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1.The Origins of Cook Islands 'Associated Statehood'

1.1. The post World War II tide of decolonisation – in the Pacific and elsewhere – had its beginnings with the 'Atlantic Charter' proclaimed by President Roosevelt and Prime Minister Churchill at their 1942 meeting at Placentia Bay off Newfoundland which vaguely acknowledged Roosevelt's resistance to the continuation of colonialism after the war. For the South Pacific, a sharper focus was provided by the 'Wellington Conference' in November 1944, when Australia and New Zealand, stung by signs that the 'Big Powers' might unilaterally re-arrange the Pacific, began to insist on concepts of 'trusteeship' and international supervision for all dependent territories after the war.[1] These concepts found their way into the United Nations Charter and institutions partly as a result of New Zealand Prime Minister Peter Fraser's chairmanship of the influential 'Trusteeship Committee' at the San Francisco Conference in 1945, called to finalise the shape and functions of the United Nations.

1.2. In December 1960 the General Assembly of the United Nations adopted Resolution 1514 (XV), better known as the *Declaration on the Granting of Independence to Colonial Countries and Peoples*. It declared that:

> (3) Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence ....
>
> (5) Immediate steps shall be taken, in Trust and Non-Self-Governing territories or all other territories which have not yet attained independence, to transfer all powers to the people of those territories without any conditions or reservations, in accordance with their freely expressed will

[1] For a good discussion of these developments and the anxieties to which they gave rise, see Gerald Hensley, *Beyond the Battlefield: New Zealand and its Allies 1939-45*, Penguin, London, 2009, especially Chapter 17.

> and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom'

It was adopted by 89 votes in favour (including NZ), with none against, but 9 abstentions. The very next day, the General Assembly adopted a further declaration. Resolution 1541 (XV) contained an annex setting out 'Principles which should guide Members in Determining whether or not an obligation Exists to Transmit the Information called for in Article 73(e) of the Charter of the United Nations'. Principle VI stated that:

> 'A Non-Self-Governing Territory can be said to have reached a full measure of self-government by :
>
> (a) Emergence as a sovereign independent state
> (b) Free Association with an independent state
> (c) Integration with an independent state

Principle VII added that:

> (a) Free Association should be the result of free and voluntary choice by the people of the territory...It should be one which respects the individuality and the cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent state the freedom to modify the status of that territory through the expression of their will by democratic means and through constitutional processes.
>
> (b) The associated territory should have the right to determine its internal constitution without outside interference ....

1.3. In 1961 the General Assembly set up a Special Committee of 17 members to study and report progress on implementation of Resolution 1514. In 1962 it was enlarged to 24 members and became known, as the 'Committee of 24'. It was exploited in the context of the ideological rivalries of the 'cold war' to expose the old colonial powers to international analysis and criticism. K.I. Murray has commented:

> 'Its repeated insistence that Pitcairn Island (population about 90) be granted sovereign independence gives one cause to wonder about the Committee's awareness of the problems of very small island territories'

The New Zealand diplomat Lindsay Watt has drawn attention to the significance of Prime Minister Peter Fraser's role in the formation of the United Nations at the

San Francisco Conference in 1945, and his chairmanship of the Trusteeship Committee in which those parts of the Charter establishing the principle of self-determination for trust territories and non-self-governing territories were developed. Watt discusses this and other factors in reaching the conclusion that:

> New Zealand - both aided and abetted by the United Nations - found itself in the vanguard as a decoloniser in the South Pacific through the 1960's and into the next decade.

1.4. Certainly, New Zealand was prepared to experiment and innovate. A specific example is the development of an associated statehood model for the Cook Islands, and later Niue, which proved acceptable to the United Nations, the key to which was the vesting of all law-making powers in the legislature of the associated state. An earlier model designed by the United Kingdom for its Caribbean territories, and which attempted to retain at Westminster law-making powers for foreign affairs and defence matters, had been rejected by the United Nations as falling short of compliance with its intentions.

1.5. Dame Alison Quentin-Baxter is the author of an authoritative 2001 analysis of the constitutional relationship between the Cook Islands and New Zealand, and was the architect of the revision of the *Letters Patent* in 1983 defining the current 'Realm of New Zealand'. Dame Alison states:

> When the Cook Islands became self-governing, there was a shadowy expectation that the free association relationship would be an evolving one, just as New Zealand's relationship with the United Kingdom had evolved in the period between 1919 and 1947. Consequently, the very existence of the free association and also its terms have to be deduced from the provisions of the Cook Islands Constitution Act 1964, the accompanying Constitution, and the solemn assurances and settled practice of the partner governments.[2]

Dame Alison summarised the constitutional relationship in the following passage:

> The New Zealand model of free association retains important constitutional links between the partners:

[2] Alison Quentin-Baxter, 'The New Zealand Model of Free Association: What Does it Mean for New Zealand?', *Victoria University of Wellington Law Review*, Vol. 39 (4), 2009, p. 607-634, p.611-612.

