

THE JURY SYSTEM IN TONGA

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INTRODUCTION

The use of juries is ‘one of the cornerstones of common law...’¹ The value of using juries is related to beliefs that ‘...juries inject community values into the formal legal process, and thus they can bring a sense of equity and fairness against the cold and mechanistic application of legal rules...’² and that public participation in the administration of justice ‘enhances the acceptability of decisions and contribute[s] to a culture in which the administration of justice is not left to a professional cadre but is understood as a shared community responsibility’.³

Tonga a former protectorate of Britain, adopted the English common law system including the jury system, as its own. Jury trials have been a feature of the Tongan legal system for more than 100 years. As has been noted, in Tonga, ‘One of the hallmarks of a free and civil society is the existence of a judicial system that is independent, respected and protected. The right for an accused person to have a jury trial is one of the features of such a judicial system. This is a value that was recognised by King Siaosi Tupou I, the founder of modern and civil Tonga, when he created Tonga’s Constitution in 1875.’⁴

Despite general beliefs in the benefits of jury trials, the jury system has its shortfalls. This paper attempts to discuss some of these problems. First it will give a brief history of the Tongan jury system and a description of the present jury system in Tonga before turning to discuss problems with the Tongan jury system and considering options for the future of jury trials in Tonga.

A BRIEF HISTORY OF THE TONGA JURY SYSTEM

The 1875 Constitution

King George Tupou I, the founder of Tonga’s present ruling dynasty, united Tonga in 1845 and proclaimed the first *Constitution* for Tonga in 1875. The declaration of rights of the *Constitution* embodied a right for an accused to a trial by jury.⁵ Jury trials were mandatory for cases tried before the supreme court and circuit courts and cases

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¹ Encyclopedia Britannica Online, ‘Jury’ (2009) <http://www.search.eb.com/eb/article-27060> (Accessed 19 March 2009).

² Neil Vidmar, ‘A historical and comparative perspective on the common law jury’ in Neil Vidmar (ed), *World Jury Systems* (2000) 1, 1.

³ M Gleeson, ‘Juries and Public Confidence in the courts’ (2007) 9 *Reform* 12-14, at p 3.

⁴ ‘Asipeli ‘Aminiasi Kefu, ‘Juries in the Tongan Judicial System: Some practical proposals (Unpublished, External Project, Graduate Diploma in Public Sector Management, Massey University, 2006) 3 - 4.

⁵ Clauses 11 and 100 *Constitution of Tonga 1875*.

committed to these courts from the police court.⁶ The right to a jury trial provided in Clause 11 of the 1875 *Constitution* for those convicted of treason, rebellion against the king, theft, bribery, perjury, forgery or embezzlement or of a crime of the like nature was stated to be ‘inviolable forever’. The more general right to a jury trial in all cases in the supreme court or circuit courts was also marked for special protection, with Clause 100 stating that ‘this law shall not be repealed for ever.’

The jury was comprised of 12 Tongans⁷ and any Tongan who was over the age of 21, paid taxes, could read and write and had not been convicted of a range of serious crimes was eligible for jury duty.⁸ As only males paid taxes, the pool was effectively limited to Tongan males.⁹ ‘Members of the Legislature, Missionaries, assistant missionaries, teachers, schoolmasters, collegians, Institution lads, servants of the Government, clerks of the Bank, military officers, the Guards and Artillery-men’¹⁰ were, however, exempted.

Foreigners residing in Tonga at that time also had a right to be tried by jury if they were accused of committing a ‘great crime’¹¹ or of owing ‘a large amount’.¹² However the jury composition for foreigners was to include six foreigners residing in Tonga who were tax payers and six Tongan jurymen who had their names on the jury list.¹³

The duties of the juries whilst participating in criminal cases were to ‘determine the facts on the basis of evidence brought before court and to give a verdict of guilty or not guilty based on the evidence alone.’¹⁴ In civil cases they were to ‘award payment or compensation as the case may be, on the merits of the case.’¹⁵

Amendments to the 1875 *Constitution*

The first change to the jury system set up in the 1875 *Constitution* occurred in 1885, when an amendment to clause thirty-one deprived Europeans of their legal right to a jury consisting six foreign residents and six Tongan jurors and introduced a twelve person all Tongan jury for foreigners facing jury trials.¹⁶ The purpose of this amendment was to ensure consistency with the policies regarding Europeans that King George Tupou I and

⁶ Clause 100 *Constitution of Tonga 1875*.

