

The Tongan Monarchy and the Constitution: Political Reform in a Traditional Context



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1. Introduction

The subjects of this paper are the Kingdom of Tonga,¹ its Monarchy, its Constitution, its traditional values and political reform. It is now well known that the government and Legislative Assembly of Tonga (the Assembly) made a momentous decision four years ago in 2010, when it amended the Constitution of Tonga (the Constitution) to shift most of the executive powers of the state from the Monarch to a Cabinet of elected leaders. For the first time in Tonga's history, the government was then elected. Four years later, on 27 November 2014, that government was called to account when Tongans went to the polls again to elect a second one.

In the course of the reform, the devolution of executive powers was incomplete due to the retention by the Monarch of several specific powers that have remained defined in the Constitution ever since its promulgation in 1875. Why did this occur? The purpose of this paper is to examine the Tongan context, particularly such features as Tonga's history, social structure, development of systems of law and government, and persisting social values. In the course of suggesting answers to the above question, the paper will offer an account of the political reform process and its outcomes.

I call the 2010 decision 'momentous' because Tonga had been led and ruled by a Monarch for well over 150 years without the people having any say as to who would run the country. The decision was also remarkable because it marked a peaceful transition of power, entirely in accordance with the terms of the nation's Constitution.

There had been growing pressure for constitutional reform but, at the end of the day, it seems that the willingness of the late King Tupou V to consider devolving executive authority upon an elected Cabinet has, if anything, increased many people's feelings of respect towards the institution of monarchy.

Tonga's 1875 Constitution stands out as perhaps the most unusual in the Pacific islands region² for the uninterrupted survival of 19th-century institutions, and for a style of monarchy that, from time to time, has shown great leadership, has also on occasions seemed selfish and eccentrically British, but still retains widespread popular support.

Two further comparative perspectives lead to the stated aim of this paper. First, the experiences of Tonga's monarchy and those of the royal lines of England, Europe and Scandinavia may be contrasted. The latter endured protracted and often violent struggles that characterised gradual progressive reform from absolute ruler to much respected figurehead. It would be unrealistic to expect that Tonga, having preserved the status and powers of its Monarch, would leap 135 years to 2010 and immediately strip its all-powerful *hau* (traditional leader) of all political authority. Instead, the objective of the mainstream Tongan pro-democracy reformers was to transform the role and authority of the Monarch in such a way as to preserve certain elements of his power and influence — to achieve a sort of 'balance' that would go some way towards securing the value of the monarchy to the nation.

Second, during recent times when many British Commonwealth states of the Pacific islands region have already generally adopted models of government like those of the UK, Australia and New Zealand — models that vest all political power in a Cabinet of elected representatives of the people, often called the 'Westminster model' — it is notable that Tonga has retained its own different constitutional approach or philosophy. In short, Tonga has opted for power-sharing in relation to both executive authority and the electoral and parliamentary systems — for the time being, at least — as the 'odd one out' in the region.



Why has Tonga decided not to conform to decolonising precedent but instead to experiment with compromises that ensure its path will continue to be unique? What might be some of the consequences?

Tongan opinions are divided on matters of reform — at home in Tonga, and abroad in the diaspora (where as many Tongans are settled in Australia, New Zealand and the USA as there are at home). Indeed, many Tongans I know and have worked with³ see beyond the negative characteristics of a powerful Monarch to an ordering of society that has not been experienced elsewhere, and should be examined more carefully before it is summarily dismissed as unacceptable in the 21st century. Opinions vary on what should be changed, and how far and fast reform should go. Many, perhaps most, believe that the distinctiveness of their political history and social system justifies a peculiarly Tongan path towards a form of democracy appropriate for Tonga. On the other hand, stern critics of the ‘traditionalist’ view argue that loyalty to the past should not colour one’s thinking, especially at a time when they believe that too little attention seems to have been paid by many politicians, and indeed by the public generally, to current and future needs and particularly to the task of understanding the nature, purpose and impact of the reform measures.

Answers to the many queries and criticisms may be summed up in two propositions. First, that the reform decisions taken by the people of Tonga in 2010 are consistent with, and show a desire to retain, traditions and values that, although now undergoing change and eroded by global and other forces, nevertheless have their place in Tonga — for the time being.

Second, that while traditions and values naturally permeate aspects of their lives to varying degrees, for very many Tongans their relationships between people of differing social rank, class or authority are governed by values such as respect for and obedience to traditional authority, or those of higher rank, and the corresponding value of reciprocity. Within a political framework constructed around such authority, there is a predisposition to accept it, so long as the reciprocal obligations of leadership are observed.

These are difficult and sensitive issues, and not of the sort that an external observer would normally attempt to write about. My broad objective in this paper is to inform a wider readership of the Tongan context of the reform developments — drawing on my research and work in Tonga over many years.⁴

The second of the six sections of this paper summarises the 2010 reform outcomes, as an introduction to the ‘law and government’ dimension of this study. The third will offer an account of the context within which the reform story may be told, including Tongan society itself, its structure and history, leading to the meeting of the two legal cultures, Tongan and British, from which amalgamated forms of monarchy, constitutional government and social control were derived. The contribution of the first King Tupou, the status of nobles, and the penetration of centralised law and government are key elements of this account. This Tongan context ensured the perpetuation of, and at times reinforced, notions of chiefly leadership and the pre-eminence of the Monarch as determining social values.

In the fourth section, the movement for political change will be introduced together with the structure of the reform process and the outcomes from it. Changes to the legislature and Cabinet, together with questions concerning how the Monarch might receive advice, will be looked at from the point of view of achieving a balance in the relationship between the Monarch and elected government. The fifth section discusses ongoing concerns and the sixth concludes the paper.

It is impossible to do justice to this topic in a short paper, and reference must be made to key supplementary reading and online resources detailed in the References at the end of this paper.⁵

2. Changes Effected By the Major Reforms

From 1875, the constitutional position was that the Monarch was the head of government as well as the head of state. Also, the Monarch has always been, and still is, of course, the *hau*, or traditional leader of all Tongans, which role is unaffected by current reforms. The supreme executive body was the Monarch in the Privy Council of Tonga where the Mon-

arch received advice and his views prevailed. Membership of the Privy Council comprised the prime minister and such Cabinet ministers as the Monarch chose to appoint to take responsibility for the ministries, all appointed by the Monarch to hold office and sit in the Legislative Assembly at his pleasure regardless of the term of the elected members of the Assembly (Constitution of Tonga 1875⁶). Usually the prime minister was a close relative of the Monarch, and most of the ministers were nobles. Those who were not, were deemed to have noble status. Also Privy Councillors and thus members of the Assembly were the two governors (administrative heads of the two island groups of Ha'apai and Vava'u) who were appointed by the Monarch with the consent of Cabinet and held office at the Monarch's pleasure.

