

PACIFIC CONSTITUTIONS — OVERVIEW

Ces deux articles présentent les règles constitutionnelles aujourd'hui en vigueur à Niue et à Tokelau, leurs fonctions et leurs principales conditions de mise en œuvre.

The following papers give a law introduction to the constitutions of Niue and Tokelau and provide a current overview of their role and key provisions.

THE NIUE CONSTITUTION

*A H Angelo**

The Constitution of Niue is neat and technically may be the best of all the constitutions of the South Pacific countries. The Constitution's origins are in an Act of the New Zealand Parliament¹ but, following constitutional convention and the traditional Common Law model,² the country is autonomous.

I INTRODUCTION

A History

The Constitution of Niue has evolved out of early New Zealand colonial statutes. The first was the Cook and Other Islands Government Act of 1901 and subsequently,

* Professor of Law, Victoria University of Wellington, New Zealand. This paper is a chapter originally prepared as a contribution for a book on constitutional evolution in the Pacific.

1 Niue Constitution Act 1974.

2 The independence constitutions of most countries in the region were law of the United Kingdom eg Australia (the Commonwealth of Australia Constitution Act 1900), New Zealand (New Zealand Constitution Act 1854), Solomon Islands (Solomon Islands Order in Council SO&I 1978/783).

just prior to the self-determination of the Cook Islands, a Cook Islands Amendment Act was promulgated which effectively severed Niue from the territory of the Cook Islands.³

The early statutes⁴ provided a code of laws for Niue. They were extensive with approximately 700 sections covering the key features of government, providing a criminal code and also dealing with customary land and family law matters. Because they were New Zealand Acts and because the Cook Islands and Niue were still colonies totally within the control of New Zealand, the Acts set out the governmental structure in a separation of powers form. This was done in the first sections of the Acts. The statutes also established discrete legal systems and provided for an executive, a legislature, and judiciary technically separate from that of New Zealand. The administration was substantially controlled from Wellington with a public service under the New Zealand Public Service Commissioner.⁵

The legislatures had limited powers and, in the early stages, were non-representative.⁶ The judiciary, which had some local first instance courts, was the judiciary of New Zealand - the then Supreme Court and Court of Appeal, with the possibility of prerogative appeal to the Judicial Committee of the Privy Council in London.⁷

Following the self-determination of the Cook Islands,⁸ the Niue Act 1966 stated the Niue situation as it remained until self-determination of Niue on 19 October 1974. The Niue Act 1966 was a template for autonomy and provided for the internal self-government of Niue. At the time of the vote in favour of a future status of free association with New Zealand, the Niue Act 1966 was substantially amended to

3 Cook Islands Amendment Act 1964.

4 The Cook Islands Act 1915 and the Niue Act 1966.

5 See Cook Islands Act 1915, s 8. More recently, during currency of Part XXXI of the Niue Act 1966 Niue Public Servants were under the State Services Commission of New Zealand.

6 Eg section 5 and Part II of the Cook Islands Act 1915.

7 The New Zealand court structure has now changed. The Supreme Court referred to here is the New Zealand court now known as the High Court. The current Supreme Court is the highest appellate court taking the place for New Zealand of the Privy Council.

8 On 4 August 1965.

reflect the fact that from self-government day Niue had an entrenched constitution. Therefore, the early sections of the Niue Act 1966 which dealt with the executive, the legislature and the judiciary were mostly repealed and were superseded by provisions in the Constitution.⁹

B Structure

The Constitution of Niue is an interesting one. It is a composite of two documents:¹⁰ The Niue Constitution Act 1974 (NZ), which has eight sections; and the document which is most readily identifiable as the Niue Constitution, has 81 articles and is structurally a schedule to the Act. The sections of the Act deal principally with an external relationship – that of Niue to the State of New Zealand. For the purposes of the governance of Niue on a day to day basis, there is little or no cause to refer to the sections of the Constitution: The 81 articles of the Constitution do all that is needed.

Niue is a sovereign state,¹¹ it is a monarchy,¹² and is a democracy run by a cabinet-style government.¹³

C The Dual Elements of the Constitution

The physical and terminological distinction in the Constitution of Niue between its sections and its articles is an important one. It reflects two sides of the coin: the relationship of free association with New Zealand and the self-governing state. The two sides of the coin are typically not seen together. They are inseparably linked but the focus at any given time will be on one side of the coin rather than the other.

9 See the Constitution of Niue, Parts I-III. Unless otherwise expressly stated "Constitution" in this chapter means "the Constitution of Niue".

10 See art 81 of the Constitution.

11 As is evidenced by its act of self-determination for a status as a self-governing state in free association with the State of New Zealand, its description as such in the Letters Patent, constituting the Governor-General of New Zealand (SR 1983/225), and its being a party in its own right to treaties with other states (eg the 1997 Boundary Delimitation Treaty with the USA).

12 Article 1 of the Constitution.

13 Articles 2-14 of the Constitution.

A consequence of the relationship of free association with the State of New Zealand is that Niue is a part of the Realm of New Zealand. This chapter will deal in turn with the role of the Realm in Niue's constitutional life, the legal significance of the relationship with the State of New Zealand, and the main features of the operation of the Constitution in Niue.

