***LAW AND CUSTOM IN TOKELAU***

***CONFERENCE NOTES***

***I INTRODUCTION***

Tokelau has always had custom; and formally, at least, it has had law for the last century.[[1]](#footnote-1)

Law is here used to refer to the system of social ordering of outside origin which in the case of Tokelau was introduced first by the British Government and latterly by the Government of New Zealand.[[2]](#footnote-2) Custom is the body of rules relating to social order created and managed by the elders of the Tokelau communities.

The first laws did not supersede custom.[[3]](#footnote-3) They did impose some administrative responsibilities on the Tokelau communities but otherwise were of interest to the colonial power and not to people in Tokelau.

In time, that system changed to one where the only official system for social ordering was the law imposed by the colonial power.[[4]](#footnote-4) The lack of reality of that system and some of the difficulties it presented were acknowledged by New Zealand in the late 1980s. In the Village Incorporation Regulations 1986[[5]](#footnote-5) the authority of the village elders was acknowledged and a local legislative power granted.[[6]](#footnote-6) After that, the law began to refer more and more often to customary authorities as the source of legal power.[[7]](#footnote-7)

In the last two decades the pattern of colonial legislation has been to give increasing authority to customary power holders.[[8]](#footnote-8) Tokelau now has, in the form of legislation, a basic set of laws which deals with administrative necessities and the most frequently encountered situations where a set of laws is seen to be appropriate. This is especially the case where it is desired to impose a penalty on an individual for breaking the rules – what the system sees as warranting the creation of offences. Notwithstanding the presence of legislation prescribing conduct for most daily circumstances, life in Tokelau proceeds, by and large, in accordance with custom: rarely in disregard of the law but typically in ignorance of it. The factual situation in Tokelau is that custom is very strong and governs the internal activities of the Government and people of Tokelau. The operation of law in matters relating to the outside world is more predictable, perhaps because interaction with the outside world was not an area for which custom had developed.

Custom continues to dominate in daily life. To the extent that inquiries are made about the law they frequently serve to bolster a customary argument where the law is consistent with the custom; or to seek to avoid the consequences where the law provides differently. The experience of those in Tokelau is of custom not of the law. This situation is changing and slowly custom is being marginalised. The progress of law as the pre-eminent social ordering tool has been hindered, primarily by the lack of resources to support the law. For instance there are police officers and a criminal law code; but police officers are not trained for their law functions, nor are lay judges. Typically they operate in an informal manner relative to the provisions of the law.

In the last 12 months some interesting examples of the interrelationships of custom and law have arisen in Tokelau – some in the field of constitutional law and others in relation to the criminal law.

Our presentation deals first with some examples of constitutional law and then with aspects of criminal law.

***II CONSTITUTIONAL LAW***

On the constitutional side there have been three main areas of recent tension. All relate to the operation of the National Government of Tokelau and all were the subject of law-making at the General Fono held in Tokelau in July this year.

The three issues relate: (1) to the formation of National Government; (2) to the role of kauhauatea (senior elders of Tokelau); and (3) to elections.

***A Formation of National Government***

The New Zealand Government placed Tokelau on the United Nations list of territories to be decolonised at an early date. That listing confirmed the right of Tokelau at international law to self-determination. It imposed duties on the Government of New Zealand progressively to take the steps necessary both to prepare Tokelau for the exercise of its right to self-determination, and to put in place material conditions which would make possible the operation of whatever future status Tokelau chose for itself, whether independence; association with another State; or formal integration into the territory of a State.

Little was done in respect of this listing by either Government until 1993. At that point, by agreement between the Government of New Zealand and the elders of the villages of Tokelau, it was decided to move purposefully towards the development of internal self-government for Tokelau. From the New Zealand point of view an immediate hurdle was that Tokelau had no national government and no national representatives. Therefore in order for there to be an entity which the New Zealand Government (or the United Nations or any other body) could deal with effectively, it was necessary to establish Tokelau national authorities. If Tokelau, for its part, wanted to engage with a foreign government it was necessary to have national mechanisms that could serve that purpose.

