

Tokelau Judicial Activity

Professor Tony Angelo¹

Introduction

This paper is about judicial activity in the Pacific. It is hoped it will serve in a small way to celebrate the life of Dr Guy Powles and his major contributions to law in the Pacific.

The paper reflects an abiding interest of Guy Powles, as indicated for instance in his work in the judicial arena, his substantial participation in the Review of the Land and Titles Court of Samoa, and his work as an editor of seminal books such as *Pacific Courts and Justice*.² This book served to introduce the judicial systems of the Pacific and provided data relating to the administration of justice in many countries. Another interesting aspect of that book, is that on pages 132 and 133 there is some basic statistical data about the courts of the Pacific – a precursor perhaps to the endeavours of the Pacific Judicial Development Programme which published its 2011 *Court Baseline Report* in 2012.

Relevant to this paper is the book which followed on from *Pacific Courts and Justice* but was a quite separate publication. In 1988 Guy Powles and Mere Pulea published *Pacific Courts and Legal Systems*.³ It is a more substantial volume than the 1977 book and has a specific chapter – chapter 38 – on “Old and new systems of laws in Tokelau” by Hosea Kirifi. In that paper Hosea spoke of the old and new ideas of law in Tokelau.⁴

The stimulus for the current paper is the *Tokelau Annual Reports for Law and Justice* which have now been produced for the last four years. The latest is the *Tokelau Judicial Annual Report 2014/2015* which was published in September 2016.

¹ Professor of Law, VUW.

² Published by the Institute of Pacific Studies, Suva, 1977, edited in conjunction with Mere Pulea and Ron Crocombe.

³ University of the South Pacific in association with the Faculty of Law Monash University.

⁴ There was in that volume no Tokelau contributor but there was a one page entry on the judicial system of Tokelau (page 126).

The Topic – Tokelau

This piece provides information on the operation of the courts and legal system of Tokelau. Tokelau is typical of small atoll communities of the Pacific. It is isolated, it lacks land-based resources other than coconut palms and bread fruit trees, and the people live substantially still in accordance with custom. Tokelau is part of New Zealand. Internationally it is regarded as a colony – a non-self-governing territory. It has a subordinate legislature in the General Fono of Tokelau and the villages. There is a local national executive of the General Fono and the Council for the Ongoing Government, and the Taupulega which operate in each of the three villages. The total population of Tokelau is less than 1500 persons⁵ who are distributed more or less equally between the three atoll villages. At the island level there is a Commissioner's Court, with appeal to an ad hoc Village Appeal Committee. A few criminal matters are in the sole jurisdiction of the High Court of New Zealand.

Courts in Tokelau have been provided for in legislation since 1912.⁶ The present judicial system has its origins in sections 2 to 11 of the Tokelau Islands Amendment Act 1970. This , was refined by the Tokelau Amendment Act 1986 sections 2 to 10. The local judges, the Commissioners, are respected members of their villages. They are appointed for three-year terms and receive an annual stipend. The courts do not deal with land matters nor, typically, with any family matters. Land matters are dealt with by the Taupulega in each village; family matters eg divorce, adoption, custody, are dealt with administratively by the Council for the Ongoing Government. What might, in a metropolitan setting, be identified as civil cases are rare. The activity of the courts is focused on social order control - that is to say primarily on criminal matters. The local courts are assisted in their work by the Police officers. The Police are paid public servants but are usually villagers without a professional police training.

Life in Tokelau runs in accordance with custom. The law has, but for some administrative matters such as the recording of births, deaths and marriages, a very limited profile and role. In respect of matters of social order the courts and custom run together or in parallel. What the

⁵ Population count on 18 October 2011 recorded 1411 “usually resident”.

⁶ The Native Laws of the Union Group 1912. This legislation established a Magistrate's Court for each island. The Magistrate (Faamasino) sat with the Faipule (Vaipuli). These laws were followed by the Native Law Ordinance 1917.

courts do is separated and is differentiated somewhat from the village management by the elders in accordance with tradition.

The story in this paper starts in 1985 with information gathered then and ends in June 2015. It records the most recent information on the operation of the courts and places the few writings on the Tokelau judicial system in context.