II A STATE OF THE REALM

Niue is part of the Realm of New Zealand.¹⁴ This is spelled out in the Letters Patent Constituting the Office of the Governor-General of New Zealand.¹⁵ This prerogative instrument is stated to be law for all the countries of the Realm, but equally it is stated that the role of the sovereign and of the sovereign's Governor-General in the countries of the Realm is subject to the laws and customs of those countries.¹⁶

The sovereign and the Governor-General have a large role within the constitutional operation of the State of New Zealand. The sovereign has a relatively strongly stated position (through the Queen's Representative) in the Constitution of the Cook Islands,¹⁷ but that is not the situation in Niue. The role of the sovereign and of the sovereign's Governor-General for Niue is only in respect of those matters which are not expressly provided for in the Constitution of Niue, and which are not incompatible with the provisions of the Niue Constitution or of any other law of Niue.

The Realm is an entity which has no formal international status and which probably does not exist beyond the Letters Patent of 1983. It would seem to indicate something in the nature of a voluntary association of like-minded countries. There is New Zealand and its non-self-governing territory of Tokelau, and the Ross Dependency. Additionally, there are the two former colonies, now states in free association with New Zealand: the Cook Islands and Niue. All these countries share the Queen of New Zealand as their Head of State. The Realm is therefore reflected in

14 As a consequence of this, Niue is within the Commonwealth. It is an associate rather than an independent member of the Commonwealth.

15 Letters Patent, I.

16 Letters Patent, IV.

17 Constitution of the Cook Islands arts 3-7.

the constitutional arrangement of Niue in that the Head of State of Niue is the Queen of the Realm of New Zealand.

The critical thing for Niue is the relationship with New Zealand and not the relationship to the Realm. The functioning aspect and the principal internationally legally identifiable aspect of the Realm is the State of New Zealand.¹⁸ The citizenship is the citizenship of the State of New Zealand; it is not the citizenship of the Realm of New Zealand. Equally, advice to the sovereign about the Realm is given by an Executive Council under the Letters Patent, that Council is composed entirely of the Ministers of the State of New Zealand.¹⁹ Further, if there is a call for defence assistance or international relations support, that can only be forthcoming from the State of New Zealand. The Realm can call on no support other than that of the individual countries within the Realm.²⁰

III RELATIONSHIP WITH NEW ZEALAND

A General

The relationship with the State of New Zealand is hinted at in the Constitution. The key provisions are sections 2 to 8 of the Niue Constitution Act 1974. They indicate that the relationship between the two states is one of free association.²¹ This means that there are two separate states and that their relationship is a voluntary one. It is the legal right of Niue to choose to become independent and no longer freely associated with New Zealand, at any time and unilaterally. On the other hand, for New Zealand unilaterally to terminate the relationship would give rise to different

18 Niue as such has no legal relationship with the other countries of the Realm. The Cook Islands is a state in free association with New Zealand, but otherwise unconnected with the other countries. The Ross Dependency is a dependency of the State of New Zealand whose international status is now substantially affected by the Antarctica Act 1960 (NZ). Tokelau is a territory of the State of New Zealand whose constitutional position is governed by the Tokelau Act 1948 (NZ).

19 Letters Patent, VII and VIII. The giving of advice to the sovereign in respect of a state of the Realm is in accordance with the law of that state.

20 From the point of view of the State of New Zealand, it is interesting to note that the various statutes relating to defence matters are the law of the State of New Zealand. Therefore, in a strict sense the role of the New Zealand defence forces would be simply to defend the State of New Zealand.

21 See in particular ss 3 and 8.

considerations. The status of free association is one of the self-determination options spelled out in the United Nations General Assembly Resolutions,²² and implicit in that status is the notion that it would be a breach of the self-determination arrangement for the state offering the association to deny the relationship.

B Foreign Affairs and Defence

The key features of the relationship with New Zealand are indicated in the quaintly worded provisions of sections 3 and 4 of the Niue Constitution Act 1974. These relate to matters of external affairs and defence, and to citizenship. It is stated that "Nothing affects the responsibility of Her Majesty ..." Such phraseology immediately raises the question as to what the responsibility might be and perhaps also whether, having identified that area, it is a matter of right of Her Majesty, or whether responsibility means "duty".²³ The position in practice is that Niue as a state freely develops its own foreign relations policy and exercises its foreign relations powers. It has diplomatic representation abroad (Wellington and Brussels), it enters into treaties on its own behalf,²⁴ and is an active participant in a number of international organisations. Equally, it is clear that in the exercise by Niue of its international status, New Zealand will provide facilities and will assist as best it can, at the request of Niue. There may additionally be some areas where Niue is not currently represented but the State of New Zealand is. In such cases, it is appropriate that New Zealand is seen as having a duty to represent the interests of Niue. One such example might be within the United Nations.

The Commander in Chief of the forces of the Realm of New Zealand is the sovereign,²⁵ represented typically by the Governor-General. How far this prerogative power of the sovereign operates for Niue is unclear. The sovereign therefore as

22 UN GA 742, 1514, 1541.

23 See on this point, but with reference to the Cook Islands, A Frame "The External Affairs and Defence of the Cook Islands – the 'Riddiford Clause' Considered" (1987) 17 VUWLR 141. See also Alison Quentin-Baxter *The Laws of New Zealand "Pacific States and Territories: Cook Islands"* (Butterworths, Wellington, 2001) Vol 20 para 30.

24 Eg the Boundary Delimitation Treaty with the USA (signed 13 May 1997): The EU/ACP Cotonou Partnership Agreement (signed 23 June 2000). Diplomatic Relations with the People's Republic of China were established in December 2007.