This was an area where there was no custom. In pre-colonial times a feudal system had operated in Tokelau and it might at that time have been possible to say that the atolls were represented by the community overlord (Fakaofo). In the 20th century, communication had been with the elders of each village and in the latter part of the 20th century by consultation with a combined gathering of representatives of the three atolls.[[9]](#footnote-9)

Instead of creating a structure for national government of a completely alien nature a pragmatic approach was taken. It was decided that the national consultative body, the General Fono, would take on a formal role. Each of the three villages would designate members for that forum. The General Fono was to meet two or three times a year for two or three days on each occasion.

For the periods between meetings of the General Fono it was decided to form a Council of the three village officials, the Faipule, who were responsible for dealing with the colonial power. The Faipule were elected in each village once every three years - a system which originated during the British colonial era.[[10]](#footnote-10)

So began a National Government for Tokelau with a General Fono and a Council of Faipule, with the members of both being designated by each village. The main function of the General Fono was to deal with the national budget. The main role of the Council was to manage the relationship between Tokelau and the Government of New Zealand; and between Tokelau and the Government of Samoa.[[11]](#footnote-11) This group may be likened to a Cabinet or a Council of Ministers.

In the 1990s the Council of Faipule rarely met. The shipping service to Tokelau was still irregular and not very frequent, and the initial telephone system was unreliable – communication was by VHF radio between villages and between the villages and the outside world. By the end of the 20th century communication had improved substantially with more regular shipping services and with a basic telephone system. By 2003, the National Government was heavily involved in the development of internal self-government and became active in working towards the exercise of its right of self-determination.[[12]](#footnote-12)

In 2003, after extensive discussions in each village and in the General Fono, Tokelau moved to formalise a Constitution for itself and in that context reviewed the role of the General Fono and of the Council of Faipule. It was decided that the Council of Faipule should double in size and each member would have a portfolio. It would be made up of six persons, two from each village. This was done because the volume and importance of the business of Tokelau was by then such that more people were needed to conduct it and, given the importance of the decisions, the customary attitude was that three people were too few to make decisions for the communities. This Council also became the executive council for the National Government. Its name in Tokelauan, Fono a te Malo Fakaauau, is the Council for the On-going Government. This name reflects the fact that this group manages the nation when the national assembly (the General Fono) is not in session.

As in 1993, customary officials were looked at to provide the expanded membership for the Council of Faipule. The three new members were the Pulenuku of each village – in effect, the mayor of each village. Although they became members of the Council from 2003, the Pulenuku had no formal responsibilities within it. As at January 2013, they had received no portfolios. This created a constitutional problem, as the Constitution provided that every member of the Council should have ministerial responsibilities. The fact that the Pulenuku did not was a clear breach of the law but neither the General Fono nor the Council took any steps to regularise the situation.

Why were the Pulenuku not given ministerial responsibilities? Some Pulenuku did not want ministerial responsibility because they saw it as conflicting with their village role as Pulenuku; some might have been happy to have ministerial portfolios but agreed that it was not in accordance with the custom of their village. In the villages many of those who elected the Pulenuku were also of the view that it was inappropriate for the person who was in effect to be the mayor of the village to have national responsibilities which would inevitably take that person away from the village for long periods of time. So the law was flouted and the primary reason for that was custom.

The strength of the customary attitude became evident early in 2013. As a result of a political standoff with the New Zealand Government, the Council allocated portfolios to all six of its members. This met the political need and at the same time complied with the law. The Council however immediately referred that decision to the villages, and the matter was also taken up by the Constitutional Review Committee. This was done in order to provide comfort to the Council in respect of what it had done and also to provide guidance before the village elections, which will take place early in 2014.

Views in each village were divided both as to whether the Pulenuku should be members of the National Government and, if they were, whether they should have ministerial responsibility.

The General Fono reached a decision in July 2013. The solution was something of a compromise. The Council of Faipule still has six members: three Faipule, and one member of each village who is designated by the village from among the members of the General Fono. That leaves it open for a village to place its Pulenuku in the Council or not as it sees appropriate from the point of view of the custom of that village. Council portfolios are allocated to the Faipule and to such of the other members of the Council who wish to have portfolios. That means that if a Pulenuku is in the Council and does not want a portfolio, the law admits that possibility. Also the allocation of portfolios is to be on the basis of fair distribution of responsibilities between the delegates of each village and on the basis of the interests and experience of each of the Council members.