⁷ Clause 100 *Constitution of Tonga 1875*.

⁸ Clause 30 *Constitution of Tonga 1875*. See also s 188 of the *Administration of Justice Act 1907* which stated that participants in jury service had to be ‘Tongan male subjects who were taxpayers, literate and free of any conviction.’

⁹ Clause 27 required that ‘All men who have arrived at the age of 16 shall pay taxes...’ Foreigners residing in Tonga for more than 6 months were also required to pay taxes.

¹⁰ Clause 30 *Constitution of Tonga 1875*.

¹¹ Great crimes were defined as being ‘treason, murder, theft, bribery, perjury, forgery embezzlement or a like crime’ (Clause 25 *Constitution of Tonga 1875*.)

¹² Clause 31 *Constitution of Tonga 1875*. The precise meaning of ‘a large amount’ was left to be defined by the legislature, but the legislature did not further define this.

¹³ *Ibid*.

¹⁴ Clause 101 *Constitution of Tonga 1875*.

¹⁵ *Ibid*.

¹⁶ Sione Latukefu, *The Tongan Constitution: A brief history to celebrate its centenary* (1975) 59.

the Prime Minister, Mr Shirley Baker had, ‘that Europeans should not have preferential treatment in Tonga.’¹⁷

Further amendments occurred in 1918, when the right to jury trial was limited, in criminal cases, to offences which were punishable by a fine of more than 50 pounds or imprisonment for more than 2 years. In 1933 the size of the jury was reduced from 12 to seven.¹⁸ In 1942 the right to trial by jury became an electable right, rather than a mandatory procedure.¹⁹ In 1977 the requirement that jurors must be tax payers was removed, and the categories of people excluded from jury service were slightly altered.²⁰ In 1984 eligibility for a jury trial in criminal cases was changed from offences which carried a punishment of a fine of 50 pounds or two years imprisonment to offences which carried a punishment of a fine of 500 pa’anga or two years imprisonment.²¹

THE PRESENT JURY SYSTEM IN TONGA

Clause 11 of the *Constitution* now states that:

‘...whoever shall be indicted for any offence if he shall so elect shall be tried by jury and this law shall never be repealed. And all claims for large amounts shall be decided by a jury...’

Clause 99 specifies that this right is only available in the supreme court:

‘Any person committed for trial before the Supreme Court on a charge of having committed any criminal offence shall if he shall so elect be tried by a jury; and whenever any issue of fact is raised in any civil action triable in the Supreme Court any party to such action may claim the right of trial by jury; and the law of trial by jury shall never be repealed’

As we can see now, a trial by jury is only available in the supreme court of Tonga. It is available to both civil and criminal cases brought before the supreme court. Trial by jury is not, however, automatic, but occurs if the defendant or the accused elects to be tried by jury. There has been some dispute as to the interpretation of Clause 99 with regards to civil cases. In *Tupou v Salala*²² it was argued that the right to a trial by jury is limited in civil cases in that an application to have a jury hear a civil case can be dismissed at the judge’s discretion. The Court, however, rejected this argument, concluding that ‘clause 99 of the *Constitution* provides a mandatory right to a party in a civil proceeding triable

¹⁷ Ibid.

¹⁸ Ibid 81.

¹⁹ From 1875 – 1975 Clause 100 was amended 3 times, in 1918, 1933 and 1942. I have only been able to access the 1942 amendment. However, reading this in conjunction with the information from Latukefu about the 1933 amendment I have been able to assume, with some certainty, what the effect of the 1918 amendment was.

²⁰ Act 8 of 1977. Again this act is not available, but the impact of this act has been deduced by comparing versions of the constitution.

²¹ Act no 25 of 1984. Again this act is not available, but the impact of this act has been deduced by comparing versions of the constitution.