25 Letters Patent, I.

Commander in Chief would have to call on the defence forces of one of the states of the Realm and expect Niue to abide by the sovereign's decisions in respect of these matters of defence and war and peace. Within the Realm, the only state with a military force is the State of New Zealand. In practice, the most likely scenario is that if there were a need for defence, Niue would request that from the State of New Zealand which would, in terms of the free association arrangement, provide that defence. In respect of matters of war and peace, it is likely that there would be close consultation between the two governments and, while it might be expected that they would be of a common view on such a matter, there is nothing to indicate that that is a necessary consequence. It would be the end of the free association agreement if the two states were to take opposite sides in a particular conflict.

The provisions relating to foreign affairs, defence and citizenship are expressed in the same terms as in the Constitution of the Cook Islands.²⁶ The Niue Constitution is overall, however, significantly different and, it might be said, is a development on the position of the Cook Islands.

C Citizenship

The citizenship law for Niue is the New Zealand Citizenship Act 1977. As a matter of legality, that Act in slightly different form is also a Niue law. For all practical purposes, the only relevant law is the law of New Zealand because the citizenship is that of the State of New Zealand and that citizenship is controlled by the government of the State of New Zealand both through its control of the Citizenship Act 1977 and also by the operation of the Immigration Act 1987 of New Zealand and the Passports Act 1992 of New Zealand.²⁷ The free association relationship therefore extends to Niue the privilege for its people to hold the passport of another state. There is nothing constitutional which precludes the establishment of a Niuean citizenship; but whether the government of New Zealand would recognise such a citizenship, or for what purposes it might recognise it, is unclear. There is no necessary conflict

26 Cook Islands Constitution Act 1964, s 5: "Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in Right of New Zealand for the external affairs and defence of the Cook Islands..." Niue Constitution Act 1974, s 6 "Nothing in this Act or in the Constitution shall effect the responsibilities of Her Majesty the Queen in Right of New Zealand for the external affairs and defence of Niue."

27 Niue has its own immigration law – the Entry, Residence and Departure Act 1985. The Passports Act of New Zealand is not Niue law and there is no Niue equivalent.

between the possession of such a citizenship and the free association relationship with New Zealand. In fact, a Niuean citizenship law might do little more (other than by way of nomenclature) than the current permanent residency permit of Niue, or than an identity card of the kind that is sometimes used at an administrative level in the Pacific by Pacific islanders for inter-island cross-border travel.

Citizenship is mentioned explicitly in the Constitution in section 4 of the Niue Constitution Act 1974. The section preserves rights under the British Nationality and Citizenship Act 1948 (NZ). That section is heavily entrenched for Niue, but amendable by a simple majority in the New Zealand Parliament. In 1977, the British Nationality and Citizenship Act 1948 (NZ) was repealed by New Zealand but there was no consequential amendment of the section by Niue. One reading of this is that Niuean citizenship rights are now only in the Citizenship Act 1977 (NZ) which is an ordinary statute in both New Zealand and Niue. This means that section 4 of the Niue Constitution Act 1974 was never a guarantee of citizenship into the future, and is increasingly irrelevant. Another reading is that citizenship is a key element of the Constitution. It was entrenched for Niue for that reason and has since 1973 been linked for the Cook Islands and Niue to human rights standards and common interests through the Kirk/Henry letters.²⁸ This approach would have section 4, now read as referring to the Citizenship Act 1977 (NZ).²⁹

D Economic Support

Section 6 of the Niue Constitution Act 1974 provides that New Zealand will continue to provide administrative and economic support to Niue. This is a key provision and basic to the relationship of free association. The understanding at the time of, and the Niue expectation since, self-determination has been that the basic budgetary and administrative support needed to maintain day to day government in Niue would be guaranteed by New Zealand. That expectation has not always been

28 The Rt Hon N E Kirk, Prime Minister of New Zealand to the Hon A R Henry, Premier of the Cook Islands. Hon A R Henry, Premier of the Cook Islands to the Rt Hon N E Kirk, Prime Minister of New Zealand. See 1973 AJHR A 10, or Cook Islands Constitution Act 1964: Pacific Division, New Zealand Ministry of Foreign Affairs <<http://www.mfat.govt.nz/foreign/regions/pacific/cookislandseclaration/cooksindependence.html#letter1>> (last accessed 15 August 2006).

29 Alison Quentin-Baxter *The Laws of New Zealand "Pacific States and Territories: Cook Islands"* (Butterworths, Wellington, 2001) Vol 20 para 28.

fulfilled. New Zealand has controlled the amount of budgetary support, and Niue's income from this source has often reduced to the detriment of provision of services in Niue and ultimately to the retention of population.³⁰ Section 6 is justiciable in New Zealand but it is difficult to imagine that in the relationship of free association the one state might sue the other.³¹

Apart from the political impediment to legal claims, there is also the fact that what is "necessary economic or administrative assistance" is very hard to establish. There are historical patterns which Niue could rely on, particularly those of the time of self-determination and the years immediately following self-determination, but there have been many debates over the years about the nature of this obligation and the proper levels for administrative and economic support.³² A positive step towards clarifying the matter was taken in 2005 with the signing of the five year economic plan between the two governments.³³

E Consultation

The Niue Constitution diverges markedly from that of the Cook Islands in relation to consultation.³⁴ Section 8 of the Niue Constitution Act 1974 indicates that there should be regular consultation between the two governments and that there is a right of consultation at the head of government level. Apart from the fact that the head of government of Niue is a Premier and the head of government of New Zealand is a

30 Eg from 5000 in 1970 to 2900 in 1984.

31 See however *Controller and Auditor General v Davison* [1996] 2 NZLR 278. There is no shortage of colonial precedent for this because of the divisibility of the Crown: See *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (HC & CA).

