in current court procedure that where a criminal offence has given rise to civil loss the same panel and the same procedure will result in a civil remedy as well as the criminal punishment.[67]

Taking the Romanist comparison a step further, it is also clear in Tokelau that the French approach to separation of powers is much more closely attuned to the local cultural attitudes than the British. While there is nothing like a public law court or system operating in Tokelau, there is very clearly the view that matters involving the government and village administration should be settled in forums of the government or the village administration and not brought before and decided by a separate and completely independent body.[68]

---

66. Note the following adaptations of the law in 1986 to account for the cultural features within the system:

Section 7(4) of the Tokelau Amendment Act 1986·

In any criminal proceedings, a Commissioner may, at any time during those proceedings, discuss the case, in the presence of the prosecutor, the defendant, and the defendant's counsel (if any), with the Taupulega of the island for which that Commissioner is appointed.

Section 10(3) of the Tokelau Amendment Act 1986

No appeal shall lie pursuant to subs (1) of this section in respect of any judgment of a Commissioner in any proceedings for any offence punishable by imprisonment for not more than 3 months or any offence punishable only by a fine of not more than $150, but any party to any such proceedings may appeal from the judg ment of the Commissioner to *such body*, and in accordance with such procedures, as are prescribed by regulations made under the principal Act

The village Elders have decided that there shall be an appeal under s 10(3) to the locally constituted tribunal

67. It is probably by coincidence that the current court procedure resembles to a marked extent that put in place by the Order in Council for the Western Pacific at the end of the 19th century The same system, in civil matters, puts great emphasis on consensus and arbitration and is not amenable to an approach which favours the advancement of excessive individualism over the interests of the community in compromise and consensus

68. For example, The Tokelau Village Incorporation Regulations 1986 provide for the village to be managed by the customary Village Council

> 7. **Management of village** - (1) A village shall be managed by the Taupulega of that village and for that purpose the Taupulega shall have and may exercise all the powers of the village
>
> 4. **Objects of village** - The objects of a village shall be to provide for the efficient and orderly conduct of village affairs, and generally to promote the economic and social well being of the people of the village and of the island of which it is part.

and gives the village the power to make village rules -

> 18. **Village rules** - (1) Subject to subclause (4) of this regulation and to regulation 19 of these regulations, a village may from time to time make such rules as it thinks fit for the purpose of attaining the objects of the village.

The Tokelau example would suggest, where there is not within the community a professional body with an interest in the maintenance of the Common Law system or an English speaking ruling elite, that the Common law is not the most practical. The development of the law in Tokelau - the little that has been done since 1981 - evidences a shift of principle from the theoretically applicable Common Law to legislative rules which either provide expressly for systems and concepts which are not Common Law or which by reference alone revests the decision-making in the matter in the customary authorities.

D. *Summary*

What has been said might be seen to favour, in respect of Tokelau, the Romanist model over the Common Law. Certainly there would seem to be a number of features making, for instance, the French law a better choice than the English. However at a very important level many of the things that the Common Law assumes as a base for its system are also the things that the Romanist system would assume. That is to say it is assumed that there will be judges within the community, that there will be lawyers, that the placing of monetary value on things is a well established and acceptable pattern, and that there is a culture where documentation is an administrative phenomenon. Generally speaking all these assumptions are wrong in respect of Tokelau and are, or would, until very recently have been wrong, in respect of most of the other Pacific Island communities.

In the process of Westernization of the Pacific communities and as a result of their recent rapidly increasing contact with the Western world, the assumptions of the Western legal systems are less strange. However, as the example of the recent constitution of Tuvalu shows, where the Western legal thought is presented in too stark a form, it makes the system dysfunctional, even at a governmental level, and change is necessary.[69] Where the culture is incompatible with international norms such as those embodied in the International Covenant on Civil and Political Rights, then there is either a direct

---

The Commissioner of each island, or the Faipule (when the Commissioner and the Faipule are the same person or when the Commissioner is incapacitated or absent), has judicial functions. (Sections 5(3), 6 and 7 of the Tokelau Amendment Act 1986.)

