

# TESTING TRADITION IN TONGA: APPROACHES TO CONSTITUTIONAL CHANGE

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*La Constitution de Tonga, en vigueur depuis 1875, est l'une des plus anciennes du monde. Pour la première fois de son histoire, elle fait l'objet de sérieuses critiques tout autant de la part de la population tongienne que des membres de ses diasporas installées en Nouvelle Zélande, en Australie ou encore aux États-Unis.*

*Depuis les dernières élections générales de 2005, les tenants du maintien du système antérieur s'opposent régulièrement, et parfois avec violence, aux réformistes qui réclament une plus grande démocratie. Ce climat politique et institutionnel extrêmement tendu, empêche les leaders tongiens d'entreprendre efficacement les réformes institutionnelles dont certaines semblent pourtant s'imposer aujourd'hui.*

*Ces événements donnent à l'auteur, l'opportunité de rappeler le contexte historique spécifique de Tonga qui a permis depuis plus de 130 années, le maintien dans le Pacifique Sud d'un régime monarchique, d'indiquer aux lecteurs la nature et l'étendue des changements politiques d'ores et déjà apparus depuis 2000 et enfin de s'interroger sur la portée réelle des réformes constitutionnelles demandées voire annoncées.*

*The Constitution of Tonga,<sup>1</sup> 132 years old in 2007 – indeed one of the world's oldest extant constitutions – has recently, for the first time in its history, been subjected to significant scrutiny by the people who live under it. The review process has also canvassed the views of the thousands of Tongans who live in the diasporas of New Zealand, Australia and the USA.<sup>2</sup> However, in the context of an increasingly polarised political debate, the translation of the outcome of that process*

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1 Constitution of Tonga 1875.

2 *Tonga: For the Enrichment of the Country* Report of the National Committee for Political and Constitutional Reform, Nuku'alofa, 31 August 2006.

*into constitutional change is proving a difficult task for Tonga's leaders, and the two years that have elapsed since the general elections of March 2005 have been among the most momentous in history.*

*This paper attempts to stand back from the trauma and hurt of recent events and to ask some underlying questions. How is it that the Pacific region is home to a monarchical system that still rules its people, and what has been the secret of its success? What are the changes to the political structure that are already occurring this century? Finally, what order of change is in the air – will it be constitutional reform on a major scale?*

*While considering these questions, this paper also offers a Political Chronology in its Appendix, as a summary of the events through the 1990s and early 2000s which culminated in the formal process of constitutional reform and the current scene. These years have witnessed diverse developments on the Tongan political stage, which, when considered against the backdrop of conservative society, must be regarded as remarkable.*

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To the outside world, the Kingdom of Tonga has seemed a peaceful, rather 'off the beaten track' sort of place, where its homogeneous, monolingual, Christian, Polynesian-style culture is enjoyed today by around 105,000 people, more literate in their own language than the citizens of any other Pacific Island state. The late King, Taufa'ahau Tupou IV, who had reigned since 1965, died on 11 September 2006 not long after celebrating his 88<sup>th</sup> birthday. His influential elder son and daughter had become controversial figures for their major involvement in commerce and accumulation of wealth, and in 2005 the younger son was obliged to resign as Prime Minister, leading to the appointment of a well educated businessman, the first PM not to possess royal or noble connections. Tupou IV was succeeded by his heir Crown Prince Tupouto'a who became King Siaosi Tupou V. Earlier, the Crown Prince and another 'royal', the late King's nephew, supported a response to long-standing pressure for a more democratic system of government,<sup>3</sup> and a major initiative was taken when Parliament in October 2005 appointed a committee to consult with the people and make recommendations "relating to political and constitutional reforms ... with a view to building national unity and promoting the social and economic advancement of the people of Tonga".<sup>4</sup>

Tonga, and its progress along a path towards parliamentary democracy, were dealt a cruel blow by certain tragic and catastrophic events on 16 November 2006 when a large part of downtown

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3 In the March elections, seven of the nine People's Representatives elected to the Legislative Assembly (frequently described in the Constitution as Parliament) were members of the Human Rights and Democracy Movement in Tonga (HRDMT). The 'royal' support referred to is not documented, rather inferred from language used in speeches and occasional remarks.

4 The National Committee on Political Reform, chaired until 6 July 2006 by the late Prince Tu'ipelehake, a nephew of the late King and regarded as a progressive member of the royal family, reported to the King and then to Parliament later in 2006.

Nuku'alofa was burned to the ground, and pro-democracy activists, including several People's Representatives in the Assembly, were blamed for what occurred.<sup>5</sup>

## ***I HISTORY AND CULTURE***

Settled over 3,000 years ago, Tonga and Samoa are at the historical base and traditional heart of the growth and spread of Polynesian civilization. It was from these two archipelagos that, about 1,700 years ago, the great sailing canoes made their way east to the Marquesas and thence to Hawaii, Tuvalu, the Cook Islands and New Zealand. Long periods of isolation between groups of islands fostered distinctive language and cultural development, resulting today in the several Polynesian nation-states and territories. In the sixteenth and seventeenth centuries Tonga wielded extensive naval power in other archipelagos, particularly Samoa and the Fiji group.

In common with most other parts of Polynesia, Tonga possessed a vigorous traditional organization of a hierarchical nature and extensive kinship groupings and allegiances which were conducive to the formation of broad bases of power. Disruptive warfare within Tonga, between competing dynasties of hereditary chiefs, caused the severance of many of the ties linking groups of people with their leaders and the land. Thus, social classes developed and in the 19<sup>th</sup> century Tonga's chiefly system readily became highly centralized. With the support of missionaries, Tafua'ahau, as the inheritor of a regional chiefdom, established his claim to the title Tu'i Kanokupolu in the then most powerful Tongan lineage. By 1845 he had unified Tonga under his leadership as King George Tafua'ahau Tupou I.

A measure of Tafua'ahau's success was the early international recognition of his sovereignty in the form of treaties with France, Germany, Great Britain and the USA, thereby forestalling any attempt to claim Tonga as a colony. A major underlying purpose of the Constitution of Tonga of 1875 (significant for its subsequent interpretation in the courts) was to demonstrate to the world that Tonga possessed the institutions of government and political stability necessary to govern itself in acceptable fashion without outside interference. One step was to relegate all rival chiefs to a status subordinate to that of the monarch, who would hold sole power to confer and remove hereditary titles. Thus the Constitution entrenched the status of twenty of them as hereditary nobles<sup>6</sup> to control parliament and, together with a further six hereditary estate-holding chiefs, to control much of the land. The three classes officially created and entrenched in law were thus the 'royal family', the 'nobles' and the 'commoners'.

When he ascended to the throne in September 2006, today's King ruled under basically the same constitutional principles that his great-great-great-grandfather had established. The form of

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5 Five People's Representatives have been committed to the Supreme Court for trial on the charge of sedition. See Appendix under "2007 May and June".

6 The number of titles is now increased to 33, but, with some multiple title-holding, held by 28 to 30 individuals.

government under the King was intended to reflect the Westminster model of responsible cabinet and independent judiciary. In fact, of course, cabinet was responsible to the King instead of Parliament. Initially, as the advisers, administrators and clerks were from Britain, Australia and New Zealand, as were the highly influential Protestant missionaries, the legal system assumed a very British appearance, which was enhanced in 1891 and again in 1903 by the consolidation of all laws into codes in both Tongan and English. Financial instability and dissension between church groups brought British intervention in 1887, and the proclamation of Tonga as a British "protected state" in 1900. Read together, the Treaty of 1900 and Supplementary Agreement of 1905, which the British forced Tupou II to sign, appear to have been superimposed as supreme law. However, Great Britain chose for the most part not to interfere directly, and Tonga administered its own affairs. During Queen Salote's reign, British influence diminished. The 1900 Treaty and 1905 Agreement were revoked in 1958, and Tonga regained full sovereignty and independence in 1970.

The Kingdom of Tonga has had a record of stability since 1875, succession to the throne and changes in the composition of its government have always been in accordance with the Constitution, and its armed forces have never been used against its citizens. This remarkable feat has been due in large part to the unique amalgam of traditional and introduced values and accompanying laws which was adopted and ultimately accepted by the populace at large. Before exploring how this was accomplished, a quick look at the constitutional provisions for government is called for.