Laws were initiated by Cabinet and introduced into the Legislative Assembly which comprised the Privy Councillors (since 1990, 12 to 14 of them) joined by nobles' representatives and people's representatives, an equal number of each, elected every three years by the nobles' and the people's respective electorates. Originally, all 20 nobles sat in the House with 20 people's representatives. With additional noble titles granted, the numbers grew to 33, but the unwieldy and expensive Assembly was reduced in size in 1914 and nobles and people were each represented by seven until 1962, when the number was increased to nine. The nine nobles' representatives were thus elected by the 30 holders of noble titles,⁷ while the nine people's representatives were elected by the wider electorate.⁸ Bills passed by the Assembly could not become law until the Monarch signed his assent. Prime minister and Cabinet were thus beholden to the Monarch for their office and status. For their part, the people's representatives had no prospect of participating in government.

Change was initiated in 2004 towards the end of the reign of King Tupou IV when it was announced that four of the elected representatives would be chosen by the Monarch to join Cabinet as ministers (on the understanding that they would no longer hold seats as elected members of the House).⁹ Dr Feleti Sevele (now Lord Sevele, a Life Peer) entered Cabinet by this route, and became the first 'commoner' prime minister in March 2006.

The practice had always been for matters of importance to be investigated by Cabinet which would make recommendations or pass resolutions for the Monarch's consideration in Council. On his succession to the throne in September 2006, the son of Tupou IV, King Tupou V declared he wished to see the devolution of his executive powers¹⁰ and withdrew gradually from active decision-making. He did intervene in aspects of the reform, and lived to see the new laws set in place, but died in March 2012. His younger brother, King Tupou VI, as we shall see, plays no role in Cabinet decision-making.¹¹

In light of the broad sweep of the history of chiefly power in Tonga offered in the next section, it will be seen that the promulgation of King Tupou I's Constitution in 1875 must, of course, be acknowledged as Tonga's greatest political reform. Nevertheless, the changes passed into law in the Legislative Assembly in 2010 constituted the first major set of amendments to the structure of that Constitution. In this section, the principal constitutional changes will be identified so that the reader who proceeds into section 3 will have in mind the system of government towards which Tonga's history was progressing.

In short, the recommendations of the Constitutional and Electoral Commission (CEC) were considered by Cabinet. Those that were approved were presented to the Assembly in legislative form, passed and assented to by King Tupou V — to become Tonga's political reforms of 2010.

The primary recommendation of the CEC was:

That the King and Privy Council shall no longer be part of the Executive Government of Tonga and the Executive Government shall be the Cabinet answerable to the Legislative Assembly (rec. 2).¹²

Adopting the recommendation, the Sevele Cabinet and the Assembly, with the approval of King Tupou V, amended the Constitution to provide that the 'Form of Government' is now a 'Constitutional Monarchy' [replacing 'Constitutional Government'] 'under His Majesty King George Tupou V and his successors' (Constitution cl.30).¹³ 'Cabinet' replaces 'King and Privy Council'. Two concise statements make the position plain:

One:

The Government of this Kingdom is divided into three Bodies –

1st The Cabinet;

2nd The Legislative Assembly;

3rd The Judiciary (cl. 31).

Two:

The executive authority of the Kingdom shall vest in Cabinet, which shall be collectively responsible to the Legislative Assembly for the executive functions of Government (cl. 51(1)).

Consequently, the Monarch now appoints as prime minister the elected member of the Assembly who is recommended by the Assembly under a selection procedure provided in the Constitution, and the monarch will appoint as ministers those members who are nominated by the prime minister (cls 50A and 51). As for the Privy Council, of which Cabinet used to be part, it no longer exists in its earlier form. It is not represented in the Assembly and is now purely an advisory body (cl. 50).

Despite the seemingly broad provision for the Monarch's relinquishment of his powers in favour of Cabinet, a subclause, 51(7), preserves all executive powers already expressly vested in the Monarch by the Constitution, any Act of the Legislative Assembly or royal prerogative. Thus, in order to ascertain the precise nature of the 'balance' of powers that has now been struck in the reform process — between the Monarch and other sources of authority — it is necessary to search for the relevant constitutional clauses and construct a list of these further powers of the Monarch.

One group of the Monarch's powers concerning:

Appointment and supervision of the Judiciary and office of Attorney-General

Through creation of the positions of Lord Chancellor and a Judicial Appointments and Discipline Panel, and

Making appointments, etc., after listening to advice from the Panel (cls 83B–102)

was proposed by Cabinet and Tupou V contrary to the recommendations of the CEC and came into

force as part of the reform. Their fate at the hands of the post-reform Cabinet, Assembly and Monarch is uncertain — see section 5.

The following clauses, which have been untouched by the reform, preserve the power, influence and entitlements of the Monarch in prescribed and not insignificant ways. They stand alongside the principal political reform, namely the devolution of executive authority, to create a sharing of power, between Monarch and Cabinet. According to the records, none of these clauses except for that concerning the veto over legislation was discussed in the reform process. It is remarkable that neither they nor the concept of power-sharing were considered, as such, by the Commission. The clauses have survived from 1875 to 2010, to the same effect, and remain today.¹⁴

Succession to the throne

The Constitution guarantees perpetual succession to the lineage of the Monarch. (2010 cl. 32)¹⁵

A member of the Royal Family who is likely to succeed to the throne may not marry without the King's consent, and if such marriage occurs, the member's right to succeed may be cancelled (2010 cl. 33).

Relationship with Legislative Assembly

The Monarch may convoke and dismiss the Legislative Assembly at any time, and may call general elections (2010 cls 38 and 77).

As to the law-making process, no law may be made by Parliament without his assent (2010 cls 41, 56).

Defence Forces and martial law

The Monarch commands the Tonga Defence Forces, may proclaim martial law and raise a militia, but may not make war without the consent of the Assembly (2010 cls 36, 46 & 22).

Right to a hearing suspended

The Monarch may suspend Habeas Corpus in case war or rebellion (2010 cl. 9).

International affairs

The Monarch may make treaties with foreign states and appoint diplomatic representatives (2010 cl. 39).

Hereditary estates

The Monarch alone may grant hereditary noble titles and estates and such an estate will revert to the Monarch in the absence of an heir (2010 cl. 112).

