

THE INTERPLAY OF LAW, CUSTOM AND THE AVAILABILITY OF RESOURCES IN TOKELAU'S CRIMINAL LAW

DANICA MCGOVERN*

I. INTRODUCTION

This note discusses a recent criminal case in Tokelau, and how the relationship between law, custom and the availability of resources played out in that case.¹ The case is notable as the first homicide in Tokelau, and also as the first time that the involvement of the High Court for Tokelau was in prospect in respect of a criminal matter. Although formal law covering criminal matters has been in place since the Native Laws Ordinance 1917, until recently, breaches of social norms have been addressed through custom rather than law. This case is part of a general trend away from the use of pure custom and towards the imperfect application of Tokelau's formal law.² It illustrates the way in which limited resources and the influence of custom can lead to unexpected (at least from a common law perspective) interpretations of legislative provisions, and how custom is used to fill gaps in existing legislation.

This note is divided into three sections. It begins with a brief overview of Tokelau's current criminal law, discussing the ways in which the legislation in force was intended to incorporate aspects of custom and to take account of the available resources. The second section describes the facts of the case and outlines some of the challenges that it presented for Tokelau. The third section notes several ways in which the law was applied that differed from what was envisaged when the legislation was drafted. It advances some hypotheses about why that occurred, arguing that the case reveals aspects of Tokelauan custom

* Danica McGovern, PhD candidate, Victoria University of Wellington. I wish to acknowledge the advice and assistance provided by Lise Hope Suveinakama, Legal and Policy Advisor to the Government of Tokelau. The views expressed here are my own.

- 1 Tokelau is a territory of New Zealand. It is situated 500 kilometres north of Samoa, and can only be reached by sea. Approximately 1300 people live in Tokelau, across the three coral atolls of Fakaofu, Nukunonu and Atafu. Tokelau is a colony listed on the United Nations Decolonisation List, and is substantially self-governing. As it is a colony, the New Zealand Parliament is the supreme law-maker. However, the Tokelau national assembly (General Fono) has a domestic legislative power. Judicial matters are handled in Tokelau by local commissioners, although the New Zealand High Court and Court of Appeal can sit as Tokelau courts.
- 2 The Tokelau Judicial Report 2011-2012 (the first publication of its kind) indicates the number of prosecutions and the types of offences that were prosecuted in each of the three atolls during that period. The Report also sets out the relevant development goals from the National Strategic Plan 2010-2015 and provides commentary on Tokelau's progress in meeting those goals. The report is available at <www.paclii.org>.

and the context in which law operates that are not fully accommodated by existing legislation. The third section also suggests some steps that Tokelau could take if it wishes to increase the extent to which it applies the law as written. These steps take the form of legislative amendments to clarify certain provisions and to increase the compatibility of the law with custom, and capacity building to enable the law to be implemented as envisaged.

There is no comprehensive written record of this case. Where documents exist, this note refers to them. However, much of the information about the process that was followed and the outcome of the case was obtained in the form of oral reports from those closely involved. The discussion of the challenges raised by the case is based on the author's experience as an advisor to Tokelau's national government in respect of this case.

II. 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 2003. The Tokelau Amendment Act makes the High Court of New Zealand the High Court for Tokelau,³ provides for the appointment of Commissioners (lay judges),⁴ and sets out the jurisdiction of Commissioners and the maximum penalties that they can impose.⁵ The Crimes, Procedure and Evidence Rules 2003 set out the substantive offences and maximum penalties, and outline basic rules of procedure and evidence. There is no written body of case law.

The Tokelau Amendment Act and the Crimes, Procedure and Evidence Rules are the product of an attempt to adapt legislation for use in a small society governed largely by custom and with a very limited legal infrastructure. Until that legislation was promulgated, 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 Nukunonu, the Native Laws Ordinance 1917, which had been repealed many years before.⁶

The content of the Tokelau Amendment Act and the Crimes, Procedure and Evidence Rules was arrived at after a long process of discussion and review of the Tokelau Crimes Regulations 1975. The review was undertaken in preparation for a move to self-determination.⁷ The Taupulega (the elders) and a law reform team from New Zealand worked together to create legislation

3 Tokelau Amendment Act 1986, s 3.

4 Tokelau Amendment Act 1986, s 5.

5 Tokelau Amendment Act 1986, s 7.

6 A H Angelo "Making the Criminal Law Your Own: The Tokelau Endeavour" in Kayleen Hazlehurst (ed) *Popular Justice and Community Regeneration* (Westport, Connecticut, Praeger Publishers, 1995) at 28.