## **II A SNAPSHOT OF THE CONSTITUTION**

After setting out a detailed declaration of rights, the Constitution goes on to provide for the form of government (Monarch, Privy Council, Cabinet, Legislative Assembly and Judicature) and matters related to land and succession. In short, the Monarch is Head of State, Head of the Executive and Commander-in-chief of the Forces. While most of the various powers and responsibilities associated with the office called Monarch, Sovereign, King (or "Tu'i" in Tongan) are contained in the Constitution, nevertheless some of the more traditional attributes of status and chiefly responsibilities of the head of the highest and most respected lineage in Tonga are unwritten. These are part of the customary law of Tonga, and the Monarch thus combines traditional status with constitutional office.

The pre-eminent status and powers of the Monarch are recognised in the Constitution in emphatic ways. For example:<sup>7</sup>

- It was the reigning Monarch who, in 1875, "granted" the Constitution to the people of Tonga.<sup>8</sup>

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<sup>7</sup> The references in this paragraph are to the latest reprint of the Laws of Tonga 1988 (which are now accessible online <<http://legislation.to/cms/home.html>>. The Constitution of Tonga 1875 has been amended many times (see n 34 for further discussion).

- The Constitution guarantees perpetual succession to the lineage of the Monarch (clause 32).<sup>9</sup>
- The sovereignty of the Monarch is declared in terms of absolute authority ("Pule") to govern Tonga and its people (clauses 17, 31 and 41).
- An important aspect of this authority is the Monarch's power over the Prime Minister and Ministers who are responsible to the Monarch for administering the government in Privy Council and Cabinet. The Monarch may appoint and dismiss at any time (clause 51).
- Similarly, in relation to the law-making process, no law may be made by Parliament without his assent (clause 56).
- The Monarch may make treaties with foreign states (clause 39).
- All land is the property of the Monarch (clause 104); the Monarch alone may grant hereditary noble titles and estates (clause 44 and 104); and such an estate will revert to the Monarch in the absence of an heir (clause 112).
- The reigning Monarch cannot be impeached (clause 41).
- The Constitution which protects the Monarch cannot be changed without his consent (clauses 67 and 79).

It is also clear that few, if any, unwritten constitutional conventions have applied in Tonga, which means that the Monarch's consent cannot be presumed or inferred. The reality in Tonga is that the Constitution confers absolute powers on the Monarch who can choose whether to exercise them in person or to delegate them to others. While the Monarch is not concerned with the details of the day-to-day government of the country, the Monarch has the constitutional power to intervene at will.

Today, the Legislative Assembly, or Parliament, comprises the members of the Privy Council (as many Cabinet Ministers as the Monarch appoints, plus two Governors), nine elected by the nobles of the Kingdom and nine elected by the commoners.<sup>10</sup> After the election in 2005, the late King exercised his prerogative to appoint to Cabinet two of the Nobles' Representatives and two of

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8 The only other constitution in the Pacific to have been conferred upon the people by the head of a local traditional royal dynasty was that of the Hawai'ian Islands when King Kamehameha III consolidated his rule with the first Pacific Constitution of 1852. The histories of the two countries then diverged dramatically when the Hawai'ian monarch was overthrown in 1893, mainly by American 'business revolutionaries'.

9 On the death of King Tupou V, his eldest son ascended directly to the throne by virtue of clause 32 (see the Appendix). Despite some media conjecture, there was no vacancy, hiatus or possible legal intervention.

10 Until 1914, all nobles (30 at that time) had been members, together with an equal number of peoples representatives.

the People's Representatives for the life of the current Parliament.<sup>11</sup> By this means, the government said that Cabinet would be more representative of Parliament, and for many years now it has been the practice of the King to appoint to Cabinet some experienced commoners from outside Parliament. The provision remains that the Ministers are deemed to sit "as nobles".<sup>12</sup> The Legislative Assembly possesses a range of powers in relation to its own proceedings and functions defined in the Constitution.

To sum up, the provisions of the Constitution reveal four realities in relation to the Legislative Assembly:

- (1) First is the very limited representative character of the Assembly. Only nine members represent the great body of Tongan citizenry.
- (2) The Prime Minister and Ministers, although members of the Assembly, inevitably feel they owe their primary responsibility to the Monarch who appoints and may dismiss them.
- (3) Despite the autonomy which the Assembly enjoys in the control of its own proceedings, it lacks full control over the law-making process. The Monarch's assent is required, and the support of the Executive is essential to the law-making process in two further ways. The rules of the Assembly require that Bills be prepared and presented to the House by Ministers of the Cabinet. While there is provision for private members' petitions to be lodged, debated and endorsed as recommendations or rejected by the Assembly, there is none for private members' Bills. Then, although the practice in routine matters is for the wishes of the majority of the Assembly to be respected, the Monarch retains ultimate authority through royal powers of dissolution (of the Assembly) and dismissal (of Ministers and Governors). The principal power of the Legislative Assembly in relation to the Executive is that it may delay or decline to pass the appropriation Bills. Ministers may be subjected to questioning.
- (4) The fourth reality is the limitation on the powers of the Assembly to deal with certain areas of law such as those relating to the Monarch, the Royal Family and the titles and inheritances of the nobles.<sup>13</sup> While, in practice, the nobles have not insisted that people's representatives be excluded from the voting process on these matters, the reality is that the legal status of the Monarch and nobles is protected against changes in the law if they wish to exercise their constitutional rights.

This snapshot of the Constitution must also highlight the Judiciary (appointed by Monarch and Privy Council) which has commanded respect in Tonga during at least the past 50 years, for its

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11 This meant that there had to be by-elections to replace them in Parliament – and that they would have to recontest their seats at the next election.

12 Constitution of Tonga 1875 cl.51.

13 Constitution of Tonga 1875 cl.67.

integrity and a welcome detachment from Tongan politics.<sup>14</sup> The judges have contributed significantly to benign interpretations of the Constitution, and, while acknowledging its realities and applying the written law, they have been able to draw on significant common law and liberal reasoning to do justice, particularly between citizen and government. In recent years, particularly 1988 to 2005, the Supreme Court and Court of Appeal have consistently applied the principles of judicial review to government action, including dismissal of an employee by the Crown<sup>15</sup> and the making of an ordinance and order-in-council by the Privy Council.<sup>16</sup> Controversially, the courts have upheld the rules of natural justice and thwarted government attempts to muzzle the media. The thread running through the judgments is that all exercise of power in Tonga, including that of the King, may be tested against the law, and the Constitution in particular.

### **III ACCOMMODATION OF INDIGENOUS AND INTRODUCED VALUES**

To return to the Tongan 'amalgam', comparison with the development of law in other Pacific jurisdictions may be made. At the time when most Pacific constitutions came into effect between 20 and 40 years ago, there was an obvious distinction, even gulf, between the customary law that had persisted during colonial times and the British or American common law. Still today, if you visit Fiji, Samoa, or the Solomon Islands, you will find that the customary law of the landholding groups, including aspects of chiefship, governs their relationships, while laws have been imported to deal with most criminal and business matters. Laws dealing with government are Western-style, with some local customary features. Constitutions usually indicate in what areas customary law applies: such as land and traditional authority. It is true that the British-style courts have generally been slow to recognise customary law, and accommodation between indigenous and introduced values in Pacific societies remains a slow process, but it does progress, but it does progress. The Tongan experience was, and still is, rather different.

### **IV EARLY ACCOMMODATION IN TONGA**

In consequence of Tonga's Constitution of 1875, an accommodation between Tongan traditional law and European-style law was further consolidated over the subsequent lengthy period.<sup>17</sup> It is

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14 There has usually been one Supreme Court judge, as the Chief Justice, and sometimes a puisne judge, appointed on contracts of three to five years. They have typically been British, having begun their careers as barristers in the UK, and joined more recently on occasions by lawyers from New Zealand.

15 *'Akilisi Pohiva v The Prime Minister and Kingdom of Tonga* (Supreme Court Civil Case 7/86 – 6 May 1988, Martin CJ).

16 *Siosiuua 'Utoikamanu and Kingdom of Tonga v Lali Media Group Ltd & others* [2003] TOCA6 (Court of Appeal – 25 July 2003).

17 Guy Powles "The Early Accommodation of Traditional and English Law in Tonga" in P Herda, J Terrell, and N Gunson (eds) *Tongan Culture and History* (1990) 145.

often noted that the Tongan Constitution makes no explicit reference to Tongan customs or cultural values. The only sources of law referred to in the Constitution are:

- the Constitution itself,
- the Acts and Ordinances of the Kingdom,
- the statutes of general application in force in England, and
- the common law of England and the rules of equity.

