

**Commonwealth Law Conference, Malta, 6- 10 April 2025**

**Tu'inukutavake Barron Afeaki, Lord Chancellor of the Kingdom of Tonga**

**A brief paper for the Conference Panel on**

***‘Achieving certainty in the law and other challenges in small jurisdictions, a case study of Tongan custom.’***

Lord Chief Justice of the Kingdom of Tonga, Malcolm Bishop KC is convening the panel on Tuesday 8 April 2025. I am honoured that he invited me to attend and share some of my insights.

Achieving certainty is a key function of the law. In the Tongan Constitutional context there are customary and cultural aspects to be considered. For example there is an Amendment to the Act of Constitution 1875 to empower the Courts to take into account Tongan custom, should it be applicable to the issues contested in a case. Such cases will require lawyers and witnesses to provide evidence to the Court of the continued existence of such a custom. Lawyers and parties will have to convince the Court that such custom exists, continues to apply and is relevant to the particular case. It is contended that this amendment will preserve custom where proven and relevant, while achieving certainty.

**THE BILL: Act of Constitution of Tonga (Amendment) Act 2020**

1. This was passed by Tonga’s parliament and presented to His Majesty in Council for consideration. His Majesty directed the Judicial Committee of His Privy Council to consider the Bill and advise Him on it. The Judicial Committee undertook extensive consultation with various stakeholders on the proposed provision.

Clause 2 of the Bill reads: -

*In English:*

**New Clause 89A inserted**

**“89A Application of Tongan customs**

Customs in Tonga comprises all reasonable and sufficiently certain customs, traditions, practices, values and usages of Tongans: and every Court or Tribunal in the Kingdom where relevant, shall have regard thereto when deciding any matter before them for decision. Custom requires to be established in evidence but in so doing a Court or Tribunal shall not apply technical rules of evidence but shall admit and consider such information as is available. Tongan Custom shall not be lost by reason of lack of recent usage.

**EXPLANATORY NOTES**

*(These notes do not form part of the Bill and are only intended to explain its scope and purpose)*

The main purpose of this amendment is to ensure that custom and customary law is not excluded from Tongan jurisprudence but it should be embraced as has been done in many other Pacific Island jurisdictions. Accordingly, the Courts in Tonga should be enjoined to have regard to Tongan custom when arriving at a decision.

Custom, like any other fact, would be required to be proved but in proceedings concerning the existence, nature and extent of custom a Court should not have to apply technical rules of evidence but should be agreed to admit and consider such information as was made available to it.

Hon. Samiu Kuita Vaipulu, Minister of Justice, 2020”

## **Analysis**

2. This briefing paper aims to give some structure to my contribution to the Commonwealth Law Conference panel’s discussion of the topic, which I have abbreviated to:

‘Achieving certainty in the law and other challenges in small jurisdictions.’

## **Tonga’s Act of Constitution Amendment Act 1875 (2020): Some questions**

What does Clause 89A mean for the public and how is it going to work?

What implications are there for certainty in the law in Tonga?

What concerns do the public and lawyers have about it?

Who supports the amendment and why?

What customs are currently recognised in Tongan law?

What influenced the removal of customs?

Have any customs been banned by statute?

Is there relevant case law to guide us?

## **Opposition to the Amendment**

3. There was opposition from mainly Pālangi (foreign) lawyers to the amendment. Why? A number of them said that allowing Tonga Custom law will undermine certainty for overseas investors seeking to bring money into Tonga.
4. The protests included that as they understood it, many of the Tongan customs had been disused, barred, codified or stopped over the past two centuries. This was said to mean that the contemporary understanding of such customs was incomplete. One expatriate foreign judge was opposed to the amendment due to the lack of certainty he said it would generate.

## **Support for the Amendment**

5. Many Tongan lawyers and all the Tongan judges (except one expatriate judge), who were consulted accepted that the amendment was a good safeguard to the remaining Tongan customs which have not been either codified or extinguished by statute.
6. The counter to the argument about uncertainty was that if a party to proceedings asserts the existence of a custom, it would be for them to adduce evidence of its existence and such evidence would of course be open to contest. That party would also have to persuade the court of the relevance of the purported custom to the matters to be determined by the court.