Honours and distinctions

It is the Monarch's prerogative to give titles of honour and confer honourable distinctions (2010 cl. 44).

Naturalisation

The Monarch may approve applications to become naturalised subjects (2010 cl. 29).

Coinage as legal tender

It is the prerogative of the Monarch, with the advice of Cabinet, to decree the coinage to be legal tender (2010 cl. 45).

Entrenched protection

The Constitution which protects the Monarch cannot be changed without his consent. (2010 cl. 79).

There remain longstanding further clauses, which originated after 1875, as where:

the Monarch in Council sits in judgment on appeals from the Land Court concerning hereditary estates and titles (2010 cl. 50(2))

and

the Monarch in Council may grant a Royal Pardon (2010 cl. 37).

To return to the Cabinet, its size is now limited to not more than half the number of elected members of Parliament (excluding the speaker). This means that the prime minister and the 11 ministers nominated by him in the 26-member Legislative Assembly must seek the support of some MPs other than ministers in order to secure passage of

legislation. Further, the prime minister may augment the skills and experience levels of his cabinet by nominating for appointment as ministers up to four appropriate persons from outside the Assembly. This was a contentious reform issue, clouded in debate, to which reference will be made later in section 4.3 because of the sentiments revealed.

The ministers are thus elected MPs representing constituencies (except for up to four, referred to above). They are bound by responsibilities under both the Constitution and the conventions of Cabinet government, as also reviewed in section 4.3.

This devolution of the Monarch's executive authority and the transformation of the Tongan Cabinet has put the whole of government leadership onto a regular election cycle for the first time — now a four-year term. The November 2010 elections referred to were the first to be held under a new electoral system in which the two electorates comprise:

- i. the hereditary landholding nobles (33 titles held by 30 nobles), plus four law lords and nine life peers (honorary nobles), who elect nine hereditary nobles as their representatives; and
- ii. the balance of the people who now elect 17 representatives (Constitution cl. 60).

In the required secret ballot on 21 December 2010, 14 of the 26 members of the new Assembly chose as Prime Minister Lord Tu'ivakano — an experienced parliamentarian.¹⁶ Pro-Democracy veteran, 'Akilisi Pohiva, mustered 12 votes. From the elected members Tu'ivakano appointed a Cabinet of 11 ministers including two nobles and both independent and Pro-Democracy people's representatives.¹⁷ Permitted to choose up to four ministers from outside the house, he chose two, one of whom is a senior woman administrator in education, respected academic and intellectual, and the other an experienced lawyer and politician.¹⁸ Over the past three and a half years from 2010, Cabinet has not been stable, mainly as a result of ministerial reshuffles, resignations and appointments.¹⁹

In short, Tonga is today governed by the elected prime minister and ministers, together with the

Monarch in the exercise of his listed powers. That is the main thrust of the reforms. Executive power is now shared.

Naturally enough, the Tongan system of government has had its critics, before and after reform — it is said to be ‘anachronistic’, and at odds with current notions of ‘democracy’ and ‘good governance’. Indeed, in many contexts (including in some academic circles, people engaged in private enterprise and aid delivery, and in the media), discourse around Tonga sometimes seems quite derogatory and dismissive.

Over the years that I have been involved with Tonga, I have become aware of these views — and, while acknowledging abuses within the system, I regard most of the views as exaggerated and ill-informed.

The question many outsiders ask is how this state of affairs came about and why have Tongans accepted it? The answer lies in Tonga’s past. I will begin by identifying from my research those elements of Tongan history, traditional organisation and constitutional development that continue to form people’s values and thinking, and have thus contributed to continuing respect for traditional authority and general acceptance of the sharing of power.

3. The Historical and Sociopolitical Context

3.1 Structure of Tongan society²⁰

Settled over 3,000 years ago, Tonga and Samoa are at the historical base and traditional heart of the growth and spread of Polynesian civilisation. 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

By the 13th century, to quote historian Ian Campbell:

Tongan society had acquired a form easily recognisable to later generations. It had a centralised system of chieftainship, one chief being recognised as superior to and having authority over all others, and deriving his

authority from heaven. He could command a large labour force; food production was efficient enough to allow large numbers of men to engage in warfare, voyaging and building. (Campbell 2001, 36)

Through the 16th and 17th centuries and into the 18th, Tongans took warfare to neighbouring island groups and built new dynasties at home that engaged in violent competition resulting in civil war. Tongans became Christians in the 19th century, when a single leader emerged to re-introduce central control with codes of law aimed at unifying the country as a Christian state — under a single dynasty.

It is useful at this point to consider the nature of the society which produced powerful leadership and lived with it for centuries.²¹ In short, Tonga possessed a vigorous traditional organisation of a hierarchical nature and extensive kinship groupings and allegiances which were conducive to the formation of broad bases of power. Disruptive warfare caused fortified towns to be built and occasionally the severance and re-alignment of ties linking groups of people with their leaders and the land. Control of land by the large descent groups (called *ha’a*) of a few high-ranking chiefs meant that subdivision into ever smaller kinship groups (*kain-ga*) placed people in a state of perpetual tenancy (Powles 1979, 65–68).

As time has gone on, the complexity of kinship relationships has increased. Perhaps the most persistent feature of society is the pervasive recognition of ‘*eiki* (the chiefly rank, or higher status, of another person).²² Anthropologist Kerry James observes:

The strength of the social system lies less strictly in the imposition of chiefly values than in their dissemination throughout society so that each segment of kin and household organisation essentially replicates the internal organisation of aristocratic structures of kindred. What appear to have been solely ‘*eiki*’ customs of kinship rank are now followed by an emancipated population and have come to represent Tongan culture and tradition (James 1997, 50).

3.2 The reforms of Tupou I and his constitution-making

Historians are agreed that the first King of Tonga was a man of remarkable intellect and vision. Taufā'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 Taufā'ahau Tupou I. He believed it was necessary to gain 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 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.

A critical 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 20 of them as hereditary nobles to control parliament and, together with a further six hereditary estate-holding chiefs, to control most of the land.

Tupou I was also driven by the desire to see estate land distributed amongst the people and made productive. Succession to hereditary titles and estates was determined by the Constitution, and associated land legislation provided for both security for the estate-holder and his obligation to distribute allotments of land to be claimed by young males and held as hereditary life interests.

Tongan society was thus to be divided in two dimensions. Three classes of citizens were officially created and entrenched in law for governmental and land-owning purposes. They were the 'Monarch and heirs to the throne', the 'nobles' and the 'commoners'. The **horizontal** lines of stratification separating these classes were however, crossed and sometimes obliterated by the **vertical** criss-crossing of kinship ties, links between hereditary groups of higher and lower status and the ranking of each

person and family *vis-à-vis* the other in accordance with kinship rules (Powles 1979, 59–62).

