

# THE LANGUAGE OF THE LAWS OF TONGA – WHICH TEXT PREVAILS?

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## Introduction

There is a current debate in Tonga as to which version or text should prevail in situations where there is a difference in meaning between the Tongan text and the English text of a clause of the *Constitution of Tonga 1875*.

On 29 August 2012, the Legislative Assembly mandated its Standing Committee on Legislation to conduct a public consultation on a government bill to amend Clause 8 of the Tongan text of the Constitution of Tonga. Clause 8 provides for the ‘Right to petition’. The amendment proposed by the *Act of Constitution (Amendment) Bill* was intended to ‘fix an obvious typographical anomaly between the English and Tongan versions of Clause 8 of the Constitution.’<sup>1</sup> Because of this alleged typographical anomaly, the English text of the clause is interpreted to give a different meaning from Clause 8 of the Tongan text of the Constitution. The proposed amendment would have resulted in changing the Tongan text to be consistent with the English text.

The proposed amendment to Clause 8 is the first time an issue of this nature has directly confronted the Assembly to make a determination thereon. Because of the strong opposition to the effect of the proposed amendment, the question then was whether the Assembly should ‘consult “the people,” over a proposal to amend the Tongan version of Clause 8...to bring it into line with the English version’.<sup>2</sup> Some members did not see the need to consult the people over this issue, while other members believed that having the people’s say was important because the issue required careful rather than hasty consideration.<sup>3</sup>

Even though the essential question raised by the Bill is whether the English text of Clause 8 of the Constitution should be preferred over the Tongan text, this matter raises issues of wider importance for the purpose of the Constitution of Tonga. That is, where there is conflict or difference between the English text and the Tongan text of the Constitution, should there be a principle as to which is to prevail? Alternatively, perhaps there is a case for saying that each situation of difference of meaning should be considered in light of its own circumstances.

This paper will begin with a brief description of the requirement to publish law in both the Tongan and English languages before it examines the different circumstances in which

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<sup>1</sup> *Act of Constitution of Tonga (Amendment) Bill 2012*, Bill No. 8/2012.

<sup>2</sup> Miniti Fika [Tonga Parliamentary Minutes] 27 ‘Aho 29 ‘o ‘Akosi 2012, 29 August 2012) <http://www.parliament.gov.to/parliamentary-business/hansard-minutes/file/54-miniti-fika-27-aho-29-o-akosi-2012?start=20> (Accessed 13 November 2014).

<sup>3</sup> Clause 79 of the *Constitution* provides for the amendment of the Constitution, except for entrenched provisions relating to the law of liberty, succession to the throne and the titles and hereditary estates of nobles, which cannot be changed. However, pursuant to Rule 131 of *The Rules of Procedure and Standing Orders of the Legislative Assembly of Tonga*, when bills are submitted to the House, the public may be consulted and relevant committee may report and provide recommendations to the Legislative Assembly based on their findings from the public consultations. This includes bills to amend the Constitution. Rules of the House, <http://www.parliament.gov.to/parliamentary-business/rules-of-the-house> (Accessed 13 November 2014.)

differences may arise. It will also analyze Clause 8 and address the issues relating to the law that governs which language would prevail and the extent to which the mixed ages and origins of clauses of the Constitution are likely to cause differences in meaning.

### **Where the law is written in two or more languages**

Before the laws of Tonga were revised and consolidated in 1988, the Constitution of Tonga contained a provision under Clause 32 which provided:

That any nation which has recognized Tonga as a kingdom it shall be lawful for the people from that nation after they have resided in Tonga for the space of two years to take Oath of Allegiance. Such persons shall have the same privileges as the native born subjects of Tonga. And for the benefit of strangers residing in Tonga after the 1<sup>st</sup> January eighteen hundred and seventy-six, any law which may be enacted by the Government shall be printed both in Tongese and English. And if in the arraignment of any foreigner it shall appear that there is a difference of meaning between the law published in English from that published in Tongese, the case shall be judged according to the English version of the law, which shall be held to be the meaning of the law. And should any foreigner be judged and there shall be no Tonga law to meet the case, he shall be judged according to the British law which shall be held to be the law of Tonga in such cases, until a law has been passed by the King and Legislative Assembly to meet the same.<sup>4</sup>

This provision shows that from the early days of the legal system, the Constitution required the law to be printed both in Tongan and English for the benefit of foreigners or strangers residing in Tonga. It is not clear from the terms used in this provision whether this approach was intended to apply to the Constitution. However, it is clear that from January 1, 1876 until 1978, the court had to rely on the English version where a foreigner was charged.<sup>5</sup>

Further, the *Rules of Procedure of the Legislative Assembly* requires that the official language of the Legislative Assembly of Tonga is the Tongan language.<sup>6</sup> This means that bills are published and submitted in both Tongan and English. It also means that discussions and passage of laws in the Legislative Assembly of Tonga are conducted in the Tongan language. Further, the *Laws Consolidation Act 1988*<sup>7</sup> required that laws be published in both English and Tongan.<sup>8</sup>

### **The language problem: Clause 8 of the Constitution of Tonga**

The problems over choice of language under Clause 8 are part of the general difficulty that arises when two texts that should mean the same thing do not.

