

CONSTITUTIONAL WEAVING: A CONCEPTUAL APPROACH TO EXAMINATION OF THE 2010 CONSTITUTIONAL REFORM IN THE KINGDOM OF TONGA

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This article provides an overview of the constitutional changes made in 2010 in light of Tonga's particular circumstances - how Tonga purported to create a devolved government in pursuit of democratisation; in reality the Constitution continues to retain the King's¹ apex role. Further, this article provides a review of how power has been exercised which will show how the King's role remains central because the 2010 reform provided him with significant executive powers. Finally, this article will address through the conceptual lens of constitutional weaving the question of why these constitutional amendments did not diminish the political powers of the King as might have originally been expected. The concept of constitutional weaving is inspired by Tonga's traditional art of weaving different strips and strands of pandanus leaves into a mat which has profound cultural values that define the Tongan people. Drawing on this analogy, the term 'constitutional weaving' is applied and adapted in this article to conceptualise the way that Tonga's 2010 constitutional reform combined both traditional and more modern or democratic values.

Cet article propose à la lumière des particularismes des Tonga, un panorama des changements constitutionnels intervenus en 2010; Il décrit les raisons de l'échec de ces réformes textuelles qui pourtant ambitionnaient d'instiller plus de démocratie aux Tonga en instaurant un système de gouvernement décentralisé. Il observe que dans la pratique, la Constitution a continué à conforter le rôle prépondérant du Roi

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1 Note that a reference to the King in general terms is a reference to the Monarch. The Constitution under cl 32 provides for the law of Royal succession where the accession of a Queen is a possibility.

qui concentre entre ses mains la quasi-totalité des pouvoirs exécutifs. Par analogie avec la manière qui consiste aux Tonga pour former une natte à tisser, différentes bandes et brins de feuilles de pandanus, chacune d'entre elles représentant les valeurs culturelles qui définissent le peuple des Tonga, l'auteur démontre sous le vocable du "tissage constitutionnel", comment grâce à un maillage constitutionnel les réformes de 2010 n'ont pas eu l'effet escompté.

I INTRODUCTION

The Constitution of Tonga was first granted to the people by King George Tupou I in 1875 in order to transform Tonga from an era of 'darkness' to an 'era of light'.² As this transformation's leader, Tupou I believed in uniting the country under a written constitution to avoid colonisation during the colonial period. Accordingly, he took modern concepts and institutions from the British-style monarchy and wove them with selected values from Tonga's traditional leadership to form the 1875 Constitution of Tonga. The result was that despite the Constitution's theoretically limiting effect, the Monarch's traditional and executive roles and powers remained almost absolute. This outcome can be attributed to the on-going Tongan cultural notions of respect for authority and an unwillingness to challenge a chief of higher rank, particularly the Monarch.

Tonga's 1875 Constitution remained in place until 25 November 2010 when a major political reform was implemented by way of adopting an amended Constitution. This reform was made possible by the then King, the late Tupou V, who was explicitly both the Head of State and Head of Government. He agreed to devolve some of his executive powers upon a Cabinet of Ministers chosen by an elected Prime Minister from an Assembly that comprised, for the first time, a clear majority of elected People's Representatives. In principle, the 2010 reforms were supposed to establish a new principle of government by Cabinet alone consistent with Tonga's Constitutional and Electoral Commission's recommendation that "The King and Privy Council shall no longer be part of the Executive Government and the Executive Government shall be the Cabinet answerable to the Legislative Assembly".³ However, in reality, this principle was altered because the Constitution

2 Cited in Sione Latukefu *The Tongan Constitution: A Brief History to Celebrate Its Centenary* (Tonga Traditions Committee, Nuku'alofa, 1975) 41.

3 Constitutional and Electoral Commission (CEC) Report, Recommendation 2. This Commission was established by the Constitutional and Electoral Commission Act 2009, among the specific matters that the Commission was established to focus on was the "roles, functions, powers, duties of, and relations between, the Monarch, the Privy Council, the Prime Minister and Cabinet, and the Relationship between the Executive and the Legislature, the composition of the Legislature." (Sch 2).

that emerged from the amending process preserved the Monarch's authority in government in the form of exceptions to the devolution principle.

