

# THE PROBLEMS OF ISLANDS

*Alison Quentin-Baxter\**

---

*The paper reproduced in this article was given at a public seminar held at Waitangi, Chatham Islands, on 5 and 6 February 1995 to discuss "Island Development and its Future". In it Alison Quentin-Baxter compares the legal situation of the Chatham Islands with the past and present situations of the Cook Islands, Niue and Tokelau, concluding that the Chatham Islands are not a non-self-governing territory but are an integral part of New Zealand. She then discusses the consequences of this status for the Chatham Islands, particularly in relation to the fish resources of their surrounding waters and suggests that the goal of self-government is not a realisable one. She proposes instead a dialogue with New Zealand Ministers in an effort to reach acceptable, pragmatic solutions, perhaps involving some legislative changes of a constitutional nature giving greater authority to local government in the Chatham Islands or modifying the application there of some Acts of Parliament, so as to take account of the practical problems that offshore islands experience.*

---

## **I INTRODUCTION**

Unlike some of the audiences I have spoken to in the last few years, you all know at first hand the problems of living on very small islands. But perhaps I can attempt to summarise them. You have the same basic need for services as people on the mainland. But at a distance of 800 kilometres, you have to be self-sufficient. Because your population is small you do not

---

\* QSO; Barrister of the High Court of New Zealand; Constitutional and International Law Consultant. Alison Quentin-Baxter began her career in the Department of External Affairs, was a lecturer in the Law Faculty at Victoria University 1967 to 1969, and became the Director (the first) of the Law Commission in 1987. In 1980 she completed a review of the Letters Patent constituting the Office of the Governor-General. She has also worked extensively with the peoples of several Pacific island states in the development of their constitutions for self-government and on independence. She was Counsel to the Marshall Islands Constitutional Conventions 1977 to 1979, and 1990; a member of the Niue Review Group 1985 to 1986, member of the Niue Public Service Commission 1987 to 1990, Counsel assisting the Fiji Constitution Review Commission 1995 to 1996, and most recently special consultant to the Niue Government on the reform of the electoral law.

have what is called the "critical mass" necessary to support these services on a cost effective basis.

There are other less tangible problems arising from your sense of your own separate identity, your own way of doing things. The arrangements that suit mainland communities do not always suit you. The purpose of this seminar is to pinpoint these problems and discuss ways in which they might be tackled.

I have had some experience in islands which were colonies - ruled from a distance by an administering power - and have helped them put in place new constitutions which enabled them to emerge as self-governing or independent states. I do not know much about the arrangements which have been devised for other islands which were never regarded as colonies of the country to which they belong - Norfolk Island, the Shetland Islands, and Prince Edward Island, to give some examples.

So I am not going to attempt to put in front of you a smorgasboard of the various sustaining dishes that other islands have found palatable, and suggest that you make your own choice. Instead, I am going to look at some underlying issues. First I am going to compare your situation with that of the Cook Islands, Niue and Tokelau, the New Zealand islands or island groups that were, or are, within the United Nations decolonisation programme. Like the people of the Chatham Islands, the people of all three are New Zealand citizens and all three are still in a constitutional relationship with New Zealand. But your situation is very different and I shall explain why.

Then I am going to look briefly at the questions which arise in any relationship between small islands and the bigger countries with which they are linked - how should resources, powers and responsibilities be shared between them? After that I look forward to listening to you describe the problems which are facing you. I appreciate very much the opportunity to learn at first hand of your concerns and the solutions you think should be put in place.

But perhaps I should sound a note of caution and remind you that the problems are one thing and the solutions another. It is rather like going to the doctor. You explain that you are not feeling well and describe your symptoms. You do not tell the doctor straight off that you need an operation or a particular drug. Any solutions for the Chatham Islands have to be acceptable to the Government and people of the rest of New Zealand. My guess is that all interested parties will need to sit down together and think up some fairly original recipes so that everyone can end up feeling reasonably well-satisfied with the meal as a whole.

