

LAW AND TOKELAU

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In 1984 the elders of Tokelau resolved to accept law in the Western European sense as a necessary and desirable tool for assisting Tokelau to prepare for self-determination under the aegis of the U.N. The elders also resolved to reform and develop the laws and legislation of Tokelau in a way that was adapted to the needs of Tokelau and that reflected as far as possible the custom of Tokelau.

Constitutionally Tokelau has had law to the exclusion of custom since 1969. In 1984 the body of law was not known in Tokelau even in broad terms, was not suited to Tokelau, and was dysfunctional. The result was that much that happened in Tokelau was contrary to law: the villages operated in their traditional way and were therefore frequently outside the constitutional protections provided by the government.

In 1984 the elders and officials of Tokelau gave visiting lawyers a description of the rules and institutions that they saw as lawlike and of the role they saw for law in Tokelau.

The purpose of this article is to place on record these perceptions of law, as stated by the elders of Tokelau before the current period of major law reform began, and also to indicate something of the background against which the decisions on law since 1984 have been made.

More specifically this paper provides a brief introduction to the status and role of law in Tokelau and deals with the reality of social ordering there in 1984 as described by the elders and in the available village and government records of disputes reported to the police or brought before the local lay magistrate. Our concern is not with the broad body of custom, but with the interface between custom and law at a key period of Tokelau's history.

Introduction

Tokelau¹ is situated about three hundred miles north of Western Samoa. It is part of New Zealand and consists of three small atolls—Atafu, Nukunonu, and Fakaofu—which are separated from each other by forty to eighty miles of sea. Each is made up of a ring of islets around a lagoon; each island is very small and at its highest point is only a few feet above sea level. Because the islands lack soil there is not a great variety of food crops, but the coconut palm grows readily and each island is clothed in coconut trees. From the sea the coconut palms are virtually all that can be seen and the impression is one of a heavily wooded area.

The total population of Tokelau is 1,690² distributed among the islands as follows: Atafu, 603; Nukunonu, 426; Fakaofu, 661. Tokelauans are categorized as Polynesians and their language bears a close relationship to Samoan. The significant contacts with the outside world today are with Western Samoa and New Zealand. The way of life on each island is communal, centered on the village. There are no major health problems; the biggest worry is the elements.

Not only are the islands of Tokelau geographically isolated from the rest of the world, but for the visitor there is the final physical barrier of the passage from ship to shore. There are no anchorages or natural harbors, so going ashore is a trip by small boat from the ship, through the surf into an artificial channel blasted in the coral, to a landing place. Having passed that barrier the visitor moves quickly and thankfully out of the tropical sun in under the umbrella of coconut palms and breadfruit trees, into the coolness of the shade and the intimacy of the village—similar to stepping directly from the street into somebody's living room. The intimacy has a clear bearing on the nature of the customary rules.

The immediate visual impact is one of order. The paths are straight and regular, and the houses take their places in the village in an orderly pattern. The impression is not only of physical order, but also of a cer-

tain discipline. There is the feeling also of people in their right place. All call greetings and welcome the visitor with a smile. However, whether on the paths or in their houses, all give the impression of going about their daily round.

The Law and Political History

Between 1877 and 1916 Tokelau (then known as the Union Islands) was a British protectorate and was administered variously from Western Samoa, Tonga, and Ocean Island. From 1916 to 1926 the islands were part of the Gilbert and Ellice Islands Colony. Then in 1926 the association with New Zealand began and Tokelau was administered till 1949 through the New Zealand Administrator of Western Samoa. In 1949 Tokelau became part of New Zealand and has since been administered from Wellington and Apia.

Western Pacific High Commission

By virtue of the Pacific Islands Protection Acts (U.K.) of 1872 and 1875 and of the Foreign Jurisdiction Acts (U.K.) of 1843 to 1875, the Western Pacific Order in Council of 1877 was made by the Queen in Council on 13 August 1877. This Order in Council was declared to apply to the Union Islands, among other places in the western Pacific Ocean. The Order in Council established the High Commission for the Western Pacific and gave the High Commissioner's Court jurisdiction over British subjects in the area. Article 24 of the order gave the High Commissioner power to make regulations for the government of British subjects or "for securing the maintenance (as far as regards the conduct of British subjects) of friendly relations between British subjects and those authorities and persons subject to them." The first legislation reasonably specific to Tokelau was made under that authority in 1884, the Arms Regulation No. 1 of 1884.³

As far as Tokelau was concerned there was little legislative activity prior to 1908. There were only eleven short pieces of legislation and many of those were simply the repeal and reenactment of rules on the same topics—principally arms and liquor control. A somewhat greater variety came at the end of the century with provision for the registration of births, deaths, and marriages; the control of contracts made with native peoples; native lands; and wireless telegraphy.

The Pacific Order in Council, 1893, repealed and replaced the 1877 order; it also applied to Tokelau. By 1893 there had been formal decla-

rations of protectorate status made in each atoll and the system of 1877 was continued after 1893 in a stronger form. Some of the procedural flexibility of the 1877 order was lost,⁴ but the main thrust of the new order was similar.

Until 1909 it appears that the general spirit of the protectorate system was still being honored in respect of Tokelau and that the main area of operation of Western Pacific High Commission legislation was in respect of British subjects and matters of particular concern to the British administrators, such as merchant shipping, quarantine, arms, and liquor control.

Gilbert and Ellice Islands Protectorate

A step toward a new law future was taken by the Gilbert and Ellice (Union Group) Regulation No. 7 of 1909.⁵ This regulation extended all existing Gilbert and Ellice Islands legislation to Tokelau and provided that all future Gilbert and Ellice Islands Protectorate regulations should also apply to Tokelau.⁶ The fate of Tokelau and the Gilbert and Ellice Islands Protectorate was, in terms of legislation, then a common one until the forming of the Gilbert and Ellice Islands Colony on 12 January 1916. On 5 May 1916 a further Order in Council added the three atolls of Tokelau to the Gilbert and Ellice Islands Colony.

The volume of legislation for Tokelau and the Gilbert and Ellice Islands Protectorate increased markedly in the period between 1909 and 1916.⁷ The law continued to be concerned with British interests, revenue, and shipping, but extended into new areas such as plant import regulation, protection of birds, and sale of food.