II THE MONARCH, TONGA'S PARTICULAR CIRCUMSTANCES AND THE TIME FOR CHANGE

The Monarch of Tonga plays fundamental roles in both Government and in Tongan society and culture. First, he is the Head of State who is also the 'supreme head'⁴ of the traditional kingship system. He is also a part of the Executive branch of government through his executive powers.

The late Tupou V was described in a statement by Tonga's Lord Chamberlain on 26 September 2006 as "A King well prepared to lead along the path of political reform".⁵ Indeed, it was only three weeks later, at the King's request, that the Prime Minister, Sevele, stated in a Press Release that the "King voluntarily cedes constitutional authority".⁶

Nevertheless, even though the late King and Prime Minister Sevele opened the door for reform, the records show that the transfer of executive authority was not complete or fully implemented.⁷ In July 2008, His Majesty announced that he would retain what he called his 'judicial powers'⁸ to appoint and dismiss judges. Later in February 2009, Prime Minister Sevele was reported to have said in a radio interview that it was too early to dismiss the King from government and that the brakes should be put on "the call to take away executive power".⁹

The above information is not to say that the reform was an unilateral initiative on the part of the Monarch of Tonga. The main push for the reform began in the 1970s, propelled by the growing number of educated commoners who had returned to Tonga. They began to question the government's accountability and popular

4 The Monarch's traditional role as the 'supreme head' is integral to Tongan society and has always been in existence. The Constitution protects the Monarchy and its position with regards to the nobility and the people by way of: Succession to the throne to be determined by hereditary rules (cl 32, 33); the King may grant hereditary estates (cl 104) and confer titles and estates upon any person and where an estate has reverted to the Monarchy (cl 112); the King is sovereign of all the chiefs and the people, and the King is 'sacred' (cl 41); the King owns lands and property and he may deal with them as he pleases (cl 48); the dignity of the King is protected in several ways in the Constitution.

5 Office of the Lord Chamberlain, Palace Office, Nuku'alofa.

6 Palace Office, Nuku'alofa, 19 October 2006.

7 See Guy Powles *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2nd ed, The University of the South Pacific Press, Suva, 2013).

8 Press Release, Office of the Lord Chamberlain, Palace Office, Nuku'alofa, 28 July 2008.

9 Tongan Prime Minister, Radio New Zealand International, 19 February 2009.

representation in the Legislative Assembly, especially the fact that there were nine Nobles' Representatives for an electorate of thirty-three noble titles while the same number of People's Representatives represented the rest of the populace (which was recorded in 1975 to be around 88,318).¹⁰ Such concerns led to the formation of the pro-democracy movement, which was later led by the late 'Akilisi Pohiva.

There were then other important actors that contributed to the 2010 reform. These included the work by parliamentary committees of the National Committee for Political Reform (NCPR) and the Tri-partite Committee for Political Reform; the Royal Constitutional and Electoral Commission (CEC) which was appointed in July 2008 under the Constitutional and Electoral Act to recommend reforms and report by November 2009; the Privy Council which also comprised the Cabinet who represented the views of the King; and the Legislative Assembly which before 2010 comprised the Privy Council, which had the support of the nobles and the clear majority, giving power to pass reform legislation proposed by Government.

The timeframe for the reform to take place was clearly 2010 as directed by the King and the general election for the Assembly was due in November 2010. Prime Minister Sevele and the Ministers were committed to have the reform legislation decided, passed and in place by that time. This tight timeframe prevented adequate consideration of reform legislation especially by the people and their representatives in Parliament. It also prevented the CEC from holding a constitutional convention that would have drawn more people into public consideration and debate around the reform proposals. The need for enough time to consider the constitutional proposals was pointed out by the CEC in its report.

III THE 2010 CONSTITUTIONAL REFORM AND THE MAJOR CHANGES

The reform of 2010 represented the first major change to Tonga's political landscape since the remarkable initiatives that took place during the reign of King Tupou I in the 19th century. The 2010 reform laws introduced a newly empowered Legislative Assembly and Cabinet in an orderly manner and fashion, which was a great credit to the Tongan cultural values of restraint, respect and responsibility.

The reform significantly changed not only the composition of the Legislative Assembly and Cabinet but also changed the mechanisms that dictate Tonga's legislative and judicial affairs. Prior to 2010, the highest executive body in government was the King in Council or the Privy Council. Clause 51 of the amended

10 United Nations, Department of Economic and Social Affairs, Population Division, World Population Prospects: The 2019 Revision. The population of Tonga recorded for 2020 is 105,695 <<https://www.worldometers.info/world-population/tonga-population/>>.