## II *THE CHATHAM ISLANDS COMPARED WITH THE COOK ISLANDS, NIUE AND TOKELAU*

By the end of World War II, many colonised countries, particularly India, French Indo-China and the Netherlands East Indies, were struggling for their independence. The United States and the countries of Latin America, which had once been colonies themselves, wanted the United Nations Charter to require all administering powers to bring their colonies to eventual self-government or independence. The new status would be chosen by an act of self-determination. Later, it was recognised that "integration with an independent state" was a legitimate alternative to self-government or independence.<sup>1</sup>

New Zealand, which had emerged from its original status as a British colony by evolution rather than revolution, was also strongly supportive. At the San Francisco conference, Peter Fraser assisted in drafting provisions requiring every member state which administered a non-self-governing territory to report regularly to the United Nations on the situation in the territory.

Although, technically, the Cook Islands, Niue and Tokelau, like the Chatham Islands, are within the boundaries of New Zealand, the Government of New Zealand recognised that they were non-self-governing.<sup>2</sup> It subsequently provided regular information about them and began the long drawn-out process that would lead the Cook Islands, by an act of self-determination in 1964, to become a self-governing state in a relationship of free association with New Zealand. Niue took the same step ten years later. Tokelau is still a New Zealand colony but its people are preparing for their own act of self-determination.

Why did the New Zealand Government identify the Cook Islands, Niue and Tokelau as non-self-governing in 1946, but not the Chatham Islands? Despite some similarities, there were marked differences between the situation in the three territories first-mentioned and those in your islands.

---

1 United Nations General Assembly Resolution 1541 (XV), 15 December 1960.

2 In its Resolution 66(I) adopted on 14 December 1946, the United Nations General Assembly noted that, under Article 73(e) of the Charter, the Government of New Zealand had transmitted information on the Cook Islands (then regarded as including Niue), without prejudice to any interpretation of the expression "Non-Self-Governing Territories" in view of the fact that the Cook Islands were an integral part of New Zealand. The resolution noted that the Government of New Zealand also intended to transmit information on Tokelau. That territory had been administered by the Government since 1925 but it did not become part of New Zealand until 1948.

The people of each of the three territories are ethnically distinct. Each has its own language. The New Zealand Parliament made laws for them, but they were not part of a New Zealand electorate. Therefore they could not be said to have been integrated with an independent state, that is with New Zealand. Moreover, although some New Zealand Acts were in force in the territories as part of their law, that was the exception. Most matters, including the criminal law, were the subject of a separate, special set of laws for the territory concerned. The customary law remained the source of rights to land.

The three territories were outside the ambit of the New Zealand taxation and social security systems and New Zealand wage rates did not apply. In 1946, all were subsistence economies. This is still the case in Tokelau, and to a lesser extent in the Cook Islands and Niue.

Although the people of the three territories had a right to come and live in New Zealand, if granted an exit permit, there was no corresponding right for New Zealand citizens not belonging to the territory concerned to live in that territory.

The picture emerges of isolated, protected communities that were not part of New Zealand in any real sense. There was little economic activity other than the gathering of traditional food. Copra was an occasional source of money income. In the Cook Islands and to a lesser extent in Niue, efforts were later made to produce bananas, citrus fruit and pineapples. It is fair to say, however, that there was no real opportunity for New Zealand to play the role it might once have fancied as an exploitive colonial power. New Zealand is generally regarded as having treated the Cook Islands with "benign neglect".

After 1948, the Charter provisions required New Zealand to promote economic, social and political development which would prepare each territory for its act of self-determination. At the time, in the early 1960s, no territories quite so small and vulnerable had acceded to full independence. Because the way of life of their peoples was so different from that of people in New Zealand, no New Zealand Government put forward the option of integration with New Zealand for serious consideration. Self-government in free association with New Zealand seemed to offer the best prospect. I shall speak briefly later about how that has worked out in practice.

You are much more familiar than I with the history of the Chatham Islands. They were annexed to the British Crown and brought within the boundaries of New Zealand in 1842. Some aspects of their history after that date are now in issue before the Waitangi Tribunal. Because of their isolation, the islands were not treated in every respect as part of metropolitan New Zealand. For a time such services as central government provided were delivered mainly

through a Resident Magistrate and later a Resident Commissioner responsible to the Department of Island Territories. But, constitutionally, the Chatham Islands gradually became integrated with mainland New Zealand.

Though not within any province, they were brought within the local government system that replaced the provincial administrations. In 1922, they achieved representation in the New Zealand Parliament. In general, the ordinary New Zealand law has always applied to the Chatham Islands. Occasionally, aspects of that law were modified to take account of the islands' special circumstances, though often not to the extent that the islanders desired.