### **Clause 89A of the Bill provides for: -**

7. "... all reasonable and sufficiently certain customs" and that "Custom requires to be established in evidence..." entailing that such customs as are relied on must be proven.
8. Clause 89A gives the Courts a discretion as to how that evidence is to be adduced, if at all and provides that: "a Court or Tribunal shall not apply technical rules of evidence but shall admit and consider such information as is available."
9. This means that proponents of a custom in the circumstances of a particular case would have to provide the existence of the custom as a matter of fact and of its continuing application. The courts regulate their own proceedings and will make findings in those cases where custom evidence and arguments are raised.
10. Finally, the amendment provides that: "Tongan Custom shall not be lost by reason of lack of recent usage."
11. This puts the onus on the party seeking to rely on existence of and relevance of a custom to the legal matters to be determined to show that the custom, the tradition alleged continues to exist, even if it has not been used as often as it had in antiquity. It will be for those relying on the custom to adduce witness evidence to persuade the court to accept the existence and relevance of said custom. Such evidence must be open to cross-examination and ultimately the court will have to make a decision.
12. The judges and magistrates considering such customs may decide to appoint an assessor who is expert in Tongan customs and traditions to assist the court in such matters, in the same way as the Land Court Act provides for assessors who are expert in customs and traditions to advise Land Court judges on such matters in determining cases in that jurisdiction. In this way, judges who seek such assistance can be helped.

## **Appeals on custom will be made to the King in Privy Council**

13. Any right of appeal on matters of custom from the Magistrates' Court or from the Supreme Court would be to the King in Privy Council, whose decisions on such appeals would be final.
14. The Clause 89A Amendment necessitates a further amendment to Clause 50 of the Constitution by inserting Clause 50 2A to specifically empower the King in Privy Council to hear appeals on matters of custom and determine the same. This is being done via the Constitution of Tonga (Amendment) Bill 2025. There are also two discreet amendments by the Court of Appeal (Amendment) Bill 2025 and in the Evidence (Amendment) Bill 2025 to implement the earlier Clause 89A Amendment. The three Bills are in a public consultation phase in Tonga.

## **Examples of custom codified: Customary Adoption of a child**

15. The only express mention of "custom" in Tongan legislation is a reference in section 6 of the *Guardianship Act 2004* which allows the Supreme Court to make a Guardianship Order in favour of a person who has had "customary adoption" of a child.
16. "Customary Adoption<sup>1</sup>" would be recognised for this purpose provided that the applicant "parent" had a continuing relationship with the child and notwithstanding that the adoption "agreement"<sup>2</sup> was "not in writing, but can be inferred from discussions or conduct"<sup>3</sup>.

## **Custom example. Traveller may drink coconuts: Town Regulations Act**

17. A distinct Tongan custom exists in respect of travellers drinking coconuts. A person may, if thirsty on a public road, take a coconut from adjoining private land to drink to sustain themselves. This reflects the Tongan tradition of compassion for travellers in hot weather remote from their own land and fruit trees. It is a well-known custom and traditional law. It is a codified custom. Another relates to ocean travellers on boats in distress and they likewise may drink and eat coconuts where they land for sustenance, but not more than is necessary to survive. The custom is not usually abused by people and in a sense rails against other statutory and common law rules about private property. However, it is a good example of a traditional custom preserved by codification in the law.

Section 13 of the Town Regulations Act provides: -

"13 Traveller may drink coconut

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<sup>1</sup> *Guardianship Act 2004* (Tonga), s.2 "customary adoption" means the placement of a child according to custom and the transfer of parental rights of customary and control in the upbringing of a child.

<sup>2</sup> *Guardianship Act 2004* (Tonga) s.6(2)(b).

<sup>3</sup> *Guardianship Act 2004* (Tonga) s.6(2)(a).

(1) Any person travelling to a distant place upon a Government road if he be thirsty may peel and drink coconuts growing by the roadside in any main road but it shall not be lawful for him to carry away any nuts but only to relieve his thirst; nor may he take nuts from any plantation.

#### Vessels in distress

(2) Should any vessel put into any island in distress it shall be lawful for the crew to drink the coconuts and eat the fruit of any trees growing in such island but it shall not be lawful for them to carry away anything beyond what is necessary for their bare support until they can reach some port.

(3) Whoever shall infringe any of the provisions of this section shall on conviction be liable to the penalty for theft.”

### **Example of a custom banned by statute: Taking according to custom**

18. ‘Taking’ based on traditional ‘fahu system’ power to take possessions or goods owned by another. This power, exercised traditionally by the eldest senior woman (or it can even be a man of the senior fahu bloodline nominated by the senior fahu, dependent on context) of a senior female genealogical line, known as the ‘fahu’ in a particular event, gathering or context – having the power to ‘take’ whatever item(s) she wanted from others who hold a genealogically inferior position to her. This was banned due to some people abusing the power in modern times. Such takings, where opposed can now be treated as theft. The customary defence has been removed by statute.