If there is any gap in the statutory laws of Tonga, the judges have always assumed that the courts will apply the common law of England and the rules of equity. The only reservation which gives judges some discretion in filling the gap in Tongan laws is that the English law is to be applied 'only so far as the circumstances of the Kingdom and of its inhabitants permit and subject to such qualification as local circumstances render necessary'.<sup>18</sup> It seems, however, that there is no authority for the courts to incorporate Tongan custom into the law.<sup>19</sup>

If the only customs and cultural values relevant to Tonga's Constitution are those that are already 'sealed' into it, what implications does this have for approaches to the task of reforming it? There are at least three factors to be considered. To start with, one must look within the Constitution itself to identify values and their scope. Secondly, what assessments have been made by Tongan leaders of the values they see as operating in this field? Thirdly, what is the significance of constitutional amendments made over the years?

#### **V CULTURAL VALUES INCORPORATED INTO THE CONSTITUTION**

The Constitution of Tonga has always incorporated certain cultural principles. The pre-eminence of the Monarch and the status of nobles are reflections of aspects of traditional cultural Tongan thinking about chiefly leadership.<sup>20</sup> Privileges accorded to them in the parliamentary process have been mentioned. Indeed, under the Constitution the law-making process is within their control. From the New South Wales lawyer St Julian,<sup>21</sup> Tupou I found that this Tongan approach to ultimate authority was well expressed in the Hawai'ian Constitution of 1852, and he adopted clauses from that source.<sup>22</sup> By way of illustration, here is a comparison of some articles from the Constitution of Hawaii 1852 with clauses from the subsequent Constitution of Tonga 1875.

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18 The Constitution says merely that the Supreme Court has jurisdiction "in all cases in Law and Equity arising under the Constitution and Laws of the Kingdom..."(cl.88).

19 Guy Powles "The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia" (1988) 10 University of Hawaii Law Review, 105.

20 Sione Latukefu *The Tongan Constitution: a Brief History to Celebrate its Centenary* 1975.

21 Charles St Julian, Official Report on Central Polynesia 1857.

22 See above n 8.



- (i) A comparison of clauses relating to the form of government under the Monarch and his personal sanctity and power:

<p>HAWAII 1852 <b>Form of government</b> Article 22 The Government of the Kingdom is that of Constitutional Monarchy, under His Majesty Kamehameha III. His Heirs, and successors</p>	<p>TONGA 1875 <b>Form of government</b> Clause 34 The form of Government for this kingdom is that of a Constitutional Government under his Majesty, King George Tupou, his heirs and successors</p>
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<p>HAWAII 1852 Article 35 The person of the King is inviolable and sacred; His Ministers are responsible; to the King belongs the Executive power; all laws that have passed both Houses of the Legislature, for their validity, shall be signed by His Majesty and the Kuhina Nui; all his other official acts shall be approved by the Privy Council, countersigned by the Kuhina Nui, and by the Minister to whose Department such act may belong.</p>	<p>TONGA 1875 Clause 44 The person of the King is sacred. He governs the land, but his Ministers are responsible. All laws that have passed the Legislative Assembly must have His Majesty's signature before they become law.</p>
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- (ii) A comparison of clauses relating to his sovereignty over the chiefs and his prerogative to appoint and dismiss ministers, who are therefore responsible to him:

<p>HAWAII 1852 Article 36 The King is Sovereign of all the Chiefs and of all the People; the Kingdom is His.</p>	<p>TONGA 1875 Clause 47 The King is the Sovereign of all the Chiefs and all the people. The kingdom is his.</p>
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<p>HAWAII 1852 Article 51 The Ministers of the King are appointed and commissioned by Him, and hold their offices during His Majesty's pleasure, subject to impeachment.</p>	<p>TONGA 1875 Clause 55 ... It is the prerogative of the King to appoint the Ministers. They shall hold their position during the pleasure of the King. It shall be lawful to impeach the Ministers by the Legislative Assembly.</p>
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As far as chiefs other than those associated with the royal lineage are concerned, the Tongan Constitution placed strict limitations on the power of the nobles and other chiefs with hereditary estates, and treated all lesser chiefs as "commoners". There were no such provisions in Hawaii.

## VI ASSESSMENTS OF CULTURAL VALUES AND HISTORICAL CONTEXT

The first person to ascribe meaning and purpose to the Constitution was its founder, Tupou I, and much research has been published on the reasons that impelled its founder to make the provisions in the document that he did.<sup>23</sup>

To summarise, it seemed essential to Tupou I that the Constitution should:

- continue the work of earlier codes of law in breaking the power of competing chiefs, while securing their participation in the State under his control;
- establish a citizen-State relationship from which all Tongans would benefit (to varying degrees);
- secure his own authority and lineage;
- protect all land from sale or other alienation; and
- generally convince the imperial powers that they need not interfere in Tonga.

It is agreed that Tupou I began his work with the need to secure his position in Tonga, and realised very soon how crucial it would be to have a European-style constitution that would keep imperial powers at bay. He appeared to have achieved these objectives.<sup>24</sup>

Apart from identifying these historical objectives, very few studies appear to have turned their attention to what might be relevant to the task of interpreting the Constitution in other respects. By 1875 many Tongans had already adopted a significant number of Christian values, and Tupou I had decided that traditional Tongan political organisation would be modified to include many of the features of a Western-style form of government in a Christian society. It is not particularly helpful

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23 Sione Latukefu *Church and State in Tonga* (1974); Latukefu *The Tongan Constitution*, above n 20; Emeliana Afeaki "Tonga: the Last Pacific Kingdom" in Ron Crocombe and others (eds) *Politics in Polynesia* (1983) 57; Laki Niu "The Constitution and Traditional Political System in Tonga" in Yash Ghai (ed) *Law, Government and Politics in the Pacific Islands States* (1988) 304; David Tupou "A Review of How the Legislative and Judicial Westminster Model Has Functioned Alongside Traditional Indigenous Systems: the Tongan Experience" in 9<sup>th</sup> *Commonwealth Law Conference: Conference Papers* (1990) 589; Futa Helu "Democracy Bug Bites Tonga" in R Crocombe and others (eds) *Culture and Democracy in the South Pacific* (1992) 139; Ian Campbell. *Island Kingdom: Tonga Ancient and Modern* (2 ed, 2001); Guy Powles *The Persistence of Chieftly Power and Its Implications for Law and Political Organisation in Western Polynesia* (PhD thesis, Australian National University, Canberra, 1979); Powles "The Early Accommodation", above n 17; Guy Powles "Traditional Authority in the Contemporary Pacific: Conflict and Compromise in Legal and Political Systems" in 9<sup>th</sup> *Commonwealth Law Conference: Conference Papers* (1990) 571; Guy Powles "The Tongan Constitution: some realities" *Papers presented at the Convention on the Constitution and Democracy in Tonga* (1992) <[http://planet-tonga.com/HRDMT/Articles/Convention\\_92/Convention\\_92.shtml](http://planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml)>

24 Latufeku *The Tongan Constitution*, above n 20.

today to attempt to splinter the amalgam into its component parts. The total sum is regarded as "Tongan".

Evidence from a later period is of no assistance in understanding the Constitution in its original form because one of the better-known features of customs and cultural values is that they are never static. Belief systems and patterns of behaviour change over time, and, for example, it is recognised that customary law in Pacific jurisdictions should be interpreted as the customary law that applies in a particular locality at the relevant time. If cultural values are to assist in interpreting a long-standing document, they would have to be those values that were held at the time the document was written or amended.

A review of certain respected writers on Tongan cultural values and traditional history reveals that, while some are clearly talking about the late-nineteenth century, others speak in a more generalised way. Professor Futa Helu refers sternly to a "morality that is characteristic of rigidly hierarchical societies ... the values of such moralities would include loyalty, submission, obedience and humility".<sup>25</sup> Distinguished lawyer, Laki Niu, identifies "total and unquestioning obedience or *faka'apa'apa*" (respect for higher rank) as "the essence of this social order", but also the importance of the roles of lesser chiefs, particularly *'ulumotu'a* and *matāpule*.<sup>26</sup> He points out that the Constitution was a "compromise" between Tupou I and the chiefs.<sup>27</sup> Aletta Biersack considers that, in addition to the *tapu* and special privileges of [the Monarch's] rank, due recognition should be given to the "reciprocal exchange of obligations and duties (*fatongia*) with his people". Kinship and *fahu*<sup>28</sup> are emphasised.<sup>29</sup>

Contrary indications for chiefly power are evident in the Constitution's clear intention to limit it. However, the Constitution's intentions with regard to chiefly leadership may also be interpreted in a more positive way. Professor Epeli Hau'ofa believes so.<sup>30</sup> He points out that, while the Constitution "sowed the seeds for the decline of the aristocracy, the ascendancy of the commoner class and

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25 Helu "Democracy Bug Bites Tonga", above n 23, 144.