Still, it is hard to fault the view taken in 1946 that, constitutionally, the Chatham Islands were not a non-self-governing territory but were already an integral part of the independent state of New Zealand.<sup>3</sup>

They did not have the characteristics of a non-self-governing territory which would have entitled them to the benefit of the United Nations principles and mechanisms. That is why they have not been given the opportunity to become self-governing in free association with New Zealand.

### ***III CONSEQUENCES OF THE PRESENT CONSTITUTIONAL STATUS***

How does the constitutional status of the Chatham Islands as an integral part of New Zealand now affect your prospects of gaining more control over your own affairs, and your fish resources in particular? In my view quite profoundly. I shall explain why.

Every independent state has full authority over its land territory, its territorial sea (now generally recognised as extending for 12 nautical miles), the seabed of its continental shelf, and, subject to certain rights of other states, the waters of its 200 mile exclusive economic zone. Non-self-governing territories - usually small islands - that have not become independent but have opted instead for self-government in free association with an independent state may or may not have the same full authority over the resources of their surrounding waters. "Self-government" is not a precisely defined concept. It is used to describe a variety of power-sharing arrangements between the self-governing state and the state with which it is associated.

---

<sup>3</sup> Above n 2. The implication was that the New Zealand Government did not regard the Chatham islands as a non-self-governing territory.

But the New Zealand model of self-government in free association, applying to the Cook Islands and Niue, and potentially to Tokelau, is so close to independence that the islands' right to their marine resources has never been in doubt. Even Tokelau, though still a colony, has the exclusive right to the revenue derived from fishing in its economic zone.

If the Chatham Islands had become self-governing in free association with New Zealand, it can be assumed that they, too, would have been seen as exclusively entitled to the resources of their economic zone, though it would, of course, have been necessary to determine the boundaries of the zone where the 200 mile line intersects with that drawn around New Zealand and its other outlying islands.

As someone who was closely involved, I can say with confidence that there was no connection between the view taken of the constitutional status of the Chatham Islands in 1946 (when it was not thought of as an issue) and New Zealand's decision in 1960 to support the claims of other coastal states in the long negotiations that led, 20 years later, to the adoption of the new international law of the sea. So there was no conspiracy to deprive the Chatham Islands of the benefit of the newly-recognised rights of coastal states by treating them as an integral part of New Zealand.

But of course New Zealand as a whole does derive substantial benefit from the fact that the geographical position of the Chatham Islands considerably extends its fisheries waters. Add to this the fact that the waters of the Chatham Rise are - or were until they were over-fished - a particularly rich resource. If the Chatham Islands are being treated unfairly in terms of access to their own fish resources, this is a strong argument for a fairer deal, but it makes it harder rather than easier to reach agreement that the Chatham Islands, too, should become self-governing and thus acquire the same rights to the resources of their surrounding seas as the Cook Islands, Niue and Tokelau.

Although the United Nations has dedicated itself to the decolonisation of all non-self-governing territories, it has also recognised that, once states are independent or self-governing, they have the right to maintain both the integrity of their territory and their authority over every part of it. That authority must, of course, be exercised in accordance with international human rights norms. More recently it is coming to be seen as subject also to the rights of indigenous peoples. These include principles of autonomy that may indirectly loosen the hold of central government over aspects of Chatham Islands life but are unlikely to provide a sound basis for a claim to the resources of the sea, particularly those of offshore waters. (I am leaving aside the distribution of the resources at the disposition of the Maori Fisheries Commission,

and the outcomes of any wider constitutional developments reflecting the provisions of the Treaty of Waitangi.)

To come back to the constitutional situation generally, even in federal states, where governmental powers are shared between the centre and the units - usually called states or provinces - that make up the state as a whole, the authority of the units usually stops close inshore, leaving the exclusive economic zone and the continental shelf within the control of central government. New Zealand, however, is not a federal state. Ever since the provincial governments were abolished in 1868, central government has had unlimited legislative authority and has been sparing in granting powers to local governments. One Australian writer has suggested that this historic attitude has made it difficult for New Zealand governments to accommodate adequately the special needs of the country's small, offshore islands.<sup>4</sup>

I should like to illustrate what you are up against constitutionally by mentioning the extreme case where the people of a particular area within an existing state attempt to break away and form a new state. Often, the area concerned is rich in resources which the inhabitants do not wish to share with the people of the country as a whole. Many civil wars, past and present, have been caused by such attempted secessions. The Russian effort to regain control of oil-rich Chechnya is just one example. Bougainville is another in our own Pacific region.

