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INTRODUCTION

Jo-Anne Fiske

Half a millennium has passed since Columbus's arrival on the shores of North America heralded a new era of European expansion and colonialism. During the ensuing 500 years Indigenous Peoples around the world have been ensnared first by European empire building and colonial authority and second by the sovereign powers of the nation-states born of European political domination. In their struggles to free themselves from the mantle of colonialism, Indigenous Peoples have developed a consciousness of a shared identity symbolized by their common moral claim against oppression and their commitment to cultural recodification. Cultural recodification necessarily requires legal recodification for the two are bound by mutually defining relations. Laws that formed essential elements in European domination played a key role in redefining human relationships to the natural environment as well as the more obvious role of reinterpreting morality and culture. It is axiomatic, therefore, that when Indigenous Peoples claim a common inherent aboriginal right to self-determination, appeal to natural law for relief from colonial repression, or seek protection of their collective right to a post imperial cultural identity, they articulate an oppositional discourse that disrupts Eurocentric conceptions of the primacy of legal statutes and equality of the individual.

The quincentenary of Columbus and the International Year of Indigenous Peoples (1993) seems an appropriate moment in which to reflect on the Indigenous Peoples' emerging consciousness of legal orders as arenas in which they can contest not only the hegemony of nation-state sovereignty, but the very meaning and intent of law itself. The papers gathered herein and originally presented in August 1990 at the meetings of *The Commission on Folk Law and Legal Pluralism*[1] offer an excellent foundation for such reflection. Not only do we find within them documentation and analysis of Indigenous Peoples' struggles for self-determination within plural legal systems, we also uncover points of departure for new directions in law and anthropology. Before turning to these papers, however, it will be useful to

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[1] The meetings were held under the heading 'Indigenous Self-Determination and Legal Pluralism' as part of the VI th International Symposium of the Commission on Folk Law and Legal Pluralism at the Law School of the University of Ottawa, Canada. For technical reasons, one of the papers presented at this meetings has been published in a former issue of this Yearbook: *See* Melanie G.Wiber & June Prill-Brett, 'Constraints on the Sharing of Power: Whose Self-Determination shall Prevail? Issues from the Philippines' 6 *Law & Anthropology* (1991) 197-209.

reflect on the history of international circumstances and events that have shaped Indigenous Peoples's consciousness of themselves and the legal systems through which they advance their claims for self-determination.

The term 'Indigenous People' is often used interchangeably with Indigenous Population, aboriginal, tribal, or autochthonous people. Various definitions have been advanced and identities construed to distinguish descendants of the original peoples of a territory from later arrivals who have subordinated the first inhabitants' descendants to the powers of an encapsulating nation-state. While no universally accepted definition can embrace Indigenous Peoples' diversity, or escape semantic critique, core elements of the concept are generally agreed upon. Indigenous Peoples are recognized as those who are conscious of themselves as a people distinct from the society that has come to dominate them, who share a claim with descendants of other autochthonous peoples to a sacred tie to the land, and who exist on the periphery of a nation-state that embraces the culture, politics, and national identity of a dominant, alien society, either because of conquest or internal colonialism. Indigenous Peoples are committed to transgenerational transference of their ancestral territories and their social and cultural traditions, and to their continued existence as a distinct identity and polity governed in accordance with traditions of authority and law.

To perceive a given population as an Indigenous People is to assign to them an identity; that is, a relationship with the external world, be it an encapsulating nation-state or the global political arena. Law is a component of identity, hence, 'Indigenous People' is a concept that connotes a jural order understood in the specificity of its relation to the nation-state. The question of defining Indigenous Peoples assumes special significance when it comes to considering the political and international legal implications of the term 'people' as opposed to that of 'population' or 'tribe.' As with 'indigenous' the term 'people' is not an ethnological concept; it belongs to the political-legal lexicon. As Clech Lâm reminds us in her paper, in international law 'people' indicates a jural order holding rights to self-determination and, hence, is preferred by Indigenous communities. At the same time, various bodies of the United Nations, while refraining from formal definitions, favour 'population' as it connotes legal neutrality.