Constitution changed this position so that the King and the Privy Council are no longer said to be part of the Executive. The Privy Council now comprises a group of advisers to His Majesty and no longer has the formal executive powers held prior to the 2010 reform.

Instead, the main reform was the introduction of the appointment to Cabinet of the elected members of the Assembly (except for up to four Cabinet Ministers from outside of the Assembly¹¹) on the recommendation of the elected Prime Minister. The King is required by the Constitution to appoint as Prime Minister that member chosen by the Assembly, and to appoint as Ministers those members or non-members nominated by the Prime Minister. The non-elected Ministers are full members of the Assembly to debate and vote (except in a vote of no confidence). Consequently, the Prime Minister and the Ministers no longer are appointed to the Assembly by the King, but rather are mainly elected members of the Assembly who then are chosen as Ministers through a process controlled by the Assembly. It is also significant that the size of the Cabinet is capped so that the number of Ministers voting together cannot constitute a majority of the membership of the Legislative Assembly. In other words, the Government needs to be supported by some members of the legislature from outside of the executive branch in order to pass budgets and laws.

In this way, Cabinet now originates from, and belongs to, the elected Assembly. The Prime Minister and Ministers work together under the notion of collective responsibility. In terms of their performance, they operate as one. This is a key element of governmental accountability. Once the Assembly's four-year term ends, that is the end of that Government, and a general election will decide who will form the next Cabinet. This form of collective accountability to the Assembly contrasts with the former constitutional arrangement whereby the Monarch could appoint and dismiss the Prime Minister and any number of Ministers at will, while also allowing them to remain in Government until removed at his pleasure. The executive government thus remained in place despite the ending of the Assembly's three-year term and any change in the People's and Nobles' Representatives.

Furthermore, under the former regime there was no means whereby the Representatives, as a matter of law, could require the Ministers to account for the administration of the Government whenever urgent matters arose. Ministers also were non-elected members of the Assembly and the electorate could not vote them out for poor performance. The 2010 reforms sought to change this state of affairs in

11 Constitution of Tonga, cl 51(2)(a) – "The Cabinet shall consist of the Prime Minister and such other Ministers who are nominated by the Prime Minister and appointed by the King, provided that (a) the Prime Minister may nominate as Cabinet Minister not more than 4 persons who are not elected representatives...".

order to bring about the ideal of responsible government whereby the executive answers to Parliament and therefore indirectly to the electorate. One of the initial calls for change was based on the lack of government accountability. In turn, the transformation of Cabinet's composition was viewed as giving power and responsibility to the people because their representatives now comprise almost 70 percent of the Assembly.

Because the executive can never comprise a majority of the Assembly, the Government will always need the support of members outside of the executive in order to pass laws and carry out business in the Assembly. The Government's need to have consistent support to implement its policies may lead to the formation of political parties. Similarly, those Members of Parliament who oppose the Government's policies may form an official opposition. However, it is interesting to note that during the political reform consultation process, neither the NCPR nor the CEC recommended in their reports that there be formal political parties established. Hence, during the time the reform legislation was debated in the House in late 2009 and early 2010, the issue of establishing formal parties was never discussed or raised, and to this day political parties are not formally recognised in Tonga's constitutional arrangements. Therefore, elected members must discuss informally amongst themselves their nomination for Prime Minister. Such a discussion culminates in the official submission of nominations for Prime Minister to the Office of the Assembly within 14 days of the return of writs. Within three days from the last date of receipt of the nominations, a special sitting must be called by an Interim Speaker (appointed by the King) where elected representatives will formally elect a person who will be recommended to the King for appointment as Prime Minister.¹²

Further, where once the King in Council had control of the Judiciary and the prerogative to appoint judges, the King in Council now performs these functions on the advice of the Judicial Appointments and Discipline Panel (JADP).¹³ In addition to recommending appointment, the JADP also is responsible for the discipline and removal of judges. The appointment, removal and dismissal of the Attorney-General and Police Commissioner also is now made by the King in Council on the advice of the JADP as per cl 31A(1).