Looking back, it can be seen that the Constitution was the culmination of decades of effort on Tupou's part to use the laws of a central authority as the means of establishing and maintaining government and implementing policies.²³ He began in 1839 with a code of laws, mainly to prohibit common crimes and enforce biblical teachings, and significantly to declare the law as the only source of authority. Chiefs were subject to it, and judges were appointed to decide guilt and punishment, traditional powers thus taken from chiefs. Following extensive consultations with the chiefs, with George Grey (then Governor of New Zealand) and with missionaries, Tupou promulgated a replacement code in 1850 that went further to control the power of chiefs, prohibit the alienation of land and assert his absolute authority. Due to this provocation of certain chiefs, and with undertones of French interference, civil war broke out in 1852 but was short-lived. That year Tupou travelled to Sydney and observed how government there was administered (Latukeyu 1975, ch. III).

The third code, of 1862, took large strides towards a charter of government, providing for justice and education, and spelling out the King's powers. Known as the 'emancipation edict', the code abolished the authority of chiefs over their people and absolute rights of chiefs over their land. The notion was introduced that chiefs would allocate land according to need and could not interfere with a man's holding as long as he paid tax and rent — as fixed by law. Tupou's strategy was that the entire population would owe loyalty to him rather than to the chiefs, thus freeing him from dependence on the goodwill of the chiefs (Latukeyu 1975, 33–40).

The story of the drafting, granting and implementation of the 1875 Constitution includes reference to advice given by missionary Shirley Baker and revisions of wording, rather than meaning, by British envoy, Basil Thomson (Latukeyu 1975, chs 4 and 5). However, Tupou I was determined to give the Tongan people a blueprint for a modern nation sustained by benign central authority based on principles of chiefly leadership.

3.3 Pre-eminence of the Monarch as a constitutional value

The Constitution of Tonga has always incorporated certain cultural principles. Indeed, it can be said that every written constitution is imbued with a discernible ‘philosophy’ (Powles 2007b, 28–32). The pre-eminence of the Monarch, the status of nobles and the existence of a commoner class reflected aspects of traditional cultural Tongan thinking about chiefly leadership, as articulated by Tupou I, and also drew on British notions of nobility of the time. By virtue of privileges accorded to Monarch and nobles in the parliamentary process, law-making was within their control. From a journalistic self-styled lawyer he had met in Sydney, Tupou I found that this Tongan approach to ultimate authority was well expressed in Hawai‘i under the leadership of King Kamehameha III in his constitution of 1852,²⁴ and he adopted clauses from that source (Latukefu 1975, 30). Comparisons of relevant articles from the Constitution of Hawaii 1852 with clauses from the subsequent Constitution of Tonga 1875, and the 1988 reprint with today’s Tongan Constitution demonstrate how concepts and the ways of expressing them have time-travelled unchanged from 1852 to 2010 (Powles 2007b, 36–38).

A review of the Constitution as it emerged from the amendment process in 2010 (see consolidation in Powles 2013, Appendix, 88–102), reveals that:

The original structure and language style, as well the precise subject matter, of the 1875 document, have been preserved.

Two-thirds (79) of the clauses of the consolidation were untouched by the reform process.

Much as before, the consolidation reflects the focus on the monarchy (55 of the 115 clauses refer to ‘the King’ in one context or another).

Thus, much of the Constitution today is the same in its application to King Tupou VI and his late brother Tupou V as it was when it applied to the brothers’ great-great-great-great-grandfather over a century ago.²⁵

All in all, the Tongan Constitution, having been created in order to establish and entrench the monarchy as the means by which the new state would

prosper, still appears to reflect that institution as foundational. If the reformed Constitution has a discernible underlying philosophy in the present century, it is perhaps that, for the time being, the interests of the Tongan people are best served by retention of a monarchy that demonstrates leadership and retains the means to protect those public interests, until further reform may be considered.

Inevitably, inconsistencies and ambiguities have arisen from retention of royal powers outside the ambit of the principle of devolution of executive authority — to be considered further in section 4.4 and 4.5.

3.4 Nobles and lesser chiefs

Traditional Tongan values associated with the authority of chiefs were incorporated in the Constitution thus reinforcing the power and influence of the chiefs selected as nobles, particularly in relation to their privileged position in the legislature and in relation to land (Marcus 1980, 76–79).²⁶ On the other hand, important values that commonly would accompany the status of chiefs and the exercise of chiefly authority have received no formal recognition. These values are concerned with reciprocity of obligation, service to the kinship group and kinship loyalty.

Nobles found that they could, if they wished, rely on their constitutional status and statutory powers under the land tenure system in order to secure compliance from their people. For some nobles it became easy not to assume traditional responsibility for them, and not to relate in a fully reciprocal manner. Other nobles, of course, have managed much better.

As for the dozens of lesser chiefs and heads of family descent groups throughout Tongan society, traditional values around chiefship, kinship and family status have always flourished, unhindered by the formal law. Respect and obedience were and are still nourished as appropriate behaviour (James 1997, 50).

3.5 Amalgam of legal cultures and spread of centralised law

Discussion to this point has focused on the Tongan chiefly system, and the British contribution must now be considered. When two social systems

came into contact, as did the British and Tongan systems last century, two legal cultures interacted. As a homogeneous society like that of Tonga had need of only one legal culture, it was natural that, over time, some sort of amalgam of the two original components would result. The introduction of British concepts was accompanied by some controversy and conflict, but the architects of the new state of Tonga selected elements from each legal culture and arrived at an early accommodation of the two. In this way, Tonga was able to lead Pacific island societies in establishing stable central government.

The distinctiveness of the Tongan experience over the past 150 years derives essentially from the ordering of Tongan society — as seen in the formation and preservation of key institutions. The ordering of society during this period originally involved the adoption and application of compatible concepts selected from two legal cultures. A combination evolved of: a) the authoritative elements of Tongan chiefly law, and b) the command theory of English jurisprudence, which, with the Christian notion of individual responsibility, characterised the British legal system. Thus, respect for authority was instilled from these persisting sources.

During the period 1850–1950, which was crucial for the establishment of national government and international independence, the essential requirement was a central foundation for the growth of the legal system. While law-making acknowledged the Constitution as the source of its legitimacy, the massive code, *The Laws of Tonga 1891* (becoming the 1903 code), provided that central legal foundation for modern Tonga. The period 1920–40 was characterised by interference by British officials and the penetration of English governmental practices. Courts under British and New Zealand judges together with local magistrates were engaged in implementing law and securing compliance (Powles 1990, 162).