7 For a discussion of that process, see Angelo, above n 6, at 27-33.

that was suitable for 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.⁸ 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 Tokelau.⁹ As the law was to be applied by officials who did not have legal training, concepts were stated in their simplest form. Vocabulary and syntax that could be readily understood in English and that could be translated into Tokelauan were adopted.

Accordingly, 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.

III. THE FACTS OF THE CASE AND THE CHALLENGES IT PRESENTED FOR TOKELAU

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. The reason given was that the victim, despite having been warned off, approached the host's teenage daughter, who was in bed.

The novelty of the case, along with a number of contextual factors, presented some challenges for Tokelau in responding to the death. Five of these challenges are noted in this section.

First, the population of Nukunonu is just 300 people. There are close relationships between those who had official roles in the case and those who were 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, and to be seen to do so.

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. Tokelau lacks equipment for crime scene investigations, and there are no facilities for medical or pathology examinations or for the collection and analysis of other forensic evidence. There was no doctor on the island at the time, there is no coroner, and in accordance with custom, the body was buried soon after the death. This means that the cause

8 At 33-35.

9 At 33-35.

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 were not 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 possibly also from the Office of the Administrator. This was because the widow of the man who died contacted the New Zealand media,¹⁰ 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.¹¹ If the charge had been murder or manslaughter, the case would have needed to be dealt with by the High Court for Tokelau. The High Court could also hear a 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.¹² 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 outlined earlier.

A charge of bodily harm or assault could be heard by a local Commissioner in Tokelau.¹³ 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 do not reflect the resulting death. 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 justice had not been done.¹⁴

10 Michael Field "Death may be first Tokelau murder" (13 January 2013) <www.stuff.co.nz>.

11 Tokelau Amendment Act 1986, ss 3 and 7.

12 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 for an offence that is alleged to have been committed in Tokelau.

13 Tokelau Amendment Act 1986, s 7; Crimes, Procedure and Evidence Rules 2003, r 136(1).

14 Field, above n 10.

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 Crimes, Procedure and Evidence Rules set 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,¹⁵ one year of community work seems a manifestly inadequate substitution in respect of a sentence for murder, which carries a maximum penalty of 20 years' imprisonment, or manslaughter, which has a maximum of six years' imprisonment.¹⁶

IV. APPLICATION OF THE LAW

This section outlines some problems with the way in which the law was applied in this case. These problems relate first to the legal validity of the body that heard the case, secondly to the offences for which the defendants were convicted, and thirdly to the sentence imposed on one of the defendants. It advances some hypotheses about why the law was applied in the way it was, based on the influence of custom and resourcing issues. As part of this discussion, steps are outlined that Tokelau could take if it wishes to improve the suitability of its criminal law for local conditions, including custom and resources. This section also highlights areas where Tokelau could focus its capacity-building efforts.

A. The Body That Heard the Case

As discussed earlier, the law provides for either a Commissioner or the High Court to hear cases and impose sentences. However, in this case, the village appointed a committee of those elders least closely connected with those involved the case, in order to reduce the impact of conflicts of interest. This was a use of custom to fill a gap in the law. There is no provision in Tokelau's criminal law that addresses conflicts of interest. However, it is custom that the Taupulega hold power and that decisions are made communally. The appointment of the committee of elders was therefore a pragmatic solution provided by custom. The law could be brought into line with custom by introducing a provision allowing for a committee of elders to be formed in these circumstances, so that decisions made by that body are legally valid as well as customarily acceptable.