Gilbert and Ellice Islands Colony

The Order in Council that established the Gilbert and Ellice Islands Colony gave specific legislative power for the colony, but did not provide for the general extension of English law to the colony. The provision was in fact to the opposite effect. The government was empowered to legislate in all areas but with specific respect for native laws and customs. That is to say, legislation was to be compatible with the local conditions and made only to the extent necessary for the proper administration of the colony.⁸

Tokelau remained in the Gilbert and Ellice Islands Colony until 11 February 1926. During that colonial period, laws with significant local impact were made—laws for prisons, weights and measures, a licensing

system, a capitation tax, control of medical practitioners, restriction on the importation of dogs, liquor control, currency control, regulation of native passenger traffic, guano control, prohibition of the use of explosives, exclusion of undesirables, divorce, the reciprocal enforcement of judgments, the protection of native lands, death and fire inquiries, and the immigration of aliens.

Dependency of New Zealand

In 1926 immediate political control over Tokelau shifted to New Zealand. New Zealand administered Tokelau on behalf of the British government through the Administrator of Western Samoa, who was based in Apia. The relevant Order in Council of 1926 provided for the continuance in force of the existing laws and gave the Governor-General of New Zealand the power to legislate for the “peace, order, and good government of Tokelau” within the territory. During the period of New Zealand administration only five pieces of legislation were promulgated and while some, such as the declaration of Apia as the port of entry for Tokelau,⁹ had administrative importance, there was no great significance in any of the others.

Tokelau—Part of New Zealand

The latest step in the development of the situation in Tokelau occurred on 1 January 1949 when, by virtue of an agreement between the United Kingdom and New Zealand and by the effect of the Tokelau Act 1948, Tokelau became part of New Zealand. Tokelau was at that stage living under custom and a limited amount of legislation from the Gilbert and Ellice Islands Colony era.¹⁰

Since the coming into force of the Tokelau Act 1948, there has been a noticeable increase in the volume of legislation for Tokelau. Forty-three acts of the New Zealand Parliament are now in force as Tokelau law, and seventeen sets of post-1949 regulations have been made specifically for Tokelau.¹¹ Of the acts only one could be said to have any internal impact in Tokelau—the Tokelau Act itself. Other acts may be of relevance to the operation of the Tokelau Administration, but are not relevant to the daily lives of the people on the islands.

The regulations are more important. They fall into two main classes—those that directly affect individuals in Tokelau (the Tokelau Adoption Regulations 1966, the Tokelau Births and Deaths Registration Regulations 1969, the Tokelau Crimes Regulations 1975, the Tokelau Mar-

riage Regulations 1986, the Tokelau Village Incorporation Regulations 1986, and the Tokelau Divorce Regulations 1987) and those of relevance to external or governmental matters (the Tokelau Copra Regulations 1952, the Tokelau Customs Duties Regulations 1957, the Tokelau Finance Regulations 1967, the Tokelau Coinage Regulations 1978, and the Tokelau Administration Regulations 1980).

The Tokelau Act 1948 arguably continued the British attitude to custom: custom was the rule in those areas for which there was no specific legislation. By amendment to the act in 1969, however, a new section—4A—was added. Its precise relation to the other sections in the act relating to sources of law was not then, nor at any subsequent time, indicated. The most obvious and likely effect was that it reduced Section 5 of the act—which included the customary rules of Tokelau—from a provision of great importance to one of little import. The addition of Section 4A¹² to the Tokelau Act 1948 was said to be a reform move motivated by a desire to make Tokelau the same as New Zealand in respect of its basic law.¹³

The recognition of things customary was dealt a further blow in 1970 with another amendment, which became effective in 1975.¹⁴ That amendment repealed the Native Laws Ordinance of 1917 and gave Tokelau a New Zealand-oriented court system. The promulgation of the Tokelau Crimes Regulations 1975 and the Tokelau Divorce Regulations 1975 further eroded the status of custom. By 1976 the only significant area of activity left by law for custom was matters relating to land.¹⁵

In 1986, however, the balance was slightly redressed with the enactment of the Tokelau Amendment Act 1986 and the Tokelau Village Incorporation Regulations 1986. The main purpose of the Amendment Act 1986 was to provide a viable court system for Tokelau.¹⁶ The system technically in force before 1 August 1986 was constitutionally defective.¹⁷ In practice no harm was done because the pattern in Tokelau was not to use the law or take any case beyond the village to which it related. The Amendment Act 1986 extends the civil jurisdiction of island commissioners and reflects the current pattern of punishment for criminal offenses used on the islands.¹⁸ Most criminal matters are dealt with either by way of fine or by an order for the performance of community work; the commissioner may, during the proceedings, discuss the case with the Taupulega (Council of Elders) of the island for which that commissioner is appointed. This is a recognition of the customary input and procedure in criminal cases on the islands. Where the penalty imposed by the commissioner is a small one, the communities felt that it would be inappropriate to involve the court in New Zealand or have a

High Court judge travel to Tokelau to deal with the appeal. There is therefore the possibility of locally heard appeals in petty criminal matters and the possibility that a commissioner other than a commissioner of the island concerned might be a member of the appeal body.¹⁹

The Tokelau Village Incorporation Regulations 1986, for the first time in eleven years,²⁰ give legal recognition to the existence of the villages, to their administrative importance, and to the functioning of their officials. The legal importance of the village leader had been recognized since 1970 in the conferral of judicial power on the *faipule* (village representative). The law now recognizes the executive existence and role of the elders and of the other two officers of the village—the *pulenuku* (village mayor) and the *failautuhi* (village clerk). The regulations also empower the making of law by the villages.²¹ As a matter of practice the villages have always made rules,²² and the villagers have abided by them as the only recognizable normative system in Tokelau. The practical consequence of the legislation-making power will therefore be procedural rather than substantive.

The Law in Tokelau

Social ordering in Tokelau, however, is not as the Tokelau Act 1948 and its amendments might suggest it to be. Social ordering in Tokelau is not that of metropolitan New Zealand. Law in the New Zealand sense is largely unknown and, subject to a few exceptions, is irrelevant to the daily life of the communities on each of the three islands. Tokelau lives by a system of customary rules.