The vote of no confidence procedure was also introduced as a mechanism for regulating and making the government accountable to the wishes of the people. Most other Pacific island countries provide for it.¹⁴ However, the amended Constitution

12 Constitution of Tonga, Schedule.

13 Ibid, cls 83C, 84, 86, 86A, 88.

14 See eg Constitution of Nauru and Constitution of the Independent State of Papua New Guinea.

does not state the reasons whereby a vote of no confidence might be brought against a Prime Minister. It is usually regarded as a political decision.

Procedurally, a motion will not be effective if it is made within 18 months of a general election, within six months before the next general election, or within 12 months after a previous vote of no confidence. Further, such a motion should not be moved unless at least five working days' notice of the intention has been given to the Speaker.¹⁵

Paragraph 174 of the CEC final report suggests that motions for a vote of no confidence should be "...used only when there has been a clear loss of confidence and not simply for personal political advantage...". This is an ambiguous prescription because it is difficult not to act 'politically' in a politically charged environment such as Parliament.

The outcome of the reform accorded the people of Tonga increased opportunities to participate meaningfully in politics. This participation can be characterised as follows: Most members of the Legislative Assembly are now elected by the people; the Assembly now chooses the Prime Minister; the Prime Minister in turn, selects Ministers from the Assembly and a fixed number from outside of the Assembly. As a result of the reform, Cabinet is more accountable to Parliament, and a majority of its members are commoners.

IV THE DEVOLUTION OF THE MONARCH'S EXECUTIVE POWER AND THE DUAL EXECUTIVE POWER

The 2010 amended Constitution devolved to Cabinet some of the executive authority that had previously been held by the King and the Privy Council. Clause 51 now provides for the executive function and powers of a new dual executive system of the Cabinet and the Monarch under sub-clauses (1) and (7) which state the following:

- (1) The executive authority of the Kingdom shall vest in the Cabinet, which shall be collectively responsible to the Legislative Assembly for the executive functions of the Government.
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- (7) The term 'executive authority' in sub-clause (1) excludes all powers vested in the King or the King in Council, whether by this Constitution, or any Act of the Legislative Assembly, any subordinate legislation, and Royal Prerogatives.

15 Constitution of Tonga, cl 50B.

Clause 51(7) constitutes a major limit on the effect of cl 51(1). Read together, they give the Cabinet much responsibility yet little power, with all the difficulties that that involves. In effect, it creates a constitutional monarchy that should operate in a combined executive where all roles work together to ensure an accountable and responsible government. This is manifested under cl 50A(3) which provides that:

The Prime Minister shall regularly and as required report to the King upon matters that have arisen with the government and upon the state of the country.

Therefore, the executive functions devolved to the Cabinet enable it to make decisions on questions of government policy and administration which were previously the functions of the Privy Council. The Constitution also gives other powers of decision either to the Cabinet directly or the King with the consent of Cabinet in areas of the currency of Tonga;¹⁶ determining the terms of leases of land up to 99 years in length, and the approval of leases of land to religious bodies and on beach frontages;¹⁷ and the approval of government expenditure during emergencies with a requirement to report to the Legislative Assembly on such a decision.¹⁸

In exercising these executive functions, Cabinet is expected to work collectively as reflected in cl 51(1) of the Constitution and s 17(3) of the Government Act which requires the Prime Minister not to decide on 'any grave or important matter' without the consent of Cabinet.

Clause 51(7) acknowledges that the remaining powers of the King are exceptions to the devolution principle. However, it should be noted that nowhere in the reports and discussions leading up to the amendment of the Constitution is there any explanation why these particular exceptions were made.

The wording of cl 51(7) seems to have been considered necessary in order to prevent the devolution principle, as expressed in cl 51(1), from depriving the Monarch of all of the other powers of an executive nature. It is also an acknowledgement that those other powers are indeed 'executive' in character. These executive powers are extensive, and the result is three distinct types of monarchical powers in the Constitution that limit the extent of representative democracy in Tonga. They include (1) the rules that confer Executive functions on the King;¹⁹ (2) the rules that establish the functions of the King in relation to the Legislature;²⁰ and

16 Ibid, cl 45.

17 Ibid, cls 105, 108, 109, 114.

18 Ibid, cl 19(ii).

19 For example, Constitution of Tonga, cls 29, 31A, 33, 36, 37, 38, 44, 46, 50, 77, 83B, 86, 88.

20 For example, cls 38, 40, 41, 68, 77.

(3) the rules that limit the capacity of the Legislative Assembly to control its own process and debates.²¹

The first type of rule is clearly executive in nature. Even though the second type of rule has to do with executive functions, it relates directly to the Monarch's relationship with the Legislative Assembly. The third rule does not relate to actions taken by the Monarch. It has to do with the rules of the Constitution which limit the scope of representative democracy in certain respects (representative democracy usually including the concept that the elected Legislature should control its own process and debates).