32 See eg Report of the Niue Review Group (Wellington and Alofi, 1986).

33 "*Halavaka ke he Monuina* – an arrangement between the government of New Zealand and the government of Niue for a programme of strengthened cooperation 2004-2009" of 30 October 2004. There was also the New Zealand Cabinet Committee decision of 2003, which indicated clearly that there should be "Whole-of-Government' Administrative Assistance" to the government of Niue. This was followed by a State Services Commission memo of the same year which developed the ideas of the Cabinet Committee decision.

34 The matter is dealt with in a specific section (s 8) of the Niue Constitution Act, but is incorporated in section 5 of the Cook Islands Constitution Act 1964 as part of the external affairs and defence provision.

Prime Minister, the provision clearly sees the relationship between the states as one of partnership and equal respect.

F Diplomatic Representation

Section 9 of the Niue Constitution Act 1974 requires that New Zealand maintain a post of High Commissioner in Niue. This is one of the heavily entrenched provisions of the Constitution. This has been done and, despite the appointment of a Niue High Commissioner to Wellington, the prime contact between the Niue government and the government of New Zealand appears to be through the New Zealand High Commission in Niue. The New Zealand diplomatic representation is the only foreign diplomatic post based in Niue. In addition to the Diplomatic Immunities and Privileges Act 1968 and the Consular Immunities and Privileges Act 1971 there is a specific Niue statute³⁵ dealing with the position of the New Zealand High Commission in Niue.

IV THE CONSTITUTION AT HOME IN NIUE

A Head of State

The Head of State for Niue is Queen Elizabeth II, Queen of New Zealand. The identification of the New Zealand sovereign is established by the Act of Settlement of 1700.³⁶ That Act is not an entrenched part of the law in Niue; it is therefore possible for Niue, alone and by a simple majority vote in the Niue Assembly, to change the line of succession to the monarchy. However, that would be incompatible with the free association arrangements and, indirectly, also with article 1 of the Niue Constitution (which is heavily entrenched) which identifies the Head of State as "Her Majesty the Queen in right of New Zealand".

The sovereign's deputy or agent in respect of Niue is the Governor-General of New Zealand, who is described in the Niue Constitution as the "representative of Her Majesty the Queen in relation to Niue".³⁷ The exercise of executive power rests with the Cabinet.³⁸ The role of the Head of State is very limited and is nominal.³⁹ There

35 New Zealand Representative Act 1981.

36 I William III.

37 Article 1 of the Constitution.

38 Article 2 of the Constitution.

are two matters to consider in this context: one is the areas in which the Head of State has an identifiable and specific role, the other relates to the prerogative.

The appointment of most members of the judiciary of Niue is by the Governor-General acting on advice of Cabinet.⁴⁰ They hold office until the age of retirement or resignation, or, removal by the Governor-General acting on advice of Cabinet in accordance with the Constitution.⁴¹

Possibilities for the active involvement of the Head of State which are much less clear, are those relating to defence and foreign affairs.⁴² Whatever those powers might be from a historical perspective, the convention in respect of them is that the sovereign would have a limited role, and probably would have duties rather than rights.⁴³

Other areas of potential importance are the conferring of honours, the exercise of the prerogative of mercy, and prerogative right of appeal to the Judicial Committee of the Privy Council. Niue has agreed to follow the honours system of the State of New Zealand. Therefore, recommendations to the Head of State would presumably go to the Head of State through the New Zealand Cabinet. The prerogative of mercy is not affected by any Niue legislation,⁴⁴ and is therefore intact.

The Niue Constitution states that there is no right of appeal beyond the Court of Appeal of Niue. However, this does not preclude the prerogative right of appeal to

39 Principally in respect to appointments to and removal from office of judicial appointees. See Part III of the Constitution. All such actions are taken acting on advice from the Niue Executive.

40 See arts 42 and 52 of the Constitution.

41 Articles 43 and 45 of the Constitution. If the Court of Appeal judge is not the Chief Justice or a Judge of the High Court but has special appointment in accordance with art 52(2)(b) of the Constitution, then the appointment is temporary and dealt with separately in art 52(5) of the Constitution.

42 See above Part III B.

43 *Joyce v DPP* [1946] AC 347. The possession of a British passport by Joyce (a US citizen) entitled him to British diplomatic protection therefore he owed allegiance to the King.

44 In the Niue Act 1966 as originally enacted, there was a statutory provision for the granting pardons and remissions of sentences – s 286.

Her Majesty in Council.⁴⁵ That would be by way of petition and, until further legislative action by Niue, remains at least a theoretical possibility.

B Executive

Following general elections, which occur every three years,⁴⁶ the elected members choose a Premier, who in turn chooses three Ministers to form with the Premier the Cabinet.⁴⁷ There is no provision for other constitutional officers in the Executive.⁴⁸ The Cabinet controls the governing of Niue and, to the extent that the Cabinet has majority support in the Assembly, also controls the legislative programme and the agenda of the Assembly. The Cabinet operates on the basis of collective responsibility. A vote of no confidence therefore results in a defeat of the administration.⁴⁹ Government becomes very difficult unless the Premier has the support of more than ten members in the Assembly. In the case of a tied vote in the Assembly (10:10), the motion is lost.⁵⁰

C Niue Public Service Commission

The Niue Public Service Commission is the employer of all who receive Niue government money, with the exception of the members of the Assembly, the Speaker, the members of the judiciary, and the members of the Public Service Commission itself.⁵¹ The Public Service Commission has an employment monopoly and, while it has to respond to government policy and obey legislation, it is independent and is not subject to political direction in any matter relating to the employment of an individual within the public service.⁵² The clear goal, following Commonwealth models, is to provide a public service employer which is independent and neutral in a political

45 See art 55 of the Constitution.

46 Article 26 of the Constitution.

47 Article 5 of the Constitution.

48 There is for instance no office of Leader of the Opposition, Attorney-General, or of Ombudsman.

49 Article 6(1) of the Constitution.

50 Article 6(3) of the Constitution.

51 Article 62 of the Constitution.

52 Articles 68 and 69 of the Constitution.

sense in order to ensure the integrity and professionalism of the public service as it administers government policies over time, regardless of politics.