The Court Records

Tokelau consists of three villages, on three separate atolls of approximately equal size and population. The three villages are Fakaofu, Nukunonu and Atafu. Each has a court presided over by a lay Commissioner.

A 1980s

In 1985 a survey done in each village endeavoured to identify “court cases” as distinct from customary matters. The enquiry was as to the “trouble cases” that were on record in the Commissioners’ offices or with the Police.⁷The records varied significantly between villages, as did the role of the Police. In many cases it was the Police records which indicated what had been happening at a social order level. The main data is recorded here.

1 Fakaofu

In Fakaofu between 1977 and 1983 there was evidence of about 50 cases, that were handled “judicially”. The cases were primarily assaults, sexual intercourse outside of marriage, attempted suicide, property conversion and the spreading of rumours. The most common sanction for this conduct in Fakaofu was an order for the performance of community work. For 1985 there was evidence of about 10 cases which included some of the same offences plus gossiping and fighting. Orders for community service by those found guilty typically ranged from one to two months. There were also reprimands and fines ranging from NZ\$10-\$20.

2 Nukunonu

⁷ The report of the survey is in Angelo, Kirifi, Fong Toy “Law and Tokelau” (1989) 12 *Pacific Studies* 29. The present paper is basically an updating of that 1989 article.

In Nukunonu in 1983, 19 cases, other than land disputes, were noted. They concerned pig trespass, breach of curfew, drunkenness, noisy behaviour, fighting, and theft. The usual penalty was a fine of between 50 cents and \$2. In the period August 1984 to May 1985 there were 18 cases and a similar range of offences as well as cases of underage drinking, *moetolo*,⁸ the use of tobacco by children, contempt of court and conversion. Fines ranged from \$2-\$20 and orders for community service ranged between one week and two months.

3 Atafu

Atafu showed 220 cases between 1974 and 1984. In 1983 there were five cases and they involved adultery, theft, and assault. The emphasis in the penalties in Atafu was on fines: they varied between \$1 and \$20. Orders for community service were for periods of up to three months. There were also orders where theft had been committed on the supply ship, barring the offenders from access to the ship on its regular visits.⁹

In a nine-month period from 1984 to 1985, 26 incidents were recorded by the police. Offences were sexual intercourse outside of marriage, assault, spreading of false rumours, property damage, and drunkenness. Additionally there were, atypically, complaints of forgery of a pay receipt, home-brew making, and an abortion. The penalties imposed were community service orders ranging from one to eighteen months and fines of \$1 to \$72. The use of police supervision, reprimand, and police mediation services were also noted. The level and nature of the penalty imposed was clearly dependent on the age, previous record, and contrition of the accused and the circumstances of the case.

B Pacific Judicial Development Programme

The Pacific Judicial Development Programme – a regional programme of judicial assistance – has been operating in the Pacific for a number of years. In the early stages its profile was for the running of seminars typically on an annual basis dealing with various matters of judicial practice and interest. The general thrust of those seminars was towards informing Pacific island court processes by reference to metropolitan Australian or New Zealand experience and

⁸ This is a customary offence relating to the invasion of the privacy of a sleeping woman. Colloquially, described as a “night creep”.

⁹ In the case in question, young boys had gone onto the ship and stolen (and consumed) several litres of ice-cream.

encouraging use of those models. It also had a substantial role in the production of the Bench Books for the various countries in the region.

In 2012 the Pacific Judicial Development Programme published a 2011 *Court Baseline Report*. That Report is a substantial document of 84 pages providing in considerable detail data on the courts in 14 Pacific countries. The data is presented under the headings of 15 indicators ranging from court clearance rates to data on the publication of judgments. In that *Report* most indicators for Tokelau have the entry “not publicly available”. One of the indicators is not applicable to Tokelau and another, where the data was publicly available, shows to a degree the inappropriateness of some of the indicators to the Tokelau situation. For instance, the indicator relating to waiver of court fees is not really relevant because there are no court fees in Tokelau. Equally, the indicator relating to the number of cases on legal aid. Legal aid is not a feature of the Tokelau system.¹⁰

C Tokelau 2011-2015

The Tokelau judicial annual reports are the only information available on the operation of the Tokelau legal system. The first readily available *Tokelau Judicial Annual Report* is for the fiscal year 2011-2012.¹¹ Following a description of the judicial system in Tokelau and some demographic data the *Tokelau 2011-2012 Report* sets out¹² the offences prosecuted during the year in each of the islands. The range of offences is similar to those noted in 1985 with one or two additional ones reflecting the changing nature of life on the atolls eg there was a case of careless driving in Atafu¹³ and in Fakaofu there is record of a conviction for sniffing petrol or glue.¹⁴ Otherwise drinking offences, fighting, adultery, and being disorderly continued to be the standard fare for the judicial Commissioners.