The rule-makers and decision-makers appear to be the elders, the administrators, and the church. These three interact and relate to each other in varying ways according to the subject at issue. Most significant is the Council of Elders in each village. The elders make rules, both written and unwritten, they administer the rules, and they make the decisions on those rules. The most visible organization is the village, personified by the Council of Elders,²³ but also visible is the administration and its technical services—the radio link, the health services, the education facilities, and the post office. At one step removed, but of undoubted significance at a Tokelau-wide level, is the General Fono—a twice-yearly meeting of delegates from each of the islands to discuss policy matters that affect all Tokelau.²⁴

The influence of the churches extends beyond Sunday churchgoing to daily evening prayers and affects significantly all matters of personal status. Particularly in marriage and divorce the church norms are likely

to be the dominant ones and at point of conflict to be preferred by the elders to the rules in legislation. Indirectly this gives a great deal of power to external church governments.

Current New Zealand research on the law of Tokelau began in 1981 through the Tokelau Law Project²⁵ and proceeded at a rather uneven pace till 1984. In July 1984 the first law meeting ever held in Tokelau was convened and at a three-day session a statement was made, by two lawyers from Wellington to the specially convened Fono, about the nature of law, its relationship to custom, and the nature and purpose of law reform. A number of areas of basic legal need were explored in discussion²⁶ and the way prepared for dealing with specific law proposals at future meetings.

The visiting lawyers presented papers in Tokelauan on the nature of law and on the relationship of law and custom²⁷ and also a draft handbook on the criminal law then in force in Tokelau. The response of the delegates of the host island, Fakaofu, was to present to the meeting a document that set out rules of their village. The document was presented on the basis that it would be useful, in the context of discussion about law, for the delegates from Wellington to be informed of the rules operating within the local community.

Most of the law meeting was spent working through the Fakaofu village document with an eye to the meaning of the rules and their use in practice. Delegates from the other two islands expressed the opinion that their village rules were basically the same as those of Fakaofu and elaborated, where they thought appropriate, on the details on which their village practices differed from those of Fakaofu. When asked if they had written village rules of the kind that Fakaofu had, the Nukunonu delegates produced a document in Samoan²⁸ that was the Native Laws Ordinance of 1917 and the Atafu delegates reported that they too had rules, but that they did not have a copy with them. Following the meeting, and on the same voyage, inquiry was made in Atafu of the village rules and a document was provided from the village records. Some time later, in response to a further inquiry whether Nukunonu had rules like those of Fakaofu and Atafu, the leaders of Nukunonu wrote down what they perceived to be its lawlike village rules. The documents²⁹ individually, and perhaps even better together, present a picture of social ordering in Tokelau.

Tokelau Custom: General

Tokelau custom appears to have three main forms: (1) the written rules of each village, (2) the body of unwritten rules accepted in each vil-

lage,³⁰ and (3) the response of the elders to situations not covered by the other two forms of rules. Discussion here will first focus on the written rules of each village that were presented during and shortly after the 1984 law meeting. The second point of focus is on data related to lawlike practice, which was gathered on visits to Tokelau in 1985 and 1986.

Custom: Written Rules

Fakaofu. The customary rules of Tokelau³¹ as presented in the Fakaofu document began with a statement about the authority of the elders,³² and was followed closely by a rule requiring all able-bodied men (*aumaga*) to participate in the communal, village-organized work programs. Curiously perhaps, the rules also ended with a statement about the relationship of the elders and the *aumaga* that highlighted the predominant role of the elders and the village council exactly as indicated by anthropological studies.

A dilemma for the elders of all three atolls and for the metropolitan government has been the maintenance of this role in the current period of change from a subsistence economy to a money economy and of adjustment to the impact of the desired material benefits that come in the form of state-provided education, health, communications systems, and the like. There are also the associated difficulties of adaptation to the reality of paid employment for the professional people who provide the desired nontraditional services. Some of this is reflected in the relationship between the elders and the government employment agency³³ and in the relationship between the elders and the traditional, unpaid work-gang, the *aumaga*. With the slow but inexorable approach of self-determination the villages and the elders are likely to assume a number of the external government functions and thus indirectly regain power at a constitutional level. The dilemma is now being addressed by the elders, in the context of the Law Project, by asserting the Tokelau reality through the medium of the law. The powers of dispensation for marriages in respect of the prohibited degrees of consanguinity are now vested in the elders,³⁴ as is the power to grant divorces.³⁵ And notably the law now recognizes the customary village and its officials.³⁶ The Tokelau Amendment Act 1986 and several other legislative proposals recently approved by the General Fono³⁷ evidence a similar tendency. The tension created in the villages by a fear of the eclipse of the traditional power base by the externally located government is now substantially reduced from the level of a few years back.³⁸

Rule 2 of the Fakaofu report spoke of the big meetings convened to

announce new proposals to the whole village and made clear the difference in Fakaofu between the elders and the heads of family. The other rules dealt with theft,³⁹ trespass,⁴⁰ curfew,⁴¹ fishing rules, *moetolo*,^{4 2} marriage prohibitions,⁴³ assault,⁴⁴ noise,⁴⁵ bird catching,⁴⁶ authority over land, and the *tama tane/tama fafine* concept.⁴⁷

In Tokelau fish are a resource second only to the coconut palm. Ten of the documented rules concerned fish or fishing and much time was spent at the 1984 meeting explaining the operation of these rules and related fishing traditions. Many of the stories were nostalgic⁴⁸—the days of a fisherman's surrendering part of his catch to a woman on the reef seem largely to be in the past.

The fishing rules were concerned with safety, ensuring the proper sharing of significant catches, good fishing practices (to ensure a good catch), and the graduation of new fishermen. Safety was a prime interest in dealing with the *ika ha* (sea life that is covered by a restriction, prohibition, or ban): turtles, marlin, and wahoo had all caused loss of life or injury. Turtles and marlin also figured in the rules that guarantee sharing because of the value and amount of their flesh; the safety requirement that these fish should be caught by a group served to protect the village from an individual's selfishness as well. The subtleties of noosing wahoo, taking flying fish by night, and catching bonito also justified special rules of behavior in those areas. The graduation of fishermen (*kaukumete*) was not a rule in the sense of a prescription or a set of punishments affecting the unqualified. It was purely descriptive of an important feature of Tokelau life and would not have been described as a law or a rule by an outsider. The ceremony before the elders involves advice to the graduands, blessings, gift giving, and feasting. The ritual invokes the pre-Christian deity Tui Tokelau.⁴⁹

Three of the matters in the Fakaofu document loom large in the anthropological discussions of Tokelau—the role of the elders, control of the land, and the brother/sister relationship. The remaining matters are of a more typical public order or public safety nature.