- The constitution of the self-governing State recognises that the Head of State continues to be Her majesty the Queen in right of New Zealand.

- The people of the self-governing State remain New Zealand citizens as of right.

- The New Zealand Government has given a commitment to go on giving the government of the associated State financial and other support as it did before self-government.

- There is an expectation that the laws and policies of both governments will reflect the shared values stemming from the common citizenship.[3]

1.6. One sceptical view of the post-WWII independence constitutions in the Pacific has been expressed by the experienced jurist, Professor Yash Ghai:

> 'The constitutions are so structured as to transfer authority to an educated, westernised elite, who speak a common language with the departing colonialists and think and plan within frameworks common to both. In that sense the constitution, far from marking the end of colonialism, can be viewed as its culmination, recording and consolidating the final victory of the westernised, Christianised, urbanised elites, in control of the restructured formal state, distinguished by their increasing repudiation of traditional institutions.' Yash Ghai, *Law Government and Politics in the Pacific Island States*, University of the South Pacific, 1988, p.49.

An influential British constitutional lawyer, Stanley de Smith, favoured a more benign interpretation:

> 'This has been a story of the piecemeal reconstruction of the Westminster model. Desperately fragile and precariously balanced, it has yet been the most sought-after of Britain's exports to the Commonwealth. From Aden to Zanzibar nothing that could be represented as being in any way inferior to the original has given satisfaction…In short, the Westminster model of responsible government has been adopted primarily because it has been persistently and insistently demanded…'

1.7. Yet there is a paradox in the enthusiasm of the departing colonial powers for insisting on 'fundamental freedoms' in the 'supreme law' constitutions foisted

[3] Alison Q-B, 2009, above note 2, p.613.

upon the fledgling states spawned in the receding tide of colonialism. It was that the departing powers were themselves at best lukewarm about, and sometimes actively hostile to, judicially reviewable fundamental freedoms in their own jurisdictions. Stanley de Smith quotes the reported comment of the Labour Party leader, Ernest Bevin, about the *European Convention on Human Rights* of 1951: 'I don't like it. When you open that Pandora's Box, you will find it full of Trojan horses'.[4]

2. The Power of the Cook Islands Parliament to change the present constitutional arrangement

2.1. Abolition, or modification, of the constitutional arrangement set out in Article 2 of the *Constitution of the Cook Islands* under which the Cook Islands is part of the 'Realm of New Zealand', with the Queen in Right of New Zealand as Head of State, is within the legislative power of the Parliament of the Cook Islands. This is clear from the terms of Article 39 of the *Constitution*, conferring full law-making authority upon the Parliament.[5]

2.2. However, although there is no limitation on the power of the Cook Islands Parliament to make such changes as it deems proper to that arrangement, including bringing it to an end altogether, there is a procedural requirement in Article 41(2) of the *Constitution* that a Bill modifying, or inconsistent with, the arrangement be passed in the manner prescribed in Article 41(2) with a two-thirds majority of the Members of Parliament, and also that such a Bill be submitted to a referendum in which it is supported by two-thirds of the valid votes cast. This 'deep entrenchment' applies not only to Article 2 of the *Constitution*, but also to Article 41 itself (so that the requirements are 'doubly-entrenched' to use the phrase of constitutional law), and to the provisions of the *Cook Islands*

[4] Stanley de Smith, The New Commonwealth and its Constitutions, Steven & Sons, London, 1964, p.181.

[5] For the sake of completeness, it is noted that the apparent limitation of legislative authority to 'the peace, order, and good government of the Cook Islands' (Article 39(1)) simply repeats the 'Westminster formula', which applies also to the powers of the New Zealand Parliament, and has been held by the Privy Council to confer 'the plenitude of sovereign legislative power'. Per Lord Pearce in The Bribery Commission v. Ranasinghe [1965] AC 172, at pages 197-8. It is therefore not thought that an argument could easily be mounted that proposed changes to the Constitution were not for the 'peace, order, and good government' of the Cook Islands. However, it may be necessary to consider some observations in R. (Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs [2001] 2 WLR 1219. Although that judgment was overturned in subsequent appeals on other grounds, it is suggested that the observations of Laws L.J. on the limits of 'peace, order and good government' in relation to the displacement of the Chagos Islanders remain relevant and useful. His Honour observed that: 'Peace, order and government may be a very large tapestry, but every tapestry has a border…'

Constitution Act 1964, with which creation of a separate Realm would be inconsistent. In particular, section 5 (the so-called 'Riddiford Clause' relating to 'External Affairs and Defence') and section 6 (relating to New Zealand citizenship) would be affected so as to require a referendum.