Common to Indigenous Peoples is their determination to regain control of their political destiny, ancestral territories, and their cultural identity. Various symbols are used to express indigenous identity: cultural tradition, spirituality, language, occupation, eating habits, esoteric knowledge of the natural environment, etcetera. Indigenous identity rests on application of new meanings to cherished, enduring symbols representative of an independent past. Indigenous Peoples elicit these symbols in an effort to define and sustain social boundaries. Appealing to customary or precolonial legal orders in order to legitimate political claims for autonomy or to define a distinct moral universe is but one strategy among many that entails symbolic improvisation or 'contrivance'. Claims to nationhood and a renegotiated role in global politics leading to decolonization - symbolically, politically, and economically - is another. As the papers in this volume illustrate, renegotiation of this role takes

place in the shadow of super-state powers of international law, which even if not evoked in specific cases is recognized as the ultimate theatre of conflict. Hence legal pluralism must be understood within this context.

Since 1975, when they held their first international conference and organised as the World Council of Indigenous Peoples, Aboriginal Peoples have emerged as a worldwide political force that has had a critical impact on international law. Their struggle for legal recodification has led them to contest the justice of statute law and to challenge the hegemony of statehood over the political integrity of nationhood. The significance of this cannot be overstated. The law of international society has been the law of sovereign states; the full subjects of contemporary international law are always states. States create and grant power to international law; if states refuse to accede to international law it fails to exist as a source of power. States thereby produce the identity and conditions of the existence of Indigenous Peoples by excluding an international order that proceeds from a rationality other than their own.

The international legal order underpinning Indigenous moral and political claims against the nation-state rests on European principles of human rights to individual equality and to self-determination of peoples. Nonetheless, international law is not without its contradictions. On the one hand, it presents itself as protector of minority peoples; on the other, it upholds the sovereignty and territorial integrity of the state. From this situation three categories of rights have emerged: universal individual rights, minority rights, and Indigenous Peoples rights[2]. The UN Human Rights Commission's Working Group on Indigenous Populations must address these rights and must define standards against which to judge alleged violations. In consequence, paradoxical implications abound. For example, individual rights can be seen as competing with collective rights (as Morrow and Pete's article illustrates); protection of the special relationship of Indigenous Peoples to their land (endorsed by the 1983 UN World Conference to Combat Racism and Racial Discrimination) can be said to threaten protection of state territorial integrity; and insistence upon the right to a fair trial as conceived by international law can disrupt traditional systems of dispute resolution (Angelo, this volume).

Indigenous political capacity for legal recodification is well illustrated in the struggle to redefine indigenous relationships to ancestral territories. Collective rights to land ownership have been recognised since 1957 in the International Labour Organization (ILO) Indigenous and Tribal Populations Convention, No.107. This convention, however, was purposefully integrationist, and as such undermined claims to self-determination. In 1986, responding to Indigenous political pressure, the ILO commenced revision of this convention. Taking guidance from Indigenous advocacy organisations - some being members of the Meeting of Experts on the Revision of the 1957 Convention, others having observer status - the ILO's governing body reviewed recommendations to revise Convention 107 and to replace its integrationist views

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[2] Independent Commission on International Humanitarian Issues, *Indigenous Peoples: A Global Quest for Justice*, with forword by Sadruddin Aga Khan and Hassan bin Talal. Zed Books, London, 1987.

with recognition of the right of self-determination of Indigenous Peoples over their own economic, social, and cultural development. In consequence, a new ILO convention has been proposed: Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries.

Recodification of Convention 107 positioned Indigenous Peoples in direct confrontation with nation-states determined to protect their own territorial integrity even while it questioned the ideological foundations of territorial integrity. Obviously, if Convention 169 is to be implemented in accordance with Indigenous Peoples's aspirations, Western jurists will need to reconceptualize indigenous land rights within the cultural frame of indigenous epistemologies and ontologies. The notion of land as the spiritual basis of identity will need recognition as a legal principle. Western jurists and scholars must possess the anthropological imagination to accept concepts of land, and hence of rights to it, that emerge from ontologies distinct from those that uphold principles of state sovereignty.

Such imaginative reconceptualisation of necessity also disturbs established conceptualisation of indigenous populations themselves. For just as ethnographers, however unwittingly, have constructed exotic, and in the past primitive, images of indigenous populations, so has law created them as social entities without tenure rights rather than as peoples with historically defined territories.