69. See the Constitution of Tuvalu in Appendix.

expression of the contradiction[70] or there is an international acceptance of the norms but a domestic non-compliance.[71]

---

70. As for instance in the Constitution of Tuvalu -

(1) Every person in Tuvalu is entitled, whatever his race, place of origin, political opinions, colour, religious beliefs or lack of religious beliefs, or sex, to the following fundamental rights and freedoms:

(a) the right not to be deprived of life (see section 16); and
(b) personal liberty (see sections 17 and 18); and
(c) security for his person (see sections 18 and 19); and
(d) the protection of the law (see section 22); and
(e) freedom of belief (see section 23); and
(f) freedom of expression (see section 24); and
(g) freedom of assembly and association (see section 25); and
(h) protection for the privacy of his home and other property (see section 21); and
(i) protection from unjust deprivation of property (see section 20), and to other rights and freedoms set out in this Part or otherwise by law.

(2) The rights and freedoms referred to in subsection (1) can, in Tuvaluan society, be exercised only -

(a) with respect for the rights and freedoms of others and for the national interest; and
(b) in acceptance of Tuvaluan values and culture, and with respect for them.

(3) The purpose of this Part is to protect those rights and freedoms, subject to limitations on them are designed primarily to give effect to subsection (2).

(a) to spread beliefs; or
(b) to communicate opinions, ideas and information;

if the exercise of that right may otherwise conflict with subsection (4).

71. This problem is one that affects Common law equally with other Western models.

IV. VARIOUS ASPECTS OF COMMON LAW SYSTEMS

A. Appeals to the Privy Council

In the Pacific area the move from colonial status has been a move away from the use of the Privy Council and the adoption of either totally internalised systems as in the case of Australia or, where the community is small, the provision of a local tribunal which is staffed ad hoc by appointed judicial officers from neighbouring countries.[72] Western Samoa, Tonga, Solomon Islands, Tokelau and Papua New Guinea for instance all have their own court systems. On the other hand Fiji, the Cook Islands, Niue, Kiribati and Tuvalu still retain appeals to Privy Council.[73]

B. *Tokelau Court Structure*

The borrowing and sharing pattern of earlier days has been replaced by a much more localised and nationalised aspect. Until 1 August 1986, Tokelau's judicial system in ascending order was the local lay judges in Tokelau, the Niue High Court, the New Zealand High Court for matters of general civil and criminal jurisdiction, and the possibility of appeal to the New Zealand Court of Appeal and thence to the Privy Council in London. The system in place from 1 August 1986 is that the only court system used is the local New Zealand court system and as far as possible, matters will be dealt with solely in Tokelau. The hierarchy now is a Commissioner in Tokelau, the High Court of New Zealand, and the Court of Appeal of New Zealand.[74] There is also provision, shortly to be implemented, for appeal in criminal matters where the penalty imposed is not large to be dealt with on the relevant atoll by an appeal tribunal, without further appeal to any outside courts. This is consistent with general patterns in the Pacific jurisdictions. It is also consistent with Tokelau cultural attitudes.

Tokelau is subject to the supervision of the United Nations Committee of 24. The requirement in the Covenant on Civil and Political Rights for an independent appeal tribunal in criminal matters was therefore a significant factor in the decision by the elders on the nature of the court structure that they opted for on 1 August 1986.

C. *Legal Education*

The matter of legal education in the area can be appreciated from a reading of *Pacific Courts and Justice*,[75] the report of G.P. Barton on legal services in Pacific

72. E.g.. Western Samoa, art.65 of the Western Samoa Constitution

73. In the case of Fiji that right has recently been exercised in *Attorney-General of Fiji* v *DPP* [1983] 2 W.L.R. 275. There is evidence that it is likely to be exercised soon in respect of a Cook Island's case, *Clarke* v. *Karika* (1982) Unreported, Court of Appeal of the Cook Islands, 2/82.

