

THE CONSTITUTION OF TOKELAU

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I INTRODUCTION

The Constitution of Tokelau presents itself in many guises. This ambiguity arises in part from the fact that Tokelau is an internal territory of the State of New Zealand.¹ It is not an independent state, nor has it yet self-determined.² Its law is therefore ultimately controlled by the New Zealand Parliament.³ Equally, it is clear that there is no single entrenched law which deals with the rules on constitutional matters that affect Tokelau.

On the other hand, there is in Tokelau a consolidated text called the Constitution of Tokelau⁴ which incorporates all the rules of key constitutional relevance. The rules gathered together in this text can be changed by normal process of lawmaking in

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1 Tokelau Act 1948, s 3. For general commentary, see Tony Angelo and Talei Pasikale *Tokelau – A History of Government* (COG, Apia, 2008) and in particular its bibliography.

2 It is listed as a non-self-governing territory by the United Nations. It voted on self-determination in February 2006 and again in October 2007, but the two-thirds majority required for decolonisation was not obtained. See New Zealand Foreign Affairs *Tokelau votes to retain status quo* www.mfat.govt.nz/foreign/tokelau/tokelauindex.html (last accessed 2 July 2009) and the official site for the Tokelau Council of Ongoing Government www.tokelau.org.nz (last accessed 2 July 2009) for speeches by the Ulu to the United Nations.

3 See generally the Tokelau Act 1948(NZ).

4 This may be found in Talei Pasikale (ed) *Tulafono a Tokelau 2009 – A Consolidated Collection of the Legislation of Tokelau* (COG, Apia, 2009) as at 1 April 2009. This is a collection of the current Tokelau Rules.

Tokelau. The consolidated document was approved by Tokelau in the course of its preparation for the self-determination vote of February 2006. It would, if the vote had been in favour of the self-determination package, have become the entrenched Constitution of Tokelau and, along with the Treaty of Free Association, have become a founding document of the self-determined state. In the event, the self-determination package did not receive the necessary number of votes. The document entitled the Constitution however remains in place as a consolidation of key constitutional rules already in force.

The Constitution of Tokelau was developed by the people of Tokelau. It is therefore rightly described as an autochthonous constitution.

II HISTORICAL BACKGROUND

In Tokelau history, there was at one time a feudal domain headed by a king in Fakaofu. The Fakaofu people exploited the southern island of the archipelago, Olohega, and received tribute from the communities of the two northern atolls, Atafu and Nukunonu. With the arrival of Christianity, this feudal regime ended and during the British protectorate and colonial period there was no national body for Tokelau nor any unifying force other than that of the colonial power and its Commissioners who were based elsewhere in the Gilbert and Ellice Islands Colony.⁵

Administrative authority was passed to the Governor-General of New Zealand in 1926⁶ and the territory itself was vested in the Dominion of New Zealand in 1949. During the New Zealand period as administering power, the opportunity was presented, in response to calls from the island communities, for gatherings of representatives of the three islands perhaps once a year, in order to discuss matters of common interest. This pattern evolved to become a regular event, and the body which took on the name of the General Fono began not only to discuss matters of common

5 This aspect of Tokelau's pre-colonial history is dealt with in: A Hooper "Ghosts of Hierarchy I: The Transformation of Chiefly Authority on Fakaofu, Tokelau" (1994) 7 *History and Anthropology* 307-320, and J Huntsman "Ghosts of Hierarchy II: Transformations of the Wider Tokelau Policy" (1994) 7 *History and Anthropology* 321-338 *Matagi Tokelau* (Institute of Pacific Studies, USP, 1991).

6 *New Zealand Gazette* 1926, February 11, 398.

interest but also to elaborate, with the government of New Zealand, the budget for Tokelau for each year.⁷

The situation in 1993, when a decision was taken to delegate powers from Wellington to Tokelau, was that there was a national body which had a regular meeting pattern and which already had a known advisory role in respect of administrative matters. With the delegations, that body the General Fono, became empowered to make administrative decisions. In the 1990s, the General Fono typically met only twice each year and then only for three days each time. The three village leaders, the Faipule, therefore took on the role of standing committee/executive council/Cabinet for the General Fono. The Council of Faipule was responsible for the implementation of the General Fono decisions and the day to day management of the government of Tokelau.