The Indigenous Peoples' impact on the process of supplanting Convention 107 with Convention 169 has been as significant as the substantive revisions themselves. As a consequence of the 1986 Meeting of Experts, the ILO was asked to include indigenous representation on a permanent basis. Such representation brings to bear new perceptions of Indigenous Peoples. No longer to be seen as primitive peoples nor ethnic minorities, they have emerged on the global stage as viable nations. Not merely self-governing administrative units subject to ultimate rights of disposition residing in state governments, they have gained the stature of self-determining peoples exercising control over territory and resources. In the process their community leaders have made the transition to international diplomats negotiating with state and extra-state governments.

The ILO Conventions are not the only fora for Indigenous Peoples' grievances. They can appeal to several other legal instruments of the United Nations: the United Nations Charter, the Universal Declaration of Human Rights, two UN Human Rights Covenants of 1966 (the Covenant on Economic, Social and Cultural Rights, and the Covenant on Civil and Political Rights), the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Prevention and Punishment of the Crime of Genocide, the Declaration on the Granting of Independence to Colonial Countries and Peoples, and the International Convention on the Suppression and Punishment of the Crime of *Apartheid.* Appeals to the UN's legal instruments can have significant effects on both customary law and nation-state laws, as has been the case in Canada. In 1985 the Canadian government felt compelled to amend The Indian Act, which had been found to violate the Covenant on Civil and Political Rights. The situation described by Krosenbrink-Gelissen in this

volume speaks to some of political and social ramifications of this appeal to international law by Aboriginal women.

As with appeals to the ILO, the accomplishments and processes of the Working Group on Indigenous Populations are likely to necessitate reformulation of legal doctrine. Protection of land and resource rights will not merely bring confrontation with states' demands to protect their territorial integrity, but will challenge the individualism inherent in the doctrine of human rights, for land rights are conceived as collective rights. In the process, recognition of self-determination by the nation-states and the United Nations gives ideological unity to these disparate struggles for decolonisation.

Such contemplation of the processes of legal recodification brings us to question the conceptual lexicon underpinning the anthropological study of law. How well do our established analytical concepts represent current Indigenous experience? Are our concepts sufficiently subtle and sophisticated to embrace shifts in meanings and power relations as nation-states come to terms with the emerging political force borne of the world-wide movement of Indigenous Peoples? Is our reliance on the perspective of legal pluralism itself an anachronism that threatens to obscure the reality of asymmetrical power relations and to belie the dynamic processes that have led to the formation of single, interactive legal systems within nation-states?

Given the plethora of nation-state structures and the multiplicity of Indigenous responses to them, it is difficult to agree upon common analytical concepts and to restrict application of widely-used terms and to standard definitions. Thus in the following papers we find several meanings implied by the terms 'self-government' and 'self-determination.' Rather than striving for unanimity, diversity has been allowed to stand. Nonetheless, several principles emerge that need conceptual clarification. The first is that nation-states may wish to accommodate Indigenous governments' demands for greater autonomy only within a framework of administrative responsibilities defined and delegated by the nation-state government; such devolution of powers is clearly less than the autonomy aspired to by the subjects of the following studies.

In general terms, 'self-government' appears to be best used to refer to devolution of responsibilities from other orders of government to an Indigenous one, while self-determination more broadly refers to decolonization envisioned by the peoples themselves and as such denotes sovereign government adhering to culturally specific traditions of leadership and authority and to a separate legal order. Notwithstanding the increasing acceptance of this distinction, new challenges to such conceptualisation emerge. As Cullen demonstrates, self-government brings with it new forms of hierarchy and intervention into individual lives. Thus in contemplating Aborigine control over mineral revenues in Australia, he asks whether or not self-determination should reside in the individual to a greater extent than is currently the case. Lâm adds further sophistication to the distinction between self-determination and self-government by arguing that the former denotes a right based on power, the latter a right based on need.