74. Appeals to the Privy Council was abolished by the Tokelau Amendment Act 186. By coincidence it is probably also consistent with the future New Zealand pattern. There are strong indications that appeals to the Privy Council will, in the medium term future, be abolished for New Zealand as they were recently for Australia.

75. C.G. Powles (ed.) (First ed., U.S.P., Suva, 1977); 2nd edition now in press.

jurisdictions,[76] articles by Guy Powles,[77] and the Commonwealth Secretariat publication edited by Campbell McLachlan.[78] Legal education in the area is provided principally by Australia and New Zealand law schools but also by the University of Papua New Guinea in Port Moresby and most recently by the short courses provided by the Pacific Law Centre of the University of the South Pacific.[79] Most of the small Pacific states are dependent on the training systems of other larger states for the education of their law professionals. It is also a feature of their systems that there are very few lawyers, and in some cases no lawyers. In Tokelau for instance there are no lawyers and no law books nor is there any apparent need for them. If the system were to be a functioning Common Law system it is inevitable that that would have to change. In the absence of law professionals, the administration and maintenance of law and order has to proceed in terms of a much more accessible body of principle than the Common law provides.

D. *Training of the Judiciary*

The training of the judiciary in the Pacific area is in much the same situation as that of legal education. To a significant extent lay judges are providing the legal services and they have either no legal training at all[80] or have been given some practical tuition at locally run courses for judges, their clerks and police officers. These lay judges may often be seen as customary authorities exercising their customary power under the guise of the exercise of a judicial function in a Common Law system. In addition to the lay judges in the systems there is also the pattern of borrowing professional judges as between jurisdictions.[81]

E. *Law Reporting and Other Related Matters*

The problems of small jurisdictions in respect of legal materials are well known.[82] As far as the small jurisdictions of the Pacific are concerned the doctrine of precedent does not function because there are typically no reports - neither from other jurisdictions nor from the jurisdiction itself. Western Samoa and Fiji have sets of reports but have not published

---

76. G.P. Barton, *Legal Resource Needs in Small States: Report on some South Pacific Jurisdictions* (Commonwealth Secretariat, London, 1980.)

77. E.g. 'Lawyers in the South Pacific' (1974) *N.Z.L.J.* 377; 'Law in the Pacific Island States' (1982) 8 *Commonwealth Law Bulletin* 1189 - 1197.

78. C.A. McLachlan, *Admission of Commonwealth Lawyers* (Commonwealth Secretariat and Commonwealth Lawyers' Association, London, 1955).

79. The main campus is in Suva, Fiji: the Pacific Law Centre is in Vila, Vanuatu.

80. The three principal judges for Tokelau are three village leaders; they are not lawyers and have had no legal training. They are elected to their position as village leader on the basis of a vote by universal adult suffrage once every three years.

81. For example Western Samoa, Cook Islands, Solomon Islands, Tuvalu.

82. C.P. W. Twining and J. Uglow (ed.) *Law Publishing and Legal Information: Small Jurisdictions of the British Islands* (Sweet & Maxwell, London, 1981).

any reports for several years now. Solomon Islands has recently begun, under the aegis of the Chief Justice, the publication of its reports and there is every indication that that series will continue. Tokelau and Niue have both very few cases and no reports.

Even more critical for the systems is the lack of published legislation and the lack of accessibility of the legislation. Tokelau is well provided for in the sense that any legislation that is made is part of the New Zealand metropolitan process and therefore appears, at least for metropolitan New Zealand readers, in the main legislation series. For Tokelau readers, of course the legislation is neither available nor in an accessible language. There is no official publication of legislation in Western Samoa or in Niue. In Solomon Islands the printed volumes of legislation have ceased to appear but the legislation is still available to subscribers to the *Solomon Islands Gazette* as a *Gazette* supplement.

The absence of law reporting may be seen to reflect particularly on the viability of a system of the Common Law. But both the absence of recorded decisions and the general difficulty of access to legislation reflect, in the Pacific area, not specifically on the viability of the Common Law system, but on the reality of a legal system in the Western sense at any level. The main ingredients for the successful ordering of these societies seem to be the strength of custom and its role in the everyday life of the average person in the community on the one hand and the strength of administrative fiat on the other.