²² [2004] TOSC 38 <http://www.pacii.org>.

in the Supreme Court to have the action tried by a jury provided that he or she asks for it.²³

Eligibility for jury duty is provided in Clause 28 of the *Constitution*:

Every male Tongan who has arrived at the age of twenty-one years and can read and write and is not disabled by the twenty-third clause of this Constitution [which disables anyone convicted of a criminal offence punishable by imprisonment for more than two years unless the have been pardoned by the King] shall be liable to serve on juries and the names of all those who are liable to serve shall be published once every year and anyone who neglects to serve shall be punished as shall be enacted by the Legislature. But members of the Legislative Assembly, ministers of religion, assistant ministers, school-masters, collegians, public servants, guardsmen, artillery-men and all officials of the Government shall be exempt from serving on juries.

Despite this apparently gender specific wording women do now participate in jury duty, as the *Interpretation Act* [Cap 1] provides, in s 2(2), that ‘words importing the masculine gender shall include females’.

The role of the jury, provided in Clause 100 of the *Constitution*, is unchanged from what it was in 1875:

It is the duty of the jury in criminal cases to pronounce whether the person accused is guilty or not guilty according to the evidence given before the Court. In civil cases the jury shall give judgment for payment or compensation as the case may be and according to the merits of the case.

The *Supreme Court Act* [Cap 10] further defines the role and duties of a jury. In criminal cases the 7 person jury must return a unanimous verdict, or else they will be discharged and a new jury empanelled.²⁴ Unanimity is not mandatory for a jury when reaching a decision in civil cases but a ‘majority of five to seven is sufficient to obtain a verdict.’²⁵ In such cases the jury gives the verdict. But deciding the amount of compensation to be awarded is left to the judge.

All people who are called to jury service must attend the court proceedings as required to do so. ‘If a person who is summoned to serve on the jury panel disobeys the summons to appear before a court provided that person has not served in the jury for that year and has no good reason for not appearing before the court, will be liable and convicted for a fine of fifty pa’anga.’²⁶

PROBLEMS WITH THE TONGAN JURY SYSTEM

²³ Ibid.

²⁴ Section 14 (8) *Supreme Court Act* [Cap 10].

²⁵ Neil Vidmar, ‘The jury elsewhere in the world’ in Neil Vidmar (ed), *World Jury systems* (2000) 436. See also s 13(2) *Supreme Court Act* [Cap 10].

²⁶ Section 10 *Supreme Court Act* [Cap 10].

Despite the fact that jury trials have been a feature of the Tonga Islands for more than 100 years, the jury system is not without controversy. Awareness of potential problems with juries has increased since the riots of 2006. After this a large number of accused elected to be tried by jury which resulted in a sizeable increase in the number of jury trials being held. Furthermore juries acquitted a number of people who had broken the letter of the law. This has led to the legal fraternity, particularly prosecutors, beginning to voice the opinion that jury trials should be abolished.²⁷ There are various reasons for this view, as discussed below.

Cost

First, operating a jury system can be very costly. In Tonga once a juror participates in jury service they are ‘...paid fifty pa’anga per day...’²⁸ plus ‘...any travelling expenses reasonably incurred in travelling to and from the court...’²⁹

In every jury trial there are 7 jurors.³⁰ A jury trial therefore costs 350 pa’anga a day in jury fees, or 1,750 pa’anga a week. From 2002 to 2005, when there were fewer jury trials, the cost of jury trials consistently exceeded the budget allocation provided for them.³¹ The increase in the number of jury trials since the events of 2006 has only made this problem worse.

Another problem is that jury trials are more time consuming than judge-alone trials, and this also increases the costs to the Ministry of Justice. The first stage in the jury trials process is the creation of a jury pool list. ‘In the month of November each year, the district officer must give a list of all Tongans residing in that particular district who are twenty-one years or older.’³² ‘The list is then given to the magistrate who will have to compile a list of jurors who are competent and liable to serve as jurors.’³³ This is not an automated process. Once a person elects for a trial by jury the court registry summons 30 people from the jury pool. During the empanelment of a jury both parties have the right to challenge a juror. ‘In both civil and criminal cases the parties each have a right to six challenges.’³⁴ This may take time. The next point of delay is that during the trial the judge has to direct or explain to the jury matters of law in relation to evidence put before the court. An aggravating factor in Tonga’s case is that the supreme court judges are expatriates and their directions are delivered in English. A court interpreter then, often, has to translate this direction into Tongan for the jury to understand.