As the code appeared to indicate an intention to legislate for Tonga in the manner of a larger metropolitan country,²⁷ it seemed important that research should ascertain as far as possible the extent to which the laws of the state in fact regulated the lives of ordinary Tongans. The large volume of information recorded on the subject²⁸ enabled a remarkable

picture to be assembled (Powles 1990, 162–69), and only a brief summary can be provided here. First to note is the extensive range of matters dealt with by law: from the collection of taxes and fees on land, animals and the licensing of activities, to requiring public standards of personal cleanliness, buildings and road repairs, school attendance and more. Every Tongan was brought into a direct relationship with their government. (Powles 1990, 162–63)

The law was disseminated and enforced by district and town officers (mayors) responsible for promulgating the law at regular *fono* (meeting), which took the place of written law.²⁹ The Governor would summons a ‘great *fono*’, and the local noble — a ‘noble’s *fono*’. Attendance has been compulsory since 1924. (Powles 1990, 163–64)

The sheer volume of court activity in the small kingdom leads to the conclusion that police and other government officials intruded into the lives of all adult Tongans and left a deep impression of the power of central government. Some dramatic statistics were achieved in the first thirty years last century, and surprisingly early in the century having regard to the short history of government.³⁰

The high conviction and low appeal rates indicate that it was the direct and energetic implementation of an extraordinarily comprehensive and penetrating system of laws which produced the statistics. Certainly, such implementation was a burden for a large proportion of the population, who were imprisoned for failure to pay fines³¹ and could lose their allotments for failure to pay rent. Punishment by whipping played its part. However, the ‘outcome’ statistics were reduced by the fact that both the criminal and the civil consequences of a ‘wrongful’ act were often dealt with at the same time under longstanding and sensible provisions aimed at permitting the court to compensate the ‘victim’. (Powles 1990, 166)

The early hierarchy of courts was operated with enthusiasm. Since 1914,³² Tonga has had a body of registered advocates, with more experience than training, who have acted in cases of all types and have been instrumental in further increasing the force of written law as a means of modifying attitudes and behaviour. They have encouraged the idea of the authority of the law as the ultimate sanc-

tion, and its machinery as the forum for dispute settlement and the manipulation of interests.

To sum up, communication between government and the governed was one way — of the ‘top-down’ variety — perpetuating notions of respect for and compliance with the requirements of those in authority. There is no parallel for this early administration of formal law elsewhere in the Pacific.

4. Reform: Process and Outcome

4.1 Pro-democracy movement and input to the reform process

The drive to reduce the executive power of the Monarch and introduce a more representative government evolved from longstanding concerns that the government of Tonga was typically incompetent and failed to account for its laxity in money matters. These concerns and the rise and many transformations of the pro-democracy movement have been chronicled by Ian Campbell (2005, 2006, 2011 and 2012). A ‘time-line’ of relevant events from 1992 to 2007, including public service strikes, public demonstrations and the Nuku’alofa riot, may be found in Powles 2007a, 130–41.

Discontent had begun to be articulated in the late 1970s, and when, in 1984, a teacher and radio broadcaster called ‘Akilisi Pohiva was sacked for conducting current affairs radio programs that criticised the government, his employer, his successful action in a Supreme Court decision given in May 1988 demonstrated that he had found a useful forum for drawing attention to future contests with the authorities. In the meantime, he was elected to parliament and became established as most prominent of those members who wanted to attack the government and demand accountability at every opportunity. Attempts to form opposition parties waxed and waned in a fluid setting with shifting associations. Between 1998 and 2004 the pro-democracy movement put forward several proposals for specific change to the Constitution, but none were accepted by government. As recounted in section 2, a commoner was appointed prime minister in 2006, leading to a crucial period of co-operation between Prime Minister Sevele and King Tupou V.

The part played by ‘Akilisi Pohiva and the pro-democracy people’s representatives leading up to and during the reform process had the effect of keeping pressure on that process. Campbell has spoken of the strengths and limitations of their contributions to it:

No one was so abrasive or persistent as Pohiva; no one had his vote-pulling power. Successive politicians entered parliament on his electoral ‘coat tails and lost when he broke with them ... Although the people’s representatives were never unified, and Pohiva was never an organisational or parliamentary faction leader, his hectoring of government provided a lead that others were pleased and able to follow. (Campbell 2011, 228–29)

During the reform process itself, the pro-democracy parliamentary candidates and representatives were unable to make many strategic and effective contributions on reform issues. Indeed, it was a feature of the reform process that PM and Cabinet, with the King’s backing, exercised control in a manner that defeated opposition attempts to influence the outcome in a significant way.

Five principle sources and forums contributed to the making of the ultimate reforms:

- i. The National Committee for Political Reform (NCPR) — comprising nine members, mainly of the Assembly, together with experienced outsiders — was appointed in 2005 by the Assembly to consult widely and record public opinion on people’s attitudes and priorities towards change. The NCPR held public consultations at home and abroad, and reported to the King, then to the Assembly in October 2006.³³ It was important that the people were consulted but, because its agenda was unstructured, the NCPR’s recommendations lacked necessary specificity.
- ii. The Assembly’s Tripartite Committee for Political Reform was appointed by government to guide parliamentary discussion forward.
- iii. The CEC, comprising four Tongans (two of whom had been members of the NCPR) from different fields — a senior woman administrator in education, a legal practitioner, an experienced

academic and secretary of the Traditions Committee — was chaired by a British judge who had served in Tonga and elsewhere in the Pacific. The CEC was appointed under an Act of Parliament with clearly defined terms of reference and to report by November 2009 — during which time it conducted hearings in Tonga and overseas, and published an interim report that attracted discussion.³⁴

- iv. The Cabinet (expressing the views of King Tupou V, Prime Minister Sevele and ministers).
- v. The Assembly itself, where the Privy Council (comprising the prime minister and ministers of Cabinet plus the governors) with further noble support if necessary, had a clear majority of numbers. Of the 82 recommendations of the CEC considered by the Assembly 15–17 December 2009, 30 were rejected or modified in some way. The outcome of the Assembly's deliberations was presented back to the Assembly between May and September 2010 in the form of Bills to amend the Constitution and related statutes.³⁵

A general election for the Assembly was due in November 2010, and the Sevele government had declared itself committed to having the reform laws decided, passed and in place by then. It is understandable that such a timeframe had to be imposed, but the consequences were unfortunate in that opportunities were limited for adequate consideration of recommendations and Bills. Through publication of its interim report, the CEC was able to draw more people in to consider and debate differing views around the reform proposals. The CEC repeatedly pointed out that the whole reform process needed more time (paras 39 and 65).