This example shows that it took 10 years for an accommodation to be reached between the requirements of the law and custom in an area which is of recent development.

***B The Role of Kauhauatea***

The second area of interest concerns the senior elders, the Hauatea. In each village council of Tokelau these are the most senior members. Because of their age, and frequently their poor health, they are not active in the management of the village but attend meetings of the Village Council and speak as appropriate and advise when called upon. They are also seen as the peacemakers when discussion in the Village Council becomes heated. This is a male group; by tradition and linguistically no women are members of the Hauatea.

With the establishment of National Government and particularly of the General Fono it was decided that the senior elders should, as a mark of respect for them and to honour tradition, have a place in the General Fono. Each village was invited to send up to four senior elders who would not be voting members of the Fono but who would be there to fulfil the traditional village role at national level when necessary. The question was then asked “If the Constitution is the guiding set of laws and if the Hauatea are the leading customary authority should that position not be honoured by specific mention of the Hauatea in the Constitution?” In recent years the matter was debated several times in the villages. Finally at the General Fono in July 2013 the role of the Kauhauatea was formally written into the Constitution, thus honouring Tokelau tradition in a non-traditional forum.

The customary view took pride of place but not without debate as to the nature of the General Fono. It was for instance asked why, if the elderly are to be respected by inclusion in the General Fono and if the General Fono is the decision-making body for the nation, the senior members of the community should not also have a vote in the General Fono?

Various reasons were given for not making the Kauhauatea members of the General Fono: One was not to politicise their role; secondly if they had a vote they would be expected (as are other voting members in the Fono) to be actively involved in the governing of the nation; and thirdly the voting members of the General Fono are all elected to that position by the village constituencies. In contrast the Hauatea are present simply by virtue of their status.

This was another example of custom impacting on the law as found in the Constitution of Tokelau.

***C National Offices***

*1 Elections*

The National Government arrangements also gave rise to the third constitutional matter that was decided by the General Fono in July 2013: the manner in which members of the National Government are chosen.

From 1993 till the election of the current Government in 2011, the election of National Government officials was purely a village matter. Further each village ran its elections in the manner it thought fit. There were different ages for the right to vote, there were different conditions as to the eligibility of voters, there were different practices as to the nomination of candidates for election, and there were different voting procedures.

The accountability of those elected was to the village. A member of the National Government when replaced by a village was replaced invariably because of some village circumstance and not because of the performance of the national role. The General Fono could neither discipline, suspend nor dismiss one of its members; nor could the Council of Faipule. Equally in terms of incapacity in the national role, provided the individual was operating successfully at the village level, the Village Council would take no action.

The possible impact on National Government was evident. It was therefore decided that because of the importance of national matters there should be a set of basic rules common to the three villages relating to who could vote and who could be elected. The consequences for the election for 2014 are that there are now National Election rules which provide specific criteria for who may vote and who may be a candidate. As to national accountability, the law reflects some first and tentative steps towards allowing the Council and the General Fono to respond to circumstances at the National Government level, by enabling them to suspend a National Government official from office.

*2 Criteria of candidates for national office*

Another interesting customary issue has arisen in the context of national election rules, in terms of the required qualifications for a candidate for national office. A candidate for national government must be at least 35 years of age; have had at least two years residence in his or her village before the election; and be a New Zealand citizen. Tokelau is a colony of New Zealand and is also subject to the ICCPR[[13]](#footnote-13) and to the first Optional Protocol. The right to vote or to be voted to office in the national government is determined by New Zealand citizenship.

A view that has been clearly expressed is that candidates for national office should also be of Tokelauan ethnicity. That is not an unexpected qualification and it may be seen as totally consistent with the customary environment. Here however the law impacted. The ICCPR and the first Optional Protocol present a legal difficulty for the inclusion of Tokelauan ethnicity as a requirement for candidates for National Government. The New Zealand Government could also be expected to disallow[[14]](#footnote-14) any Tokelau law which contravened the international human rights instruments.

It may be anticipated that, in practice, the persons who are voted to positions in National Government will be of Tokelauan ethnicity. If so, that will follow the customary expectations.