The use of juries can also lead to an increased number of retrials. First, in criminal cases if the verdict is not unanimous there needs to be a retrial. Second, there may be situations

²⁷ See, for example, Pacific Beat, ‘Tonga: Calls for jury trial to be scrapped’ (31 October 2007) <http://www.abc.net.au/ra/programguide/stories/200710/s2077688.htm> (Accessed 7 August 2009).

²⁸ Section 2(ii) *Supreme Court (Allowances To Jurors) Regulations 1998*.

²⁹ Section 2(i) *Supreme Court (Allowances To Jurors) Regulations 1998*.

³⁰ Section 13(2) and 14(1)(c) *Supreme Court Act* [Cap 10].

³¹ Kefu, above n 4, 11.

³² Section 9 *Supreme Court Act* [Cap 10].

³³ Section 9 *Supreme Court Act* [Cap 10].

³⁴ Section 13(2) and 14(2) *Supreme Court Act* [Cap 10].

in which the jury has heard evidence which is not admissible and a direction to the jury will not suffice to undo the impact of the inadmissible evidence. An example of this occurring is the case of *R v Amanoni*.³⁵ In this case the judge discharged the jury and ordered a re-trial because evidence made by the prosecution was prejudicial to the second accused and the judge stated that a direction to the jury would not restore the jury to the position it was in before hearing this evidence.

The composition of juries

There are two aspects to this problem, insufficient vetting of jurors and inadequate qualifications of jurors. Jury vetting 'is described as the process of pre-court checking of potential jurors.'³⁶ This should be done both on a general level to check that the jury pool is all eligible for inclusion and at a specific level for each jury trial. In Tonga jury vetting is reported to be done poorly because in practice, the list of potential juries is only 'made available to the parties on the morning of the trial provided there has been no direction by the judge for earlier disclosure upon request by one of the parties.'³⁷ Further, there is little information provided in the jury pool list. 'The jury pool list contains only the names of the persons and the villages they are from.'³⁸ It also appears that there is no thorough checking off eligibility before people are included in the jury pool list, as another concern is that 'there is no time for the Police to determine if a jury pool member has any previous convictions.'³⁹ There is also no mechanism for determining 'whether or not a jury pool member is a victim of the same offence the accused has committed.'⁴⁰ The lack of early notification to lawyers of potential jurors and lack of information about them means that would be hard for lawyers to determine a jury which may be best disposed to their cause. It is said that the only basis lawyers use for their challenge is the apparent appearance of a person.⁴¹ The insufficient vetting of jury may result in the empanelment of a partial or biased jury, which undermines the trial process.

Another potential problem is that the only qualifications a person needs to qualify as a juror is to be 'twenty-one years of age and older, literate and free of convictions.'⁴² There are a large number of people exempted from participating in jury service. The exemptions include 'school-masters, collegians, public servants'.⁴³ As these sectors are major employers of Tonga's university graduates this means that Tonga's jury pool will tend to contain less educated people, who may not be fully literate in English. This is a problem because legal terms are complex to understand. Lawyers take almost four years studying such terms. Not only this, but, as mentioned before, Tonga's supreme court has expatriates sitting as judges. The directions and explanations of law are delivered in English and therefore must be translated into Tongan. The proceedings themselves may

³⁵ [2006] TOSC 7 <http://www.paclii.org.vu>.

³⁶ Mark Findlay and Peter Duff, *The Jury under Attack* (1988)116.

³⁷ Kefu, above n 4, 16.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Ibid.

⁴² Clause 28 *Constitution of Tonga*.

⁴³ Clause 28 *Constitution of Tonga*.

be conducted in Tongan or English, depending on ‘what language they [the lawyers] prefer to run the trial in. If it is in English the court interpreters will have to translate [all of the proceedings] into Tongan for the jury.’⁴⁴ This might arouse confusion and may result in juries remaining confused throughout the whole time. ‘A misunderstanding of evidence or legal concepts that result in verdicts that are questionable’.⁴⁵ Furthermore, jury service information is very poor in Tonga. Poor jury service information may make jurors feel intimidated and therefore hinder their following of the trial before them.⁴⁶ These are problems which may lead juries to decide perverse or unreasonable verdicts, which once again undermines the trial process.