26 Niu "The Constitution and Traditional Political System", above n 23, 308.

27 Ibid 306.

28 The practice of "taking" pursuant to *fahu* had been outlawed as unacceptable to missionary teaching (Code of Laws 1862 s 13), but "taking" is only one aspect of the concept of *fahu*. The *fahu* is the child (especially the eldest child) or descendants of a man's sister, especially in the female line, who have privileged status within the extended family.

29 Aletta Biersack "Blood and Garland: Duality in Tongan History" in P Herda, J Terrell, and N Gunson (eds) *Tongan Culture and History* (1990) 46, 49-50.

30 Epeli Hau'ofa "The Social Context of the Pro-Democracy Movement in Tonga" *Papers presented at the Convention on the Constitution and Democracy in Tonga* (1992) <[http://planet-tonga.com/HRDMT/Articles/Convention\\_92/Convention\\_92.shtml](http://planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml)>.

through this the need for constitutional reform today". Nevertheless there was and still is a crucial role for the aristocracy, by which he appears to mean the royal and noble lineages.<sup>31</sup>

Hau'ofa writes that they are "the foci of our culture and our identity as a Tongan people, as well as being the signposts of our historical continuity as a nation".<sup>32</sup> This interpretation is not inconsistent with the stated objectives of the Constitution, and could contribute to a better understanding of it.

On a different aspect, Dr 'Ana Taufe'ulungaki is concerned that, by virtue of the Constitution and related laws, the women of Tonga lost the status and privileges that they had enjoyed in the pre-contact period.<sup>33</sup> She observes that the most serious omission was in relation to women's rights to land, and notes the damage done to the practice of *fahu*. Unfortunately, the stated objectives of the Constitution referred to above do not seem to identify the crucial gender issue. Because these objectives were carried through, it is difficult to see how it can be argued today that the background context of the Constitution requires an interpretation favourable to the status of women. Of course, this would make an excellent topic for further research.

## VII AMENDMENTS TO THE CONSTITUTION

Unlike the great majority of written constitutions, the Tongan Constitution is in practice no more difficult to amend than an ordinary statute.<sup>34</sup> On the face of it, there is some protection provided for amendments which would affect succession to the throne and the titles and hereditary estates of the nobles, as well as "the law of liberty" (referring to the "Declaration of Rights" with which the Constitution begins). Clause 79 provides that the Assembly is not permitted to amend the law affecting these matters.<sup>35</sup> However, the likely intention of the framers of the Constitution was that the Monarch and nobles could waive the protection and, indeed, amendments affecting nobles' estates have been made. The reality here is that the ease with which the Constitution may be

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31 Ibid.

32 Ibid.

33 'Ana Taufe'ulungaki "Women, Politics and Democracy in Tonga" Papers presented at the Convention on the Constitution and Democracy in Tonga (1992) <[http://planet-tonga.com/HRDMT/Articles/Convention\\_92/Convention\\_92.shtml](http://planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml)>.

34 Tupou I did not want his Constitution to be tampered with, and he required that, after an amendment had been passed three times in the Parliament in the ordinary way, it was to be held over for two years, and, if passed again, could then be submitted to the King. However, during the 1880s, his Prime Minister, Shirley Baker, wanted all sorts of changes and found the two-year wait was irksome. In 1880, Baker persuaded Parliament and King to remove it.

35 Constitution of Tonga 1875 s 79.

amended is inconsistent with the importance attached to the document by its founder who described the Constitution as a "palladium of freedom to all Tongans forever".<sup>36</sup>

There are several obstacles in the path of those People's Representatives who might seek change in the face of opposition.<sup>37</sup> For example, when "laws relating to the King or royal family or the titles and inheritances of the Nobles" are before the Assembly, the current clause 67 requires that "only the nobles of the Legislative Assembly may discuss or vote upon these laws", and they are sent straight to the Monarch for signature. Originally, in 1875, the then clause 70 had allowed the whole Assembly to discuss the law, but only the nobles to vote. Removal of the People's Representatives from the right to discuss these matters as seen in clause 67 occurred in 1914 as one of several reforms which increased the power of the King and nobles.<sup>38</sup> In practice it seems that the Monarch and Nobles' Representatives have usually declined to insist on their rights – but they can if they wish.

A brief analysis of the frequency and scope of amendment of the Tongan Constitution may put it into perspective. Extensive re-writing and modifying was carried out by two Prime Ministers and a Chief Justice in the early period 1875 to 1914.<sup>39</sup> Then, during the period 1914 to date, in a Constitution of 115 clauses, 56 have been amended, 20 of them more than once, and four clauses have been repealed. Most of the amendments have been of a 'modernising' nature – to render the Constitution workable in changing times. Nevertheless, the original underlying objectives and the basic political structures and relationships have not been changed in any significant way since 1914 – with perhaps a couple of exceptions.

Tonga's highest appellate court was the Privy Council comprising the Monarch, the Cabinet of Ministers and the Chief Justice, until it became apparent that, with an increase in litigation involving the state, it was inappropriate for there to be no clear separation of powers. In 1966, legislation to establish a Court of Appeal to replace the Privy Council as the highest court in all matters other than land and chiefly title disputes was passed, but not implemented until 1990.<sup>40</sup> A further significant change was the amendment in 1982 which altered the dynamics of the Legislative Assembly by re-enlarging it to provide for nine instead of seven representatives each elected by the nobles and the people.<sup>41</sup>

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36 Powles "The Early Accommodation", above n 17, 146.

37 For a more extensive discussion, see Guy Powles "Constitutions and People's Values: Changing the Constitution of Tonga" in Elizabeth Wood Ellem (ed) *Tonga and the Tongans: Heritage and Identity*, Melbourne (in press).

38 Constitution of Tonga (Amendment) Act 1914 No 1.

39 This is detailed in Powles "The Early Accommodation", above n 17, 156-162.

40 Constitution of Tonga (Amendment) Act 1966 No.13.

41 Constitution of Tonga (Amendment) Act 1982 No 17.

Perhaps the most politically contentious amendment has been the latest one,<sup>42</sup> where the government amended clause 7 relating to 'Freedom of the Press' so as to expand the grounds upon which Government could limit the right of free speech. The intention was to be able to obstruct its critics, mainly the political reformists, who were publishing attacks on Government in media owned by them and their sympathisers, in Tonga and overseas. In a remarkable judgment in 2005, the Chief Justice struck out certain phrases in the new clause 7, giving a decision for the plaintiffs who had challenged the constitutionality of the amendment. Most, but not all of the amendment was struck out as inconsistent with the freedom of speech which it sought to limit.<sup>43</sup> This was the latest of a series of judgments in which the Supreme Court found attempts to control the media to be unconstitutional.

So how might one approach amendment of the Tongan Constitution today?

Clearly, two points of view have to be considered:

1. From the point of view of the Monarch, royal family and nobles, if they work together, the Constitution can be changed at their will – as long as they decide to retain the majority of votes in the Legislative Assembly – and Tonga has passed amending statutes about 30 times over the years.<sup>44</sup>
2. Consequently, looking at amending the Constitution from the perspective of the People's Representatives and the public at large today, they still face significant procedural hurdles. These will apply to attempts to pass any amendments coming under either of two broad subject areas:
  - the Monarch, royal family, or succession to the throne, or
  - the inheritances and titles of nobles and chiefs with inherited estates.

Change within the framework of the Constitution can proceed only with the approval of the Monarch and nobles.

### ***VIII THE FOUNDATION OF MOVES FOR CONSTITUTIONAL CHANGE***

As consolidation of traditional and constitutional authority under a single Monarch was a major pre-occupation of Tupou I and his successor, amendments to the Constitution up to and including those made in 1914 were driven mainly by concern to deal with rivalry from and between holders of influential traditional titles. Then, following a further sixty years of government by the traditional

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42 Constitution of Tonga (Amendment) Act 2003 No 17.

43 *Taione and others v Kingdom of Tonga* Supreme Court No CV/2004, 8 October 2004 [TOSC 47].

44 This is in addition to the re-writing and modifying done before 1914. The impact of amending statutes on the clauses of the Constitution has been mentioned above.

elite, the voices of People's Representatives came to be heard, in and out of Parliament. Campbell observes:<sup>45</sup>

Since the 1970s, a faction of commoner politicians has become characteristic of Tongan politics and has taken on the role of critic and public conscience. Their increasing outspokenness in the 1980s, and especially in the 1990s was a major transition in Tongan political behaviour and perception.