2.3. It is sometimes suggested that there might be some sort of 'inherent power' for the Cook Islands Parliament to alter the restrictions just discussed by ordinary majority. However, the position was clearly stated by Lord Pearce in the Judicial Committee of the Privy Council – the highest Court for the Cook Islands under its present *Constitution* – that:

> The proposition which is not acceptable is that a legislature, once established, has some inherent power, derived from the mere fact of its establishment, to make a valid law by the resolution of a bare majority which its own constituent instrument has said shall not be a valid law unless made by a different type of majority or by a different legislative process.[6]

3. 'Conventions of the Constitution' – importance for the Cook Islands.

3.1. One of the most difficult concepts to explain to lawyers trained outside 'Westminster model' legal systems is the nature and role of conventions of the constitution. These are the rules of the constitution which, by definition, and in contrast to the written rules of the constitutional documents, the Courts of law do not enforce. But their character nevertheless entitles them to be called constitutional rules, and their breach is habitually and properly described as 'unconstitutional'.

3.2. It is most important to understand that the whole history of the path to independence of the 'old Commonwealth' countries after the First World War, and the development of the present international capacity of the Cook Islands, is in both cases founded on the evolution of conventions relating to the source of advice to the Crown in respect of the affairs of the territory concerned. It came to be accepted by the United Kingdom Government at Westminster that the Crown was advised as to matters concerning the 'Dominions' – as the old Commonwealth countries were called – by the responsible Ministers in each country, and not by the Ministers at Westminster. Similarly, it is now unequivocally accepted that, on Cook Islands matters, Her Majesty the Queen in Right of New Zealand is advised by her Cook Islands Ministers. It is agreed on

[6] Bribery Commissioners v. Ranasinghe (1964) 2 All E R 785, per Lord Pearce at page 792.

all sides that section 5 of the *Cook Islands Constitution Act* 1964 – colloquially known as the 'Riddiford Clause' – is affected by that convention.[7]

3.3. In the case of the old Commonwealth, changes to the legal rules came well after the establishment of the *de facto* independence achieved under the conventions of the constitution. In the case of New Zealand, for example, it was not until 1947 that the *Statute of Westminster* 1931 of the Westminster Parliament was adopted so as to bring law into line with convention. But New Zealand had been recognised as a 'fully independent sovereign state', a member of the League of Nations, and a founding member of the United Nations well before this 'tidying up' of the legal rules. Similarly, it is by the emergence of conventions that the independent capacities of the Cook Islands in foreign affairs and treaty-making and the exclusive role of Cook Islands Ministers are established. This is reflected in such documents as the 1988 Declaration by New Zealand de-coupling the Cook Islands from New Zealand treaty-action[8], and the Joint Centenary Declaration (JCD) of 2001 affirming that:

> Her Majesty the Queen as Head of State of the Cook Islands is advised exclusively by Her Cook Islands Ministers in matters relating to the Cook Islands.[9]

and that:

> In the conduct of its foreign affairs, the Cook Islands interacts with the international community as a sovereign and independent state…[10]

3.4. You may think that this 'conventions approach' to Cook Islands constitutional development seems suitable and effective - it is flexible and does not require political convulsions to operate. However, our enthusiasm might be tempered by two warnings. First, recalling that conventions are by definition not enforced by the courts, we may fear that if actions based on the conventions were to be challenged before the Cook Islands Courts, they might be somewhat reluctant to look beyond clear words in the constitutional provisions, although no doubt it would be argued on behalf of the Government that those words should now be

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[7] See, Alex Frame, 'The External Affairs and Defence of the Cook Islands - The 'Riddiford Clause' considered', *Victoria University of Wellington Law Review*, Vol. 17 (1987), p141-151.
[8] New Zealand Declaration to the Secretary-General of the United Nations, 10 November 1988, UNGA LE 222 New Zealand. In brief, the Declaration had the effect that the Cook Islands would only participate in New Zealand treaty action with the consent of the Cook Islands Government. It had a further effect of recognising the competence of the Cook Islands to enter into international relations 'in its own right'.
[9] Joint Centenary Declaration 2001, Clause 3(1).
[10] Joint Centenary Declaration 2001, Clause 4(1).

understood in the light of the conventions. Secondly, if the Cook Islands view of the state of the conventions gets too far ahead of the New Zealand view, or vice versa, then it becomes difficult credibly to assert the existence of the convention. So far as possible, therefore, both of these situations should be avoided.