Grounds for appeal difficult to prove

Furthermore in the jury system, an obvious problem which Tonga shares with other countries that have this legal institution is that appeals due to inappropriate conduct by juries or jurors are difficult to prove, because confidentiality of the deliberations of the jurors is an important rule to be followed. This was illustrated by the decision in *Paea v Rex*.⁴⁷ In this case, the appellant applied to be released on bail until determination of his appeal. One of the main affidavit evidences where that two of the seven jurors had disagreed with the verdict announced in the court. However the court held that this was inadmissible due to the principle that the court refuses to receive affidavits from jurors purporting to disclose what took place during their deliberations in the jury box because ‘it is essential in the public interest for a number of reasons’.⁴⁸

Inability of juries to be impartial

Whilst the above problems are significant, the most major problem with the jury system in Tonga is the lack of impartiality in the juries. Impartiality is one of the main requirements an adjudicator must acquire when sitting in a trial. It is an important requirement because if an adjudicator remains partial, resulting verdicts of trials brought before that particular adjudicator will be perverse.

Cultural practices

Tonga is a small country with inhabitants of about 98,000.⁴⁹ The smallness of the population strengthens the bonds of family ties, church affiliations and custom

⁴⁴ Interview with court interpreters for the Supreme Court of Tonga, (March 2009).

⁴⁵ Ibid. Kefu provides the following example of an unreasonable verdict, ‘In the criminal case *Rex – v – Lueleni Maka*, Cr.36/2002 (17-22 January 2002, Ward CJ, Nuku’alofa) the accused was charged with offences in relation to forging travel documents. Despite admitting to committing the offence on oath during the trial, the jury acquitted the accused. Two weeks later the accused was arrested by US Immigration authorities for the same charges. He was latter prosecuted in the United States together with other charges, including slavery, and was convicted and is now serving a substantial imprisonment sentence in the United States.’ (Kefu, above n 4, footnote 23).

⁴⁶ Kefu, above n 4, p 15-16.

⁴⁷ [2001] TOSC 3 <http://www.pacii.org.vu>.

⁴⁸ Ibid.

⁴⁹ James and Tufui, *Transparency International National Integrity Systems of the Pacific Country Study Report, Tonga* (2004) 7.

relationships and political groupings.⁵⁰ This makes it quite difficult for potential jurors to be impartial. The custom of *fetokoni 'aki* which can be defined in English as 'the ethos of sharing and caring... remains strong in the Tongan society'⁵¹ which means that people are reluctant to brand others as criminals because of the shame to the family involved, damage to social fabric and the breaking of relationships.⁵² 'To do so would be unkind, or, in Tongan *angakovi*.'⁵³ This custom or practice is seen as a hindrance to the impartiality of a jury. They are required by law to base their decisions on the evidence before the court. With a custom like *fetokoni 'aki*, which is very strong, people may have already held preconceived views on the correct outcome. It should also be remembered that Christianity is very influential in Tonga. Christian principles of forgiveness and absolution complement *fetokoni 'aki*.

Another cultural factor that hinders the impartiality of a jury is the closeness of family ties. 'Demands of relatives and friends are very powerful because they are backed up by social sanctions and tradition'.⁵⁴ One of these powerful social institutions is the *fahu* institution 'by which one has to defer to one's sisters or female cousins in the same generation and their children, or to a female line of ancestry common to one's paternal line.'⁵⁵ This, along with the 'traditional social ethic that it is more becoming to care for one's relatives than oneself'⁵⁶ has been seen as a 'real pitfall for adjudicators in the lower court.'⁵⁷ If this happens to the local adjudicators, it may well be implied that these same pitfalls apply to jurors. It is unrealistic to expect that measures to reduce impartiality during selection of juries and directions during trial can eradicate the influences of custom when a juror serves on jury service.