Clause 8 of the *Constitution* (1988 Revised Edition) provides for the freedom of the public to petition the King and the Legislative Assembly. The Tongan text provides that:

*'Oku ngofua ki he kakai kotoa pe ke fai 'enau tangi.*

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<sup>4</sup> *The Constitution of Tonga 1875*, c 8, in Sione Latukefu, *The Tongan Constitution: a brief history to celebrate its centenary* (1975) Appendix A, 91, 96.

<sup>5</sup> Clause 29, *Constitution of Tonga* (1988 Revised Edition).

<sup>6</sup> Rule 21 of the *Rules of Procedure & Standing Orders of the Legislative Assembly of Tonga*, above n 3.

<sup>7</sup> *Act 42 1988* (Tonga).

<sup>8</sup> *Ibid* section 4(1).

*‘Oku ngofua ki he kakai kotoa pe ke fai ‘enau tohi pe ko ‘enau tohi kole ki he Tu’i pe ki he Fale Alea pea ke fakataha ‘o alea ki he me’a ‘oku ha mai kiate kinautolu ‘oku totonu kenau kole ki he Tu’i pe ki he Fale Alea ko hono tokotu’u pe ko hono ta’ofi kapau ‘oku nau fakataha melino pea ta’e ha mahau tau mo ta’e moveuveu.’<sup>9</sup>*

The above Tongan text allows members of the public to petition the King or the Legislative Assembly on matters that appear to them necessary to petition to the King or Legislative Assembly ‘to establish or to stop’, so long as they meet peaceably without arms and without disorder. Given the structure of the provision, the text is not clear as to what is to be established or stopped.

On the other hand, Clause 8 of the English text of the *Constitution* (1988 Revised Edition) provides that:

Freedom of petition

All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to pass or repeal enactment provided that they meet peaceably without arms and without disorder.

The English text (1988 Revised Edition) provides that members of the public can petition the King or the Legislative Assembly to pass or repeal enactments. There is also no suggestion in the Revised Edition that Clause 8 has ever been amended since 1875.

However, there is a question about the accuracy of Clause 8 in the English text of the Constitution in the 1988 Revised Edition. This concern is raised because of the noted difference between the English text of the Constitution (1988 Revised Edition) and the English version of the Constitution that is appended in Sione Latukefu’s book, *The Tongan Constitution: a brief history to celebrate its Centenary*.<sup>10</sup> According to this version, Clause 8 provides that:

All people shall have the right of writing to or petitioning the King or Legislative Assembly, and assemble and consult concerning things which appear to them necessary to petition to the King or Legislative Assembly for the purpose of making enactments or repealing, so long as they meet peaceably without arms and without disorder.<sup>11</sup>

Arguably, the English Clause 8 in Latukefu’s book places no restriction on the types of issues and redress that a petitioner can pursue under this clause. The problem with this approach is that there is little knowledge of the context and circumstances of the time the clause was written. Hence, it is impossible to be certain whether there were intentions for any limitation on what a petitioner could ask for, to whom the petition should be presented, or any limit to what actual redress could be granted.

Nonetheless, there are two important language issues that could be identified in Clause 8. First, is the question about the law governing which language would prevail when there is an

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<sup>9</sup> This is consistent with the ‘Law of Tonga 1876’, which was published by Government Printer in 1876.

<sup>10</sup> Sione Latukefu, 1975, *The Tongan Constitution: a brief history to celebrate its centenary*, Tonga Traditions Committee, Nuku’alofa.

<sup>11</sup> *Ibid.*

inconsistency between the Tongan and the English texts. Second, there is a need to investigate the origin and the meaning of Clause 8 of the *Constitution*.

### **Law governing which language prevails**

Briefly, the history of the law of Tonga shows two different approaches to the question of which text or language should prevail where there is a difference in meaning between the Tongan text and the English text of a clause of the *Constitution* or a section of an Act of the Assembly.

Before 1978, Clause 32 protected foreigners who might not understand the Tongan language when they were arraigned in criminal cases. However, in an amendment in 1978, the parts of this clause relating to different ‘versions’ were deleted so that, since then, the clause deals only with naturalization.<sup>12</sup>

The issue of language in criminal trials later re-appeared in the *Interpretation Act 1903* (as amended in 1978 and current in the 1988 Revision of Statutes). Section 21 states:

#### **Application of English or Tongan versions in criminal trials**

If upon the trial of any person for an offence against any law of Tonga it is manifest that the Tongan and English versions of the section which the accused person is charged with violating differ in meaning, then, in deciding the question of the accused person’s guilt or innocence the court shall be guided by what appears to be the true meaning and intent of the Tongan version.