Certain People's Representatives began calling upon government to account for alleged misuse of funds and lack of transparency. Failure on the part of Cabinet to respond led to critical private radio broadcasts and newspapers, and law suits against government by jailed journalists and disgruntled employees. Major scandals involving passports and public funds added fuel for more widespread discussion and discontent.

The Political Chronology presented in the Appendix to this paper takes the story through the 1990s and early 2000s to mid 2007.

Prior to the death of King Tupou IV, four types of activity could be discerned, much of it contemporaneous.

Firstly, the role of People's Representatives ensured that Parliament was a forum for debate, and a bar at which Cabinet was increasingly often called to account – but it seldom responded to the call. There is no doubt that such public scrutiny as there was encouraged the government to raise the level of competence of Ministers, and experienced commoners were appointed from time to time. When ultimately embarrassed by scandals and allegations which it found difficult to cope with, the government made a crucial decision in March 2006 to appoint a Dr Feleti Sevele as its first commoner Prime Minister. The events leading to his substantive appointment may be traced in the Appendix. Dr Sevele holds a doctorate in economic geography from the University of Canterbury, Christchurch, NZ, is one of Tonga's most successful businessmen, and, along with the majority of People's Representatives, a member of the Human Rights and Democracy Movement in Tonga (HRDMT). His position on political reform at the time he was appointed is set out in the Appendix.

Second, early conventions, workshops and public meetings, dispersal of ideas through the media, and the preparation and discussion of different models for constitutional reform all contributed to the growing awareness on the part of the public at large of a perceived need for change of some sort. It was a feature of proposals as they were developed and presented that most of them took a fairly minimalist approach to reform, concentrating on specific aspects of constitutional arrangements, such as the composition of the Legislative Assembly, or the Monarch's powers in relation to law-making. One set of proposals, from the HRDMT, worked through a number of different possible structures, and was generally moving towards a 'Westminster-like'

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45 Ian Campbell "The Quest for Constitutional Reform in Tonga" (2005) 40 (1) *Journal of Pacific History* 91, 93.

system of an executive which is chosen by, sits in and is responsible to, the legislature. Another, by Afeaki, proposed the US presidential system.<sup>46</sup> None of the proposals appeared to consider the Constitution as a whole, which seems to leave a number of reform issues to be addressed.

It is a feature of these presentations to government of what people were thinking on the subject of specific change, that, until the middle of 2006, the government gave the impression of ignoring them all.<sup>47</sup>

The constitutional debate has been one-sided. Government has declined to consider any of the suggestions put forward over the years. Why this is so cannot be said with certainty: it might be the self-interested conservatism of an anachronistic elite reluctant to hasten its own demise; it might be a matter of protocol, the reformists having gone about their task in ways that offended the aristocratic sense of propriety and respect; it might also be a matter of personalities, of individuals having taken such offence at the style of others that they refuse to listen to the message.

The third type of activity which helped to bring matters to a head was the combination of crippling public service strikes and public demonstrations, from small to massive as described in the Appendix, in downtown Nuku'alofa. Of the dramatic Public Service Association strike of August-September 2005, Campbell noted:<sup>48</sup>

The sustained defiance of the strikers, their solidarity and finally the effrontery of this last act [calling for dismissal of the PM] are unprecedented in modern Tongan history and indicate extreme dissatisfaction with the regime and its recent performance. These events do not herald the collapse of the government, or even the threshold of constitutional change, but they do mark a shift in the relative strength and confidence of the contending parties.

These demonstrations were occasioned by several grievances, but they showed a willingness on the part of citizens to engage in activity which is seriously anti-social in traditional terms – if they feel strongly enough. It is also noted that, included among the grievances, and sometimes at the top of the list, was, and still is, the call for democratic reform, usually aimed at seeking a Cabinet which is truly accountable to Parliament.

Finally, after months during which the idea of a formal review of the Constitution was tossed around, the determination of the late Prince Tu'ipelehake,<sup>49</sup> nephew of the late King and Nobles' Representative in Parliament, bore fruit. In the absence of action on the part of Cabinet, King or Regent, the Prince persuaded Parliament to establish a National Committee of the Kingdom of

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46 See the Appendix for details.

47 Campbell "The Quest for Constitutional Reform", above n 45, 98.

48 Ian Campbell "Progress and Populism in Tongan Politics" (2006) 41(1) *Journal of Pacific History* 49, 60.

49 Tragically, the prince and his wife were killed on 6 July 2006 in a road accident in the United States.



Tonga for Political Reform (NCPR). This was not without a struggle, and the voting in favour of his proposal was 12 to 6. The Committee comprised Prince Tu'ipelehake as Chair, six MPs and four "independent Tongan professionals". The Prince issued a statement in which he drew attention to the independence of the Committee from government, and outlined its objectives in terms of the breadth of consultations with the people that he was hoping it would achieve, emphasising the *talanoa* (sitting down for informal talks)<sup>50</sup> as the best way of proceeding. The Committee also visited NZ, the US and Australia to obtain the views of the diasporas.<sup>51</sup> It has been difficult to assess the process adopted by the Committee as there appears to have been no direct evaluation or feed-back through the Committee and, as yet, no published commentary on it, in Tongan or English. It is clear, however, that the Committee was committed to sitting and listening to people's concerns on a range of governmental matters concerning them without setting a structure for discussion of specific constitutional reform.

The NCPR adhered to its schedule and reported to the late King and Crown Prince by 31 August 2006 and then to Parliament by 30 September. The Report<sup>52</sup> is a remarkable document for its record of the thorough and repeated consideration of the *talanoa* process of consultation, and its emphasis on the centrality of Tongan values, as identified and elaborated upon at length. For the purposes of this paper, however, it is noted that the Report does not discuss values behind the Constitution in terms different from those identified by the authors described above under 'Assessment of cultural values' in Part VI.

The Report deals with issues raised by people at meetings which were deliberately unstructured, and thus offers an insight into the public's priorities, often quite apart from any question of constitutional change. Its recommendations were broadly stated, with the suggestions set out in the Appendix. The Committee stressed the wide divergence of proposals and opinions presented, and, seeking to find middle ground, was apparently keen to encourage further discussion. Importantly in light of subsequent events, it proposed that there be a 'roadmap' extending as far as 2009, which did not seem to require government immediately to announce a firm decision on its conclusions. This, unfortunately, is what the People's Representatives in Parliament did call upon Cabinet to do. For its part, Cabinet had a proposal of its own which failed to satisfy the Representatives and groups of their supporters which began gathering in the public space of Pangai Si'i. The violent and destructive events which followed on 16 November are summarised in the Appendix.

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50 Traditional deference would normally inhibit frank discussion between a member of the royal family or noble, and commoners.

51 Ironically, the vehicle crash that claimed Prince Tu'ipelehake's life occurred as he was on his way from the late King's birthday celebrations in Tonga to the last meeting in the US – to be held with Tongans living in Los Angeles.

52 *Tonga: For the Enrichment of the Country*, Report of the National Committee for Political and Constitutional Reform, Nuku'alofa, 31 August 2006.

Since then, reform appears to have been 'on hold' while government leaders deal with the crisis, but progress is still being made with discussion of reform at the Cabinet and Privy Council level. It would be foolhardy, at this stage, to suggest how quickly and in what manner the process of constitutional review will advance. The death of Prince Tu'ipelehake removed from the scene a well-liked and respected leader who had the capacity to bring together people with opposing views on political reform, and to follow through with an agreed policy. On the other hand, the leadership shown by the new King in clarifying, at least to a degree, the extent to which the Monarch will take a back seat and act on advice is a step forward of major significance.

As to the nature of the reform, much depends on how Tongans feel today about their iconic Constitution, which they have clearly revered in the past. In a recent paper I suggested that, having regard to its antiquity, it may be important for the people of Tonga to inquire and consider to what extent the current Constitution recognises and reflects current Tongan values.<sup>53</sup> Such an inquiry would involve examination of the whole document. If it is considered that the current Constitution lacks such recognition, there is perhaps an argument for reviewing the whole document, clause by clause. A brief survey of the ways in which other constitutions have managed to reflect national priorities and desired socio-political principles might throw useful light on options for constitutional change in Tonga. In most cases, such recognition of current needs and ideas for a new constitution has come from a popular base, involving high standards of widespread discussion, consultation, and participation.