As might be expected in an oral tradition, and in the circumstances that gave rise to the stating of these rules, not all the customary rules were expressed. For example, the prohibition on sexual intercourse outside of marriage is regularly enforced and offenders punished, but that offense was not mentioned in the document.⁵⁰ Where the rules prescribed or prohibited a line of conduct the sanctions imposed for breach of the rules were reprimand, community work,⁵¹ fine, or caning for children. On two occasions the document suggested that an appropriate penalty might be to take the offender to court. The instances in question were theft and assault.⁵²

Nukunonu. A longer but less descriptive document sets out the fifty-seven rules that the people of Nukunonu saw as relevant to the task of explaining their customary activities to foreign lawyers. Those rules dealt with the key cultural topics of the *tama tane/tama fafine* concept, the role of the elders, and the sharing of produce. Fourteen of the rules dealt with fishing, three with the protection of coconut plantations, and one with the control of pigs. The bulk of the remainder were concerned with typical criminal offenses—curfew violation, drunkenness, rumor-mongering, noise, lighting of fires, trespass, and rape. As in Fakaofu some actions that are clearly prohibited (e.g., theft) were not included. Different from Fakaofu were the indications of licensing and price controls. Penalties suggested were reprimand, caning, community work, fine, and police supervision.

The fishing rules were more detailed than those of Fakaofu but similarly motivated. The *ika ha* were even more specifically dealt with and the customary manner of sharing turtle meat given a rule of its own. The *kaikumete* (or *taukutukuga*) appeared also, with a sanction against anyone who improperly took the place of a qualified fisherman at the back of a canoe.

The sexual offenses carried the heaviest penalties—a fine up to \$10 or banishment;⁵³ the list included *moetolo*, incest, public display of romantic attachment, adultery, fornication, rape, and *fakapouliuli*.^{5 4}

The *lafu* (restricted lands) and ownership of reef areas were obviously matters of concern—four rules addressed the issues. Both the Fakaofu and Nukunonu documents spoke of the reef areas; neither was aware of the possible Crown rights under the Tokelau (Territorial Sea and Exclusive Economic Zone) Act 1977.

Atafu. The people of Atafu prepared no written rules for discussion. The customary village administration, however, is interesting because, unlike Fakaofu and Nukunonu, it had some written rules already in existence in 1984 and has since amended those rules on occasion by resolution of the elders. What Atafu had in 1984, and still has, is village legislation that is recognizable as such to a lawyer and is of the kind that was first envisaged by the Native Laws Ordinance 1917.

The topic specificity of the thirteen short rules, and their failure to deal with any of the central cultural matters or most of the other topics presented in the Fakaofu and Nukunonu documents, suggests that the “rules for village order” of Atafu are supplemental to longer-standing traditional rules. The written rules as they stood in 1984 were all criminal in nature. The topics were trespass, Sunday observance, the *lafu*, spearfishing, making fires,⁵⁵ pig raising,⁵⁶ the curfew, and selfishness.⁵⁷

In February 1985 a penalty was added for failure to cover a water tank with a mosquito screen and special rules were elaborated for controlling the consumption of alcohol in specified gatherings. The rules provide community work and fines as the standard penalties.

Custom: Unwritten Rules

A survey of the data available for the three islands shows that the problems most commonly submitted for formal decision of a judicial nature have related to land disputes, fighting, stealing, illicit sexual relationships, spreading false rumors, and unjustified complaints. Some of these matters are not listed in the written documents that the islanders discussed and some are not in the law. The source of these other rules is clearly within a body of unwritten custom that is well known and accepted in each village. The origin of these other rules is not clear, but the Native Laws of the Union Group 1912 and the Native Laws Ordinance 1917 may give a clue (see Table 1).

The *Native Laws of the Union Group 1912* was published in 1914 by the Government Printer in Fiji. It follows the pattern of the Native Laws of 1894 and appears to be the precursor of the Native Laws Ordinance 1917. Whether these rules were ever *law* for Tokelau is a moot question. They were, however, more important than any other published rules of Tokelau, because they were in English and Samoan and because they dealt with the customary system of the atolls. They reflected to a small degree the administrative presence of the British. The rules recognized the native customary authorities' administrative role, linking the head of each island and the British authorities, and also established a rudimentary court system to deal with criminal offenses and civil matters. A village clerk was required to keep records and hold the money submitted as payment for fines, and the meetings of the elders and the holding of courts were provided for in broad outline. A rudimentary criminal procedure was also established; the procedure was an inquisitorial one. Following the constitutional clauses of the document was a brief criminal code. The punishments, which had a particular local flavor, were also listed. In most cases male offenders had to perform community work and female offenders were employed in the making of various handicrafts. Fines could be paid, according to an established rate, with coconuts. The rules also required obedience by the people to the elders and good land use.

The Native Laws Ordinance 1917 contains the Native Laws of the Gilbert, Ellice, and Union Group passed by the native governments in

1916, and had the effect of repealing earlier native laws. The judicial and administrative system set up in the 1912 laws was retained in the 1917 ordinance. The significant difference between the two laws is that some new offenses were promulgated and some of the offenses from the earlier laws were omitted. The 1917 ordinance also provided procedures for celebrating marriages and for dealing with offenders who had previous convictions for similar crimes.

Most of the offenses referred to in police records, the punishments used, and the procedures and village organization that are accepted as custom are those outlined in the 1912 laws and the 1917 ordinance.⁵⁸ One might speculate, not having access to the relevant British records, that the British built their legislation on customary systems that they found operative in the Gilbert and Ellice Islands area, and that between 1914 and 1975 that body of principle melded with and came to be regarded as the custom in Tokelau.

New Problems: Trouble Cases

That leaves the third head of custom. How are new problems dealt with? What of the passing yachtsman who decides to drop in on Tokelau? Should he be welcomed, turned away, revictualled? Or what of the unexpected or unacceptable use of alcohol on an island? In these areas the village councils have shown themselves ready and able to act very quickly, and in so doing have established precedents for dealing with similar problems in the future.