4.2 The Legislature

As already indicated, much of the Constitution remained unchanged by the 2010 reforms. Of course, the Monarch is no longer involved in initiating legislation, but he retains his power of veto, through which he can exert influence on law-making, if he chooses. The Monarch retains the right to summons and dismiss Parliament — powers reserved in practice for emergencies. It was noted in 1990 that Tonga's Monarch is the only

head of state in the Pacific who has absolute veto power, and is also alone in his power of dismissal (Ghai and Cottrell 1990, 145, 162), and this has not changed.

As to the representatives (reps) in the Parliament, it had always been the case that the number of people's reps would equal the number of nobles (or, since 1914, the number of nobles' reps). This disproportionate arrangement has now been reviewed for the first time. Issues considered by the Commission included whether the nobles should have any allocated seats in Parliament at all, and if they had such seats, whether the nobles' reps should be elected by the nobles alone or by the wider electorate.

The idea of retaining nine nobles' reps but at the same time increasing the number of peoples' reps from nine to 17 had been recommended without explanation in the NCPR's report of August 2006, and it seems no subsequent opinions weighed heavily against it. That numbering now appears in the Constitution (cl. 60). There was however a major conflict of views put to the CEC on the principal issue. In concluding that discussion, the CEC made several observations. It said:

The presence of the Nobles in the Assembly has long been accepted and is still regarded by a substantial number of members of the public as essential when considered against the traditional structure of Tongan society and the importance of the ties of *kainga* and *ha'a* (family and dynasty) (para. 320).

and concluded:

The decision to retain them will be seen by many outside our borders as a failure to grasp a chance to achieve democracy. We define democracy by more than the right to elect a representative parliament. Much that truly defines democracy is already enshrined in traditional Tongan values ... at this stage, we feel the continued presence of the Nobles in the new and untried representative parliament will be accepted by most Tongans as a sensible and, possibly, necessary influence. Having said that, we feel compelled to note that the apparently casually prepared

and inadequate submissions, initially by the Nobles' representatives and later by the Nobles as a whole, leaves us little ground for such a hope (para. 323).

Indeed, the nobles' reps had opposed the creation of the CEC and abstained from voting on the Bill which set it up.

The main reform affecting the Assembly is the transformation of its responsibility. Instead of being divided between a) members from outside as ministers loyal to the King, and b) members owing allegiance to their constituency of voters, the whole elected membership of 26 is now responsible to its respective electorates for finding, within its numbers, appropriately experienced and ethical leaders to be the prime minister and the ministers. Of course, by the same token, it is the responsibility of the two electorates to elect Assembly members suitably qualified for leadership.

4.3 The transformation of Cabinet itself

As government of the nation is managed day by day, the PM and ministers in Cabinet are the centre of attention. A contentious issue was whether the PM should be able to increase the skills and experience levels of his Cabinet by appointing up to four appropriate persons from outside the Assembly. In the past, successive Monarchs had done so. Differences of opinion became apparent during the reform process, reflecting views from 'The King should be able to appoint them, in order to maintain a bond between the King, the Nobles and the People' (Tripartite Committee, recorded in CEC para. 148), to rejection of the idea of such appointments (whether by King or PM) on the part of the CEC members, who considered that leadership qualities were more important for a Cabinet minister than technical expertise, and further that the strength of the monarchy was not diminished by the complete withdrawal of the monarchy from government of the country (paras 149–50).

Turning to Cabinet as a whole, it is fundamental to the success of Cabinet government in Tonga that all Cabinet members accept that they are bound by the conventions of Cabinet government as practiced in countries that follow the British-derived Cabinet-based system, several of which are still, of course,

constitutional monarchies. Thus, Cabinet is now 'collectively responsible to the Legislative Assembly' from which (except for up to four) they were chosen in order to carry out 'the executive functions of the Government' (cl. 51). What was once a long-standing convention is now required by the Constitution. Undoubtedly, the focus will now be on the conduct of ministers, not only in the administration of their portfolios, but also in their acknowledgment of the prime minister as their leader (no need to look over one's shoulder to see what the Monarch might be thinking), their acceptance of Cabinet confidentiality and their preparedness to promote and defend all Cabinet decisions.

4.4 'The King in Council'

One of the puzzling outcomes of the reform process was the Sevele government's refusal to adopt the CEC's recommendations regarding providing advice for the Monarch. When he sat with a Privy Council of his ministers, pre-reform, the Monarch would rely on them for advice, and the 'King in Council' was the highest executive authority in the land. The Privy Council now comprises only those 'people whom the King shall see fit to call to his Council' (cl. 50) — and he may choose none, if he thinks he doesn't need advice.

The CEC was aware of the relationship applicable between non-executive monarchs and cabinet governments found in the UK and Commonwealth. The words of an early British constitutional commentator come to mind: 'To state the matter shortly, the sovereign has, under a constitutional monarchy such as ours, three rights — the right to be consulted, the right to encourage, the right to warn' (Bagehot 1867, 130). These valuable functions can only be carried out effectively if the monarch has competent advice.³⁶

Further, given that the Monarch in Tonga retains a considerable number of powers, it would seem to be in the public interest that he should have the best advice available to him. The CEC's recommendations (rejected as indicated above) were that, in addition to the King's own appointees, the Council should be a constitutional body with a core of 6 ex officio members selected by, for example, the Council of Churches, the Traditions

Committee, and the governors of the island groups. Also, to ensure advice was prepared, the prime minister should report to the King once a week, and the Council should meet at least once every three months (recs 10–16).

I believe no public statement was made on the issue, but that the prime ministers and ministers may have felt it was inappropriate for the King's discretion in relation to his Council to be dictated by the Constitution. As it happened, the late King had begun the practice of appointing 'law lords' to advise him, and uncertainty surrounding this initiative is mentioned in section 5.

4.5 Approaches to 'finding the balance'

What were the considerations going through the minds of those people involved in the reform who were aware that an intended outcome of the process would be a very significant sharing of executive power between the Monarch and elected government?

As discussed above, evidence of respect for persisting traditional authority exists in relation to the status of the Monarch but also as a widespread social value (James 1997). Before proceeding further, it is relevant to review the opinions of respected Tongan writers on the subject. While they approach the subject from very different viewpoints, there is an underlying consensus.