Events and thinking in Tonga have, however, proceeded down a very different route. The reverence attached to the Constitution for what it stands for, and the increasing polarisation of tensions surrounding the need for some reform measures without further delay, have conspired to close down options. The work of the NCPR does not appear to have opened up discussion of the Constitution per se as the object of reform. It seems that Tongan constitutional planners are faced with a dilemma. A decision merely to make some critical changes here and there in the Constitution probably appeals to those leaders, including now the King and most of the current Cabinet, who feel that groups in society opposed to change, and perhaps the people generally, would be unwilling to interfere with their traditional system of royalty and nobility, except to the extent strictly necessary to achieve certain limited objectives. Respect for and allegiance to the royal family and nobility remain fundamental values for most Tongans, and the NCPR has, if anything, reinforced those values. Perhaps it is only the lawyers and law drafters who are horrified at the realisation that a minimalist approach to change will probably mean that the Constitution will be divided into 'old' and 'new' parts.

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53 See above n 37.

Tongan leaders naturally have better opportunities than this writer to assess what can feasibly be achieved. Would it be worthwhile considering a compromise approach? This might involve long-term strategy and a short-term process:

- a) The government might adopt as an ultimate objective the development of a comprehensive and consistent blueprint for the nation, which all Tongans could feel belonged to them, and responded to their cultural values and aspirations;
- b) In the more immediate future, however, the goal will be to identify the changes now necessary for the proposed reforms and to seek approval for them. If the further process of consultation around these reforms were to include widespread publication of the full Constitution, as a document which people would be encouraged to read and understand as part of the discussion of the changes, then a significant step toward a long-term review might have been achieved.

**APPENDIX*****A POLITICAL CHRONOLOGY 1992 – 2007 OF EVENTS RELEVANT TO THE MOVEMENT FOR POLITICAL CHANGE*****1992**

A constitutional convention was held by newly-formed Pro-Democracy Movement, with democratisation as its theme. Papers discussed alternatives, with emphasis on a fully-elected parliament and prime minister. No proposals resulted. Government opposed the idea of the convention and sought to harass it.<sup>54</sup>

Repeated parliamentary motions by People's Representatives seeking reform or constitutional review failed.

**1998**

First specific proposals for new constitution were written by the Pro-Democracy Movement Committee, and discussed at a public seminar. The proposed changes were for a ceremonial Monarch, abolition of Privy Council, wholly-elected Parliament without noble-commoner distinction, led by leader of majority party as PM – ie the Westminster concept of responsible government.<sup>55</sup> The Pro-Democracy Committee became a formal organisation, - originally named the Tonga Human Rights and Democracy Movement, subsequently the Human Rights and Democracy Movement in Tonga (HRDMT).

**1999**

A public convention considered a large number of papers and the 1998 proposals, and agreed on a set of propositions for governance rather than constitutional reform.

**2002 April**

The HRDMT proposal (Draft 3) for a democratic monarchy was submitted to the King, PM and Ministers. These modest suggestions included creation of a nobles' house, leaving the King's authority largely as it was.

**2002 September**

The HRDMT adopted Draft 4 which proposed that the King no longer be head of government, vested executive authority in Cabinet, and turned the Privy Council into an upper house. Parliament would elect the PM from its membership, and would include six seats for representatives of Tongans

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54 Sione Latukefu "The Pro-Democracy Movement in Tonga" (1993) 28(3) Journal of Pacific History 52.

55 Campbell "The Quest for Constitutional Reform" above n 45, 95.

overseas. Parliament could over-ride the King's veto with a 75% vote, but many of his powers were unchanged.

**2003 May to 2004 October**

Court decisions on media issues were damaging to the government's reputation.

**2004 August**

The King dismissed three Ministers, including lawyer Clive Edwards who had been in Cabinet for eight years, most notably as Minister of Police. It was rumoured that he was regarded responsible for many of the unsuccessful actions taken against the media, which had tarnished Tonga's reputation.<sup>56</sup>

**2004 September**

A HRDMT workshop presented Draft 5, in a document which discussed five structural weaknesses in the existing Tongan system and reviewed its strengths. This draft built on its predecessor, abolished the concept of upper house, deprived the Monarch of veto and focussed on the composition of Parliament which would have 30 members elected by universal suffrage (9 seats for nobles, six for women and 15 open seats; no overseas representation).<sup>57</sup>

**2004 November**

The PM announced the King's intention after the March 2005 election to appoint two elected Nobles' Representatives and two elected Peoples' Representatives to Cabinet, for the life of the next Parliament. This was described as a "natural progression of the political system" (statement of PM Prince 'Ulukalala Lavaka Ata, younger son of the King<sup>58</sup>). This unexpected development seemed to puzzle observers. It did not amount to a constitutional reform, as no change in the written law was required for its implementation. However it was significant in bringing into Cabinet Dr Feleti Sevele, an independent-minded, well-educated (PhD in economic geography from University of Canterbury), businessman, and supporter of HRDMT – who later became PM.

**2005 March**

In the General Election, the HRDMT candidates won all but two of the People's Representatives' seats.

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56 Radio NZ International, 3 September 2004.

57 *HRDMT Proposal* – personal communication Lopeti Senituli 22 May 2006.

58 *Matangi Tonga* (Nuku'alofa) 11 November 2004.

**2005 April**

Dr Feleti Sevele was appointed Acting PM (having been appointed to Cabinet in accordance with the government's earlier decision), but only during the absence overseas of PM Lavaka. The appointment was made by Crown Prince Tupouto'a as Regent, in the absence of the King.

**2005 May**

A large public demonstration took place over the rising cost of electricity and the involvement of the Crown Prince in the ownership of this utility.

**2005 June**

Farmers protested with their vehicles at Parliament House over the new consumption tax.

**2005 July**

A major public service strike commenced over new salary scales.<sup>59</sup> This lasted six weeks, with protesters assembled at the central Mala'e Pangai Si'i, and daily protests at Parliament House.

Clive Edwards, now a People's Representative for Tongatapu, submitted to the government his recommendations for amendments which would bring into effect representative government with a prime minister and cabinet chosen by and from parliament, leaving the Monarch with an advisory role.<sup>60</sup>

**2005 August**

A government decision to remove the strikers from Pangai Si'i was challenged in the Supreme Court, where a crowd sang outside during the proceedings. The day following the hearing the Chief Justice ordered the police to refrain from removing people from the Pangai Si'i.<sup>61</sup>

**2005 September**

Negotiations between the strikers and government ended on 3 September with the signing of a Memorandum of Understanding in which the government made considerable concessions to the Public Service Association (PSA) and also agreed "to consider" the demand that "a Royal Commission be established immediately to review the Constitution to allow a more democratic government to be established; and for the Royal Commission to report back to government on 31 December 2005".<sup>62</sup>

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59 *Matangi Tonga* (Nuku'alofa) 21 July 2005.

60 Clive Edwards, *Proposal for Constitutional Changes*, Nuku'alofa, 27 July 2005.

61 *Matangi Tonga* (Nuku'alofa) 13 August 2005.

62 *Matangi Tonga* (Nuku'alofa) 4 September 2005.

A demonstration of over 10,000 (said to be the largest march in Tonga's history) marched to the Palace calling for the dismissal of the PM, Prince Lavaka and the Cabinet.<sup>63</sup> A petition to the King also asked for the return of government assets taken by the King's sons and daughter such as power generation, Tonga's orbital slots and its internet domain address ".to". A second petition signed by all nine People's Representative called for a referendum on the issue whether a commission should be established to review the Constitution with a view to making Tonga more democratic.<sup>64</sup>

Veteran lawyer, Laki Niu, presented his proposals for amendment to the Constitution to Cabinet, and announced that he would camp at Pangai Si'i with a loud speaker, demanding agreement by all members of the Cabinet to his proposal. He expressed frustration with the process of political reform initiated by HRDMT and others. On the other hand, his demand for a parliament of 24 elected by the people and six by the nobles was a modest one.

#### **2005 October**

Parliament, by vote of 12:6, created a National Committee of the Kingdom of Tonga for Political Reform (NCPR). The Committee comprised Nobles' Representative Prince Tu'ipelehake (a nephew of the late King) as Chair, six MPs and four "independent Tongan professionals". Prince Tu'ipelehake, who had been urging Parliament for some time to move in this direction, stated:<sup>65</sup>

What is very important here is the fact that the Committee is totally independent of Government. What is different and unique about this exercise is that the recommendations submitted are all from the people of Tonga and not just the views of a certain group of people.

The Committee produced a brochure in December stating that its purpose was "to receive and consider submissions, hold consultations and facilitate *talanoa* (informal talks) relating to political and constitutional reforms and recommend legislation with a view to building national unity and promoting the social and economic advancement of the people". The timeline was to be August 2006 for submission of its Report to the King and September 2006 for submission to Parliament.