Written records of the practice of the local judges or police are virtually nonexistent.⁵⁹ Discussions, however, with police officers, village clerks, and other government and village officials on each of the islands established the following data.

Fakaofu. Between 1977 and 1983 evidence was available of approximately fifty cases that were not concerned with land matters and that were handled “judicially” by the village. The cases were primarily assaults of various types, sexual intercourse outside of marriage, attempted suicide,⁶⁰ restitution of property, and the spreading of rumors. The typical sanction was the performance of community work. Tokelau had prisons during the British period but there have been none now for many years. Nevertheless, detention is occasionally mentioned by the police. In one case of an illicit relationship the recidivist couple were “detained” for two months, that is, they were kept on separate islets by police supervision.

TABLE 1. Comparison of Early Native Law Regulations

Native Laws of the Union Group 1912		Native Laws Ordinance 1917	
Offense	Punishment	Offense	Punishment
Murder	Death	Murder	Death
Assault	Fine or imprisonment. If weapon used—imprisonment, flogging	Assault	Fine or imprisonment with hard labor. If weapon used—imprisonment. If assault on women or children—flogging
Theft	Imprisonment with hard labor. If violence used—assault also punishable. For male recidivist—flogging. Compensation possible	Theft	Imprisonment with hard labor. If violence used—assault also punishable. Goods returned
Adultery	Imprisonment. Male offender—damages to husband complaining; female offender—make mats, sennit hats, or other articles	Adultery	Imprisonment with hard labor. Exchanging wives—double penalty
Fornication	Imprisonment and compensation to betrothed man		
Exchanging wives	Imprisonment and punishment for adultery		
Rape	Imprisonment	Rape	Imprisonment with hard labor. If girl under 16—flogging as well
Fires (causing)	Imprisonment with hard labor, compensation	Fires (carrying, lighting)	Fine, imprisonment with hard labor, compensation
Threatening or abusive language	Fine or imprisonment with hard labor	Threatening or abusive language	Fine or imprisonment with hard labor
Slander	Imprisonment with hard labor	Libel and slander	Imprisonment with hard labor
Drunkenness	Fine or imprisonment with hard labor	Drunkenness	Imprisonment with hard labor
Damaging trees	Hard labor	Malicious damage to cultivation	Imprisonment with hard labor, compensation
Visiting steamers	Fine, imprisonment with hard labor		
Possession of a firearm without license	Fine or imprisonment with hard labor		

TABLE 1. Continued

Native Laws of the Union Group 1912		Native Laws Ordinance 1917	
Offense	Punishment	Offense	Punishment
Trading without license	Fine		
Dog without license	Fine		
Failure to register births, deaths, and marriages	Fine	Failure to register births and deaths	Fine, or imprisonment if in default
		Attempted suicide	Imprisonment, hard labor
		Abortion	Imprisonment
		Incest	Imprisonment with hard labor
		Adultery with daughter-in-law	Imprisonment with hard labor
		Procuration of women for immoral purposes	Imprisonment with hard labor
		Contravention of marriage laws	Fine, or imprisonment if in default
		Sorcery	Imprisonment with hard labor
		Gambling and games of chance	Fine, or imprisonment with hard labor if in default
		Contempt of court	Fine, or imprisonment if in default
		Aiding and abetting the commission of a crime	Same punishment as if committed the crime
		Attempted crime	Similar punishment as if committed the crime. In case of attempted murder—imprisonment with hard labor
		Not aiding the police	Imprisonment with hard labor

Source: See n. 52.

In 1985, better data were available. There was evidence of ten cases and they concerned fornication, the spreading of rumors, boundary disputes, gossiping, fighting, and pregnancy of unmarried women. All penalties imposed were those found in the customary rules: fines, orders of community service, and reprimands. The range of punishments was from one to two months of community service and fines of from ten to twenty dollars.

Nukunonu. In 1983 there appear to have been nineteen cases other than land disputes.⁶¹ They concerned pig trespass, the breaking of curfew, drunkenness, fighting, making rude noises in the village, and theft. The usual penalty was a fine and the range was between fifty cents and two dollars. Detention was the typical immediate reaction to drunkenness; in 1985 on three occasions drunk persons were detained by the police until they were sober.

In the period August 1984 to May 1985 the same types of offenses were noted: theft, drunkenness, fighting, and sexual intercourse between persons not married to each other. Additionally, there were cases of underage drinking,⁶² *moetolo*, one of use of tobacco by children, trespass, contempt of court, and one of conversion of a motorbike. There was a total of eighteen cases for that period. The fines imposed ranged from two to twenty dollars, restitution was used as a remedy, and community service orders of between one week and two months were imposed by the commissioner.

Atafu. Atafu showed 220 cases between 1974 and 1984. In 1983 there were twelve land cases and five others. The nonland cases involved adultery, theft,⁶³ and assault. No evidence was found of any offense against the written village rules. The emphasis in the criminal law decisions in Atafu was on fines: they varied between one and twenty dollars. There were additionally orders for community service of up to three months and orders barring the offenders from access to the supply ship on its regular visits in cases where theft had been committed on the ship.

In a nine-month period from 1984 to 1985, twenty-six incidents were recorded by the police. Offenses were sexual intercourse outside of marriage, assault,⁶⁴ spreading of false rumors, property damage, and drunkenness. Additionally there were, atypically, complaints of forgery of a pay receipt, home-brew making, and an abortion. For those offenses for which penalties had been imposed, the community service orders ranged from one to eighteen months and fines were of one to seventy-two dollars. The use of police supervision, reprimand, and police

mediation services were also noted. The level and nature of penalty imposed were clearly dependent on the age, previous record, and contrition of the accused as well as on any special circumstances of the case.

Overview

Tokelau has not moved quickly or readily to the use of law in the Western European sense of the word. For those accustomed to rape, murder, and extraordinary violence as regular headlines in the newspaper, the pattern of life and of offending in Tokelau is very mild. That is the impression gained from what the records show and what has been reported as having happened. The picture is of a generally peaceful community.

Tokelau has accepted the notion of a bureaucratic governmental rule system. Some legislation even operates much as it might, from the legislator's viewpoint, have been expected to operate. Notable in this context are the Tokelau Marriage Regulations and the Tokelau Births and Deaths Registration Regulations. Law in these areas has been known in Tokelau since at least 1917 and the registration and government record-keeping aspects are firmly established in the communities.