The fact that the law prevents Tokelau from including ethnicity as a criterion for participation in National Government is somewhat anomalous: a colony being prepared for self-determination is generally expected to have laws developed to meet its own needs.[[15]](#footnote-15) For that reason it might have been anticipated that it could state expressly what the rules are that govern the nomination of candidates. The difficulty for Tokelau is that there is no Tokelau citizenship: people of Tokelau have New Zealand citizenship. As a State, it might be expected that Tokelau could define its own citizenship, and in a way that gives priority to ethnicity. Accessing a position in National Government would then be more difficult for non-indigenous people simply because few would be citizens of Tokelau.

The pressures created by the need for National Government, and developing experience, have resulted in the creation of law in areas which till now were governed at the village level by custom.

***III CRIMINAL LAW***

***The Interplay of Law and Culture: Some Insights From Recent Events in Tokelau***

***Introduction***

I’m going to talk about a recent criminal case in Tokelau, and how the relationship between law, custom and the availability of resources played out in that case. In a very general sense what we see happening in Tokelau’s criminal law is a move away from pure custom to the imperfect application of law. So I will begin with a brief overview of where Tokelau’s current criminal law comes from and its relationship with custom. I’ll then tell you about the facts of the case and outline some of the challenges that it presented for Tokelau. Following that, I will give some examples of how the law was applied imperfectly by the village authorities. I will advance some hypotheses about why that happened, based on my understanding of aspects of Tokelauan custom and the context in which law operates in Tokelau. I will finish by suggesting some steps that Tokelau could take if it wishes to increase the extent to which it applies the criminal law as written.

My knowledge of this case comes from my involvement as an advisor to Tokelau’s national government. While the case was handled at village level, the national government wished to be advised on the law and the process to be followed, so that was how I became involved. To the best of my knowledge, what I will say about the process that was actually followed and the outcome is accurate. However, these things have been difficult to confirm because there was no comprehensive written record made, and I’m reliant instead on a couple of documents and on oral reports from those who were closely involved in the matter or who have spoken with people who were closely involved in the matter.

***Tokelau’s Criminal Law***

Tokelau’s criminal law is found in the Tokelau Amendment Act 1986 (a New Zealand statute) and the Crimes, Procedure and Evidence Rules, which were promulgated by the General Fono in 2003. The Tokelau Amendment Act makes the High Court of New Zealand the High Court for Tokelau,[[16]](#footnote-16) provides for the appointment of Commissioners (lay judges),[[17]](#footnote-17) and sets out the jurisdiction of Commissioners and the maximum penalties that they can impose.[[18]](#footnote-18) The Crimes, Procedure and Evidence Rules set out the substantive offences and maximum penalties, and outline basic rules of procedure and evidence.

The legislation was enacted after a long process of review of Tokelau’s criminal law and practice, which was undertaken in preparation for a move to self-determination. The Taupulega and a law reform team from New Zealand worked together to create legislation that was suitable for Tokelau.

At that time, Tokelau’s official criminal law was found in the Tokelau Crimes Regulations 1975. Those Regulations had not been made specifically for Tokelau. Rather, they were sections of the Niue Act, which were based on New Zealand legislation. The 1975 Regulations did not seem to have been used or even known about in Tokelau. Instead, breaches of social norms were addressed using custom or, in some areas, the Native Laws Ordinance 1917, which the villages were unaware had actually been repealed many years before.

The review of Tokelau’s criminal law was a process of adapting the existing law to make it suitable for use in Tokelau. Offences which the Taupulega considered necessary to maintain social order were selected from those contained in the Tokelau Crimes Regulations, and some new offences were created. As the law was going to be applied by people who did not have legal training, the language was simplified as much as possible, and language and syntax that could be translated into Tokelauan was used. The Taupulega also decided on maximum penalties for offences, and whether a local Commissioner or the High Court should have jurisdiction for each offence. Finally, the rules of procedure and evidence were greatly pared down in order to make them suitable for use in a small society with extremely limited legal infrastructure.

So the form of Tokelau’s criminal law is foreign, in that it is contained in legislation based on a Western legal framework, and it makes use of common law concepts. However, the current law was developed by the Taupulega, with the assistance of lawyers from New Zealand, so both the substantive offences and the procedural rules reflect aspects of custom, and at the time were considered appropriate for Tokelau’s needs and for the resources available.