An assessment of Tonga's political scene in light of its cultural history was offered 30 years ago by well-known teacher and administrator, Emiliana Afeaki, who spoke of Tongan acceptance of 'the values attached to the roles and norms of each of the three classes'. She observed 'Tongans are proud of their country and of its monarchy which is indeed the stabilising factor of the society' and, without qualifying that statement, went on to add that government would be wise 'if it revolutionises itself from within to suit a changing society' (1983, 58, 77–78).

The late Professor Futa Helu referred, in typically stern fashion, to Tonga's culture as a 'morality that is characteristic of rigidly hierarchical societies' and observes that 'the values of such moralities would include loyalty, submission, obedience and humility' (1992, 144). Veteran lawyer, Laki Niu, identified 'total and unquestioning obedience

or *faka'apa'apa*' (respect for higher rank) as 'the essence of this social order', and referred also to the importance of the roles of lesser chiefs. He warned of the gradual breakdown of such respect in recent times (1992, 308–309). The late Professor Epeli Hau'ofa pointed out that, while the Constitution 'sowed the seeds for the decline of the aristocracy, the ascendancy of the commoner class and through this the need for constitutional reform today', nevertheless there was and still is a crucial role for the aristocracy, by which he appeared to mean the royal and noble lineages. He added 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' (Hau'ofa 1992).

By the time it was necessary to reach decisions on reform proposals, Tongans had been reminded of the three classes — the Royalty, the Nobles and the Commoners — as a fundamental structure seen from time to time in published speeches, reports and papers. At important public meetings, the three classes are sometimes called the 'three pillars of society', the 'three tables', or, as was said in the report of the NCPR — 'the framework for proceeding with reform relied on "a House of the King, Nobles and the People of Tonga based on Unity"':³⁷

Returning to the reform process itself, it is noted that, to the extent that there was an agenda for reform, it was set by the Act establishing the CEC. Nevertheless, Cabinet sought to interpose its own priorities from time to time, and again at the point of final discussion by the Assembly, by which time the CEC was no longer functioning. As far as the primary question of the monarch's executive authority was concerned, the CEC and Cabinet together approved of the concept of the devolution of that authority as a fundamental reform in the hierarchy of government and the necessary constitutional amendments passed through the Assembly accordingly. However, as far as I am aware, no mention was made in the CEC's public discussions or report or during Assembly sessions, of the Monarch's express powers as found elsewhere in the Constitution. The following observations may help to explain, rather speculatively, what occurred.

In the schedule to the CEC Act 2008 that set out the matters to be reported on by the CEC, there

were two mentions of the Monarch under ‘The Executive’, as follows:

- The roles, functions, powers, duties of, and relationships between, the Monarch, the Privy Council, Prime Minister and Cabinet,
- Delegation of certain authority by the King to the Prime Minister.

Although it was assumed by some people familiar with them (including this author) that the terms of reference of the Commission covered the Monarch’s express powers (those powers being some of the ‘roles, functions, powers’ of the Monarch included in the Schedule), the Final Report of the CEC expressed the opposite opinion (para. 91). However, the prime minister and Cabinet had made a detailed submission to the CEC early in 2010 (which was referred to in the CEC’s report but not published) and there is every likelihood that the notion that these express powers of the Monarch should not be interfered with emanated from that source.

For his part, in February 2009, Prime Minister Sevele was reported as saying in a radio interview that it was too early to dismiss the Monarch from government and that the brakes should be put on ‘the call to take away executive power.’³⁸ Indeed, a story had been told by Sevele himself in a published paper about how, in the mid-1980s he was lectured by two aid representatives — from Australia and New Zealand —

to the effect that the major shortcomings of Tonga and the cause of its economic ills were the monarchy and nobility systems, the extended family and the building of elaborate churches. I replied: anyone with a little appreciation of the Tongan way of life would realise that to do away with these things would be tantamount to stripping off some of the most fundamental and stabilising elements of Tongan society (1987, 74).

Indeed, the Sevele Cabinet had no desire to strip the Monarch of all powers in government matters. The principle of the devolution of the Monarch’s executive authority upon Cabinet was not going to be absolute and exclusive.

What conclusions might be drawn from the apparent absence of public discussion about the retention by the Monarch of the named powers?

Generally speaking, it would seem more respectful to leave it to the Monarch to decide whether to act in his own discretion or on the recommendation of the prime minister. Perhaps it was hoped that, despite the absence of any precedent for constitutional conventions in Tonga, such a convention might be developed by the Monarch, of his own volition, whereby he would always follow the advice of the prime minister in defined circumstances.

Consequently, the Constitution that emerged from the amending process preserved some of the King’s authority in government — as many of the Tongan leaders during the reform process hoped that it would.

This outcome, I suggest, reflects adherence by the leaders to the established Tongan values of respect for and deference to their Monarch and traditional *hau*. These values have been adhered to both through the process of reform and in the substance of the reform achieved. To a degree, common sense and pragmatism played their part, as it was clearly easier to allocate the respective powers of Monarch and Cabinet in accordance with the ways in which the relevant clauses of the Constitution already separated them.

5. Further Considerations

In July 2008, the late King Tupou V caused consternation in legal circles when he announced that he would retain what he called his ‘judicial powers’ — by which he meant executive powers in relation to the appointment and dismissal of the judges (extended later to cover the office of attorney-general). As mentioned above, he appointed four ‘law lords’ as Privy Councillors to advise him, and ultimately went on to instruct Cabinet to discard the existing conventional Judicial Services Commission and to provide for new offices, institutions and procedures which, in his view, were needed to protect judicial independence.³⁹

Legal opinions as to the best way for Tonga to proceed in relation to this matter are divided. The advice given to the late King Tupou V has apparently been rejected by those now advising Cabi-

net,⁴⁰ with the result that legislation for the repeal of the relevant reform measures and for the re-introduction of the Judicial Services Commission has been passed by the Assembly but not yet assented to by Tupou VI.⁴¹

The timing of events prevented the CEC from considering the merits of the issue other than to commend the pre-reform government for its adoption of the 'Judicial Services Commission' approach. However, on the general question of the involvement of the Monarch in decisions affecting the direct running of the country, the CEC sounded a warning. If a controversy were to arise concerning a judge, the Monarch may ultimately be drawn into it. At this point it is socially unacceptable to think of holding the Monarch publicly accountable. The Assembly may demand explanations from Cabinet ministers but His Majesty cannot be treated in that way. Indeed, it is often said that the Monarch should always avoid tasks that are potentially contentious. It is of paramount importance to preserve the dignity of his office, remote from the rough-and-tumble of disputation and strife. The CEC was explicit on this point (para. 95).⁴²

With these considerations in mind, Tonga's leaders may find that the 'judicial powers' initiative of Tupou V in 2008 will test the 'balancing of powers' concept in the near future.