I am not, of course, suggesting that, however unfairly they feel they are being treated, the people of the Chatham Islands are likely to rise in rebellion against the Government of New Zealand, with the predictable criminal law and even military consequences. I am simply trying to make the point that it will be very difficult to persuade any New Zealand government that the questions of access to or revenue from the fish resources in the waters around the Chatham Islands or of the application to the islands of other laws, such as the Resource Management Act, give rise to legitimate issues of constitutional principle.

#### ***IV A BASIS FOR FURTHER DISCUSSIONS WITH THE NEW ZEALAND GOVERNMENT***

It seems better to present the concerns of the people of the Chatham Islands as practical issues which need to be dealt with because they affect their future well-being. Securing that well-being should readily be seen as an objective which is in the interests both of the islands

---

4 James Crawford "Islands as Sovereign Nations" (1980) 38 ICLQ 277,284.

themselves and the country as a whole. The solutions may well involve some legislative changes of a constitutional nature giving greater authority to local government in the Chatham Islands, or modifying the application there of some Acts of Parliament, but these changes are more likely to be acceptable to central government if they can be clearly seen as reflecting good sense and fair dealing as between Chatham Islanders and mainland New Zealanders. Some problems may be solved by agreement on the need for consultation or agreement before particular actions are taken by the New Zealand authorities.

At this point I have to say that the constitutional status of small islands does not in itself determine the extent, if any, to which they should receive economic support from the country with which they are linked. A lot will depend on the relative wealth of the island and the mainland, taking account of the resources under the control of each, and the extent to which there is a widely-held perception that the wealth of the richer partner should be shared with the poorer.

This proposition can be illustrated by again looking at the situation of New Zealand's associated states. The particular form of self-government already in place in the Cook Islands and Niue, and possibly to follow in Tokelau, gives the local legislature plenary powers. The New Zealand Parliament cannot make laws for the islands. Their own legislatures can amend or repeal such existing New Zealand laws as were in force there before self-government. The local legislatures also decide how all revenue is to be spent, whether it is generated locally or received as aid.

The three island groups do not have particularly resource-rich fishing zones, but they do receive some revenue from the pelagic species caught in their waters. They also levy the usual range of taxes. But none of them is economically self-sufficient. To a varying extent, they all receive financial support from the Government of New Zealand. For reasons of presentation and practicality, this is provided from the foreign aid budget of the Ministry of Foreign Affairs and Trade. The aid programme is negotiated with the government concerned. The outcome of the negotiations depends largely on what might be called political factors - the perceptions within the Ministry and the Government as well as the New Zealand community as a whole of what is due to the island group concerned, as well as the total amount of the foreign aid budget and the other demands upon it.

In the case of the Cook Islands and Niue, promises of continuing support were made at the time of self-government, though the extent of that support is seen as a very open question. Inevitably, judgments tend to be made about the good management or otherwise of the particular government. In the case of Tokelau, the fact that the United Nations is still looking

over New Zealand's shoulder undoubtedly prompts relatively generous treatment. However, in earlier papers, I have expressed doubts about the extent to which, in the longer term, the Cook Islands, Niue and Tokelau will continue to be seen as part of the wider New Zealand community and thus entitled - as of right rather than as the recipients of charity - to ongoing financial support.<sup>5</sup> Of course I hope that this worry proves groundless.

As you well know, and as I have already noted, the Chatham Islands are undoubtedly seen as a part of the wider New Zealand community. But this is a cause for concern rather than rejoicing because present political philosophies insist that they be treated, as far as possible, exactly like any other isolated part of New Zealand. Regional development is seen as strictly the responsibility of the region, not of central government. The fact that, in the case of the Chatham Islands, central government controls the main resources of the region and keeps all the revenue derived from those resources is seen as irrelevant.