***The facts of the case***

In November 2012 there was a drinking party at a home in Nukunonu. One of the men who attended the party was found later that night on the ground outside the house. He was taken to hospital, but he died. The host of the drinking party later admitted to having pushed him off the veranda of the house, because he had approached his teenage daughter, who was in bed, several times.

***Challenges presented by the case***

As far as we know, this was Tokelau’s first homicide case, so it raised a lot of questions for them about how to proceed. Additionally, there were a number of contextual factors that it made it a particularly complex and challenging situation.

First, Nukunonu is a small place. Just over 300 people live there, and so there are close relationships between those with professional roles in the case and those involved as victims, defendants, and witnesses. This meant that there were many conflicts of interest that needed to be addressed in order to handle the case fairly.

Secondly, the police investigation had to rely primarily on statements from those who were present when the incident occurred, because very little physical evidence could be gathered. There is a lack of equipment for crime scene investigations, and there are no facilities for medical examinations or for the collection and analysis of other forensic evidence. There wasn’t a doctor on the island at the time, and in accordance with custom the body was buried soon after the death. This means that the cause of the injuries sustained by the deceased and the ultimate cause of death could later only be guessed at. Collecting the statements was also difficult – the men who had been at the party were intoxicated, and most of the people who weren’t intoxicated were closely related to the accused, making them reluctant to talk to the police.

A third challenge for Tokelau was the uncertainty about the respective roles of the village government, the national government and the Office of the Administrator. The case was handled at village level, but there was some involvement from Tokelau’s national government and from the Office of the Administrator. This was because the widow of the man who died contacted the New Zealand media, and because the Nukunonu Police had requested assistance from the New Zealand Police. However, exactly what the roles of each government were at the time, or should be, was unclear.

Fourthly, Nukunonu had a choice of jurisdictions. Depending on the charges laid, the case could be heard either by a local Commissioner or by the High Court for Tokelau.

If the charge had been murder or manslaughter, the case would have needed to be dealt with by the High Court for Tokelau, which is the New Zealand High Court. The High Court could also hear of charge of bodily harm, if the Commissioner declined jurisdiction. This would have been the first criminal case that the High Court for Tokelau had heard. The judge would have needed to familiarise him or herself with Tokelau’s law, and probably travel to Tokelau for a hearing, entailing delay and expense.[[19]](#footnote-19) The concern about conflicts of interest would not have been as significant had a High Court Judge heard the matter. A High Court Judge would also have experience dealing with homicide cases, which the local Commissioners do not have. However, there was concern about involving outsiders, and particularly about the presence of the international media if there was to be a High Court trial. Additionally, had a charge of murder or manslaughter been laid and had the accused defended it, it is highly unlikely that the burden of proof would have been discharged, due to the evidential issues I outlined earlier.

A charge of bodily harm or assault could be heard by a local Commissioner in Tokelau. This has the advantage that it is a known process, and that it avoids issues with delay, expense and outside involvement. However, the charges of bodily harm and assault might be considered inadequate as they don’t reflect the fact that somebody died. In fact, the host of the party was convicted of bodily harm, and the widow of the deceased contacted the New Zealand media expressing concern that the truth had been covered up and that the man who caused her husband’s death had not been held to account for that.

Finally, the range of penalties provided for in the legislation does not reflect what can actually be imposed in practice, and may in any event be considered inadequate for the seriousness of the offending in this case. The legislation sets maximum terms of imprisonment for each offence. However, imprisonment is never imposed and in fact there is no prison in Tokelau. If a sentence of imprisonment was imposed, either a prison would have to be built, or an existing building would have to be designated as one. The Crimes, Procedure and Evidence Rules contain a table for converting prison sentences to community work. However, the maximum term of community work that can be imposed is one year. While community work may be complemented by customary penalties such as a public reprimand and an apology to the family of the victim, one year of community work seems a manifestly inadequate substitution for a sentence for murder, which carries a maximum penalty of 20 years’ imprisonment, or manslaughter, with a maximum of six years’ imprisonment.