As in the case of Clause 29 of the *Constitution*, the terms of Section 21 applied only in criminal trials and not to laws generally.

However, when the laws of Tonga were revised and consolidated in 1988 into series of volumes under the *Laws Consolidation Act 1988*, Section 11 provided:<sup>13</sup>

#### **Construction of Revised Edition**

(2) In the event of any doubt arising with respect to the meaning of any passage in the Revised Edition, or of any difference existing between the English text and the Tongan text of any such passage, the English text shall be held to give the true meaning of such passage.

This general approach to resolving the differences between the languages was intended to be repealed in 2007 by Section 34 of the *Tonga Law Commission Act 2007*, but the Act has not been brought into force, leaving Section 11 unaffected.<sup>14</sup>

Further, Section 21 of the *Interpretation Act* was enhanced in 2009 to provide for the interpretation of laws generally. This process was enabled under the *Law Revision (Miscellaneous Amendments) Act 2009* under Section 8 which repealed Section 21 and replaced it with this new provision:

#### **21 Tongan language version of a law takes precedence**

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<sup>12</sup> Clause 29, *Constitution of Tonga* 1988 Revised Edition.

<sup>13</sup> The Constitution and laws of Tonga are consolidated into a series of volumes every 20 or 30 years, a process which is supervised by the Attorney-General and the Assembly.

<sup>14</sup> The *Tonga Law Commission Act 2007* has been assented to by the King but is not in force.

Where it appears to a court that the Tongan language version of a provision in an Act differs in meaning from the English language version of that same provision –

- a) the court may give the provision its correct meaning and act accordingly if it considers that there has been a simple clerical error or error in translation; or
- b) the court shall treat the Tongan language version of that provision as giving the true meaning of the law if it considers that the difference in meaning goes beyond a simple clerical error or error in translation.

In sum, in the event of a difference between the Tongan text and the English text of an Act, Section 21 requires that the Tongan text prevail if the court considers that the difference in meaning goes beyond a simple clerical error or error in translation. If a court considers that there was a simple clerical error in the translation, the court may give the provisions of that Act its correct meaning; in other words, it has a choice of versions.

In the case of interpreting the *Constitution*, Section 21 is silent on the question of which text is to prevail when there is a difference or conflict between the Tongan and English texts. Arguably, based on Section 21 of the *Interpretation Act*, in the event of difference or conflict between the Tongan and English texts of the *Constitution*, the Tongan text should prevail. This may not be acceptable as a general statement of principle.

There are several references in the *Interpretation Act* to the expression ‘Act’ and ‘Constitution’<sup>15</sup> and similar expressions are also found in the *Constitution*.<sup>16</sup> These clearly show that Acts of Parliament, and not the *Constitution*, were very much in the minds of the framers of the *Interpretation Act* at the time they enacted Section 21. Thus if the framers of Section 21 had intended to extend its application to the differences or conflicts that may arise between the Tongan and English texts of the *Constitution*, one would have expected them to make clear provision in the *Interpretation Act* to that effect, as one of the matters mentioned frequently in the *Interpretation Act* is the *Constitution*. The fact that the drafters of the *Interpretation Act* did not include such a provision in Section 21 when they could easily have done so suggests that they did not intend Section 21 to apply to the differences between the Tongan and English texts of the *Constitution*. As a matter of principle, this is in line with the Court’s position in Tonga that the ‘Tongan version of the Constitution must prevail in cases of conflict with the English version, and no Act can alter this unless by amendment of the Constitution itself’.<sup>17</sup>

The *Constitution of Tonga* does not contain any general provision which deal with the question of which text of the *Constitution*, Tongan or English, prevails in the event of inconsistency. The task is thus left to the judiciary or subsequent amendment.

In 1990, the issue of the conflicts in the English and Tongan texts of the *Constitution* was briefly raised in the case of *Sione Tu’ifua Vaikona v Teisina Fuko*.<sup>18</sup> It was stated that because the *Constitution* was the supreme law, ‘the Tongan version of the Constitution must

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<sup>15</sup> Section 2 of the *Interpretation Act* defines ‘Act’ to include ‘a proclamation, regulation, rule, notice or other instrument made or issued in pursuance of an Act’. It also defines ‘Constitution’ as ‘the Constitution of Tonga granted by his Majesty King George Tupou I on the fourth day of November 1875 as amended from time to time’.