#### **2005 November**

On the 130<sup>th</sup> anniversary of the Constitution, a public holiday, a political rally was addressed by Pro-Democracy Movement leaders, who explained how the Constitution in reality deprived them of their fundamental rights in the governing of the country.<sup>66</sup>

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63 *Matangi Tonga* (Nuku'alofa) 6 September 2005.

64 *Ibid.*

65 *Matangi Tonga* (Nuku'alofa) 27 October 2005.

66 *Matangi Tonga* (Nuku'alofa) 4 November 2005.

**2005 December**

A new Committee for Political Reform headed by long-standing reformist and leading People's Representative, 'Akilisi Pohiva, presented to the King a 60-page booklet containing proposed amendments to the Constitution including three of the proposals already lodged.<sup>67</sup>

**2006 January**

The new People's Democratic Party, which originated in May 2005, held its first meeting and pledged to work for political reform.<sup>68</sup>

**2006 February**

At the request of the Prime Minister, a three-member delegation of legal and political advisers arrived from the Commonwealth Secretariat in London to see what assistance might be provided with regard to political reform.<sup>69</sup> The government has subsequently obtained assistance from New Zealand and Australia.

**2006 March**

Following the resignation of PM Prince Lavaka on 11 February, Dr Feleti Sevele was appointed PM of Tonga, the first commoner to hold that position.

Interviewed in May, Dr Sevele said:<sup>70</sup>

My appointment as minister was part of the reform. I mean we are fortunate in that it was initiated by the royal family, by the Crown Prince. Now my appointment as Acting PM, then as PM, you know that's a very historical, and in terms of Tonga, revolutionary. You have people saying, no, there will be no changes. But it's there. Government is in full support of the National Committee for Political Reform, we are supporting that, we are awaiting the result of their discussions with the people. Look, the reforms are ongoing and will continue. At the same time, we want to ensure Tongans dictate the pace and nature of the reforms and in such a manner that the economy and the country can move forward at the same time without adverse disruptions.

Later, in New Zealand, it was suggested to him that perhaps "His appointment is seen by some as an admission by Tonga's royal family, rocked by increasing pressure for increased democracy, and presiding over a weak economy, that things have to change if there is not to be major social unrest. Others, though, have suggested he got the job mainly because of his friendship with Crown

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67 *Matangi Tonga* (Nuku'alofa) 7 December 2005.

68 *Matangi Tonga* (Nuku'alofa) 30 January 2006.

69 *Matangi Tonga* (Nuku'alofa) 9 February 2006.

70 *Islands Business* (Suva) May 2006, 19.



Prince Tupouto'a, and because the royal family believes he will do their bidding now that he is in office."<sup>71</sup>

However, Dr Sevele rejected any suggestions that he was someone else's man. He has always acted, and will always act, in the national interest, he said. "The Crown Prince has been a friend of mine for 30 years – but 'Akilisi Pohiva has been one for 20. I have two close friends at opposite ends of the political spectrum."

He went on:<sup>72</sup>

Change is what many of us have been wanting, but that is not to say we can do as we like. We have a political system and a constitution that have stood the test of time for 130 years... There are three pillars of Tongan society – the royal family, the nobility and the people. It is important as we move along the spectrum of political change that these are left intact.

#### **2006 April**

A proposal for a different model of government was presented to the King by Afeaki, a Matapule (traditional chief) of the King from Ha'apai and a chartered accountant. He proposed the "Washington model" as used in the USA as the basis of a system of government for Tonga.<sup>73</sup> Under this model, the King would have presidential powers, and the Executive Branch of government would be separated from the Legislature, as the President of the USA is separated from Congress. The King would choose the Cabinet Ministers to work with him. The King and Cabinet would be dependent upon Parliament to pass laws and approve finance.<sup>74</sup>

#### **2006 May**

The PSA President Dr 'Aivi Puloka told a press conference that the PSA wanted a new Interim Government to take over Tonga and relieve the existing Cabinet of their duties while the process of possible amendments to the Tonga Constitution in Parliament takes place, "for the sole purpose of having a Democratic Government where the people of Tonga elect a permanent cabinet."<sup>75</sup>

A new National Political Reform Committee led by 'Akilisi Pohiva and comprising People's Representatives, public servants and the Tonga Business Association met with Prince Tu'ipelehake and the NCPR and presented a model for constitutional change which focussed on a Parliament of 39 elected by the people, to 6 seats for nobles and 33 for the people. Parliament would elect the PM

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71 *Pacific Connection* (Wellington) Issue 8, June – August 2006, 3.

72 Ibid.

73 *Matangi Tonga* (Nuku'alofa) 19 April 2006.

74 *Afeaki Proposal* – personal communication March 2006.

75 *Matangi Tonga* (Nuku'alofa) 31 May 2006.

who would choose the Ministers, and its laws could not be vetoed by the King. The Monarch is described as "ruler" but it is not clear from the announcement whether the King would sit with the Cabinet in a Privy Council, as at present.<sup>76</sup>

In major Cabinet changes, the Prime Minister appointed Mrs Malia 'Alisi Afeaki Taumoepeau (who had been Solicitor-General) as Attorney-General and Minister for Justice, and the first woman to enter the Tongan Cabinet. Another lawyer and former Minister of Lands, the noble Hon Fielakepa was appointed Lord Chamberlain, to assist the King.<sup>77</sup>

Lopeti Senetuli, long-standing leader of the HRDMT was appointed press secretary and political advisor to the PM, Dr Sevele.

### **2006 June**

During May and June, the NCPR travelled in New Zealand, Australia and the US holding meetings with members of local Tongan communities to ascertain their views on political reform and matters concerning their relationship with their native country, such as dual citizenship.

Princess Salote Pilolevu opened Parliament on 1 June as Princess Regent due to the absence overseas of both the King and the Crown Prince. In her speech from the throne,<sup>78</sup> she said:

Political reforms in Tonga are inevitable, but reforms must be managed properly to avoid disastrous consequences. These reforms must be undertaken at a pace, direction, and extent which we Tongans, as a united and forward-looking nation, can manage properly in the overall, long-term interest of our beloved nation. Let us not follow the examples of other countries who have rushed into political reforms without the prerequisite preparations, and the inevitable disastrous consequences.

Distinguishing hers from her father's speeches from the throne, the Princess Regent openly discussed the possibility of political reforms. She added:

Change is a fact of life, and thus political changes or reforms are inevitable, and must be discussed thoroughly by both the public and the government.

She noted that the Parliamentary National Committee for Political Reform, chaired by HRH Prince Tu'ipelehake, had the full support of government. "We await with interest the outcome of their meetings and consultations with the people," she said.<sup>79</sup>

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<sup>76</sup> *Tonga Now* (Nuku'alofa) 24 May 2006.

<sup>77</sup> *Matangi Tonga* (Nuku'alofa) 18 May 2006.

<sup>78</sup> *Matangi Tonga* (Nuku'alofa) 2 June 2006.

<sup>79</sup> *Ibid.*

On the afternoon of the same day, a thousand marched to the Palace Office with a petition demanding action on a number of matters including ownership of electricity and political reform. They threatened a strike within one month if they did not receive satisfaction from government.

On 30 June, government's reply was delivered by the Attorney General, who noted that the petitioners had muted their demands, and extracts from the Princess's speech (above) were referred to.<sup>80</sup>

On matter of importance to the many Tongans living (and particularly women marrying and children born) overseas, the Privy Council decided to reform the Nationality Act to allow dual citizenship.<sup>81</sup>

A proposal by Tapani Mangisi for the introduction of 'full' parliamentary democracy which would assign to the King an advisory role only was presented to the NCPR at its Melbourne meeting on 22 June.<sup>82</sup>

#### **2006 July**

"Looking frail and in his wheelchair, King Taufa'ahau Tupou IV returned home to Tonga on Saturday July 1, in time for the celebration of his 88th birthday on July 4".<sup>83</sup>

Tragically, Prince Tu'ipelehake, Chairman of the NCPR, and his wife, were killed in a motor accident in Los Angeles on 6 July, while travelling from the King's birthday celebration in Tonga to meet with members of a Californian Tongan community. Subsequently, Dr Sevele acknowledged the great loss suffered in Tongan public affairs by the tragic death of the Prince, and announced that the work of the Reform Committee would continue.