***Application of the law***

*The Court that heard the case*

As I’ve said, the law provides for either a Commissioner or the High Court to hear cases. However, in this case, the village appointed a committee of those elders least closely connected with those involved the case, in order to avoid and reduce the impact of conflicts of interest as much as possible. I suggest that this was a use of custom to fill a gap in the law. The law could be brought into line with custom by introducing a provision allowing for a committee to be formed in these circumstances, so that its decisions are legally valid as well as customarily acceptable.

Incidentally, the Commissioner at that time did not actually have a valid warrant, meaning that his exercise of the Commissioner’s jurisdiction would have been legally invalid anyway. However, customarily he still held the authority to act as Commissioner, which is why cases continued to be heard even though the necessary steps to renew the warrant had not been taken after it expired.

*Choice of charges*

The host of the party was convicted of bodily harm, and the other men at the party were convicted of drunkenness and trespass. However, none of these charges were appropriate for the facts of this case. I’ll go through each of them and explain why that is, and why I think they were used anyway.

I’ll start with the drunkenness and trespass convictions. Under rule 52 of the Crimes, Procedure and Evidence Rules, a person who is drunk in a public place and causes a disturbance or is unable to look after him or herself commits an offence. However, a person’s home is not a public place, and so nobody at the party committed this offence. The issue with trespass is similar. Under rule 38, there are two ways to commit trespass. The first is to be in a place belonging to another, without a lawful excuse, or to remain there after being asked to leave. In this case those present had been invited to someone’s home and were not asked to leave. The second way to commit trespass under rule 38 is to commit what would be called burglary in NZ law, which is to enter someone else’s property with the intention to commit an offence. There is no evidence that any of the men at the party went along to the party with that intention, so they did not commit trespass under rule 38(2) either.

What might have happened here was a collision between what was understood culturally as a just outcome in this case, and the offences that the law actually provides for. I think possibly there was a sense that the men who were at the party shared some responsibility for the death and deserved to be punished. The village authorities chose drunkenness and trespass as the offences to use to achieve this end, because the men were drunk and at someone else’s house. The details of the offences in law just weren’t considered to be important. This has the unfortunate effect of making the text of the law effectively meaningless. There are a couple of possible remedies. Tokelau could either use custom outright to hold accountable people who are believed to share responsibility for a death, where their level of responsibility falls short of criminal responsibility under the law. Alternatively, the law could be amended to extend criminal liability to those who culturally are considered to share responsibility for a death. Underlying the current law is a view that criminal responsibility is individual, which may not be appropriate in a collective society. Amending the secondary liability provisions to reflect ideas of collective responsibility could be an option if Tokelau wished to make its criminal law more compatible with custom.

Turning now to the host of the party, he was convicted of bodily harm. Rule 14 sets out two ways in which the offence of bodily harm can be committed. The first is by intentionally causing bodily harm, without a lawful excuse. It would have been quite acceptable for the host of the party to be charged under this provision, although ordinarily because the victim died a manslaughter charge would be used instead. However, he was actually convicted under rule 14(2), which provides that “a person who causes bodily harm to another under such circumstances that, if death had been caused, the offence of manslaughter would have been committed, commits an offence.” This was not the appropriate provision, because of course the man did die.

From conversations that I had with people involved with the case at the time, I know that the wording of rule14(2) caused some confusion, and there was a belief that it was a manslaughter provision.

This illustrates the need to ensure that all the provisions are clear enough that they can be interpreted accurately by lay judges and others who do not have legal training or much in the way of formal education. Rule 14(2) could be clarified by taking out the reference to manslaughter, and using the actual concepts instead, for example “a person who causes bodily harm by carelessness or while committing an unlawful act commits an offence.” There could also be more guidance in the Rules themselves as to how they should be applied, as there is no body of case law to assist with interpretation and it is unlikely that one will develop. This does raise a question of the appropriateness of a comprehensive written text for a largely oral culture. That’s a question for Tokelau to consider. Additionally, in order to make the law more accessible for those using it, it would be desirable for there to be more training for police and Commissioners, and perhaps for the police to be required to seek formal legal advice in serious cases and for that advice to be available.