III THE ROLE OF THE TOKELAU ACT 1948

In the present colonial situation, the basic constitutional document for Tokelau is the Tokelau Act 1948 of New Zealand. It was by this Act that Tokelau was incorporated into the state of New Zealand as an external territory. Subsequently, New Zealand placed Tokelau on the UN list of non-self-governing territories⁸ and Tokelau has, at least for the last 30 years, been gradually prepared for its act of self-determination in accordance with UN norms.⁹

The Tokelau Act 1948 states first that Tokelau is part of New Zealand. The current constitutional setup for Tokelau is that the Head of State is the Head of State of New Zealand and that the monarch's delegate, the Governor-General, is the Governor-General of Tokelau.¹⁰ This follows from the fact that Tokelau is a territory

7 Anthony Angelo "Establishing a Nation – A Second Look" (2001) *Revue Juridique Polynésienne*, Hors serie volume 1, RJP 235. Other relevant documents are the Reports of the Administrator of Tokelau presented to the House of Representatives. See below, n 9.

8 United Nations www.un.org/Depts/dpi/decolonization/docs.htm (last accessed 2 July 2009).

9 Documents relevant to this issue are collected in Rosemary Gordon (ed) *Tokelau. A collection of documents and references relating to constitutional development* (Tokelau Administration, Apia, 1995), and the reports of the Administrator of Tokelau presented to the NZ House of Representatives. The reports most pertinent to the topic of this paper are those for the years 1992 and following. The latest report is for the year ended 30 June 1999 (Ministry of Foreign Affairs and Trade, Wellington, 2000).

10 Tokelau Act 1948, s 3.

of the State of New Zealand and also from the Letters Patent 1983, which state that Tokelau is one of the countries of the Realm of New Zealand. In the executive line of authority, below the Governor-General is the Executive Council and, below that, the Minister for Foreign Affairs and then the Administrator for Tokelau. At that point the Tokelau self-government system takes over: National Government headed by the General Fono, and its standing committee, the Council for the Ongoing Government.¹¹ The Ulu is the head of government of Tokelau, and in all ordinary events represents Tokelau both nationally and abroad.

The Tokelau Act 1948 also states that the Minister responsible for foreign affairs has the responsibility for the administration of the Tokelau Act.¹² In the exercise of regulation-making power under the Tokelau Act, regulations were made for the administration of Tokelau – the Tokelau Administration Regulations 1993.¹³ Those regulations indicate that the executive authority for Tokelau will be exercised by an Administrator who will answer to the Secretary for Foreign Affairs. There is also provision in the regulations for the delegation of power by the Administrator¹⁴ to any other person, and in particular to Tokelau institutions.¹⁵

Before the entry into force of the 1993 regulations, there were earlier regulations of the same name and under them the powers of the Administrator had regularly been delegated to a full-time public servant, the Official Secretary who was in fact the chief government official for Tokelau.

The Official Secretary was a member of the New Zealand Government Public Service appointed by the State Services Commission.¹⁶ The Official Secretaries were

11 The 6 person Council is the successor of the Council of Faipule.

12 Tokelau Act 1948, s 9.

13 Now known as the Administration Rules 1993. These may be found in the *Tulafono a Tokelau 2009 – A Consolidated Collection of the Legislation of Tokelau*, above n 4.

14 The Administrator was typically part-time and either a retired diplomat or a senior officer of the Ministry, Lindsay Watt (1993-2003) was the first (and so far) only full-time Administrator.

15 Administration Rules 1993, r 5-7.

16 Tokelau Amendment Act 1967, Part I.

for many years promising young men from within the Ministry for Foreign Affairs. In the late 1980s, the first Tokelauan was appointed to that role.

The State Services Commission of New Zealand was responsible for the Tokelau Public Service. That authority was exercised with an increasingly light hand until 1999 when the Tokelau Act was amended to allow a Tokelau Service Commission to take over responsibility for the employment of Tokelau public servants, their management, and their discipline.¹⁷

After some adjustment, the Tokelau public service is now under the control of the executive body for Tokelau, the Council for the Ongoing Government. This group of six elected officers, representing the three villages of Tokelau, has the responsibility for appointing all directors in the Tokelau public service and for their management and discipline. The Council for the Ongoing Government delegates to the individual Directors the responsibility for the employment management and discipline of public servants within the departments.

Appeals from the actions of the heads of departments are heard by the Council for the Ongoing Government. The legislative authority lies ultimately with the New Zealand Parliament. There is also power in the Governor-General in Council to make regulations for Tokelau.