Next in point of strength as an area of legitimate law interest, a number of common criminal offenses have been accepted: theft, assault, adultery. The offenses have definitions that differ from the common law paradigms, but the elders nevertheless see them as law matters. Adultery most likely took its law connotation from the 1917 legislation, where it appeared first in official legal guise. It ceased to be an offense at law in 1975, but there was no change in Tokelau because there was no access to the post-1975 law in either of the languages used in Tokelau. Even had the 1975 regulations been known it is unlikely attitudes would have changed, because thinking about adultery is clear and very much alive in the society.⁶⁵ Typical offenses that were legislated for in the colonial era are therefore treated as law. Similarly very serious public order matters are regarded as matters for the law. Evidence of this is less easy to find because of the absence of rapes and murders. The British practice is again relevant and reflected in recently expressed views in Tokelau that if serious offenses were committed they should be dealt with by judges from outside of Tokelau and that preferably the offenders should be removed from Tokelau.

The fact that Tokelauans regard some classes of offenses as law matters does not preclude some overlap or duplication with custom. A serious assault might well be taken before the commissioner as a law mat-

ter, while other assaults are dealt with directly by the elders in their traditional capacity. Though some Tokelauans speak in terms of a clear distinction between the law (that which has to be dealt with by the commissioner) and village custom (a matter for the elders), there is no indication how the distinction is made in a given case.

The data presented in 1984 showed little evidence of offenses against what were seen as purely village rules. Significantly there was no mention of those areas of custom that were dominant and uncontradicted.⁶⁶ An explanation may be that those areas are considered a purely Tokelauan affair and thus of no concern to outsiders, or that there may not be much offending in those areas. It should also be noted that the lack of income of many in the community, the general absence of individual property (such as would be suitable for seizure and sale), and the extensive network of family relationships make the typical European law enforcement measures inappropriate to the Tokelau legal system.

Some new rules are created and new problems handled in customary fashion by decision of the elders; many other new problems are conceived of as law matters and either local rules are made (as in the case of Atafu) or the Tokelau Administration is asked about the law on that matter. A marine disaster and salvage will be handled on the spot in the customary manner. Less urgent matters, particularly if modern in aspect and likely to be of a recurring nature, will be regarded as law matters. Thus speargun fishing, trade licensing, price controls, and controls on the activities of foreigners in the communities are all seen as possible and proper areas for the operation of law.

The law has a limited but increasing role in Tokelau. In Tokelauan perception it is closely related to criminal law, to the activity of the government (as distinct from the village), and to the newer features of life in Tokelau (such as the radio telephone, the post office, and a planned airstrip).

This analysis of the perception of law, if correct, provides an explanation for the dearth of evidence about the practice of traditional rules. In the fields of communal living and familial and personal relationships there are clear and operative rules, but in 1984 they were not discussed as law nor typically are they yet seen in Tokelau as within the proper realm of law. The analysis also offers some explanation both for the absence of a view that typical civil matters⁶⁷ might be matters for law and for the lack of desire in law discussions to extend legislation into civil law areas.⁶⁸

Law is related to *palagi* (Europeans, foreigners); it is viewed primarily as a cultural concept. It is not seen in a functional perspective as sim-

ilar to the rules of custom. It is the social ordering mechanism that foreigners used in Tokelau independently of custom and that foreigners can be expected to use to deal with modern problems. This dichotomy is the way Tokelauans view the realms of law and custom in the present twilight zone between the dominance of custom and an increased awareness and use of law.

Conclusion

In Tokelau generally the law is not known, is not accessible to the people, and is therefore not used. Its effect in 1984 was that it technically rendered illegal much of what was happening on a daily basis in Tokelau. Notwithstanding the contradiction of law, the custom followed in Tokelau provided a viable system of social order. That system of social order was not rights-oriented or encouraging of individualism—it was tailored to a community and its environment, and functioned well. It was centered not on laws, courts, and lawyers as predicated by the Tokelau Act, but on the traditional village.

NOTES

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1. For general background information see *Report of the Administrator of Tokelau for the Year Ended 31 March 1986*, New Zealand Parliament House of Representatives, Appendix to the Journals, E14; *Report of the United Nations Visiting Mission to Tokelau, 1986*, U.N.G.A. A/AC 109/877.

2. Recorded on 10 October 1986, *Tokelau Census of Population and Dwellings 1986* (Christchurch: Department of Statistics, 1987).

3. *Fiji Royal Gazette*, 1884, 87.

4. For example, that contained in Article 34, the promotion of reconciliation and reference to arbitration. Cf. Articles 131-134 of the 1877 Order in Council.

5. *Fiji Royal Gazette*, 1909, 1065.

6. The effect was to make the following law for Tokelau: The Gilbert and Ellice Islands Protectorate (Consolidation) Regulation 1908, No. 3 of 1908; the (Merchant Shipping) Fees Regulation 1909, No. 3 of 1909; the Distillation (Prohibition) Regulation 1909, No. 5 of 1909; the Gilbert and Ellice (Quarantine) Regulation 1909, No. 6 of 1909.

7. See *Tokelau—Subdelegated Legislation (1877-1948)* (Wellington: Victoria University of Wellington/Tokelau Administration, 1986).

8. Gilbert and Ellice Islands Order in Council 1915, *S.R. and O. 1948* Vol. 9, 655:

VIII. In the exercise of the powers and authorities hereby conferred upon him, the High Commissioner may, amongst other things, from time to time, by Ordinance, provide for the administration of justice, the raising of revenue, and generally for the peace, order, and good government of the Colony, and of all persons therein, including the prohibition and punishment of acts tending to disturb the public peace. Provided as follows: . . .

(3) That the High Commissioner, in making Ordinances, shall 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, except so far as the same may be incompatible with the due exercise of His Majesty's power and jurisdiction, or clearly injurious to the welfare of the said natives.

9. "Port of Apia Deemed Port of Entry for Union Islands Ordinance," *Western Samoa Gazette* Supplement, No. 1, 4 March 1941, 805.

10. Without doubt the most important piece of legislation from that era was the Native Laws Ordinance of 1917. *Western Pacific High Commission Gazette 1917*, 39.