It may be that, if the Chatham Islands had been able to become self-governing on the same basis as New Zealand's existing associated states, they would be economically self-sufficient and able to provide from their own revenues all the services they require. That would depend on a careful analysis of the factual information that I understand your Member of Parliament, Ruth Dyson, has sought about the cost of the central government services provided to the Chatham Islands, the tax revenue from the islands and the income and expenditure attributable to the issue and management of fishing quota for species in Chathams waters. May I commend her initiative and stress the need for the use of complete, up-to-date and accurate statistical information, and also for good analysis of it, in any further case presented to central government.

But, even if, as a self-governing state, you did not need outside economic support, you would still have great difficulty, with a population of only 700 or so, in physically providing the range of services that the community would expect, let alone establishing and maintaining the supporting infrastructure. This is already a worry in Niue with 2000 people, and even

---

5 "Free Association - The Pacific Way", a paper given at the Asia/Pacific Regional Seminar held at Port Vila, Vanuatu, 9 to 11 May 1990, by the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, unpublished, and "Sustained Autonomy - An Alternative Political Status for Small Islands?", a paper given at the Pacific Regional Seminar held at Port Moresby, Papua New Guinea, 8 to 10 June 1993, by the United Nations Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, published in (1994) 24 VUWLR 1.

more so in Tokelau with a population of 1500 spread over three atolls. I would like to see New Zealand provide more of the infrastructure as it did in the days before self-government, though it would be necessary for supporting services to be channelled through a New Zealand agency that was committed to acting, in effect, as an organ of the government of the island.

In any event, for the reasons I have explained, I do not think that a goal of self-government for its own sake would be a realisable one for the Chatham Islands, at least in the short to medium term, and perhaps ever. What does seem attainable is a re-examination of current problems, an identification of the places where the shoe pinches, and a commitment to finding acceptable, pragmatic solutions. These would need to take account of the fact that offshore islands are different from isolated mainland communities and therefore have to be treated differently.

I have reasonable confidence that a balanced, commonsense approach of that kind will be accepted eventually, but it may take time. I am not able to advise you on how you can best capture the attention of New Zealand ministers and officials and convince them that your concerns are to be taken seriously and dealt with promptly. A main hurdle is that there is no Minister or Department charged with the responsibility of ensuring the well-being of the people of the Chatham Islands. Therefore, no one feels that your future is their problem.

In attempting to raise again the important questions that concern you, you will be trying to maintain the quite delicate balance between appeals to reason and, if those continue to fail, a resort to some form of protest. Protest has its uses when it is impossible to make progress through the recognised channels. But it carries with it the risk that the actions of the protestors may alienate public opinion or be laughed off as ridiculous.

It seems to me that, at the moment, you are doing well and obtaining just the kind of sympathetic publicity in the news media that will make ordinary New Zealand citizens feel that you are entitled to a fairer deal. I hope you can capitalise on that source of support in the very near future.

---

*LES ÎLES CHATHAM ET LA NOUVELLE-ZÉLANDE, EXEMPLE DES DIFFICULTÉS RENCONTRÉES PAR LES PETITS ÉTATS INSULAIRES DU PACIFIQUE POUR ACCÉDER À L'AUTO SUFFISANCE*

Cet article représente le résumé d'une série de séminaires, animés par Alison Quentin-Baxter, qui se sont tenus les 5 et 6 février 1995 à Waitangi (Iles Chatham) ayant pour thème le développement des petits états insulaires du Pacifique et leur futur envisageable.

L'auteur se livre à une comparaison entre le régime constitutionnel et légal des îles Chatham avec celui des îles Cook, de Niue et de Tokelau.

Elle en conclut qu'en l'état du droit applicable et de sa mise en œuvre pratique, les îles Chatham ne peuvent pas être considérées comme de véritables États souverains et qu'à ce jour, elles restent encore et surtout une partie intégrante de la Nouvelle-Zélande.

Elle s'attache à relever les conséquences de cette situation de dépendance, notamment dans le domaine de l'exploitation des ressources halieutiques autour de ces îles.

Elle préconise non seulement l'instauration d'un dialogue avec les différents ministères néo-zélandais concernés, mais aussi que soit pris en compte la nécessité de modifier le cadre légal actuel régissant les rapports entre la Nouvelle-Zélande et les îles Chatham.