4. The Position of the New Zealand Governor-General in relation to the Cook Islands

4.1. Because, in accordance with the *Letters Patent* as revised in 1983, the Governor-General of New Zealand is the Queen's representative in the whole Realm, including the Cook Islands, that Governor-General is formally an office-holder in relation to the Cook Islands, but he/she is the holder of an office without apparent function.[11] This conclusion follows from the express statements in the *Letters Patent* that the Governor-General's powers are:

> without prejudice to the office, powers, or authorities of any other person who is appointed to represent the Queen in any part of the Realm and to exercise powers and authorities on the Queen's behalf.

and the form of the Governor-General's oath of office contains a similar reservation.

4.2. The Queen's Representative in the Cook Islands is such a person appointed to represent the Queen by Article 3 of the *Constitution*, and is empowered to exercise all the major constitutional functions, it being specified in Article 5 of the *Constitution* that the Queen's Representative must do so in accordance with the advice of the responsible Cook Islands Ministers unless a discretion is expressly provided in the *Constitution*. It is accordingly believed that all the functional powers of the Governor-General of New Zealand have been displaced in favour of the Queen's Representative by these mechanisms. Whether in an extreme situation some residual 'reserve powers' might be found to remain with the Governor-General of New Zealand in situations where the Queen's Representative is unable or unwilling to exercise his or her constitutional powers is a question difficult to answer in the abstract.[12] As the Duke of Newcastle observed in a despatch in 1862 to the Governor of Queensland:

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[11] See, Alison Quentin-Baxter, *The Laws of New Zealand*, 'Pacific States and Territories: Cook Islands', Butterworths, Wellington, 2001, para. 27, at pages 56-57.

[12] See Professor R.Q. Quentin Baxter, 'The Governor-General's Constitutional Discretions: an Essay towards a Re-definition', *Victoria University of Wellington Law Review*, Vol. 10 (1980), p. 239.

> Extreme cases are those which cannot be reduced to any recognised principle, arising in circumstances which it may be impossible or unwise to anticipate.

5. The 1973 Kirk/Henry Exchange – 'acceptable values' as a condition of the Cook Islands/New Zealand relationship

5.1. In the well-known letter to Premier Albert Henry in 1973, the New Zealand Prime Minister, Mr Norman Kirk, observed:

> …the bond of citizenship does entail a degree of New Zealand involvement in Cook Islands affairs. This is reflected in the scale of New Zealand's response to your country's material needs; but it also creates an expectation that the Cook Islands will uphold, in their laws and policies, a standard of values acceptable to most New Zealanders.[13] (emphasis added)

What is the significance of this element of the relationship? Perhaps that it is the values 'acceptable to most New Zealanders' that are the condition of the relationship. It is suggested that Cook Islands New Zealanders, along with the majority of their co-citizens in New Zealand itself, are part of that notional consensus, both as a source and as beneficiaries of the assurance. That interpretation is supported explicitly by the terms of the JCD:

> The Cook Islands and New Zealand share a mutually acceptable standard of values in their laws and policies, founded on respect for human rights, for the purposes and principles of the United Nations Charter, and for the rule of law. (emphasis added) [14]

Appendix of Constitutional Provisions

Cook Islands Constitution

Article 39 (Power to Make Laws)
(1) Subject to the provisions of this Constitution, Parliament may make laws...for the peace, order, and good government of the Cook Islands.
(2) The powers of Parliament shall extend to the making of laws having extra-territorial operation.

[13] Exchange of Letters between the Prime Minister of New Zealand and the Premier of the Cook Islands concerning the nature of the special relationship between the Cook Islands and New Zealand, Wellington, 4 and 9 May, 1973, App. J.H.R. 1973, A-10.
[14] JCD 2001, Clause 2 (1). See also Alison Quentin-Baxter, *Laws of New Zealand*, note 11 above, para. 32, p.79.

(3) Without limiting the generality of the power conferred by subclause (1)...that power shall...include the repeal or revocation or amendment or modification or extension, in relation to the Cook Islands, of any law in force in the Cook Islands...

Article 46 (New Zealand Parliament not to legislate for Cook Islands)
Except as provided by Act of the Parliament of the Cook Islands, no Act, and no provision of any Act, of the Parliament of New Zealand passed after the commencement of this Article shall extend or be deemed to extend to the Cook Islands as part of the law of the Cook Islands.

The 'Riddiford Clause' (section 5 of the Cook Islands Constitution Act 1964)
Nothing in this Act or in the Constitution shall affect the responsibilities of Her Majesty the Queen in right of New Zealand for the external affairs and defence of the Cook Islands, those responsibilities to be discharged after consultation by the Prime Minister of New Zealand with the Prime Minister of the Cook Islands.