It is possible that the decision to use 14(2) might also reflect the desire that the incident be dealt with locally. The offence of manslaughter must be dealt with by the High Court, but a local Commissioner can hear cases under rule 14. I wonder whether the decision to use 14(2), in the belief that it was the offence of manslaughter, was seen as a way to get around the jurisdictional bar. If so, it might be useful to revisit the question of jurisdiction. The Taupulega had decided in 2003 that murder, manslaughter, and treason should be dealt with by an outsider because of their seriousness and because the villages had no experience with these offences. It is possible that that view has now changed, so it would be useful to revisit the issue.

*The sentences imposed*

The host of the party was sentenced to two years’ community work by the committee exercising the Commissioner’s jurisdiction. However, the Tokelau Amendment Act provides that the maximum sentence a Commissioner can impose is three months’ imprisonment (which could be substituted with up to one year of community work) or a $150 fine. Perhaps the sentence that was imposed reflects a judgment that the seriousness of the offending meant that the penalties that could be imposed legally were too low. Certainly by international standards, a year of community work seems very low for some of the more serious offences, for example bodily harm, rape and cruelty to children. This might be a time to revisit the range and seriousness of penalties, to consider whether they are appropriate for local conditions and serve the needs of the community.

To conclude, this case was a difficult one with a number of contextual challenges for Tokelau. It has revealed some complexities in the interaction between law and custom in Tokelau’s criminal law, and highlighted the role that limited resources play in that relationship. Tokelau’s criminal law has now been in force for 10 years. With that experience and with self-determination again on the agenda, it is timely to revisit the criminal law, with a view to ensuring that it is suited to the resources available and that it meets the needs of the community.

***IV CONCLUSION***

Tokelau custom is strong. The law is weak. In the long-term, conditions favour the law as being the dominant social ordering system. When that might occur will depend on the provision of the infrastructure needed to support law.

1. Tokelau became part of the Gilbert and Ellice Islands Colony on 5 May, 1916 by Order in Council 1916 No 167. [↑](#footnote-ref-1)
2. New Zealand took over the administration of Tokelau for the British government on 11February, 1926. Tokelau became a New Zealand colony on 1 January, 1949 by effect of the Tokelau Act 1948. [↑](#footnote-ref-2)
3. Under the Gilbert and Ellice Islands Colony Order in Council of 1915, the High Commissioner for the Western Pacific had power to make law for the colony but in the exercise of the power the High Commissioner was to “respect any native laws and customs by which the civil relations of any native chiefs, tribes, or populations under His Majesty’s protection are now regulated…” (cl VIII(3)). [↑](#footnote-ref-3)
4. Tokelau Islands Amendment Act 1969. [↑](#footnote-ref-4)
5. Village Incorporation Regulations 1986, SR 1986/319. [↑](#footnote-ref-5)
6. The role of the Taupulega was recognised in reg 7; the legislative power was granted by reg 18. [↑](#footnote-ref-6)
7. Eg The Biosecurity Rules 2003 refer only to Tokelau offices and officers. See also Transfer of Powers Rules 2003. [↑](#footnote-ref-7)
8. Eg See in particular Custom (Sources of Law) Rules 2004. [↑](#footnote-ref-8)
9. ---- [↑](#footnote-ref-9)
10. Native Laws of the Union Group 1912 (O le Tulafono mo le Atu Tokelau). [↑](#footnote-ref-10)
11. The port of entry for Tokelau. Apia is also the location of the offices of the Tokelau national government. [↑](#footnote-ref-11)
12. Which it did in 2006 and 2007 to no effect. [↑](#footnote-ref-12)
13. ICCPR, art 25. [↑](#footnote-ref-13)
14. The power of disallowance is provided in s 3F of the Tokelau Act 1948. [↑](#footnote-ref-14)
15. See UN Charter, art 73. [↑](#footnote-ref-15)
16. Section 3. [↑](#footnote-ref-16)
17. Section 5. [↑](#footnote-ref-17)
18. Section 7. [↑](#footnote-ref-18)
19. This is because there is no authority in New Zealand law to transfer a person from Tokelau to New Zealand and hold them in custody in New Zealand for an offence that is alleged to have been committed in Tokelau. [↑](#footnote-ref-19)