11. See A. H. Angelo, "Tokelau—Its Legal System and Recent Legislation," (1987) 6 *Otago L.R.* 477, 495-498.

12. Section 4A: "The law of England as existing on the 14th day of January in the year 1840 (being the year in which the Colony of New Zealand was established) shall be in force in Tokelau, save so far as inconsistent with this Act or inapplicable to the circumstances of Tokelau. Provided that no Act of the Parliament of England or of Great Britain or of the United Kingdom passed before the said 14th day of January in the year 1840 shall be in force in Tokelau, unless and except so far as it is in force in New Zealand at the commencement of this section."

13. Speech by Hon. J. Hanan (Minister of Island Affairs), *N.Z. Parliamentary Debates* Vol. 360, 1969:481.

14. The Tokelau Amendment Act 1970 came into force on 1 December 1975.

15. The jurisdiction of custom in land matters had been reaffirmed by Section 20(2), Tokelau Amendment Act 1967: "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." During the debate on the 1967 amendment bill, Mr. M. Rata stated that "[c]ustom in the Islands is for land normally to go to the eldest son, and when his occupation ceases, it reverts to the group. When there was some dispute as to inheritance, the village councillors were able to decide the issue. . . ." He then asked the minister of island territories (Hon. J. T. Hanan) whether this would still apply under the Amendment Act. The minister replied, "If it is in accordance with their customs, with meetings of elders to determine the question, this would still apply; there would be no change" (*N.Z. Parliamentary Debates* Vol. 353, 1967:3070).

16. See Angelo, "Tokelau—Its Legal System and Recent Legislation."

17. That system, which is to be found in the Tokelau Amendment Act 1970, provided for primary jurisdiction in a commissioner on each island. The court of general jurisdiction and the court of appeal for petty matters was the Niue High Court, with jurisdiction of an

equivalent nature for some matters in the New Zealand High Court. Appeal was to the New Zealand Court of Appeal and potentially there was, as a matter of prerogative, appeal to the Privy Council.

18. Section 7.

19. Section 10(3): “No appeal shall lie pursuant to subsection (1) of this section in respect of any judgment of a Commissioner in any proceedings for any offence punishable by imprisonment for not more than 3 months or any offence punishable only by a fine of not more than \$150, but any party to any such proceedings may appeal from the judgment of the Commissioner to such body, and in accordance with such procedures, as are prescribed by regulations made under the principal Act.”

20. Since the repeal of the Native Laws Ordinance 1917 by the Tokelau Amendment Act 1970, which took effect in 1975.

21. Regulation 18.

22. Cf. Rule 15 of the Native Laws Ordinance 1917: “(1) The Magistrate and Kaubure may make Island Regulations for the good order and cleanliness of the Islands, such Regulations to be subject to the approval of the District Officer on behalf of the Resident Commissioner. (2) The penalties imposed under the above Regulations shall not exceed a fine of ten shillings or one month’s imprisonment.”

23. In Atafu the Taupulega comprises the head of each family group, together with the *faipule* and the *pulenuku*. In Fakaofu the council is made up of the *faipule*, the *pulenuku*, and the village elders: meetings involving all the heads of family groups are held only infrequently. The Nukunonu council consists of heads of extended families, together with the *faipule* and the *pulenuku*.

24. The definition of the General Fono in Section 2 of the Tokelau Act 1948 is vague: “General Fono means the representatives of the people of each island of Tokelau, usually consisting of 15 persons from each island of Tokelau selected in accordance with traditional custom and usage and usually meeting in session at least once a year.” As a matter of practice and convention the General Fono now makes all policy decisions for Tokelau and controls the Tokelau budget.

25. The Tokelau Law Project is under the aegis of the Tokelau Administration and was instigated by the government of New Zealand and the United Nations. Its terms of reference were as follows:

1. To prepare a statement of the law presently in force in Tokelau
2. To provide, by way of commentary or otherwise, the basis for a consolidated edition of the legislation in force in Tokelau; to indicate any legislative change by way of repeal, amendment, or addition necessary for the legislation (a) accurately to reflect the present constitutional and legal structure of Tokelau and (b) to be internally consistent
3. To report on the revision and reform of the Tokelau legislation with a view to the production of a systematic text of a revised laws of Tokelau for the ready reference and use of those concerned with Tokelau law
4. To investigate Tokelau custom with a view to its recognition by or incorporation in legislation where appropriate. (*Research and Revision of the Law of Tokelau* [Wellington, 1981], 2)

Published products of the Law Project to date include the working paper *Tokelau Law Lexicon* (Wellington: Ministry of Foreign Affairs, 1986) and *Subdelegated Legislation (1877-1948)* (see n. 7); the Tokelau Amendment Act 1986, which provides a viable court system for Tokelau; the Tokelau Village Incorporation Regulations 1986; and the Tokelau Divorce Regulations 1987.

26. For example, a viable court system, extension of the commissioner's jurisdiction, marriage regulations consistent with the local rules of incest, and the Crimes Regulations.

27. For some discussion of these issues see A. H. Angelo, "The Common Law in New Zealand and Tokelau," paper written for the conference "Common Law in Asia," University of Hong Kong, December 1986; publication forthcoming in *Melanesian L. J.*

28. The missionary language of Tokelau.

29. The Fakaofu document contained sixteen rules; its pattern was to set out the rule, outline the policy behind the rule, and list the penalties. Nukunonu had a longer document with fifty-seven rules; the rules and penalties were briefly stated and covered a wider range than those of Fakaofu and Atafu. Atafu presented the shortest document; its thirteen rules followed a pattern similar to that of Nukunonu's.

30. See generally A. Hooper, *Aid and Dependency in a Small Pacific Territory* (Auckland: University of Auckland, 1968); A. Hooper, *Outline of the Social Organisation of Fakaofu* (Auckland: University of Auckland, 1968); A. Hooper, *Land Tenure in the Tokelau Islands*, Working Paper 11, Proceedings of South Pacific Commission symposium on "Land Tenure in Relation to Economic Development," Fiji, 1969; J. Huntsman and A. Hooper, "The Desecration of Tokelau Kinship" (1976) 85 *Poly. Soc. J.* 257; J. W. Huntsman, "Concepts of Kinship and Categories of Kinsmen in Tokelau Islands" (1971) 80 *Poly. Soc. J.* 317-354; J. Huntsman and A. Hooper, "Male and Female in Tokelau Culture" (1975) 84 *Poly. Soc. J.* 415-430.