The provisions of the Constitution are supplemented by Public Service Regulations which deal principally with the conditions of employment of public servants. Beyond that, there is no other law on the relationship of the Government to the public service.

D Secretary to the Government

The key point of liaison between the Cabinet and the Public Service Commission, and public service generally, is the Secretary to the Government. The Secretary to the Government is the senior public servant, is entitled to be present at all Cabinet meetings, and is responsible for the coordination of the work of the departments of government.⁵³ The Secretary is appointed by the Public Service Commission after consultation with the Cabinet. Control of the appointments to, the operation of and discipline within the public service are the responsibility of the Public Service Commission. Coordinating the delivery of services to meet government policy needs, is the role of the Secretary to the Government.

E Legislature

The legislature is the Niue Assembly; it has 20 members.⁵⁴ Fourteen members are elected in constituencies based on the traditional villages, and six are elected on the basis of a national roll.⁵⁵ The population loss of Niue since 1974 has greatly affected the operation of this electoral system. Some of the village constituencies have very few voters and there are often very close contests for seats.⁵⁶

53 Article 63 of the Constitution.

54 Article 16(2)(b) of the Constitution.

55 Article 16(3) of the Constitution.

56 Under the Niue system, the tie is broken by the drawing of lots. Niue Assembly Act 1966, s 70(3). In the elections of 2005, there were tied votes in two constituencies.

F Sources of Law

The sources of law for Niue are, in descending order of importance, the Constitution, Acts of the Niue Assembly, Niue subordinate legislation, Niue custom, and the common law of Niue.⁵⁷

The Constitution is, by self-declaration, the supreme law of Niue, and any law that contradicts it is void.⁵⁸ The statutes of Niue are designated as Acts,⁵⁹ and are the normal form of principal legislation for Niue. Within the legislative field, there are a number of statutes and some regulations which were inherited from New Zealand. Examples are the Customs Act 1966, the Diplomatic Immunities and Privileges Act 1968, the Marine Insurance Act 1908, and the United Nations Act 1946. Laws such as these are now an integral part of the Niue legal system and the Acts have the same status as Acts of the Niue Assembly. A feature of such legislation, if it were inherited before 1974, is that from the time of extension until self-determination in 1974 the legislation would have been subject (as Niue law) to the same amendments as the law in New Zealand. That was as a result of section 676 of the Niue Act 1966. Post-self-determination, sole responsibility for legislation was vested in Niue and therefore there are many laws which in Niue still have the form the law had in New Zealand before 19 October 1974. Alternatively, that law may have developed differently in Niue by way of amendment than the law has in New Zealand. In a number of cases, a law of New Zealand origin continues in Niue in its pre-1974 form, although that law has been repealed or replaced within the legal system of New Zealand.⁶⁰

Regulations are few in number and sometimes deal with extensive technical matters, but more typically provide for administrative updating.⁶¹

Niue custom is little evident, except in relation to land. Land in Niue is almost exclusively held in accordance with custom. The land that is not customary land is government land.⁶² The other area where in the past there has been some evidence of

57 Interpretation Act 2004, s 4.

58 Niue Constitution Act 1974, s 4(1).

59 Article 34(2) of the Constitution.

60 Eg Chattels Transfer Act 1924 (introduced by Niue Act 1966, s 684).

61 Eg the fees for gun licences and road traffic licences.

62 Niue Amendment Act 1968 (No 2), s 3.

the operation of custom is fishing.⁶³ That impact is now much less clear and, to the extent that fishing custom and hunting traditions are respected, it is more likely as a requirement of informal village regulation than as a matter of law justiciable in the state court system.

G Law-making

1 Ordinary Acts

The law-making procedure involves a process of three readings⁶⁴ of a Bill with, typically, reference to the Bills Committee after the first reading. The Niue Assembly usually meets once every six weeks, and is disinclined to take urgency on measures. The result is that a law proposal will typically take at least two months to proceed through the system. At first (if a government Bill), it will require the endorsement of Cabinet; it requires distribution to members of the Assembly at least ten days before the first reading. On approval at the third reading, the Bill is passed, and becomes law when the Speaker and Clerk of the Assembly sign and counter-sign that the procedures of the Assembly have been followed in respect of that law.⁶⁵ Commencement of the law is, unless expressly provided in the Act itself, the date of signature by the Speaker.⁶⁶

2 Special Bills

In addition to the ordinary procedure for the passing of laws, some law proposals have specific constitutional provisions governing them. The most obvious and most usual is that any Bill involving government finance must have the support of the Premier or a Member of Cabinet.⁶⁷ The other matter of significance is that any Bill which can affect Niuean land may proceed in the Assembly only when accompanied by the report of a Commission of Enquiry set up to deal specifically with that legislative proposal.⁶⁸

63 See the legislation that was repealed by the Domestic Fishing Act 1995.

64 Article 22(8) of the Constitution.

65 Article 34(1) of the Constitution.

66 Article 34(3) of the Constitution.

67 Article 30 of the Constitution.

68 Article 33 of the Constitution.

3 *Salaries of members of the Assembly*

The Niue Public Service Commission has a gate-keeping role in respect of the salaries and allowances of members of the Assembly and the Speaker.⁶⁹ No Bill relating to these matters can proceed except on the initiative or with the support of a report from the Public Service Commission.