In present practice, the lawmaker for Tokelau is the General Fono; and for each of the villages, the Village Council (the *Taupalega*). There is no capital city or main island for Tokelau, and the role of Chief Minister (*Ulu*) of the Government rotates among the three Faipule each year. The term of office of Faipule is three years, and each chairs the Council of the Ongoing Government for one year. During that year, the meetings of the General Fono are hosted by the island of the Faipule who is the Chief Minister for that year. The General Fono also has a chairperson who is proposed by the host island for the year during which the General Fono sits in that island. The chairperson is not a member of the General Fono and has neither a deliberative nor casting vote.

¹⁷ See Tokelau Amendment Act 1999, s 3 as implemented by the Tokelau (Employer for the Tokelau Public Service) Order 2001 (SR 2001/98). The Tokelau Employment Commission established by r 3(1) of the Tokelau Public Service Rules 2001 was recognised as successor to the State Services Commissioner as the employer for the Tokelau Public Service. The Tokelau Employment Commission was discontinued by effect of the Public Service Rules 2004.

The Tokelau Act 1948 additionally provides, in the 1986 amendment, for the court system for Tokelau, and most notably for the appointment of a judicial Commissioner on each atoll of Tokelau. The judicial system has the New Zealand Court of Appeal at its apex, hearing appeals from the High Court of New Zealand acting as the High Court of Tokelau. Neither of these courts has ever been seized of a Tokelau case. At the first instance level, there is a Commissioners' Court in each village which deals with petty criminal and civil matters.¹⁸ The judicial Commissioner is appointed by warrant of the Governor-General of New Zealand for three years.¹⁹

A Commissioner is typically a respected member of the local community, but has no legal training and, in some cases, will have minimal knowledge of English which was the language of origin of much of the criminal law.²⁰

Custom is a source of law in Tokelau. This creates no difficulty for Commissioners; however it could be a problem for the High Court or Court of Appeal. To alleviate this potential problem, the Custom as a Source of Law Rules 2004 provide for assistance for those courts.

IV THE PATH TO DECOLONISATION

A Delegated Powers

Since 1926, Tokelau was administered by New Zealand through offices based in Apia. In 1993 new administration regulations were promulgated and, in 1994, there was an almost total delegation of powers of the Administrator to the General Fono²¹ (the national political gathering) and when the General Fono was not sitting to the

18 Refer to the Constitution, Parts 8-11. Further references are the Custom as a Source of Law Rules 2004, and the Crimes, Procedure and Evidence Rules 2003.

19 Tokelau Amendment Act 1986, s 5.

20 All laws made in New Zealand have only an official text in English. Since 1996, the laws made in Tokelau by the General Fono have almost always been made in Tokelauan. In recent years all have been made in Tokelauan. The texts of all laws are available in *Tulafono a Tokelau 2005* which presents the consolidated text of laws of the General Fono – volume I Tokelauan, volume II English.

21 For the text of the 1993 delegation, see above n, 9 *Tokelau a collection of documents and references relating to the constitutional developments* (Malo a Tokelau, 1999) 227-232.

standing committee of the Fono, the Council of Faipule (now known as the Council for the Ongoing Government).

Also in 1993, there were substantial delegations by the New Zealand State Services Commissioner to contractors who worked exclusively with the Tokelau public servants. To a degree, they filled the gap left by the disestablishment of the post of Official Secretary. This delegation paved the way for future delegations to a Tokelauan to act as Public Service Commissioner. That in turn enabled an easy transition to a totally Tokelau controlled public service and the withdrawal of the State Services Commission of New Zealand.

Therefore, 1993 was a turning-point in the development of Tokelau-wide self-government. The Public Service Commission had delegated its powers, and in 1994 the Administrator had delegated the Administrator's executive powers.

At the same time, Tokelau organised itself to receive these delegated powers. The General Fono moved from being simply a policy formulating body which assisted the New Zealand government, to being a national grouping with power to settle all administrative matters by way of the various delegations.