<sup>16</sup> Clauses 19, 41, 91.

<sup>17</sup> *Sione Tu’ifua Vaikona v. Teisina Fuko* (No. 2) TOSC Civil Case No. 14/199, <http://www.pacii.org/>.

<sup>18</sup> *Ibid.* This case involved Fuko submitting his nomination for election as a member of the Legislative Assembly of Tonga. He had not paid a sum of money which the Supreme Court had ordered him to pay in unsuccessful court proceedings. By the time of the elections, at which he was elected, the sum had been paid.

prevail in cases of conflict with the English version, and no Act can alter this unless by amendment of the Constitution itself'.<sup>19</sup>

From the above, if the differences arise in the course of litigation or court action for a declaration as to meaning, the respective parties drive the proceedings and the court lacks the power to investigate more widely in the public interest. In the interests of justice, rules of interpretation are provided for the courts.

In summary, the types of circumstances in which differences may arise include those –

- a) where subordinate legislation differs from its empowering parent statute, or where any legislation differs from the constitution that provides the authorizing power;
- b) where a 'revision of laws' occurs, and the revision commissioner carries out the revision under an empowering statute that provides rules for dealing with differences in text and/or meaning;
- c) where the law is written in two or more languages and differences occur between them; and
- d) in the case of different languages, where a foreigner or a citizen from one language group is disadvantaged unless the criminal law is expressed in a language he is familiar with.

If there are rules of interpretation, they may vary between one type of difference and another. For example, rules for revision of laws may be different from rules for difference in language. Rules for disadvantaged accused in trials are obviously in a class of their own.

Taking this discussion of rules to assist courts further, Parliament should always be aware of the fact that it is the legislature's work in making the law that can risk or cause these problems of difference in the first place, and thus require rules. It is the legislature and not the courts that is the law-maker, so it is up to the legislature to step in and resolve significant problems of difference in meaning when they arise.

### **History: Language in early Constitution draft**

The authority to interpret the *Constitution* and law of Tonga is vested in the judiciary rather than the legislative branch of government. However, where there is doubt as to what happened many years ago, research to the history of the *Constitution* will be necessary. This is because the court may not have investigative powers to call for evidence, as litigation is party-driven.

In the early 19<sup>th</sup> century, King George I was able to establish his control throughout Tonga. This extended control necessitated the introduction of rules that would apply uniformly throughout Tonga.<sup>20</sup> With the help and advice received from Europeans who had come to live in Tonga, laws were produced to control the land.<sup>21</sup> Law-making in Tonga actually began with the Codes of 1839, 1850 and 1862, and King George I had already developed ideas for a constitution when the need arose in the early 1870s. By 1875, it was clear that urgent steps were needed to set up a system of government which would stave off annexation.

The *1875 Constitution of Tonga* is stated to have been based upon British and Hawaiian models to entrench the Monarchy and establish the three branches of government as

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<sup>19</sup> Ibid. No reasons were provided in the decision of this case.

<sup>20</sup> Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (3rd ed, 2011) 2.

<sup>21</sup> Ibid.

Executive, Legislature and Judiciary.<sup>22</sup> Rutherford also mentions that the *Constitution* was based on the Westminster model and the precepts of the Hawaiian Constitution.<sup>23</sup> As a result, the *Constitution* was described as both liberal and conservative, democratic and hierarchical, and was the answer to the challenges that Tonga faced at the time of its promulgation.<sup>24</sup> With assistance from Shirley Baker, who was at the time a missionary and adviser to the King's adviser, the *Constitution of Tonga* was compiled from 1872.<sup>25</sup> This exercise was based on advice from the Premier of New South Wales, Sir Henry Parkers, who provided all the laws of the Government of New South Wales and a copy of the 1852 Constitution of Hawaii.<sup>26</sup>

The *Constitution of Tonga* was granted in 1875 for two main reasons and purposes.<sup>27</sup> First, it was to enable Tonga to gain recognition from the 'civilized' nations and maintain its own independent government to avoid direct colonization; second, to 'maintain efficient administration as a means of attaining internal stability'.<sup>28</sup> King George I wanted Tonga to have 'the type of legal and constitutional machinery which would enable her to gain recognition from the civilized nations and maintain her own independent and stable government'.<sup>29</sup>

A record of how the Tongan and English drafting of the *1875 Constitution* was carried out is attached to the *Constitution* as published by Latukefu, which reads:

This Constitution was originally compiled, at the request of His Majesty King George, by the Rev Shirley W Baker; afterwards amended and completed by His Majesty himself, together with certain alterations made by the Legislative Assembly, 1875.

By His Majesty's request, the Rev S W Baker translated this Constitution from Tongese into English.

'WELLINGTON T GU'  
AIDE-de-Camp.