31. Entitled *Tulafono Fuka—Aganuku a Tokelau* (Fakaofu) [Customary Rules of Tokelau (Fakaofu)].

32. "Dignity and peace is controlled by the elders, as is safety in the islands of Tokelau" (*E pulea e toeaina te maalu ma te (nofo) filemu, vena ma te haogalemu i na motu o Tokelau*).

33. The State Services Commission of New Zealand.

34. Regulation 5(4) of the Tokelau Marriage Regulations 1987.

35. Regulation 8 of the Tokelau Divorce Regulations 1986.

36. The Tokelau Village Incorporation Regulations 1986, especially regulations 3, 5, 7, 8, 12, and 18.

37. The pattern of legislative development is for the General Fono to formulate, discuss, and approve proposals that are then submitted to the Administrator for promulgation as legislation.

38. There has been no increase in the size of the Tokelau Public Service (T. P. S.); work contracts (*konekalate*) are made between the Tokelau Administration and the village elders for employment of casual labor in the villages; and the official secretary for the Tokelau Administration (the head of T.P.S.) is now a Tokelauan.

39. The rule defined theft as *kaihohoa*. This is the appropriate definition, but the Samoan *gaoi* is also heard. (The village records were until very recently written in Samoan and

prayers at meetings may still be said in Samoan). The most serious act in traditional society was theft, consequently it had the most serious penalty: for example, Fakaofu had the drowning stone. The fact that this rule was stated early in the document probably reflects the traditional seriousness of the offense. If the theft is from the village land, the offender is usually dealt with by the elders only, but if private property is involved the individual who has suffered the loss may go directly to the commissioner.

40. It is not going on the land but residing there or taking coconuts from the land that is the offense.

41. The curfew rule covers the evening prayer time and night curfew. The evening prayer time, which is signaled by the ringing of the church bell at about 7 P.M., lasts for about an hour and is policed by the elders. The night curfew is from about 10 P.M. until dawn and involves a general prohibition on movement about the village.

42. Attempting to possess a woman while she is asleep. *Moe* means sleep, *tolo* to take. Intercourse is not required. A touching or disturbing of clothes is the usual physical element.

43. See the Tokelau Marriage Regulations 1986, which provide for dispensations, for example, a relaxation by the Administrator of the prohibition on the marriage of first cousins (see Hooper and Huntsman, "The Desecration of Tokelau Kinship"). For many years there has been discussion and concern in Tokelau about the prohibition of marriage in respect to degrees of consanguinity. The Tokelauans prohibit marriages at least to second-generation relations and often to third- or fourth-generation relations (that is, second and third cousins). There was in Tokelau considerable feeling that the law (which from 1975 prohibited only first-cousin marriages) should prohibit all relationships that are prohibited customarily. By 1984, however, when discussions on the regulations took place, other forces were at work, notably the impact of greater freedom of movement for people in and out of Tokelau and between Tokelau and metropolitan New Zealand. The elders were therefore conscious of the fact that young Tokelauans in metropolitan New Zealand could, as first cousins, marry and return to Tokelau and confront the elders with a *fait accompli*. The answer of the elders to this problem is set out in regulations: no new prohibited degrees were added to the regulations and the power of dispensation was vested in the elders.

44. The Tokelauan word is *miha*. There is no assault in Tokelau unless there is injury.

45. The proscription is on noise at any time and refers mainly to unnecessary shouting and rowdy behavior. Thus noise generated by properly organized games, work-related noise such as that from chainsaws and outboard motors, and noise from radios and cassette players (because they are still few in number) are not covered by this rule.

46. The prohibition is on catching birds on the *puka* trees. Only certain men are familiar with the technique of catching these birds and permission to catch the birds must be granted by the elders.

47. See Hooper, *Aid and Dependency*; and Huntsman and Hooper, "Male and Female in Tokelau Culture."

48. Of the days before aluminum dinghies and outboard motors, when quietness was treasured and disturbed schools of fish could not be followed at speed.

49. After the invocation to Tui Tokelau, the chant finishes with a recitation of the name of fish from the various zones of the sea, that is, open sea, reef, lagoon.
50. Nor was murder. In none of the three documents was anything written or said about burials, though obviously the rules are clear and often used.
51. Supervised by the village police and interchangeable with fines.
52. Cf. *Native Laws of the Union Group 1912* (Suva: Fiji Times Ltd., 1914) and *Native Laws Ordinance 1917*, *Western Pacific High Commission Gazette*, 1917, 39.
53. Banishment is no longer in practice. In the Atafu document, however, it is still listed as the traditional punishment for couples who use the pastor's grounds as a meeting place.
54. Living together as a couple without being married; literally, "living in darkness." The indications were that the concern was with de facto relationships of visitors, as the practice is not common among the local people.
55. Prohibited on the seawalls on the lagoon side of the village, except when there is a northwesterly wind that will direct the smoke away from the village.
56. The pigs are to be fed between 6-10 A.M. and 2-4 P.M. Feeding pigs outside these set times, pig trespass, and not tethering a sow if it is outside the fence are offenses.
57. A particular aspect treated by the Atafu rules is *kafaga-tahi*, in Nukunonu called *kafaga-lua*. This refers to a man's going separately to his family's land to get coconuts for himself instead of going with the other men of the family and sharing the produce among the whole (extended) family.
58. The Native Laws Ordinance 1917 was law until 1975 and in 1984 still claimed by Nukunonu as its law.
59. There were few records in 1984 and the hurricane and tidal wave of 1987 destroyed many of those.
60. That is, running away in a canoe.
61. In Nukunonu the *faipule* decides land matters. First, agreement is sought between the parties. If that fails the *faipule* gives a decision. If the dispute is still unsettled the parties are asked to take an oath and await divine intervention to settle the land dispute.
62. The relevant age is eighteen.
63. Among these cases was one in which five boys were punished for taking three gallons of ice cream from the supply ship and eating most of it. The fines ranged from \$2 to \$3.
64. Often associated with drunkenness. In one of these cases a wife struck her husband on the head in a domestic dispute. She was fined \$20 for assault and he was fined \$10 for drunkenness.
65. The new criminal code approved by the elders in 1986 contains adultery as an offense.
66. For example, the checking of boats on their return from fishing or a visit to the plantation.
67. For example, contracts, torts, and succession.
68. For example, execution of judgments for debt.