B Legislative Power

This pattern of delegation was strengthened in 1996 with an amendment to the Tokelau Act 1948, which gave a legislative power to the General Fono of Tokelau. This power was a broad one, but was limited to making laws that are not contradictory of any New Zealand Act of Parliament in force in Tokelau, or of any regulation made by the Governor-General of New Zealand after 1996.²² The other limits on its power relate to the role of treaties in respect of Tokelau²³ and an extraterritorial limitation on the legislative power thus granted.²⁴

Each village of Tokelau had for nearly a century had a domestic legislative power of a limited kind.²⁵ That was confirmed by the Village Incorporation Regulations of

22 See now Tokelau Act 1948, s 3B.

23 Above n 21.

24 See Tokelau Act 1948, s 3A(4).

25 See Native Laws of the Union Group 1912 (Published by authority, Suva, 1914) laws VI paras 3 and 7.

1987, and that local government authority remains in force but subordinate to any Rules made by the General Fono.²⁶

Since 1996, neither the New Zealand Parliament nor the Governor-General in Council has legislated for Tokelau other than in a complementary role or in order to provide the necessary legislative support for Tokelau political decisions.²⁷

There is therefore a very clear Tokelau legislative power for all matters relating to Tokelau. Since 1996, Tokelau has used its legislative power to amend, repeal, or patriate²⁸ the great bulk of legislation in force in Tokelau which it had inherited from New Zealand-based legislators. As at 2006, what Tokelau law remains in Acts of the New Zealand Parliament or regulations made by the Governor-General is sparse and limited to those constitutional areas which relate to Tokelau's colonial status.²⁹

Those current laws deal with the power of the New Zealand Parliament to legislate for Tokelau, the power of the Governor-General of New Zealand in Council to legislate for Tokelau,³⁰ power of the Administrator of Tokelau to exercise executive authority in a limited set of circumstances, the judiciary,³¹ the law relating to the territorial sea and the exclusive economic zone.³² In none of those areas has New Zealand recently exercised any authority. The removal of those powers would therefore not result in any disruption in the government of Tokelau. In all cases, the New Zealand government would simply withdraw its authority from the islands to the extent necessary and Tokelau could legislate as necessary to take over from any New Zealand laws that were repealed.

26 Refer to the Village Incorporation Rules 1987, r 18.

27 Eg to provide for control of the public service to shift from Wellington to Tokelau.

28 See eg Change of Names Rules 2004.

29 Eg Tokelau Act 1948; Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977; Citizenship Act 1977.

30 Tokelau Act 1945, s 4.

31 Tokelau Amendment Act 1986.

32 Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977.

C Preparing to Vote

By 2005, the relationship with New Zealand had evolved to the point where the New Zealand government remained responsible for Tokelau by virtue of its being part of the State of New Zealand but, as a result of the development of self-government in preparation for an act of self-determination, had very few powers for direct intervention in the government of Tokelau. The substantial powers that remained were the supreme legislative authority vested in the New Zealand Parliament and the subordinate legislative power which is vested in the Governor-General of New Zealand in Council.

It would be possible for the Administrator of Tokelau to revoke the delegation of authority to the Tokelau institutions. However, that would not have great practical significance unless there were also a change to the Tokelau laws by New Zealand legislators because, since 1996, Tokelau has legislated to vest executive authority in local officers. There are few areas where the Administrator as such retains any power.³³

1 Free Association and "The Principles of Partnership"

Key years in terms of Tokelau constitutional development have been 1993, 1994, 1996, and 1999. All were examples of development by way of legislation. The next significant steps were administrative agreements with the government of Tokelau. In 2003, Tokelau signed a statement with the New Zealand government entitled 'The Principles of Partnership'. That document spelled out for Tokelau and New Zealand the general understandings relating to their relationship. This document bears many resemblances to a free association agreement. Although Tokelau remains a colony, the "Principles of Partnership" set out for Tokelau a number of the understandings that had been developed by New Zealand with the Cook Islands and Niue over the years, but which for them remain largely unarticulated. In this sense, the Tokelau constitutional arrangement was a considerable improvement on the largely unwritten relationships that New Zealand has with the associated states of the Cook Islands and Niue.

³³ One example is the power in the Tokelau (Territorial Sea and Economic Zone) 1997 Act. That power is still expressed as a power of the Administrator.

At the same meeting of the General Fono at which the Principles of Partnership³⁴ were signed, Tokelau announced that it was prepared to explore further with New Zealand the nature of a future arrangement of free association and that it would, in light of the details elaborated after consultation, be willing to consider an act of self-determination.³⁵

2 *The finance package*

In 2004, the Prime Minister of New Zealand visited Tokelau³⁶ and a three-year financial package was agreed with Tokelau.³⁷ The Prime Minister of New Zealand also gave public notice of the New Zealand government's tentative timetable in respect of Tokelau; it envisaged a self-determination vote before the end of 2005.