In this period, offending by women varied between 14% of the cases in Nukunonu to 29% of the cases in Atafu. As for the distribution between adult and juvenile offending, that too varied

¹⁰ Rule 94 makes provision for legal aid. Rule 96 of the Crimes Procedure and Evidence Rules provides for the appointment of an amicus. There are no lawyers in Tokelau and litigants in Tokelau have, to date, represented themselves.

¹¹ At page 31 of the Baseline Report there is indication that an annual report on the performance indicators had been submitted by Tokelau in 2010.

¹² Pages 12-21.

¹³ There was probably only one or two vehicles there at the time!

¹⁴ There is no such offence in the national law. The prosecution must therefore have been under a village rule.

from 7% of the cases in Nukunonu to 59% of the cases in Fakaofu. Earlier data is imprecise on these matters, but juvenile offending and prosecution of women for offending were noted in the 1980s.

2012-2013

In the period 2012-2013 the range of offences recorded was the same: assault, fighting, alcohol, offensive behaviour, theft and trespass. The gender of accused persons was notable in Atafu at 84% women with no women accused in Fakaofu and Nukunonu. As for the age of offenders, the three islands were very much the same with juvenile offenders¹⁵ accounting for between 22%-30% of the cases.

2013-2014

In 2013/2014 there was no change in the range of offences brought before the Commissioners. The statistics showed an increase in the number of women accused (20% in Atafu, and 34% in Nukunonu) and 20% young people involved in the courts.

2014-2015

The data in the *Tokelau Judicial Annual Report 2014/2015* shows that 66 cases were heard by the law Commissioner in Atafu, 21 cases were heard by the Commissioner in Nukunonu, and 61 cases were heard by the Commissioner in Fakaofu. The cases for the year are of a similar criminal nature: assault, theft, fighting in a public place, intoxicating liquor, trespass, and offensive behaviour. There were no appeals from the decisions of the Commissioners to a Village Appeal Committee but that has to be set against the fact that in the vast majority of cases the accused pleaded guilty. The statistics provided on offending by gender and age analysis are: Atafu 40% female and 16% youth; Nukunonu 60% female and few if any youth, and Fakaofu 25% female and 40% youth.

D Gender and age

When the first survey was done in the 1980s statistics were not gathered relating to the gender and age of offenders. There is, however, no doubt that there was a spread of gender and age offending at that time. For instance all offending involving sexual intercourse outside of marriage or adultery necessarily involved a man and woman accused. Offending by children

¹⁵ See below, sub Part D.

was less frequently observed. Such offending was more likely to be dealt with informally, however, the trespass and theft case in Atafu involved young boys.¹⁶

The question of age of offending is a difficult one to establish clearly. The first two Annual Reports recorded as juvenile offending the actions of persons under the age of 18. In the 2013-2014 and 2014-2015 Reports there are two entries in the statistics - one for offending by those under 17, and another for those 17-25 years of age. The data therefore is difficult to compare directly. It is notable that offending recorded by the under 16s is very low with the bulk occurring with the 17-25 year olds.

Culturally, Tokelau has a broad definition of youth. In many instances the class of youthfulness is not closed until a person marries so that in a youth group there may well be persons in their thirties.