4 *Amendments to the Constitution*

Legislation which proposes an amendment to the Constitution is governed by article 35 of the Constitution. It sets out qualified majorities for the voting in the Assembly on the Bill, the requirement of a national referendum on the Bill proposal, and also the passage of a specified amount of time between the presentation of the Bill and the conduct of the national referendum. The entrenchment of the provisions of the Constitution is therefore strong. It is particularly strong in respect of the sections of the Constitution (which are found in the Niue Constitution Act 1974), the linking articles 1 and 2 of the Constitution, and article 69 of the Constitution on the role of the Niue Public Service Commission. Most of the articles of the Constitution can be amended following a simple majority support at the national poll. The specially designated provisions can be amended only with two-thirds support at the national poll.⁷⁰ The consequence of these arrangements is that it is very difficult to change the provisions of the Constitution which relate to the relationship with New Zealand or to change the law relating to the role of the Niue Public Service Commission.

5 *The Request and Consent Procedure – Article 36*

Article 36 envisages the situation where an Act passed by the New Zealand Parliament might also become the law of Niue.⁷¹ Article 36 says that this will only be possible with the request and consent of the Niue Assembly to that action and, further, that the request and consent be formally noted in the New Zealand Act. This provision has not been used for several decades. An example of such a statute is the Citizenship

⁶⁹ Article 32 of the Constitution.

⁷⁰ Article 35(1)(b)(i) of the Constitution.

⁷¹ Article 36 also makes provision for New Zealand regulations to be Niue law.

Act 1977 (NZ) which, by virtue of article 36, is also the Citizenship Act 1977 of Niue⁷² As a result, most people born in Niue are eligible for New Zealand citizenship.

Article 36 was probably originally seen as an efficient manner for Niue to obtain legislation in respect of major or technical matters which would otherwise be difficult for it to deal with at a purely local level.⁷³ Increasingly, Niue has accepted the responsibility of legislating for itself and, where New Zealand legislation is to be used in the same terms in Niue, the more recent pattern is for the Niue Assembly to pass a law which indicates that the law of New Zealand (or any other country for that matter) for the time being is the law of Niue. A prime example of this is in respect of the intellectual property legislation of Niue which is the New Zealand intellectual property legislation for the time being in force in New Zealand.⁷⁴

The Cook Islands had a provision similar to article 36 in its Constitution of 1964, but repealed it in 1980. Whether Niue should also repeal the article in order to better reflect its autonomy is a moot question. There is no current debate on that matter in Niue. This may reflect the fact that Niue has a very different relationship with the State of New Zealand from that of the Cook Islands. Niue may therefore be content that this provision remain in its Constitution. A second reason is that to change the law would require a constitutional amendment, which in Niue is a much more daunting process than in the Cook Islands; and third, in a limited number of areas this facility is probably the best way to ensure the continuation and coordination of the relationship between the states of New Zealand and Niue.⁷⁵

72 See Citizenship Act 1977 (NZ), s 29(2).

73 Or which, by virtue of Niue's position in the Realm of New Zealand require co-ordination between it and the other states.

74 See now the Niue Act 1966, s 737: A copyright, design, patent, or trademark protected by New Zealand law shall be accorded the same protection by the courts of Niue as that available in New Zealand under the laws of New Zealand for the time being in force".

Other examples of this area of sharing or borrowing legislation were the abortive attempts of the Misuse of Drugs Act 1990 and the Civil Aviation Act 1999. These endeavours were, at least in part, unconstitutional because they purported to extend New Zealand law other than in accordance with art 36 of the Constitution. They could have incorporated the New Zealand law as a pure Act of the Niue Assembly, but did not do so.

75 For instance, in those areas – and there are, at most, half a dozen of them – where the constitutional system of Niue is closely linked to that of New Zealand, and where for the

Theoretically, it is interesting to contemplate the possibility that article 36 might be used to amend the Constitution by simple request and consent resolution of the Niue Assembly. This could arise in situations when constitutional amendment would be very difficult to obtain if operating within Niue's internal system. Ostensibly, it would be a breach of convention for New Zealand to legislate to amend the Constitution of Niue after the self-determination result of 1974. However, the technical possibility remains⁷⁶ that in time of crisis,⁷⁷ either because of the amount of time required to obtain a constitutional amendment in Niue or because of political disarray and collapse of the Niue political system, the Assembly might request legislation of the New Zealand Parliament which would amend the Niue Constitution Act 1974, and *ipso facto* amend the Niue Constitution. In such a circumstance, it may be expected that the New Zealand Parliament would refuse to act and regard such an approach as a denial of the Niue act of self-determination, and also as an unacceptable intervention in the internal affairs of a foreign state. However, if it did so, Niue's Constitution would be amended.

6 *Delegated Legislation*

Subordinate legislation is now almost invariably made by Cabinet by way of regulations. The procedural requirement is that regulations should be tabled at the meeting of the Assembly which follows the making of the regulations.⁷⁸ The making of subordinate laws is empowered typically by an Act but, in some instances, is directly empowered by the Constitution. Examples of the latter are the Public Service

time being that matter is controlled by the law of New Zealand, it is perhaps appropriate that, when New Zealand changes its law, that law also become the law for Niue. Matters of this kind could be the law of citizenship and the law of succession to the throne. Beyond that, article 36 has no necessary or appropriate role.