It is clear from the historical account of the drafting of the *Constitution* that although King George I received advice from both missionaries and non-missionary sources, he still considered, altered and decided what needed to go into the *Constitution* according to what he believed was suitable for Tonga.<sup>30</sup> As a result, the *Constitution* was written in a layman's language and in a form which was perceived to be inconsistent with the legal language of the laws of Tonga.<sup>31</sup> Further, since the inception of the *Constitution* in 1875, amendments were made 'from time to time, but it remains, in substance, the law of the land'.<sup>32</sup> For this similar

<sup>22</sup> Latukefu, above n 4, 45.

<sup>23</sup> Noel Rutherford, *Friendly Islands: A History of Tonga* (1977).

<sup>24</sup> Rodney Hills, *The 1990 Election in Tonga* (1990). Latukefu also posed an important question as to whether there is a need for reform as some of these initial challenges had changed over the years since 1875. Above n 4, 89.

<sup>25</sup> Latukefu, above n 10, 40.

<sup>26</sup> Ibid.

<sup>27</sup> In essence, the Constitution is divided into three main parts, namely: The Declaration of Rights, which lays out the general principles by which the monarch, the judiciary and the government are to conduct themselves; the Form of Government, which details the role and structure of the executive including the Privy Council, the Cabinet and the Legislative Assembly; and 'The Lands', which deals with matters such as the principles of inheritance pertaining to estates, general laws of property and land matters.

<sup>28</sup> Latukefu, above n 10, 8.

<sup>29</sup> Ibid 48.

<sup>30</sup> Ibid 41.

<sup>31</sup> Ibid 89.

<sup>32</sup> J.S. Neill, *Ten Years in Tonga* (1955), cited in Latukefu, above n 10, 88.

reason, Powles stated that a focus on the ‘wording of the Constitution will inevitably give rise to inconsistencies, mainly because the document has been amended in so many places but not re-written in a consistent style’.<sup>33</sup>

### **Analysis: Inconsistencies in Clause 8 (Tongan and English texts) of the Constitution**

The first part of the *Constitution* provides for the Declaration of Rights and functions effectively as a Bill of Rights for the people of Tonga. The Declaration of Rights was adopted from the *Hawaii Constitution* and was incorporated into the *Constitution of Tonga* so that the Tongan citizen would gain ‘a measure of recognition at the expense of the authority of nobles and lesser chiefs’.<sup>34</sup> The implication of this incorporation is that not only do these rights explicitly form part of the domestic law of Tonga, but also that particular decisions and actions can be challenged and actually overturned on the basis of those actions being inconsistent with constitutionally enshrined rights. The Declaration of Rights keeps government powers in check.

To analyze the significance of Clause 8 before the 1988 revision of laws and after, it is necessary to look at the two English versions of the *Constitution*: the 1875 English version published by Latukefu<sup>35</sup> and the 1988 Revised Edition of both the Tongan and the English texts. It is important to compare these texts for accuracy and clarity.

Here are some essential distinctions from these versions:

Clause 8 in the Tongan text (1988 Revised Edition) reads:

*’Oku ngofua ki he kakai kotoa pe ke fai ’enau tohi pe ko ’enau tohi kole ki he Tu’i pe ki he Fale Alea pea ke fakataha ’o alea ki he me’a ’oku ha mai kiate kinautolu ’oku totonu kenau kole ki he Tu’i pe ki he Fale Alea ko hono fokotu’u pe ko hono ta’ofi kapau ’oku nau fakataha melino pea ta’e ha mahafu tau mo ta’emaveuveu.*

This Tongan version is consistent with the Tongan text of the *1875 Constitution* which was published in 1876.<sup>36</sup>

According to Latukefu’s version of the *1875 Constitution* (English version),<sup>37</sup> Clause 8 provides:

All people shall have the right of writing to or petitioning the King or Legislative Assembly, and assemble and consult concerning things which appear to them necessary to petition to the King or Legislative Assembly **for the purpose of making enactments or repealing**, so long as they meet peaceably without arms and without disorder. (emphasis added)<sup>38</sup>

The English text from the *Constitution* (1988 Revised Edition) provides in Clause 8 that:

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<sup>33</sup> Guy Powles, *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga’s Path to Democracy* (2nd ed, 2013) 83.

<sup>34</sup> Latukefu, above n 10, 45.

<sup>35</sup> Latukefu, above n 4.

<sup>36</sup> Kupu 8 ‘o e Koe Konisitutone o Toga 1875 (Clause 8 of *The Constitution of Tonga*, published in the *Law of Tonga 1876* (printed in 1876 Government Printer), provides: ‘8. Oku gofua ki he kakai kotoabe ke fai e nau tohi, be ko e nau tohi kole ki he Tu’I, be ki he Fale Alea. Bea ke fakataha o alea ki ha mea oku ha mai kiate kinautolu oku totonu ken au kole ki he Tu’I, be ki he Fale Alea, ko hono fokotuu, be ko hono taofi, kabau oku nau fakataha melino, bea tae ha mahafu tau, mo tae maveuveu’.