As is evident from this collection, this definitional distinction is not mere semantic quibbling, rather it lies at the heart of the seminal axis of conflict. Two papers from Canada exemplify this distinction, and represent the structural contests found throughout the papers of this volume. As Dickson-Gilmore argues, the Kahnawake dispute over justice rests on this very principle; application of section 107 of the Indian Act to allow for administration of justice in accordance with Canadian legal codes fails to meet the expectations of community members committed to a self-determined system of governance and justice. Similarly, La Rusic demonstrates that Cree administration of a government compensation policy for hunters, which is rooted in prevailing social welfare practices of the provincial government, constitutes no more than devolution of the nation-state's self-defined powers and threatens to undermine hunters' self-definition of their traditional economic and social practices, as well as the capacity of the local group for administrative autonomy.

Semantic debates on distinctions between self-government and self-determination constitute more than mere symbolic manipulation. Rather, the quest for self-determination disrupts the concept of sovereignty, calling into question the established foundations of power in the international legal order. Consequently, the struggle for self-determination as conceived by Indigenous Peoples threatens nation-states' hitherto undisputed assumptions of their sovereignty, which has embodied control over their internal territory and provided entry into the UN fraternity of sovereign states.

The contest between a nation-state's efforts to constrain Indigenous powers to self-government and the struggle for decolonisation repeats itself throughout the world, as the papers of Kuppe and Svensson in this volume clearly illustrate. Nation-states resist indigenous demands for sovereignty and nationhood (for example, for recognition as autonomous polities denoted as First or Original Nations) because nation-states visualise 'nation-ness' in their own image. In other words, nation-states cast all claims of sovereignty within their own mould of statehood and respond to Indigenous communities accordingly. Such imagined communities provoke nation-states to resist self-determination and the authority of customary law, and to incite queries such as 'Does this mean they want an army?' Imagining indigenous nations as militarised states or as threats to territorial integrity deflects serious consideration of the creative options indigenous self-determination and nationhood offer. Hawaiian perception of self-determination within a circumscribed territory, as understood by Clech Lâm, constructs a contrary 'imagined possibility' engaging the nation-state and the international arena in creative restructuring of opportunities for ongoing negotiations of intergovernmental relations between Indigenous Peoples and their encapsulating nation-states.

The asymmetrical nature of powers evident in the cases described in this volume and the adversarial context in which they exist bring into question the meaning and political implications of 'legal pluralism.' Arising from a liberal politics of tolerance and difference, legal pluralism suggests an equitable, if not harmonious,

balance of powers between co-existing legal orders. It further implies that such co-existing legal orders are discrete entities, applicable to equally discrete, bounded populations. As such, the term not only fails to address the real struggles of decolonisation, but also obscures the intricate history of colonial legal orders that have led to an integrated legal system[3]. It also obscures the contradictory nature of law itself. While state-imposed law does subordinate minority peoples, it can also be enabling[4]. When it is beneficial, Indigenous Peoples appeal to state law and accommodate their traditional laws to the dominant legal order, as MacInnis illustrates with the case of the Kingsclear Maliseet fishing dispute. Complexity of asymmetrical power relations is further adumbrated when it is recognised that law does not preside alone as a source of social regulation and encoded morality. In contradistinction, as Wiber and Prill-Brett, citing Vanderlinden, remind us, law is but one of several 'competing regulatory normative orders.'[5] The concept of legal pluralism with its emphasis on tolerance and accommodation neither highlights the multiplicity of these competing interests, and embedded structures of power in which they operate, nor illuminates the dialectical relations that pertain between legal orders themselves and between legal and other normative orders.

Comparison of disparate indigenous societies and their conditions of legal recodification is an inherently difficult procedure that must not be limited to mere juxtaposition of case studies. The articles in this volume comprise a chorus of voices from which a coherent whole can be analytically explicated and significant trends in legal strategies delineated through the exploration of legal consciousness and of a number of distinct structural orderings of legal codes. But the ubiquitous nature of many of these issues, the impact of autonomy debates on internal community tensions or the consequent emerges of new power relations in decolonisation struggles, for example, does not mitigate the need for careful analysis on a case-by-case basis or the need for theoretical reconceptualization of extant power relations encoded in legal orders.

To conclude, reproduction of opposition through symbolic contrivances of legal recodifications and shared goals of decolonisation reasserts and strengthens common Indigenous identity. Nonetheless the road to self-determination is perilous. The inexorable power of international authority imposes conditions and expectations of what constitutes viable players in the global arena with little appreciation of the lives and social realities or of the desires and dreams of Indigenous Peoples themselves. However, their creative endurance and capacity for survival and revitalization without appropriation of Western legal philosophy promises a brighter future.