15 Tokelau Amendment Act 1986, s 7(2).

16 Crimes Procedure and Evidence Rules 2003, r 136(1) and Schedule 2.

Incidentally, the Commissioner at that time did not have a valid warrant, so his exercise of the Commissioner's jurisdiction would have been legally invalid anyway. However, customarily he still held the authority to act as Commissioner, and so he continued to hear cases even though the necessary steps to renew the warrant after it expired had not been taken.

B. The 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. This section outlines the reasons these charges were inappropriate, and advances some hypotheses about why they were nonetheless used by the village authorities.

The offence of drunkenness is committed when a person is drunk in a public place and causes a disturbance or is unable to look after him or herself.¹⁷ However, the incident leading to the death occurred at a person's home, which is not a public place, meaning that this offence was not committed by anyone who attended the party. The issue with the convictions for trespass is similar. Trespass can be committed by, without lawful excuse, being in a place belonging to another,¹⁸ entering a place belonging to another after being warned not to, or remaining there after being asked to leave.¹⁹ Trespass can also be committed by entering a place belonging to another with the intention to commit an offence.²⁰ In this case, those present had been invited to the home and were not asked to leave. There is no evidence to suggest that any of the men went along to the party with the intention to commit an offence. They did not, therefore, commit trespass.

It appears that the decision to convict the men who attended the party of drunkenness and trespass was the result of a collision between what was understood culturally as a just outcome in this case, and the offences that the law provides for. 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 appear to have chosen drunkenness and trespass as the legislative provisions to use to achieve this end, and disregarded the elements of the offences. This is problematic, because it makes the text of the law effectively meaningless. There are a couple of possible remedies. Tokelau could 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 are considered culturally to share responsibility for a death. Underlying the current law is a view that criminal responsibility is individual, which may not be appropriate in such

17 Crimes, Procedure and Evidence Rules 2003, r 52.

18 Crimes, Procedure and Evidence Rules 2003, r 38(1).

19 Crimes, Procedure and Evidence Rules 2003, r 38(2)(ii).

20 Crimes, Procedure and Evidence Rules 2003, r 38(2)(i).

a strongly 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.²¹

The host of the party was convicted of bodily harm. Rule 14 of the Crimes, Procedure and Evidence Rules 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.²² It would have been quite acceptable for the host of the party to be charged under this provision, although ordinarily a manslaughter charge would be preferred because the victim died. However, the host of the party was actually convicted under r 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.” The fact that death was caused meant that this was not the appropriate provision under which to convict the host of the party.

Discussions that took place at the time revealed that the wording of r 14(2) caused some confusion, and that there was a belief that the offence provided for in r 14(2) was manslaughter rather than bodily harm. This illustrates the need to ensure that all 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 concepts alluded to 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 is a question for Tokelau to consider moving forward. Additionally, further training for police and Commissioners could assist to make the legislation more accessible for them. In the absence of a prosecution service, it may also be desirable for the police to be required to seek formal, independent legal advice in serious cases, and for steps to be taken in order to ensure that that advice is available.

It is possible that the decision to use r 14(2) also reflected the desire (expressed at the time) 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 r 14. The decision to use r 14(2), in the belief that it was a manslaughter provision, may have been seen as a way around the jurisdictional bar on a Commissioner hearing the case. If so, it may be useful for Tokelau to revisit the question of jurisdiction. The Taupulega had decided in 2003 that murder, manslaughter and treason should be dealt with by the High Court,

21 The secondary liability provisions are found in r 113 of the Crimes, Procedure and Evidence Rules 2003.

22 Crimes, Procedure and Evidence Rules 2003, r 14(1).

because of the seriousness of these offences and because the villages had no experience with them.²³ It is possible that that view has now changed, so it would be useful to reconsider the issue.

C. The Sentence Imposed for Bodily Harm

The final problem with the way in which the law was applied in this case is with the sentence imposed on the host of the party. He 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.²⁴ Perhaps the sentence that was imposed reflects a judgment that the penalties that could legally be imposed 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 may 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.

V. CONCLUSION

This case 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 interaction. Tokelau's current criminal law has now been in force for 10 years. With that experience, 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.

23 Angelo, above n 6, at 31.

24 Tokelau Amendment Act 1986, s 7; Crimes, Procedure and Evidence Rules 2003, r 136(2) and Schedule 3.