### **Criminal Offences Act s 147 Taking things according to Tongan custom**

“Every Tongan who following the former Tongan custom takes anything capable of being stolen belonging to any of his relatives without the permission of its owner and with intent to deprive such owner permanently of such thing shall be liable to the same punishment as if he had committed theft.”

19. This provision criminalizes abuse of the “fahu system” in Tonga by ensuring that a person cannot take anything from another person without ‘colour of right’ and would not be able to rely on the traditional “fahu” rights she may have held.

20. The banning of the defence of these traditional ‘takings’ in the criminal code reflects Tongan society, via pressure applying to the legislature to change and outlaw a tradition which was being abused in modern conditions, causing harm which could no longer be tolerated. The custom has been abrogated by statute.

### **Some Relevant Case Law**

21. The absence of reference to custom in the Tonga Constitution or statutes suggested to then Chief Justice, Hon. Webster CJ in 2005 that Tongan culture or

custom was not a relevant factor for judicial consideration “except...to the extent that it formed part of the context when the Constitution was adopted in 1875.”<sup>4</sup>

22. In the context of the *Taione v Kingdom of Tonga* [2005] Tonga LR 67, on the evidence available to him, Webster CJ may well have been correct to exclude consideration of Tongan culture or custom, however His Majesty the King’s Law Lords of the Judicial Committee of the Privy Council disagree. This decision on its own and without moderation of other context is not and cannot be general authority for the proposition that Tongan Courts are excluded from considering issues of custom in deciding a case before them for determination.
23. Custom is a foundational thread of the weave of the fabric of a nation. Judges ought to have regard to custom in their decision-making unless reference to local custom is expressly prohibited by Statute, but ideally by the Constitution itself. Such an approach has found favour with the Courts of Canada and New Zealand.
24. In the New Zealand case of *Te Weehi v Regional Fisheries Officer* [1986] 1 NZLR 680 the Court noted with approval (page 791) what came to be called the Canadian approach:
- “The Canadian cases follow the general approach that rights of native or aboriginal people may not be extinguished except by way of specific legislation which clearly and plainly takes away that right.”*
25. Not recognising customs and traditions is inconsistent with the rights of indigenous peoples.

### **Continuing Influence of Colonial Powers**

26. The problem arose in the South Pacific in the 19th century with the colonial expansion of European nations, particularly the United Kingdom, France, Germany and the United States of America into the region and the imposition of foreign laws and values on the people of our ancient island nations.
27. University of the South Pacific academic, Yoli Tom’tavala views the process of custom recognition in the Pacific nations as part of the “decolonisation” of local legal systems states -
- “During colonialism, the customary laws of the indigenous people were either disregarded altogether or given very minimal recognition. Just as political decolonisation is achievable, so should legal decolonisation. This...means that the system of laws of the former colonies must be found on customary systems and norms”<sup>5</sup>*

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<sup>4</sup> *Taione v Kingdom of Tonga* [2005] Tonga LR 67 at page 105; See also *Faletau v ‘Akau’ola* [1997] Tonga LR 185

<sup>5</sup> Yoli Tom’tavala in his paper entitled “Customs and Customary Law in Pacific Island States”.

28. The Tongan author and academic, ‘Epeli Hau’ofa was much more trenchant in his criticism of colonial practices. He railed against what he called “neo-colonial hegemonists” who sought to relegate island nations to the ignominy of aid dependency and forms of servitude to other influences: see his thought-provoking article: “Our Sea of Islands.”<sup>6</sup>

### **The Civil Law Act**

29. Although the Kingdom of Tonga was never colonised by a foreign power<sup>7</sup>, our legal system adopted English concepts albeit with the proviso now found in the *Civil Law Act*<sup>8</sup> that in the absence of any local “provisions” to the contrary English principle of common law and equity applied in Tonga “only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualifications as local circumstances render necessary.”
30. Until recently the superior Courts of Tonga have not often been required to consider Tongan custom in arriving at a decision, and appear to have done so only in the *Taione* and *Faletau* cases, and in the *Panuve v Panuve* Land Court Case LA 26/2015 decided in August 2017<sup>9</sup> - a dispute over a family home on an ‘Api Kolo (a Town Land Allotment) between a widow and her eldest stepson, who had made substantial payments to cover a debt incurred in building the house.
31. In that case Paulsen LCJ stated (paragraph 44) that “consistent with custom the house belonged to “the widow’s late husband (the son’s father): and again at paragraph 54 that “this was a case where the Court had to have regard to Tongan usage and custom and I have obtained particular assistance from the Assessor.”
32. Land Court Assessors are used by judges in cases before the Land Court of Tonga. They are experts in Tongan traditions and customs.
33. Magistrates of the Tonga Police Magistrates Courts advise that they daily apply their knowledge of Tongan customs and traditions as necessary when dispensing justice in the lower jurisdiction. This is all conducted in Tongan language with Tongan litigants and is less formal than proceedings before the Land Court and Supreme Court.
34. In criminal sentencings in both the Supreme Court and Magistrates Courts, on occasions of merit, sentencing judges advise that they have taken customs into account in considering pleas of mitigation. This has been where the accused has