<sup>37</sup> Latukefu, above n 4, 91.

<sup>38</sup> It is not known as to why the two English versions are different.



All people shall be free to send letters or petitions to the King or Legislative Assembly and to meet and consult concerning matters about which they think it right to petition the King or Legislative Assembly to *pass or repeal enactments* provided that they meet peaceably without arms and without disorder. (emphasis added)

The proposed amendment that was recently debated in Parliament is a re-translation of the Tongan text of Clause 8 as a clause that had a couple of words missing, perhaps by oversight, and added the words *ha lao* (enactments) after the words *ko hono fokotu'u pe ko hono ta'ofi* (to establish or to stop).

On the other hand, we should not lose sight of the fact that although Baker drafted the *Constitution* and Tupou I decided the final draft of the *Constitution*, it was Baker who translated from English to Tongan and vice versa. It may well be that the English meaning of the words was the real intention.

A review of the two texts, the Tongan text in the 1988 edition and the English text in Latukefu's book, shows that both convey the same meaning. The English text in the Latukefu book conveys a more precise translation of the Tongan text than the English revised text in 1988. In fact, the Tongan text in the 1988 Edition is not properly worded and is not grammatically in order. When comparing the Tongan text and the English text attached in the Latukefu book, the Tongan text is a direct/verbatim translation of the English text.

### **Do both versions/texts of Clause 8 convey the same meaning?**

Essentially, the real issue that needs consideration is whether the meaning of the two versions actually differs.

Historically, the right to petition under Clause 8 can be traced back to a 1669 UK House of Commons resolution that states:

...it is an inherent right of every Commoner of England to prepare and present petitions to the House in case of grievance; and of the House of Commons to receive them...<sup>39</sup>

The exercise of this right involves more than just the formal presentation of a petition to Parliament; rather, it involves people meeting to discuss their grievances, preparing and signing statements of their grievances and dissent, and petitioners going together to present their petition to Parliament.<sup>40</sup> The then-Prime Minister of Britain, William Pitt, stated during a House of Commons debate in 1795 that:

[N]o-one would venture to deny the right of the people to express their opinions on political men and measures, and to discuss and assert their right of petitioning all branches of the legislature; nor was there any man who would be farther from encroaching on that right than himself. It was undoubtedly a most valuable privilege...<sup>41</sup>

In effect, the right to petition the King and Parliament is a way to protest about a matter or a right to request action for the redress of grievances provided that it is within the power of the King and the Parliament to address those grievances. Clearly from the deliberations in the

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<sup>39</sup> D Fellman, *The Constitutional Right of Association* (1963) 4–5, citing *Cobbett's Parliamentary Debates* (1669) 432–433.

<sup>40</sup> W S Holdsworth, *A History of English Law* (1938) 700.

<sup>41</sup> House of Commons, *Parliamentary History* (1795) vol 32, 274.

Legislative Assembly of the proposed amendments to Clause 8, the difference between the original Tongan text of the *Constitution* and the English text is very significant and not just ‘a simple clerical error or error in translation’.<sup>42</sup>

The terms *fokotu’u* and *ta’ofi* are translated in the English text (Latukefu book) as ‘enactments’ and ‘repealing’, respectively. The terms ‘enactments’, ‘enact’, ‘enacting’ are used throughout the *Constitution* in both English texts. However, the Tongan translations for these words are used interchangeably, depending on the context, to mean *fokotu’u* or *tu’utu’uni*. The terms ‘repealing’ and ‘repeal’ are used to mean *ta’ofi* or *tamate’i*. The use of these terms in the *Constitution* does not suggest the meaning of ‘enactment’ as a process of law being made official. Rather, the usage of the terms, ‘for the purpose of making enactments or repealing’ appearing in the English text (Latukefu book) is a reasonable translation of *ko hono fokotu’u pe ko hono ta’ofi*.

The Tongan text is less precise in meaning and is open to wider interpretation than the English version. In the Tongan text, the term *fokotu’u* suggests the meaning to ‘advance’ or ‘establish’ or ‘propose’ something to the King or the Legislative Assembly. The use of the term ‘repeal’ suggests a meaning of putting a stop to matters generally, not necessarily matters related to or confined to statutes.<sup>43</sup> Given that the history of *Constitution* was adapted from the *1852 Kingdom of Hawaii Constitution*, the relevant provision on the right to petition provides under Article 4 that:

All men shall have the right, in an orderly and peaceable manner to assemble, without arms, to consult upon the common good; give instructions to their Representatives; and to petition the King or the Legislature for redress of grievances.