76 Perhaps not envisaged at the time of the making of the Constitution. If however, the argument raised earlier at footnote 27 were correct, that would be an example. Possible support for an argument that such amendment is not subject to art 35 of the Constitution – *Robati v Privileges Standing Committee of the Parliament of the Cook Islands* [2001] NZAR (CA) 282. It is submitted that that case was wrongly decided.

77 Public Emergency Act 1979.

78 Interpretation Act 2004, s 22.

Regulations which deal with the employment conditions of public servants,⁷⁹ and the Standing Orders of the Niue Assembly.⁸⁰

The Village Councils also have a rule-making capacity granted under the Village Council Act 1967. There is very little activity in this field and, currently, the use of the power appears to be in abeyance. There is a tendency visible in national legislation to centralise control in Cabinet or in a Minister. This restricts both village legislative initiative and customary rules.

***H* Judiciary**

The judiciary is the only area in the Constitution of Niue where the Head of State is directly empowered. It is the Governor-General who appoints most Judges to the High Court and to the Court of Appeal. The Chief Justice and other Judges of the High Court have typically been New Zealand judges closely connected with the Maori Land Court. The reason for this appears to be that the bulk of the cases, that the High Court has to deal with relate to Niuean land. There are some criminal matters, and also some civil matters, but they are infrequent. The High Court sits in Niue from time to time. Specific matters are often dealt with by international telephone conference call.

At the time of writing, Niue has fewer than 1500 residents. The low level of demand for judicial services is therefore not unexpected.

The Court of Appeal is appointed *ad hoc* and typically comprises retired members of the New Zealand judiciary. The Court of Appeal sits infrequently and usually in New Zealand, the location being dependent on the convenience of the Judges.

At a lower level and dealing with most matters of judicial interest in Niue are the Commissioners who are locally appointed lay judicial officers.⁸¹ Justices of the Peace also perform some judicial functions at a petty jurisdictional level.

79 Article 68 of the Constitution.

80 Article 20(10) of the Constitution.

81 Articles 46-50 of the Constitution.

I The Speaker

The Speaker is an officer of the Assembly, and is elected by the Assembly at its first meeting after an election.⁸² The role of the Speaker is that of a chairperson. The role is non-political and largely formal. The Speaker has no vote, either deliberative or casting, in any resolutions before the Assembly. The Speaker's other duties involve the swearing-in of the Premier and Members of Cabinet, the warranting of an Acting Premier, and the declaration of the vacancy of a seat in the Assembly.⁸³

The role of the Speaker is presented as a purely formal one.⁸⁴ By oversight rather than design, there are however two areas of limited Speaker discretion. The first is the calling of the Assembly after a vote of no confidence is passed. The rules of article 6(3) do not address the issue; therefore the Speaker must act in his or her own deliberate judgment against the general background of the Constitution. The second area of discretion is the appointment of temporary Ministers. A contrast here is with the role of the Speaker in appointing an Acting Premier. One article uses "may" and the other "shall". The intention was probably that the Speaker was obliged to act on the recommendation in both cases. It would be anomalous if that were not the intention; however the language used gives the Speaker a discretion in one situation and not in the other. This discretion, if not to politicise the role of Speaker, must be restricted to confirming the facts. Any use of the discretion to choose as between candidates, or to render Cabinet ineffective, would subvert the Constitution on a key point.

J The Clerk of the Assembly

The Clerk of the Assembly is a constitutional office of low profile but high significance. Potentially, it is the most important constitutional office. Not only can there be no Act or constitutional amendment without the obligatory certification of the Clerk, but also most importantly it is the Clerk who must keep the constitutional machinery running in the absence of a Speaker.⁸⁵

82 Article 20(4) of the Constitution.

83 See arts 7, 9, 10 and of the Constitution.

84 The Assembly budget (under the control of the Speaker) is part of Vote Premier.

85 See arts 20(9) and 27 of the Constitution.

V *CHANGES TO THE CONSTITUTION*

The Constitution of Niue has been amended on only one occasion, and that was in 1992. There was an omnibus Bill prepared, and it achieved the necessary support in the Assembly and at the constitutional poll.⁸⁶ There were a number of matters of significance dealt with in that constitutional amendment. The first and most substantial related to the judiciary. The Constitution was amended to provide for a Niue High Court and a Niue Court of Appeal in place of the earlier system which relied on the High Court of New Zealand and the Court of Appeal of New Zealand. This was in effect a patriating provision, emphasising the autonomy and self-government of the State of Niue. In the context of the restructuring of the judicial system, the former Niue Land Court and Niue Land Appeal Court were abolished, and in their place there is a Land Division within the High Court of Niue.

The qualification to be an elector in Niue was also amended to require New Zealand citizenship of all who wished to be candidates for election.

Along with that amendment was the repeal of article 31 of the Constitution. This was an interesting provision which required a certificate of the Chief Justice⁸⁷ in respect of any legislative proposal which would impact on the criminal law or the status of persons. In the absence of a Bill of Rights in Niue, this was the nearest to a human rights requirement. That provision was repealed in 1992, with the result that the only human rights provisions of Niue are those few covered independently of a Bill of Rights in the Constitution⁸⁸ and in ordinary statutes such as the Race Relations Act 1972.

Many international human rights treaties bind Niue but, apart from the Race Relations Act, there is no domestic implementation of the treaties. Further, although the ICCPR binds Niue, Niue is not a party to the First Optional Protocol. In 1974, when the Niue Constitution was drafted, New Zealand had not legislated for human rights and, unsurprisingly therefore, there was no Bill of Rights entrenched in the Niue Constitution. By 1992, the New Zealand situation had changed and there was

⁸⁶ Constitution Amendment (No 1) Act 1992.