Media influence

In Tonga media, namely radio broadcasts, newspaper and television can be very influential. They are either owned by one privately or by the government. The bilingual newspaper *Kalonikali*, the radio station *Tonga A3Z* and Television Tonga come under the ownership of the Government. Other newspapers such as *Taimi 'o Tonga*, a bilingual newspaper produced in Auckland, and *Koe Kele'a* a local newsheet and the television station OBN are owned privately.⁵⁸ The independent media is used to voice anti-government criticisms. Such criticisms can easily infect the minds of potential jurors.

⁵⁰ Radio Australia, 'TONGA: Calls for jury trials to be scrapped' (31 October 2007) <http://www.radioaustralia.net.au> (Accessed 7 August 2009).

⁵¹ James and Tufui, above n 49, 10.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ Hingano Helu, 'Independence of Adjudicators and Judicial Decision Making in Tonga' in Guy Powles and Mere Pulea (eds), *Pacific Courts and Legal Systems* (1988) 48, 49.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, 50.

⁵⁷ *Ibid.*

⁵⁸ James and Tufui, above n 49, 8.

In the civil case *Tupou v Saulala*⁵⁹ an interlocutory proceeding was held to decide whether or not the defendants were entitled to have their substantive defamation actions tried by jury. The plaintiff (the Crown) argued that they were not. The reason given by the plaintiff was that the attacks made by the defendants in an article on the front page of the Tonga star newspaper and allegations made in a television programme called check it out, had “poisoned” the minds of potential jurors or influenced them in such a way that the prospect of a fair trial by jury has been put in “serious jeopardy”.⁶⁰

Despite the failure of this argument it does raise an interesting point. After hearing allegations made against a person in the media it is likely that this will influence a jurors view. In the Tongan environment where media is politicised into “pro and anti government” outlets, then a jurors political leanings, coupled with media reports, could undermine impartiality.

Members of the electorate sitting in cases involving members of Parliament

Another contribution to the lack of impartiality or a jury is where members of the electorate are sitting in cases involving elected members of parliament. It has been contested that such cases there is a likelihood of bias of the part of the jury. This was contested by the prosecutor in the case of *Rex v Pohiva*.⁶¹

The accused have elected jury trial and the prosecution has applied for an order that the jury should not be selected from the Tongatapu district where the trial is to be held but from Vava'u. The accused oppose the application on the basis that they should have a jury from this district or, if not, that it should be drawn from a district other than Vava'u.⁶²

The arguments made by the prosecutor were that

1. ‘The political process is such that it is designed for members of the electorate to be influenced by the persons who campaign as candidates especially those elected as their members of parliament... The credibility of the accused is a fundamental issue at trial. Members of an electorate will have already made credibility assessments on the people they do or do not vote for. To have the group elected from this district would undermine the entire trial process.
2. It is undesirable to have a jury on a serious criminal matter which goes to the heart of the constitutional process to be picked from the district that voted two of the three accused into parliament. Any trial picked from that district would have the appearance of being biased in favour of two of their elected members of parliament. ...it would be literally impossible to obtain an impartial jury.’⁶³

⁵⁹ [2004] TOSC 38 <http://www.paclii.org.vu>.

⁶⁰ Ibid.

⁶¹ *Rex v Pohiva* [2003] TOSC 18 <http://www.paclii.org.vu>.

⁶² Ibid.

⁶³ Ibid.

Whilst the prosecutor's arguments failed, they are compelling. There is an obvious potential bias in empanelling a jury from the district that elected for the two accused to be their representatives in parliament.

We can also see acquittals of members of parliament in post-riot trials. On 15 July 2008 one of the Members of Parliament who was charged with eight charges relating to the riots of 2006 were acquitted by a jury on all counts.⁶⁴ A more recent case, which involved the Ha'apai's people representative and four others, also resulted in acquittals. What makes this case particularly awkward is that it was report that the jury only took 30 minutes to reach a decision.⁶⁵ Whilst I am not saying that these decisions were wrong, given that it is reasonable to suspect that juries are going to be biased in favour of people who they have voted for, these verdicts may also be perceived as suspicious.⁶⁶ It is this perception of suspicion that allows that jury to undermine the delivery of justice through the courts.

WHAT IS THE FUTURE FOR THE TONGAN JURY SYSTEM?