Using this approach to interpret Clause 8 of the *Constitution* (Tongan text), it could be argued that Clause 8 was never intended to restrict the right to petition to ‘passing or the repealing of enactments’ or *ko hono fokotu’u pe ko hono ta’ofi ha lao*. Rather, this right was there for the people, provided that they ‘assemble in an orderly and peaceful manner without arms’, to ask the King or the Legislative Assembly for some redress to their grievances.

On the other hand, the English version of Clause 8 (1988 Edition) is literally interpreted to allow the people to petition the King or the Legislative Assembly only ‘to pass or repeal enactments’. In this light, during the parliamentary debates over the bill to amend the Tongan text, some parliamentarians interpreted the English version to import an element of restricting the right to petition only to matters relating ‘to pass or repeal enactments’.<sup>44</sup> This means that Clause 8 only allows people to petition on matters related to enactments. On analysis, it could be argued that although the provisions of the *Constitution of Tonga* use broad language, they cannot be protected absolutely: they often explicitly allow for ‘reasonable’, ‘justified’ or ‘necessary’ restrictions for particular purposes, and even if this is not the case, the courts will often infer the existence of such restrictions.<sup>45</sup>

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<sup>42</sup> *Act of Constitution of Tonga (Amendment) Bill* (No. 8/2012) and the Explanatory Notes.

<sup>43</sup> Pesi Fonua, ‘Tonga’s House Debates Language of Constitutional Clause’ (2012) <https://web.archive.org/web/20141009052500/http://pidp.org/archive/2012/September/09-06-10.htm>.

<sup>44</sup> Pesi Fonua, ‘Tonga Constitution ambiguous on right to petition King’ *Matanagi Tonga* (Nuku’alofa, Tonga) 2 August 2013 <https://web.archive.org/web/20141009033701/http://www.islandsbusiness.com/news/tonga/2200/tonga-constitution-ambiguous-on-right-to-petition/>.

<sup>45</sup> For instance, the case of *Taione v Kingdom of Tonga* [2004] TOSC 47; [2005] 4 LRC 661, <http://www.paclii.org/>.

However, it was further noted that despite the restrictive nature of the English text, in practice, people do exercise this right without any restrictions on subject, but the Speaker and the Clerk make the final decision as per Clause 62<sup>46</sup> and in accordance with Division 6 of the *Rules of Procedure and Standing Orders of the Legislative Assembly of Tonga*.<sup>47</sup>

As a matter of principle, Clause 62 is a procedural provision for the exercise of the right under Clause 8, which only applies to petitions submitted by members of the Legislative Assembly. The rules of procedure do not place any distinctions on the subjects or substance but rather emphasize the form that the petition must take before it is read in the House. Thus, the proposal to narrow down the meaning of Clause 8 under the bill to amend the Tongan text to align with the English text could be argued as unreasonable, unjustified or unnecessary.

On analysis, it can therefore be argued that the two texts do not convey the same meaning. The English text of the provision conveys a more precise and restricted meaning compared to that conveyed by the Tongan text. The difference in the wording of Clause 8 of the Tongan text and the literal translation back into the Tongan of the English text becomes clearer.

### **Constitution texts: which is to prevail?**

Again, one would have thought that if the framers of the *Interpretation Act* had intended the Tongan text of the *Constitution* to prevail over the English text in case of difference or conflict, the Act would have made a provision to that effect. But there is no such provision in the *Constitution*, or in the *Interpretation Act* for that matter.

This means that we have to consider the factual evidence as to whether the *Constitution* was drafted in the Tongan language and translated into English or vice versa.

From the postscript by the King's Aide-de-Camp to the 1875 English version set out earlier, it is clear that the original text of the *Constitution* is the Tongan text, which can in itself be argued to be a uniquely Tongan document,<sup>48</sup> although the contents were adopted and borrowed from English and foreign sources. However, it was clear that the framer of the 1875 *Constitution* usually considered these foreign sources and modified them to fit and be suitable for Tonga. From the above extract, the English text is a translation of the original Tongan text of the *Constitution* prepared by His Majesty, George Tupou I. In such a case, if there is a difference or conflict in meaning between the original Tongan text of the *Constitution* and its English translation, the Tongan text should prevail.

It is the traditional task of the Court when construing a statutory provision to ascertain the intention of the legislature from the words used by the legislature in the statutory provision. Here, the words of the *Constitution* used by the legislature are in the Tongan text of the *Constitution*; the English text is a translation.