Many of the powers that come under these three categories have to do with the reserved power of the Monarch under cl 51(7). In other constitutional monarchies that adhere to the principles of responsible government, the Monarch generally retains similar reserve powers. These powers are there for the Monarch to use in her/his role as the guardian of the Constitution and to ensure that the other institutions of government adhere to the fundamental constitutional principles of responsible government. At the same time, constitutional conventions circumscribe when and how these powers are able to be invoked and exercised. By contrast, Tonga does not have constitutional conventions.

V HOW THE NEW DUAL EXECUTIVE SYSTEM OPERATES

Since 2010, four elected governments have formed Cabinets. Each successive government has operated with the thought that Tonga is more democratic and some even tried to ensure that they put in place a more democratic system of government.

However, the retention of the Monarch's executive powers in the Constitution has posed questions regarding whether Tonga is a 'Constitutional Monarchy' as expressed under cl 30. First of all, could the Monarch, invoke these powers whenever and however he sees fit, or should there be a practice or expectations that limit how these powers are to be used, such as constitutional conventions? If it is the latter, how do they develop and what might cause them to arise? These issues and questions can be illustrated by considering the Monarch's exercise of powers under the Constitution.

21 For example, cls 61, 67,

A The Monarch's Power to Refuse Assent

On 28 August 2014, the Legislative Assembly of Tonga passed five Bills²² aiming for further democratisation of Government. These Bills were consequently submitted to the Privy Council for Royal Assent.

In May 2015, a Privy Council resolution was issued, stating that His Majesty was "pleased, by and with the advice of His Privy Council"²³ to decline consideration of these constitutional amendments, giving the reason that:²⁴

...the requirements of Clause 79 of the Constitution had not been complied with, namely, that there was no acceptable evidence laid before him to demonstrate that 'the Cabinet are unanimously in favour of the amendment'.

However, the sequence of events required by cl 79 seems to mean that the Assembly considers and votes in favour of the proposed law three times and then the King and the Cabinet considers it. On the wording of the clause, Cabinet could draw from a later Assembly (so that later Cabinet could reach a decision on what happened in the Assembly in 2014) except that it would not be in the spirit of the clause.

Even though the subsequent Cabinet had resubmitted the above amending legislation to the Legislative Assembly for further deliberation between 2015 and 2017, it has since been resolved that it required consultation with the public.

B Monarch's Power to Dissolve the Legislative Assembly

On 24 August 2017, Tupou VI, after considering advice from the Speaker of the Legislative Assembly,²⁵ decided to dissolve the Legislative Assembly under cls 38

22 The Act of Constitution of Tonga (Amendment) Bill 2014; The Judicial and Legal Service Commission Bill 2014; The National Spatial Planning and Management (Amendment) Bill 2014; The Tonga Police (Amendment) Bill 2014; The Tonga Police (Amendment) Bill 2014.

23 His Majesty in Council's Decision PC 35/2015 of 27 May 2015.

24 Ibid. Clause 79 provides: It shall be lawful for the Legislative Assembly to discuss amendments to the Constitution provided that such amendments shall not affect the law of liberty, the succession to the Throne and the titles and hereditary estates of the nobles. And if the Legislative Assembly wish to amend any clause of the Constitution such amendment shall after it has passed the Legislative Assembly three times be submitted to the King and if His Majesty and the Cabinet are unanimously in favour of the amendment it shall be lawful for the King to assent and when signed by the King it shall become law.