⁸⁷ This certificate (or response) would be obtained by the Chief Justice being invited to comment on the legal, constitutional, and policy issues raised by the legislative reform.

⁸⁸ Eg the right to vote – article 17 of the Constitution.

also the example of the Cook Islands which in 1981 amended its Constitution to include human rights provisions.⁸⁹ The Government of Niue considered the matter and decided not to enact a Bill of Rights.

The absence of specific human rights laws has not caused any obvious social problems. Perhaps this flows from the size of community, the fact that it is largely homogeneous, that religious affairs are well regulated, that the right to vote every three years is entrenched, or that there are legal protections for equality in employment with the main employer, the Niue Public Service Commission. Ultimately, these few laws, the rule of law, and judicial review give the protection that members of the community have against abuses by the government or their fellows.

Over the years, the amendments of the Constitution made in 1992 have been subject to a number of adverse comments. The first is that there should not have been an omnibus Bill but that each of the substantive changes should have been the subject of a separate poll. The way the proposal was presented, it was "all or nothing" in the sense that, if a voter desired that the qualification of candidates for the Assembly be limited by New Zealand citizenship, the vote would be yes, even if the abolition of the Niue Land Court was not particularly favoured.

Some concern has also been expressed about the deletion of article 31 with its human rights implications, but no strong feeling is evident for its re-enactment.

Experience with the land law might suggest that the patriation of the judicial system should have proceeded without the abolition of the specific land court system. Since 1992, there has been a range of judicial practice. Some High Court judges are reported to have approached the amendment on the basis that, because land matters were now to be dealt with by a Division of the High Court, the normal rules of High Court procedure would apply to land cases. Another view, and that followed by some judicial practice, is to say that the Land Division is not subject to the normal High Court Rules but that the practice of the Land Division should follow the practice and the procedural rules of the former Niue Land Court.⁹⁰ That view may be the better law view given that the 1992 amendment did not repeal the extensive statutory provisions relating to procedures of the Land Court.

⁸⁹ Articles 64-66 of the Cook Islands Constitution.

⁹⁰ See Niue Amendment Act (No 2) 1968, Parts V and VI.

Since 1992, there have been several constitutional review committees established by the Niue Assembly. On only one occasion did a proposal from such a review proceed to the Assembly. Reportedly, it did not get past the first procedural requirement of article 35 of the Constitution.

The primary concern in the late 1990s was to have a constitutional amendment procedure which enabled or required amendments to be put to the nation on an issue by issue basis. The sentiment was clear, and was clearly a reaction to the 1992 experience. There is, however, nothing in the present article 35 which precludes that approach to constitutional amendment, nor a number of discrete proposals being subject to constitutional poll at the same time.

In the 21st century, expressions of interest in constitutional amendment have focussed primarily on increasing the size of Cabinet and on extending the life of the Assembly to four or five years. The Niue Constitution is a rigid one. Because of the extensive effort involved and the costs incurred in holding a national poll, a government, or indeed an Assembly, is wary of proceeding along a constitutional amendment route without a clear purpose and sense of a positive outcome.

It would be wrong to conclude that the sole reason for constitutional reform in Niue is the rigidity of its Constitution or the reactions to the 1992 amendment. In a number of areas, reform of constitutional law other than the Constitution would be desirable, but there has been little or no action in those areas either. The Constitution contemplates that statutes will be passed to complement the Constitution in relation to privileges of the Assembly,⁹¹ exemptions for members to hold contracts involving public money,⁹² and the judiciary.⁹³ The Assembly has legislated only in respect of article 19. The conclusion may be drawn that the Constitution and constitutional law are not Niue governance priorities.

VI CONCLUSION

The Niue Constitution is not a "Westminster" constitution. It is a distraction and unhelpful to consider the possibility. Frequently, such a comparison is made by

91 Article 24(5) of the Constitution.

92 Article 19 of the Constitution.

93 Article 39 of the Constitution.

outsiders commenting on governance issues. The fact that things are done differently in London or in the majority of Pacific states with so-called Westminster constitutions does not mean that, for instance, Niue should have an Attorney-General, a Leader of the Opposition, or the Head of State involved in law-making. The Niue Constitution was designed for Niue without these features. Changes to reflect such alien elements would involve rethinking the whole Constitution and for reasons unrelated to the Niue situation.

Niue has felt keenly the pressure of international affairs. Because it is a state and lacks natural resources, it has been affected by the war on terrorism, by the international criminal law movement, by EU and WTO aid and trade policies, and by the presence of the two Chinas in the region. The pressures are aggravated by the simple fact that Niue has barely the human resource available to run its domestic government without heeding the insistent calls of the outside world.⁹⁴

The Constitution has performed and is performing well. In some areas, it is honoured more in the breach than in observance. Nevertheless, it has provided 30 years of stability⁹⁵ in a country with a frail economy and small population. The difficulty of amendment has buttressed that stability and, what in a less well drafted constitution might have been a liability, has proved an asset. It has provided not just domestic certainty but also strength in the relationship with New Zealand.

94 Ministers and senior public servants are regularly abroad attending to this matter. See Rebekah Plachecki "Beyond the Southern Cross – International Counter-Terrorism Initiatives from a Pacific Perspective" in (2006) 12 *Revue Juridique Polynesienne* 55, or (2005) 11 *NZACL Yearbook* 55.

95 As the case law attests.