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[3] Richard Roberts and Kristin Mann, 'Law in Colonial Africa' in: Kristin Mann & Richard Roberts (eds.), *Law in Colonial Africa.* Heinman, Portsmith, N.H., 1991.

[4] June Starr and Jane F. Collier, 'Introduction: Dialogues in Legal Anthropology' in: June Starr & Jane F. Collier (eds.), *History and Power in the Study of Law: New Directions in the Study of Legal Anthropology.* Cornell University Press, Ithaca, 1990.

[5] As mentioned, Wiber/Prill-Brett's paper was published in a former Volume of *Law & Anthropology*, see FN 1.

CONTENTS

SELF-DETERMINATION, SELF-GOVERNMENT AND LEGAL PLURALISM IN TOKELAU

Is Decolonisation Imperialistic?

Anthony H. Angelo

The purpose of this paper is to raise for consideration, aspects of the impact on traditional government of the externally driven goal of international self-determination at a territorial level, and the degree to which the move to international legal self-determination encourages the move from legal pluralism[1] to a single law system. Current developments in Tokelau raise the question whether self-government and self-determination as encouraged by the United Nations are consistent with legal pluralism and the maintenance of traditional systems of government. In Tokelau self-government at a territory-wide level and self-determination fit uneasily with the traditional culture. Moves in the direction of self-determination have been coincident with moves away from the acceptance of custom as a source of law.

Background

Tokelau

Tokelau consists of three small isolated atoll communities lying between Western Samoa and Tuvalu in the Pacific Ocean. The population of 1,800 people live in a subsistence economy based on the coconut palm, breadfruit tree and fish. The community is homogeneous.[2]

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[1] In this paper the word 'pluralism' refers to the existence of two sets of rules operating side by side within the community.

'Legal pluralism' refers to recognition of the operation of the two system ba the constitutional system of the state.

'Defacto pluralism' refers to the situation where there is recognition of one system, the state system, but the other system continues to operate.

[2] The following bibliography is useful for background reading on Tokelau:

A. Hooper, *Aid and Dependency in a Small Pacific Territory*, Working Paper No. 62, September 1982, Department of Anthropology, University of Auckland.

R. Kuppe and R. Potz (eds.), Law & Philosophy, Volume 8, 1–10.

Recorded contact of Tokelau with outside authorities began with the establishment of a British Protectorate for the three atolls in the late 19th century.[3] That relationship was followed in 1916 by the incorporation of Tokelau into the Colony of the Gilbert and Ellice Islands Colony.[4] In 1925 Tokelau was excluded from the Gilbert and Ellice Islands Colony[5] and was from then until 1948 administered as a British territory for the British government by New Zealand, from Western Samoa.[6] On 1 January 1949 full authority over Tokelau was transferred from the United Kingdom to New Zealand and Tokelau became an integral part of the realm of New Zealand by virtue of section 3 of the Tokelau Act 1948.

When Tokelau became a protectorate and was brought within the jurisdiction of the Western Pacific High Commission[7] the only system of law known in Tokelau was the traditional customary one. The Western Pacific High Commission did not interfere with that system but dit, as required by the protectorate system, put in place several pieces of legislation to deal specifically with British subjects who were in Tokelau or who were dealing with Tokelau.[8] There was then legal pluralism in Tokelau.

The advent of the colony brought with it a range of externally promulgated laws that applied to all people in Tokelau.[9] Local government however was left in local hands, as also was a small legislative power.[10] The Constitution of the colony accepted legal pluralism within the territory and provided specifically that colonial legislation should be limited and interfere to the least possible degree with the traditional practice of the native inhabitants.[11] Administration by New Zealand, and

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A.H. Angelo, 'The Common Law in New Zealand and Tokelau' (1986) 16 *Melanesian Law Journal* 1-27.

A.H. Angelo, 'Tokelau - Its Legal System and Recent Legislation' (1987) 6 *Otago Law Review* 477-498.

A.H. Angelo, 'The Indigenous People of Tokelau and the Legal System' (1987) 2 *Law and Anthropology* 347-358.