25 The Monarch has an unrestricted authority to dissolve the Assembly at any time and hold a new election under cls 38 and 77(2) of the Constitution. There is also no agreed practice or convention whereby the Speaker of the House must advise the King to dissolve parliament, even though this has happened in the past. The Speaker's involvement in this case may have been part of attempts to change the government led by Akilisi Pohiva (the first elected commoner to become Prime Minister and a pro-democracy activist). Pohiva and his government came into power after the 2014 general election. One of their main agendas was to continue the reform that started in 2010. They were criticised in parliament for their attempt to re-submit amendments to the Constitution and for other

and 77(2) of the Constitution. The Speaker's letter to the King outlined the following reasons for his advice to dissolve parliament:²⁶

- (1) The draft of the Bill to review or amend clause 41 of the Constitution which grants His Majesty's authority to assent to all legislation adopted by the Legislative Assembly before it becomes law.
- (2) The government's earlier plans to sign and ratify CEDAW thereby bypassing His Majesty's authority under clause 39 to make treaties and sign conventions on behalf of the country.
- (3) The government's earlier signing of the PACER Plus agreement which is a regional convention without prior authorisation by His Majesty in accordance with clause 39.
- (4) The draft Bill to amend the Constitution to remove His Majesty's authority (clause 31A) to appoint the Attorney-General and to appoint the Police Commissioner (under the Police Act) and transfer these powers to the Prime Minister and Cabinet.
- (5) Lying to the Legislative Assembly that Hon 'Etuata Lavulavu would be punished and would not be delivering on it.
- (6) Misleading the Legislative Assembly on the Pacific Games 2019 and continuing to collect the foreign exchange levy though hosting the Games had been cancelled.
- (7) Raising their own salaries in response to a tax increase whilst the rest of the country carry the extra tax burden.

decisions the Prime Minister made, such as employing his son as his personal assistant, the alleged 'poor governance, nepotism and favoritism.' Consequently, on 2 February 2017, a notice of no-confidence motion was received at the Legislative Assembly. Seven Nobles and three People's Representatives signed this motion. However, on 27 February 2017, the House voted on the motion and Pohiva's Government survived. This was followed on 15 May 2017 by a decision by Pohiva's Government that it was withdrawing its decision to host the 2019 Pacific Games. This decision was based on a World Bank report which cautioned that Tonga's financial problems would be exacerbated if it hosted the 2019 Pacific Games. A culmination of differences between Pohiva's Government and its critics was shown in a letter from the Speaker to His Majesty which was described as detailing the Speaker's 'frustrations.' (RNZ 13 September 2017). In an interview after the vote on the motion, Pohiva referred to this situation as a 'failed coup'. Michael Morrah "Tonga's Prime Minister Blames Ousting on 'Failed Coup'" *Newshub* 27 August 2017, <<http://www.newshub.co/nz/home/world/2017/08/tonga-s-prime-minister-blames-ousting-on-a-failed-coup.html>>.

26 Nuku'alofa Times "Tonga's Political Crisis – The inside story" 16 September 2017 <<http://nukualofatimes.tbu.to>>.

- (8) Petitions of impeachment not worthy of the Legislative Assembly's time and resources.

The King's dissolution power is contained in cl 38 of the Constitution. It provides that the Monarch may dissolve the Legislative Assembly at his pleasure and command that new representatives of the nobles and people be elected to enter the Assembly. Clause 77(2) further provides that "it shall be lawful for the King, at his pleasure, to dissolve the Legislative Assembly at any time and command that new elections be held". These provisions therefore allow the Monarch to dissolve the Legislative Assembly even before the Legislative Assembly's term expires.

However, following the dissolution in August 2017, a general election was held on 16 November 2017 and representatives from the Pro-Democratic Party won 14 of the 17 electoral seats, enabling the party to again form a government. The late 'Akilisi Pohiva was then re-elected as Prime Minister by the Assembly.

VI CONCLUSION – WHAT DOES THIS TELL OF HOW TONGA'S CONSTITUTION WORKS?

The principles and reality of Tonga's constitutional reform in 2010 magnify the uniqueness of Tongan society. It shows the effect of weaving traditional values and democratic principles. It was a process where traditional and authoritative strands and strips of the Tonga's system of government and the Monarch's hereditary succession were used to weave and interlace with selected principles of democracy and of responsible and accountable government. The outcome of this weaving process is a dual executive power system: The executive functions are shared between Cabinet and the King. In principle, the 2010 constitutional reform reflects the weaving of different strands which favoured both democratisation and the status quo.