V. CONCLUSION

The Common Law theoretically applies to Tokelau, but because of the geographical isolation of Tokelau, the lack of access to the law and the great strength of its customary system, has been largely irrelevant to Tokelauans. Even if there were a desire by Tokelauans to apply the Common law, language difficulties, the inaccessibility of the Common Law, the lack of legal resources, and the inapplicability of the Common Law experience to the Tokelau situation would make the task a formidable one.

Tokelau has survived adequately till now without knowledge of the Common Law. Its future legal situation is best assured by the development as the need arises of its own rules in its language.

APPENDIX

THE CONSTITUTION OF TUVALU
Preamble

WHEREAS in adopting the Independence Constitution of Tuvalu the people of Tuvalu provided in the Preamble to it as follows:

WHEREAS the Islands in the Pacific Ocean then nown as the Ellice Islands came under the protection of Her Most Gracious Majesty Queen Victoria in September 1892 and on 12 January 1916 in conjunction with the Gilbert Islands became known as the Gilbert and Ellice Islands Colony;

AND WHEREAS on 1 October 1975 Her Most Excellent Majesty Queen Elizabeth II was graciously pleased to establish the Ellice Islands as a separate colony under their ancient name of Tuvalu;

AND WHEREAS the people of Tuvalu, acknowledging God as the Almighty and Everlasting Lord and giver of all good things, humbly place themselves under His good providence and seek His blessing upon themselves and their lives;

AND WHEREAS the people of Tuvalu desire to constitute themselves as an Independent State based on Christian principles, the Rule of Law, and Tuvaluan custom and tradition;

NOW THEREFORE the people of Tuvalu hereby affirm their allegiance to Her Most Excellent Majesty Queen Elizabeth II, Her Heirs and Successors, and do hereby proclaim the establishment of a free and democratic sovereign nation....;

AND WHEREAS the Constitution has served the people of Tuvalu well since Independence but now, more than seven years since its adoption, it is time that the people of Tuvalu reconsidered it in the light of their history and their present and future needs as they see them;

NOW THEREFORE, the people of Tuvalu, having considered, as individuals, in their maneapas and island council, and in their Parliament, what should be in their constitution, give to themselves the following Constitution.

IN SO DOING, the people of Tuvalu set out for themselves and for their governmental institutions, the following Principles:-

Principles of the Constitution

1. The Principles set out in the Preamble to the Independence Constitution are re-affirmed and readopted.

2. The right of the people of Tuvalu, both present and future, to a full, free and happy life, and to moral, spiritual, personal and material welfare, is affirmed as one given to them by God.

3. While believing that Tuvalu must take its rightful place amongst the community of nations in search of peace and the general welfare, nevertheless the people of Tuvalu recognize and affirm, with gratitude to God, that the stability of Tuvaluan

society and the happiness and welfare of the people of Tuvalu, both present and future, depend very largely on the maintenance of Tuvaluan values, culture and tradition, including the vitality and the sense of identity of island communities and attitudes of cooperation, selfhelp and unity within and amongst those communities.

4. Amongst the values that the people of Tuvalu seek to maintain are their traditional forms of communities, the strength and support of the family and family discipline.

5. In government, and in social affairs generally, the guiding principles of Tuvalu are -

agreement, courtesy and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness;

the need for mutual respect and cooperation between the different kinds of authorities concerned, including the central Government, the traditional authorities, local governments and authorities, and the religious authorities.

6. The life and the laws of Tuvalu should therefore be based on respect for human dignity, and on the acceptance of Tuvaluan values and culture, and on respect for them.

7. Nevertheless, the people of Tuvalu recognize that in a changing world, and with changing needs, these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution not only must recognize their fundamental importance to the life of Tuvalu but also must not unnecessarily hamper their expression and their development.

THESE PRINCIPLES, under the guidance of God, are solemnly adopted and affirmed as the basis of this Constitution, and as the guiding principles to be observed in its interpretation and application at all levels of government and organized life.