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<sup>6</sup> ‘Epeli Hau’ofa, ‘Our Sea of Islands’ published 1993 by the University of the South Pacific

<sup>7</sup> In the 19<sup>th</sup> Century, King Taufa’ahau Tupou I entered treaties of Friendship and Protection between Tonga and France, Germany, United States of America and then with the United Kingdom.

<sup>8</sup> Section 4 (as amended).

<sup>9</sup> See [Tongan Legislation - Land Court - LA-2017](#) – for unreported decision of Paulsen LCJ in LA 26/15, dated 7 August 2017, available from <https://ago.gov.to/cms/judgements/land-court>

within traditions made customary gifts, and or money and an apology to the victim and the victim's family, and where they have been accepted.

### **A Safeguard in the Amendment**

35. The safeguard, in answer to some opponents to the Amendment is that in line with some sound Commonwealth authorities<sup>10</sup>, customs and traditions sought to be relied upon must be reasonable and sufficiently certain. They also require to be proved, just like any other fact. However, because of the nature of the custom subject matter under review an exception from the usual rigid and technical rules of evidence has been made. Judicial discretion has been granted to the Tongan Courts to admit and assess whatever information is made available to it. This is not unusual for specific jurisdictions dealing with particularly cultural considerations. For example in New Zealand there are special provisions for certain proceedings which permit a limited departure from the strict rules of evidence. In New Zealand this currently exists in matters falling under the jurisdiction of the Maori Land Court<sup>11</sup> and the Waitangi Tribunal<sup>12</sup>, both of which are concerned with investigating aspects of indigenous custom and 'aboriginal' title. In my own experience in both those jurisdictions, it does not result in a lowering of standards so much or uncertainty; rather it facilitates getting best evidence in a manner not otherwise available under usual court strictures.

36. In Tonga the Constitutional Amendment inserting Clause 89A will be passed into law by His Majesty the King providing His assent. Then custom, like any other fact in a case, will be required to be proved. In proceedings concerning the existence, nature, extent and relevance of custom a Court will not have to strictly apply the technical rules of evidence but will admit and consider such information as was made available to it, then make a decision.

### **Where to from here?**

37. What other customs, traditions might be raised in proceedings? Whether criminal, family, land, succession to titles, civil, commercial, administrative or otherwise?

38. The point of the Amendment is that in Tonga as in other jurisdictions, such customs as may continue to exist and for which evidence can be adduced and contested will not be lost or denied a chance to be ventilated and examined by the parties and determined by the courts.

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<sup>10</sup> Wyld v Silver [1962] 3 All ER 309 (Court of Appeal); Egerton v Harding [1974] 3 All ER 689 (Court of Appeal); New Windsor Corp v Taylor [1895] AC 41 (HL).

<sup>11</sup> Maori Land Act 1993; Maori Land Court Rule 2.4 which enables the Court "to excuse compliance with a rule "of evidence if it considers" that compliance would be oppressive or otherwise inappropriate:.

<sup>12</sup> Commissions of Inquiries Act 1908. Section 4B(1) enables the Tribunal to receive any evidence that "may assist it deal effectively with the subject of the inquiry, whether or not it would be admissible in a Court of Law."



39. I am very grateful to my friend, colleague Law Lord and Attorney-General of Tonga, Mrs Linda Folaumoetu'i for her work and research in respect of the Constitution and the present Amendment. I have relied heavily on many discussions with her and also on her erudite written analysis on custom law matters over the past five or six years. *Mālō e ngaue mo e fakahoko fatongia.* [Thank you for your work and service on duty.]

40. I am also grateful for the support, public service and work of my friend and colleague Law Lord and Privy Councillor of Tonga, the Rt. Hon. Lord Ramsay Dalgety KC for his service and efforts to support the Constitution, Judiciary, King and good folk of Tonga.

Dated at Malta, this 8<sup>th</sup> Day of April, 2025

**Tu'inukutavake Barron Afeaki ©**

Lord Chancellor

Kingdom of Tonga