3 *A Treaty of Free Association*

Following the visit of the Prime Minister in 2004, work began in earnest on the preparation of a decolonisation proposal that could be put to the people of Tokelau for their act of self-determination. The material presented to the populace for the 2006 vote contained a copy of the Constitution and a draft Treaty of Free Association with the State of New Zealand.³⁸ The Constitution was the internal government part of the proposal and was effectively the law already in force in Tokelau. All that would happen with an acceptance of the self-determination package would be that the New Zealand government would withdraw from the constitutional scene and the General Fono, Council for the Ongoing Government, and the villages would be in sole control.

34 See Talei Pasikale *Tulafono a Tokelau – Laws of Tokelau 2005* (Manulele Tokelau, Tokelau, 2005) 486.

35 See the *Tokelau, Meeting of the Special Committee on the Constitution* (Fakaofu, October 2003).

36 This followed a meeting of the Pacific Islands Forum in Samoa at which Tokelau had been a special guest because of its declared interest in self-determination.

37 Above n 34 *Tulafono a Tokelau*, 492. Refer to the Self-Determination Package as noted above. Other relevant documents are the speeches made by New Zealand which can be accessed through the New Zealand Foreign Affairs webpage www.mfat.govt.nz/media-and-publications/media/mfat-speeches/2004/0-4-October2004.php (last accessed 2 July 2009).

38 In the years preceding the vote there were extensive discussions in Tokelau in the 3 villages and with the diaspora about the vote and the substantive issues connected with the vote.

The draft Treaty of Free Association was a new document and went through many variations in the course of the years of its drafting. It built substantially on the Principles of Partnership of 2003 and on the economic package of 2004. It was, however, drafted as a treaty and has detail on each of its ten clauses provided in a set of supporting documents which would also have a binding effect. At a third level, there were a number of informational documents explaining the status quo in respect of the relationship of Tokelau and New Zealand, and indicating the base from which the relationship would in future grow.

The emphasis in the negotiations of the treaty was on slightly different aspects of the arrangement, depending on whether it was the Tokelau interest or the New Zealand interest that was being addressed. From the Tokelau point of view, the most significant provisions were those relating to the economic and administrative assistance and to international relations. Over the months, discussions increasingly focussed on those two areas. The package had approval in principle from the New Zealand Cabinet and the General Fono by the middle of 2005, and had final formal approval of the New Zealand Cabinet late in November 2005. By that time it had become clear that the self-determination vote would not take place in 2005, and it was scheduled for February 2006.

4 Referenda

Against that background and in order to be prepared for a positive result from the referendum, New Zealand legislation was prepared in draft form to give effect to the result of the self-determination vote. The main point of the proposed New Zealand Act of Parliament was to repeal the New Zealand law which related to Tokelau as a colony of New Zealand. Had the February 2006 vote been in favour of the self-determination package, a Bill was scheduled to go to Parliament in the first quarter of 2006 with a view to its becoming law by the middle of the year. The actual date of commencement would have been agreed by the Tokelau and New Zealand governments and the signing of the Treaty of Free Association would have followed immediately the entry into force of the Tokelau Amendment Act. That would be the New Zealand government's acceptance of the result of the self-determination vote. In the result, nothing happened. The New Zealand government, however, announced that the self-determination package would remain open to Tokelau to consider further if it so wished.

In June 2006 the Tokelau government reported at its annual visit to New York that it was contemplating having another vote on self-determination some time in 2007. That vote took place in October 2007 under the same conditions as the vote of 2006. The number in favour of the autonomy package increased slightly over the 2006 vote but again fell short of the 67% threshold.

V THE FUTURE

A Tokelau in the Realm

Under the self-determination package, Tokelau would have been totally internally self-governing. It would, however, have remained part of the Realm of New Zealand and, as a member of the Realm, would have the Queen of New Zealand as the Head of the Realm. For matters affecting the Realm, such as the exercise of any prerogative power or the award of honours, the Head of the Realm would have been responsible. In other respects, Tokelau would have operated independently of both the Realm and of the State of New Zealand. The Head of the Realm, the Queen of New Zealand, would have had no constitutional role in the internal government of Tokelau.