### **Conclusion**

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<sup>46</sup> Ibid. Clause 62 provides for the Rules of Procedure of the Legislative Assembly where under clause 62(2), it provides that 'Any member of the Legislative Assembly may, in accordance with its rules of procedure – (a) introduce a Bill in the Assembly; (b) propose a motion for debate in the Assembly; or (c) present a petition to the Assembly, - and it shall be dealt with in accordance with the Assembly's rules of procedure.'

<sup>47</sup> Under Rules 120-124 of the *Rules of Procedure and Standing Orders*, a petition must conform to certain requirements such as: any petition must be presented by a member 'who shall sign his name at the beginning thereof; ensure that it – conforms with these Rules and Orders of the Legislative Assembly; respectful; decorous and temperate in its language'.

<sup>48</sup> *Moala v. Kingdom of Tonga* [1996] TOSC 6; C 1076.9, <http://www.paclii.org/>.

The Bill to amend the Tongan text of Clause 8 was referred to the Standing Committee on Legislation in 2012 for public consultation as to whether the people would agree with the amendment or not.<sup>49</sup> The report<sup>50</sup> of this Standing Committee after public consultation shows that there is a strong discontent over the proposed amendment to the Tongan text and also the general approach to interpretation when there is a conflict between the Tongan text and English text of the *Constitution*; that is, the Tongan text should prevail.

However, it should be noted that even if the proponents of latest English version say that the references to ‘enacting and repealing’ are there to show that that is the only remedy a citizen can have in the Assembly, this may still be incorrect. This is because the Legislative Assembly’s opportunities to promote and often secure redress can be carried out by committees in accordance with the Rules of the Legislative Assembly. Clause 65 of the 1875 *Constitution* empowers the officers of the Assembly to make rules in connection with their meetings ‘in accordance with the usages of other legislatures’. In 1975 and 1988 revisions, Clause 62 mentions rule-making power without further comment, and it is the *Act to Amend the Constitution*<sup>51</sup> that expands the provision again to specifically empower a member to introduce a bill, propose a motion or present a petition.

In the particular case of Clause 8, it is possible that the translator who purported to place limitations on petitions by requiring bills or repeals to follow, must have mixed up the actions and the outcomes. Prior to 2010, the person who translated the original Clause 8 from Tongan to English was careless in the examples he gave for limiting petitions. However, this is a problem that should be investigated by the legislature with a view to forming a policy on what it thinks should be its appropriate function in relation to citizen’s petition.

The broader question of how to interpret differences in meaning of two languages may need attention and amendment to the Constitution may be necessary. However, before attempting to draft suitable rules, the relevant Committee of the Assembly should be tasked with investigating and reporting on the extent to which the mixed ages and origins of clauses of the *Constitution* are likely to cause differences in meaning to arise.

It may also be advisable to redraft both texts of Clause 8 to ensure that the people can petition the King and Parliament on any issue of public importance. A petition must seek action which the Assembly is empowered to take, but Clause 62 shows us that bills, motions and petitions are separate remedies always possessed by the House. However, it should be noted that a ‘clause-by-clause’ approach may take some time. Ideally, the Government and the Legislative Assembly would now bring the *Tonga Law Commission Act*<sup>52</sup> into force, and the proposed constitutional clause review could be assigned to it. Alternatively, the Legislative Assembly has law and Legislation Committees which can organize research on behalf of the Legislative Assembly to get the true understanding of the Constitution.

Nonetheless, it is clear that Tonga’s *Constitution* and laws need to be re-written in a more consistent manner. Perhaps, it is best that the Legislative Assembly of Tonga consider an amendment to the *Constitution* by including a specific provision which clearly expresses the Tongan text as the authoritative text in the case of difference. Examples of explicit

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<sup>49</sup> Above n 2.

<sup>50</sup> Lipooti Fika 1/2913 ‘a e Komiti Tu’uma’u ki he Lao, Standing Committee on Legislation, Parliament of Tonga, Report No. 1/2013 (2013).

<sup>51</sup> *Act to Amend the Constitution 2010* (Tonga).

<sup>52</sup> *Law Commission Act 2007* (Tonga).

constitutional provisions addressing inconsistencies in the different versions/texts of a constitution are available in Samoa's *Constitution 1960*.<sup>53</sup>

Having said that, we have to be mindful that recent laws<sup>54</sup> are normally drafted in English and are very technical. It is acknowledged that the Tongan translation may not be able to capture the meaning or the intention of the English version for obvious reasons. Giving due regard to these language and translation complexities, the Legislative Assembly of Tonga needs to exercise caution in preventing injustice arising from a Tongan translation that deviates significantly from the English version of a law of Tonga.

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<sup>53</sup> *Constitution* (Samoa) art 112: 'Authoritative texts – The Samoan and English texts of this Constitution are equally authoritative but, in case of difference, the English text shall prevail'.

<sup>54</sup> For example, *The Customs Act 2006* (Tonga).