In light of these problems, the question to ask is what should the future for the Tonga jury system be? Some lawyers, mainly prosecutors, are of the opinion that it should be abolished⁶⁷ yet others believe that it should be maintained but a few improvements be done⁶⁸ to improve this legal institution. There are so many problems in operating a jury system in such a small country with such a strong culture that it can certainly be argued the best thing to do would be to abolish the jury system. If we are to abolish the jury system what then should Tonga do? There are two possible alternatives Tonga can chose from to replace the jury system. These are to use a judge alone or adopt the use of assessors.

In the Pacific the use of assessors has been more popular than juries.⁶⁹ Assessors often have a role that is merely advisory, particularly in relation to matters of custom, and in this way bring an element of "trial by peers" to judicial proceedings. They differ from juries in that their input is not usually binding on the judge. However, assessors have not been used with great success in many countries. For instance, in Vanuatu, Solomon

⁶⁴ ABC Online, 'Jury acquits Tongan MP of riot-related charges' (15 July 2008) <http://www.abc.ne.au> (Accessed 29 September 2008).

⁶⁵ Radio New Zealand International, 'Five accused found not guilty of sedition in Tonga' (29 March 2009) <http://www.rnzi.com/pages/news.php?op=read&id=45627> (Accessed 7 August 2009).

⁶⁶ It can be noted that not everyone has been acquitted by juries following the 2006 riots. (See, for example, Matangi Tonga Online, 'Five accused found not guilty of sedition in Tonga' (5 December 2007) <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=7&num=3532> (Accessed 7 August 2009).

⁶⁷ Radio Australia, 'TONGA: Calls for jury trials to be scrapped' (31 October 2007) <http://www.radioaustralia.net.au> (Accessed 7 August 2009).

⁶⁸ Kefu, above n 4.

⁶⁹ Eric Colvin, 'Criminal Procedure in the South Pacific' (2004) 8(1) *Journal of South Pacific Law* <http://paclii.org.vu/journals/fJSPL/vol08no1/1.shtml> ((Accessed 7 August 2009).

Islands, Kiribati and Tuvalu assessors are rarely used.⁷⁰ In part this might be because of concerns about the ability of assessors to understand legal proceedings or the ability of assessors to remain impartial. These are the problems that are at the heart of the desire to the jury system.

The other alternative for Tonga would be to have all trials heard by a judge alone. In Tonga there is considerable confidence in the judiciary, which, at superior court level, is made up of expatriates who are appointed by the King.⁷¹ There has been no evidence to prove that judges are appointed upon other things than merit alone. Indeed, politically unpopular judges have received reappointment. In 2003 it was suggested that the Chief Justice be impeached following a case that went against the wishes of the Privy Council.⁷² However following Cabinet's deliberation he was given a further term of contract, as his judgement, although unpalatable to some and against the grain of Tongan custom, was legally unimpeachable.

There is an argument to be made that judges are more impartial than juries in Tonga. The very reason why the King and Privy Council appointed expatriate judges was because local judges were and are easily influenced by the Tongan custom and way of life. They are competent as they understand the law and do not have to have a person to explain to them what the law is. Their decisions are given in writing which allows both parties to a case to see how the judge came about to the decision he made. Furthermore we have the appeal system that may be used when one thinks that the judge erred in law in a given case. This system helps ensure the justice is carried out.

CONCLUSION

To conclude, there is a case to be made that the jury system is a financial burden and has failed to achieve impartiality. As a result it compromises the delivery of justice (in the sense of equal application of the rules to every case) through the courts. The jury system should therefore be abolished. As for the future, my opinion is that using a judge alone is best for Tonga. Assessors have not proven successful in other countries and are also prone to problems of lack of understanding of legal arguments and lack of impartiality. But Judges in the Supreme Court are expatriates and are not influenced by the customs or the Tongan way of living. They are independent and considered to be impartial. There is also a functioning appeal system if people are unhappy with decisions. Would this be enough to ensure justice?

⁷⁰ For an overview of assessors, their use in the Pacific, and difficulties with assessors see *Ibid.*

⁷¹ James and Tufui, above n 49, 8.

⁷² See Michael Field, "Tongan newspaper declares "victory"" (26 May 2003) <http://www.michaelfield.org/tonga4.htm> (Accessed 7 August 2009).