#### **2006 August**

The Minister for Justice, Hon 'Alisi Taumoepeau, announced that planning was under way to establish an independent anti-corruption body with investigatory powers to deal with all public sector corruption allegations.<sup>84</sup>

The Privy Council decided to approve amendments to the Land Act to remove certain disabilities affecting women in relation to the inheritance of allotments.<sup>85</sup>

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80 *Tonga Broadcasting Commission* 30 June 2006.

81 "Media Release" Government of the Kingdom of Tonga, Nuku'alofa, 23 June 2006

82 *Matangi Tonga* (Nuku'alofa) 17 July 2006

83 *Matangi Tonga* (Nuku'alofa) 3 July 2006.

84 "Press Release" Office of the Attorney-General, 11 August 2006.

85 "Media Release" Government of the Kingdom of Tonga, Nuku'alofa, 15 August 2006.

The NCPR completed its Report on schedule at the end of August under its new Chairman, Dr Sitiveni Halapua, and presented it to both the King in Auckland (where he had returned to hospital) and the Crown Prince in Nuku'alofa.<sup>86</sup>

### 2006 September

His Majesty King Taufa'ahau Tupou IV died on 11 September and a period of State mourning for one month was declared by the Prime Minister. On the same day, the Crown Prince Tupouto'a was sworn in before the Privy Council and proclaimed His Majesty King Siaosi Tupou V. Succession followed the Constitution and there was no public questioning of the heir's right to ascend to the throne.<sup>87</sup>

In accordance with well established tradition, the late King was buried in the Royal Tombs on 19 September and the nobles and certain other chiefly families carried out the *ha'amo* ritual presentations of food and other duties 20-29 September.<sup>88</sup>

On 26 September, Hon Fielakepa, the Lord Chamberlain, issued in the form of a 'Press Release' from the Palace a remarkable 'introduction' to the 58-year old King, describing his background, education and experience in some detail. Importantly, the Lord Chamberlain announced that –

- the King would dispose of "all his commercial interests in Tonga ... in conformity with the obligations and demands of his high office";
- he is "committed to the reform process adopted by Parliament for extensive public consultation to form a basis for change";
- his recommendations to the late King "for a more democratic approach" to appointments to Cabinet had been accepted;
- "... Cabinet Ministers now come to office only on the advice of the Prime Minister, rather than through the exclusive power of the Monarch";
- "There is now a binding precedent for monarchical authority to be exercised on Prime Ministerial advice"; and
- King Siaosi "regards the monarchy as an agent of change" while believing "Tonga's Constitution is the keystone of the Kingdom's peace and stability. [It] "does not have to be

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86 *Matangi Tonga* (Nuku'alofa) 1 September 2006.

87 *Tonga Government Gazettes Nos 19 and 20*, 11 September 2006 (and see text above, under "Snapshot of the Constitution").

88 *Matangi Tonga* (Nuku'alofa) 21 September 2006.

fundamentally changed for representative democratic government to be introduced speedily".<sup>89</sup>

On 27 September, the King appointed his younger brother, and former Prime Minister, Lavaka, to be Crown Prince Tupouto'a Lavaka.<sup>90</sup>

### 2006 October

Dr Halapua, Chairman of the NCPR, presented the Committee's Report to the Legislative Assembly on 4 October, and the formal reading, followed by questions and debate continued to 12 October. This complex document requires careful study. As to its recommendations for change, it took a strictly minimalist approach and appeared to be concerned over the wide spectrum of views presented to it. Specifically, it seemed to be of the opinion that the Assembly should comprise 17 People's Representatives and the present 9 Noble's Representatives, that the King should appoint the Prime Minister and the 2 Governors, and that the Prime Minister would then select the Ministers of Cabinet. Changes to the electoral base and method of election were also traversed, as were issues relating to women and children, land, health and the presence of Chinese people. Significantly, the Report referred to the uncertainty of many people as to what reform might or should involve, and suggested a measured timetable for consideration and reform, extending into the year 2009, with drafting of changes along the way in 2007 and consideration of them in 2008. A 'roadmap' was to be drawn up and followed.<sup>91</sup>

After consultation with the King, Cabinet responded with a new proposal (eg a smaller Assembly with 14 members elected by the People; retention of the existing electoral method; appointment of Cabinet by the Prime Minister subject to the discretion of the King to appoint up to one third of the Ministers, from inside or outside Parliament; and acknowledgement of the concessions made by the King), and it seems there was debate as to whether the differences between the two proposals were significant. The Prime Minister also proposed the formation of a fresh 'tri-partite' committee of the House to take the two proposals and all the members' concerns forward and report back in the New Year. This was in accordance with the NCPR's roadmap.<sup>92</sup>

On 23 October, a group of business people and politicians prepared a petition to the King to dismiss the Prime Minister, Dr Sevele, which was declined.<sup>93</sup>

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89 "A King Well Prepared to Lead – Press Release" Office of the Lord Chamberlain, Nuku'alofa, 26 September 2006.

90 *Matangi Tonga* (Nuku'alofa) 27 September 2006.

91 *Tonga: For the Enrichment of the Country*, Report of the NCPR, Nuku'alofa, 31 August 2006 (and see discussion in text above); *Matangi Tonga* (Nuku'alofa) 10 October 2006.

92 *Matangi Tonga* (Nuku'alofa) 21 October 2006.

93 Radio NZ International, 23 October 2004.

The anti-corruption initiative begun in August was advanced on 31 October when a report on legislation concerning the establishment of a commission was presented to the Minister of Justice.<sup>94</sup>

#### **2006 November**

Protesters meeting at Pangai Si'i and calling for more rapid reform were reportedly using loudspeakers in such a way as to disturb Parliament and the personal abuse of individual members was complained of. On 14 November, the Attorney-General issued a statement asking people to be patient while the House addressed political reform in an orderly manner. She reminded them that the King had accepted the nature of the reforms. The Assembly would use its disciplinary powers if her request was not heeded.<sup>95</sup>

On Thursday 16 November, groups and individuals, mainly young men and boys, began throwing stones at government buildings and certain business premises, then set some alight. Strong winds blew fires through a large number of buildings, while there was rioting in the streets that blocked the fire services, and in the course of widespread looting, several looters lost their lives. The destruction of the greater part of downtown Nuku'alofa was complete within a few hours. That night and the next day, the reaction of the people of Tonga was one of shock and disbelief – and it was apparent that none of the leaders in government or opposition had anticipated a riot, much less such a catastrophe. The Lord Chamberlain referred to a "small but dangerous criminal element"<sup>96</sup> The Prime Minister proclaimed a "state of danger" placing the affected area under the control of the Police Force, while the Privy Council passed regulations giving the Police and Defence Forces extended powers for 30 days.<sup>97</sup>

#### **2007 January**

The Prime Minister announced that the government's proposal for a continuing committee to consider the recommendations made by the NCPR and Cabinet were still on the table. He regarded the differences as "slight".<sup>98</sup>

#### **2007 May and June**

Sedition charges laid against 'Akilisi Pohiva, Clive Edwards and three other People's Representatives were heard in the Magistrates Court at the preliminary hearing stage, followed by the Magistrate's decision on 6 June to commit the five to the Supreme Court for trial. From the

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94 *Matangi Tonga* (Nuku'alofa) 31 October 2006.

95 "News Release", Office of the Attorney-General, Nuku'alofa, 14 November 2006.

96 "Press Release" Office of the Lord Chamberlain, Nuku'alofa, 17 November 2006.

97 Proclamation of 17 November 2006 under the Public Order (Preservation) Act; and Emergency Powers (Maintenance of Public Order) Regulations 2006 made on 17 November 2006.

98 *Matangi Tonga* (Nuku'alofa) 26 January 2007.

prosecution evidence produced, it is alleged that the defendants asked for a meeting with the Prime Minister on the afternoon of 16 November to present demands from the political group that Cabinet agree to specific details for reform of the Assembly. It is alleged that the PM and Ministers present were told that unless the PM signed a letter in the terms requested, the Representatives could not be responsible for what might follow. The PM agreed.<sup>99</sup>

It has been suggested by Lopeti Senituli, adviser to the PM, that the conduct of the defendants amounted to an attempted coup.<sup>100</sup> In any event, the defendants have elected trial by judge alone, at a date to be fixed.<sup>101</sup> As the matter is before the courts, and the defence case has not been heard, further discussion is impossible.

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99 *Matangi Tonga* (Nuku'alofa) 17 May 2007.

100 Lopeti Senituli "The Attempted Coup of 16 November 2006" online on the Government website <[http://www.pmo.gov.to/artman/publish/article\\_257.shtml](http://www.pmo.gov.to/artman/publish/article_257.shtml)>.

101 *Matangi Tonga* (Nuku'alofa) 6 June 2007.