Interestingly, this weaving process is also the reason the reform is characterised as a transformation initiated and led by the Tongan Monarch. Ian Campbell argues that it was Tupou V who introduced political change in Tonga and that he was the real democratiser of Tonga.²⁷ In emphasising the key actor's roles in democratisation, O'Donnell and Schmitter²⁸ brought the issue of leadership to the fore. They wrote

27 Ian C Campbell *Tonga's Way to Democracy* (Herodotus Press, Christchurch, 2011) 232.

28 Guillermo A O'Donnell and Philippe C Schmitter *Transitions from authoritarian rule: Tentative conclusions about uncertain democracies* (Johns Hopkins University Press, Baltimore, 1986).

that the "talents of specific individuals" could be the determinant of outcomes²⁹ especially if "they hold huge reserve powers, as kings in transforming societies do".³⁰

The reality of applying these woven executive powers reflects another unique dimension of the Tongan people. The incidents outlined about the King's exercise of his executive power to refuse assent and dissolve parliament display some political and constitutional maturity, cultural restraint and respect on the part of the people and their representatives in Parliament. Firstly, the Prime Minister and Government accepted the undemocratic actions of the Monarch in dissolving parliament. Subsequently, the people expressed their support for the Prime Minister through the ballot box and not on the streets of Nuku'alofa. Secondly, the election heralded the introduction of a party-political system for Tonga. With the majority of the peoples' representatives being elected due to their allegiance to the Pro-Democratic Party, this may produce the party discipline that is necessary to allow the Government to control its supporters in Parliament, govern the country, and implement policies without compromise. Thirdly, the result of the election may arguably be used as a confirmation of the desire of the people of Tonga to see genuine democracy introduced into the country and their wish to see the Prime Minister continue his path towards full parliamentary democracy. Hence, election results should be treated as a signpost for the Monarch and the nobles that there is progress towards democracy even though genuine constitutional reform is required.

Tupou VI was not acting unconstitutionally in dissolving the parliament, rather he was exercising his personal royal prerogative that is not limited by the Constitution or the laws of Tonga. Even though the position is unsatisfactory, the Constitution is clear that the Monarch can exercise this power. Nevertheless, this prevents the Government from ensuring that responsible and democratic governance occurs. The dissolution of parliament by the Monarch thus showed the precarious nature of the democratic principles that were supposed to have been introduced by the reform of 2010 and the need for further reform.

The legal power of the Tongan Monarch highlights the difference between Tonga and the other countries operating with political parties and constitutional conventions. In New Zealand and the United Kingdom, this royal prerogative may only be exercised by the Sovereign or Governor-General following advice by the Prime Minister and can be used by the party in power to its political advantage. If the Prime Minister believes that their party is likely to win an early election then the Prime Minister can advise the Sovereign or Governor-General, as the case may be,

29 Ibid, 5.

30 Ibid.

to dissolve parliament. As a matter of convention, the Prime Minister's advice will always be accepted as long as the Prime Minister still has majority support in the House. It is only if this is not the case that the "reserve powers" become relevant. There, the Governor-General/Sovereign may have to make an independent decision as to whether an election is necessary.³¹ Be that as it may, these conventions combined with the exercise of party discipline do not apply in Tonga since the Prime Minister does not advise the Monarch to dissolve the Legislative Assembly.

From this ambiguous situation, there is a clear question regarding the intention and the role of the Monarch and the Privy Council, who were the architects and weavers of the reform and the new executive structure and system. In other words, was the Constitution designed or woven to be ambiguous and unclear?

In addressing this problem, Ottaway³² argued for regarding "the deliberate character of semi-authoritarian regimes as not failed democracies or democracies in transition but rather as carefully constructed and maintained alternative systems". These incipient democracies have been described as 'illiberal,' 'delegative' or more generally as 'hybrid' regimes. They constitute ambiguous systems that combine the rhetorical acceptance of liberal democracy, the existence of some formal democratic institutions and respect for a limited sphere of civil and political liberties with essentially illiberal or even authoritarian traits.

From this angle, Tonga's case shows that a ruler is not necessarily going to employ tactics that will undermine the ruler's own power. As explained above, the outcomes of the reform have shown considerable skills in manipulating the reform process to strengthen the ruler's own rule. On the surface, Tonga is seemingly transitioning towards democracy. However, this transition was intended to be only partial, leaving considerable authority with the Monarch and his advisers. This reality constrains, hinders and restricts the development of a constitutional culture which the effectiveness of the Constitution depends on, and it increases the uncertainty about the impact, meaning and effect of the new constitutional regime.

31 As happened in Australia in 1975; it has never happened in New Zealand.

32 Marina Ottaway *Democracy Challenged: The Rise of Semi-Authoritarian* (Carnegie Endowment for International Peace, Washington, DC, 2003) 3, 18.