A.H. Angelo, 'Tokelau - The Village Rules of 1988' (1988) 4 *Queensland University of Technology Law Journal* 209-224.

A.H. Angelo, H. Kirifi, A. Fong Toy, 'Law and Tokelau' (1989) 12 *Pacific Studies* (3) 29-52.

Report of the Administrator of Tokelau for the Year ended 31 March 1989.

Report of the United Nations Visiting Mission to Tokelau, 1986, A/AC 109/877 and Add 1.

R. Gordon, *Tokelau - A Collection of Documents and References Relating to Constitutional Development*, Tokelau Administration, Apia, 1990.

[3] Formal annexation occurred in 1989.

[4] Order in Council Annexing the Union Islands to the Gilbert and Ellice Islands Colony, 1916.

[5] Union Islands (No. 1) Order in Council, 1925.

[6] Union Islands (No. 2) Order in Council, 1925.

[7] See the Western Pacific Order in Council of 1877, and the Pacific Order in Council, 1893.

[8] An example is the Arms Regulation 1884.

[9] An example is the Bills of Exchange Regulation 1897.

[10] Native Laws Ordinance 1917, article 15(1) of the laws which appear in the Schedule.

[11] Gilbert and Ellice Islands Order in Council, 1915, clause VIII (3).

Tokelau's later becoming part of New Zealand did not change that regime.[12] A small body of legislation existed for Tokelau which primarily concerned those responsible for the administration of Tokelau and the relationships of Tokelau with the outside world. Substantially the villages of Tokelau proceeded under their customary government in accordance with their customary rule system.

Abrogation of Customary Law

Tokelau was placed by New Zealand on the United Nations list of dependent territories in 1962.[13]

The first signs of change in the legal system came at a technical level in 1969 with the passage of a new section for the Tokelau Act[14] which provided that in the absence of specific legislation applying to Tokelau the residual source of law was to be the common law of England as at 14 January 1840. The intention of this legislation, and arguably its effect at a technical level, was to deny legal pluralism for Tokelau and to establish from that time a single body of law for all of Tokelau; within that state legal system land was reserved as a matter under the sole control of the inhabitants and their customary practices.[15] Many other areas of central concern to the traditional system had by 1975 been overtaken by specific legislation for Tokelau, promulgated in New Zealand: matters of public order were dealt with in the Tokelau Crimes Regulations 1975 and marriage,[16] divorce,[17] adoption,[18] and births and deaths registration[19] were also covered by specific legislation.

At a practical level, however, the constitutional shift away from custom as a source of law in 1969 was probably not known in Tokelau. It certainly had no real impact on daily life. From 1969 till 1987 the pre-1969 pluralism continued de facto to regulate Tokelau matters. To the extent (and this was a rare occurrence) that there was an external concern with any legal issue in Tokelau the state constituted legal system was applied. The members of the Tokelau communities continued to live by custom.

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[12] Section 5 of the Tokelau Act 1948 provides:
'EXISTING LAWS TO CONTINUE IN FORCE: All laws in force in Tokelau at the commencement of this Act shall continue in force except so far as they are inconsistent with this or any other Act of the Parliament of New Zealand in force in Tokelau or with any regulation in force therein.'

[13] General Assembly Official Records, Eighteenth Session, Annexes, (addendum to agenda item 23 A/5446/Rev 1), 288-289.

[14] The Tokelau Amendment Act 1969 inserted section 4A in the principal Act.

[15] Tokelau Amendment Act 1967, section 20(2) reads:
'Subject to the provisions of this Part of this Act, the beneficial ownership of Tokelauan land shall be determined in accordance with the customs and usages of the Tokelauan inhabitants of Tokelau.'

[16] Tokelau Marriage Regulations 1969 (SR 1969/132). [Now replaced by the Tokelau Marriage Regulations 1986, SR 1986/320].

[17] Tokelau Divorce Regulations 1975 (SR 1975/262). [Now replaced by the Tokelau Divorce Regulations 1987, SR 1987/28].

[18] Tokelau Adoption Regulations 1966 (SR 1966/160).

[19] Tokelau Births and Deaths Registration Regulations 1969 (SR 1969/131).