The 2006 self-determination package envisaged that, in future, the judiciary of Tokelau would continue as at present with a Law Commissioner on each island, with more important cases to be tried by a High Court of Tokelau, and with final appeal to a Court of Appeal of Tokelau. The proposal would have had the High Court of Tokelau and the Court of Appeal being coterminous with the High Court and Court of Appeal of New Zealand. Those courts would, as now, apply Tokelau law to any matter coming before them.³⁹

B New Zealand Citizens

The people of Tokelau are under the Citizenship Act 1977 of New Zealand and are entitled to New Zealand citizenship in accordance with its terms. Under the self-determination package that right would have continued and, as in the case of the Cook Islands and of Niue, the right to New Zealand citizenship (and thence easy communication with the bulk of Tokelauan diaspora which is in the State of New

³⁹ Additionally, there are special rules where custom is pleaded as a source of law in any litigation in the High Court. Refer to the Custom as a Source of Law Rules 2004. This is listed in the *Tulafono a Tokelau 2009 – A Consolidated Collection of the Legislation of Tokelau*, above n 4.

Zealand) would have been a key element of the relationship of free association between the two states.

C International Human Rights

Tokelau has a nascent human rights regime under which it accepts the principles of the Universal Declaration of Human Rights (UDHR). Tokelau is subject to the major international human rights treaties by virtue of its status as part of the State of New Zealand. The fact that New Zealand is a party to a treaty has typically meant that the treaty also applies to Tokelau.⁴⁰ One human rights treaty that binds New Zealand but not Tokelau is the UN Convention on the Rights of the Child.

Being party to a treaty is one thing, accepting it as domestic law is another. The State of New Zealand has substantially implemented the human rights conventions in its law but, until the Human Rights Rules 2004, there was no Tokelau human rights legislation. The Human Rights Rules 2004 were very short and simple and are now incorporated in the Constitution of Tokelau. They enact the principles of the UDHR as domestic law and provide an administrative process to deal with human rights violations. Beyond that lies the First Optional Protocol to the ICCPR which also binds Tokelau.⁴¹ The ICCPR is also accepted as Tokelau law, but only to the extent of its elaboration of the principles of the UDHR and consistency with the UDHR. By way of example, the detail of article 14 ICCPR would be Tokelau law because of its relationship to articles 10 and 11 of the UDHR. On the other hand, the individualism of the ICCPR is tempered by the dominant rule of article 29 of the UDHR.

D Treaty-making

Tokelau has, consistent with its development of self-government and the provisions of United Nations General Assembly Resolution 2625, a limited international legal personality. That has been extensively used in entering into memoranda of understanding with neighbouring states⁴² and by its participation in the work of a number of international and regional organisations such as UNICEF,

40 Note the 1988 Declaration of New Zealand to the UN Secretary General UNGA LE 222.

41 Refer to the Bayefsky webpage regarding International Human Rights Treaties www.bayefsky.com/docs.php/area/reservations/state/123/node/3/treaty/ccpr/opt/1 (last accessed 2 July 2009).

42 Eg Tuvalu and Samoa – for the text, see *Tulafono a Tokelau*, 480-483.

SPREP, WHO, FFA, the University of the South Pacific and, most recently, the Pacific Islands Forum.⁴³ Tokelau has not been able to sign any treaties in its own right but it has, as a signatory for New Zealand, signed treaties affecting its territorial boundaries.⁴⁴

If Tokelau were to become a state in free association with New Zealand as a result of decolonisation, it would, as the Cook Islands and Niue, have the international capacity to enter into treaties in its own name. The first exercise of that capacity on the basis of the present decolonisation package would be the entering into of the Treaty of Free Association with the State of New Zealand.

E Being Tokelauan

The Constitution of Tokelau is not a "Westminster" constitution. There is no direct election to the national government, there is no party system, there is no upper house in the legislature, there is no Cabinet government, and the Head of State has no involvement in the domestic legislature or administration.

Constitutional reform in Tokelau has been driven by two key factors: the desire to entrench the role of the elders and villages in village and national government affairs, and the complementary interest in the decolonisation process.

For Tokelau, the development of the "full measure of self-government" means reserving ultimate power in all matters to the villages, having internal government autonomy, and having the structures and assurances of future security in place before any act of self-determination. This means that significant attention is paid to the interests of local communities. In the circumstances of 2009, the local communities are clearly in control of their situation, and individuals in those communities by virtue of their voting rights have a power much greater than they have in custom where decisions are made by the elders.

43 Tokelau has observer status.

44 Eg with the USA and with France – see the New Zealand Treaty Series, also reproduced in the *Tulafono a Tokelau* above n 34, 470-484. Since 1993 New Zealand has always asked Tokelau whether it wishes a particular treaty to extend to it before New Zealand has signed to include Tokelau.