As a matter of law the age of majority is 21. (Interpretation Rule 2): the minimum age for marriage is 16 for woman, and 18 for men (Marriage Rule 6): the age of consent is 16 (Rule 19) under the Crimes Procedure and Evidence Rules: 18 years of age is the minimum age for drinking alcohol (Rule 50); smoking is prohibited for the under 16s (Rule 51); school attendance is compulsory until the age of 16 (Rule 63). The age of criminal liability is provided for in Rule 114 of the Crimes Procedure and Evidence Rules. There is no liability for a person under the age of 10, and a conditional liability for those aged 10 and under 14. No prison sentence can be imposed on person under the age of 16 (Rule 136).¹⁷

E Other Data

A closer indication of how judicial life proceeds in Tokelau, and consistent with the theme of this volume – the relationship between modernity and tradition in the South Pacific - are the papers by Danica McGovern in “The Interplay of Law, Custom and the Availability of Resources in Tokelau’s Criminal Law”¹⁸ and “Homicide in Tokelau: Criminal Procedure”¹⁹. They show how in Tokelau in a situation of severe stress, the imported legal system and the traditional system interacted. The incident described in those pieces also highlighted the

¹⁶ Above n 8.

¹⁷ There are no prisons in Tokelau.

¹⁸ (2012) 10 NZYIL 189.

¹⁹ (2013) 19 CLJP 127.

difficulties for the operation of the imported legal system in a situation such as that presented by the death in Nukunonu in 2012. In the absence of professional medical services and with forensic assistance at least weeks away, a formal homicide investigation could not take place. No cases have been recorded where the judiciary outside Tokelau have been engaged in respect of Tokelau litigation. Serious legal impediments exist to the conducting of a criminal trial at the highest level of the Tokelau judiciary. Civil cases are a different matter; there has been only one known instance where civil process begun in the High Court of Tokelau.²⁰

A slightly more common involvement of the High Court in New Zealand in Tokelau related matters concerns the potential enforcement of New Zealand child custody orders in Tokelau. It is known that instances have arisen in New Zealand where this was considered but none is known to have proceeded to enforcement within the Tokelau legal system.²¹

Conclusion

What the data shows is that the main subject of judicial action in Tokelau involves what can be described as criminal offences and a fairly limited range of them at that: adultery, fornication, theft, assault, drunkenness, and an array of antisocial behaviour such as fighting, making noise, and spreading rumours. An outsider might expect, even in such small communities, a much greater involvement of the judicial system. Even allowing for the fact that all land matters are dealt with by the elders, that most family law matters which do not relate to land are dealt with administratively, that the main employer is the national government or a village government which has specific dispute resolution procedures within the Employment Manual, and that personal injury is dealt with as a village administrative matter, there is still an array of civil law disputes that might be brought to the Commissioner's Court, as might all the local offences relating to the environment, the use of natural resources, fishing and local government matters such as the lighting of fires and the disposal of rubbish.

It seems clear still that the Tokelau perception of what is a "legal" matter relates to matters which are of a central criminal nature. To what extent that attitude is influenced by the short

²⁰ T Angelo and A Allan "High Court of New Zealand and Tokelau: A Recent Case" (2012) 43 *VUWLR* 645.

²¹ Rule 161 Crimes Procedure and Evidence Rules provides for enforcement in Tokelau of foreign custody orders.

list of criminal offences in the Native Law Rules of 1912 is not clear. Also not clear is why Atafu which recorded the highest level of judicial activity in the 1980s still in the 2011-2015 years typically has the highest level of court use. Other persistent features of the system are the entering of guilty pleas by accused, the absence of appeals to the Village Appeal Authority, and beyond the statistics, the extensive use of traditional and cultural methods for dealing with social disorder in respect of, what in legislative terms, are criminal matters.

Something can be said about the relationship of modernity to tradition in the Tokelau situation. That is that modernity is very slow to take hold. The publication of the Judicial Annual Reports is a sign of modernity²² but at the ground level and in practice it appears that very little has changed in the last 40 years. Tradition remains to deal with disputes and disruption of social order in Tokelau. Important to this conclusion is the smallness of the villages, their remoteness from other centres, and the nature of sanctions or remedies that best reflect social circumstances on the islands.

At page xii of *Pacific Courts and Legal Systems* the editors stated –

In every Pacific country, law and justice have been influenced by introduced principles and practices, but in every country aspects of the traditional order remain – in some cases very strongly. Years ago many people assumed that the traditional elements would soon be totally replaced, but it has not been so, nor is it likely to be. Each Pacific country is developing a unique amalgam of local and foreign precedents in creating its own system of justice.

That statement remains true of Tokelau today.

²² But note the incomplete reporting on Fakaofu for the 2014-2015 period.