A further matter that may be raised, perhaps as a priority, for the new government elected late November 2014 concerns a policy adopted in 2012 called 'The 'Good Governance' agenda' under which the government introduced and opened for public discussion an integrated set of laws directed at securing principles of transparency, accountability and trust throughout government. The Attorney-General announced a package of three Bills under which there would be an independent body with a number of divisions overseen by a Good Governance Commission — an anti-corruption division, an ombudsman division, and other functions that Tonga may want to go ahead with now or in the future — for freedom of information, international crime, money laundering, etc. These were all designed to keep staffing to a minimum within Tonga's budget. The Bills were introduced to the Assembly in 2012 and referred to a standing com-

mittee for public consideration.⁴³ Has this initiative stalled? (Powles 2013, 76–77). Is it an example of the sort of situation where the influence of the Monarch might be enlisted in the new post-reform climate?

As is natural after any major law reform, people ask to be given time to become acquainted with it. Certainly, as the main structures of reform are in place, it may be tempting to many people to leave matters as they are, or at least to pause for some time, before taking further action. For one thing, there is a new King on the throne and many citizens will be waiting to see what his views are and what direction he will take on many issues.

Crises can arise overnight. Perhaps the new 'motion of no confidence' was an example (cl. 50B). The story is told of how a motion was presented to the Speaker on 18 June 2012, and remained a threat to Cabinet for months until it was defeated 13 votes to 11 on 3 October that year. There is now a Bill to require a two-thirds majority vote in order to carry a motion of no confidence, but no action on it (Powles 2013, 73–76). Another potential crisis may be triggered by threats to abolish the nobles' electorate and throw open all seats in the Assembly to popular vote — where nobles would stand as ordinary candidates. Such a move could encourage the nobles to insist on constitutional privileges that protect them — thus testing the Constitution further.

In light of this paper's focus on the Monarch's relationships with the rest of government, might it be possible for aspects of this area of law reform to be looked at further, particularly in light of concerns over the quality of advice generally for the Monarch? Many countries have law reform commissions, made up of part-time appointees to reduce cost. In 2007, such a commission was proposed for Tonga and legislation passed and assented to. For no publicly stated reason, the Tonga Law Commission Act was never brought into force — perhaps the idea could be re-examined, along with provision for the Monarch to be represented?

6. Conclusion

The monarchy: This study has reviewed the history and recent development of the Monarchy as the pre-eminent institution within Tongan soci-

ety and Tonga's political structure. Constitutional change has involved a redefining of the Monarch's role, alongside popular thinking about the symbolism of the balancing of the 'three pillars' that sustain Tonga. The most significant shift in Tonga's system of authority has been the devolution of executive power from the Monarch to the elected representatives of the nobles and the people. However, as demonstrated in this paper, the devolution has not been complete, and it seems that there will be ongoing interest in identifying just where power and influence lies, and in arguments for and against further reform.

Through examination of Tonga's political history and social setting, this paper has sought to demonstrate that an historical amalgam of penetrating systems of traditional authority and introduced law has had a tendency to foster attitudes of respect, deference and compliance towards those exercising lawful power. These attitudes are most marked where the Monarch is concerned, and it is suggested that, to a significant extent, they have contributed to the absence of questioning and debate surrounding the implications of the sharing of executive powers under a reformed Constitution.

In the immediate future, the leadership qualities of King Tupou VI will be closely observed.

The Constitution: Tonga's unique vintage Constitution was flown proudly like a flag on a pole from 1875, for the world to see that the people of these islands had a set of laws for government which rendered the need for colonial intervention unnecessary. There was then a long period of settling down, while the two strands of Tongan traditional authority and British legal conventions amalgamated into the system of government which existed, with relatively minor changes, until 2010.

The magnitude of the 2010 reforms should not be underestimated. The reforms that have been argued for, and the changes that have actually been made, cannot be understood without real familiarity with the amended Constitution, its wording and the reasons given for the changes. I have sought to encourage such familiarity, and have been fortunate to have permission to publish the unofficial consolidation of the Constitution as amended (Powles 2013, appendix). Hopefully, the Constitution will

be brought down from the flagpole and spread out on the table — on tables in offices and schools — so that it becomes everyone's property.

In Tonga, the old adage is borne out — that you cannot change peoples' values and priorities with the stroke of a law-maker's pen. Nonetheless, it does seem important that steps are taken to introduce practices designed to encourage attitudes and behaviours in all branches of government that break with traditional notions of relationships built on subservience to social rank.⁴⁴ Apart from recognising the position of the Monarch, such deference within the system is at odds with the demands of government, where transparency and accountability are the foundation of fairness and the building of trust. If adopted, the proposed Good Governance regime of policies and laws should encourage improvement of relationships between all concerned.

The process of adapting to constitutional change is naturally slow. In a message read to the Assembly at its closing on 7 June 2013, His Majesty Tupou VI observed that Tonga needed more time to allow its new democracy to flourish.⁴⁵ Tonga's second post-reform election in November may test new leaders. As Tonga travels down a path that encourages greater confidence in their elected representatives and ministers, the hopes of the Tongan people will surely ride on that journey.

Author Notes

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His doctoral research at the Australian National University examined the significance of traditional leadership for the development of legal systems and government in Polynesian societies and the early introduction of constitutions and legal systems.

He studied the history of Tonga's Constitution and has been associated with the recent constitutional reform process in Tonga. This has taken the form of advice requested over time by government and by the Commission on Electoral and Consti-

tutional Reform and the Royal Land Commission. For further details of Tongan research, see End-notes 3 and 28, below.

Retired from teaching, Guy works from his home office, where he may be contacted at <guy.powles@monash.edu>.

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Government of the Kingdom of Tonga

- Constitution of Tonga 1875 (English version), see Latukefu 1975. Appendix A.
- Constitution of Tonga 2010 (unofficial consolidation at 30 Nov), see Powles 2013. Appendix.
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Endnotes

- 1 The Tongan archipelago contains 52 inhabited islands, some remote. Seventy-three per cent of the population live on the main island of Tongatapu. The welfare of the population of 105,300, 37% under 15, is contributed to by remittances from an equal number of Tongans living in New Zealand, Australia and the US. Tongans are highly literate in Tongan, the language of government and commerce (Small and Dixon 2004).
- 2 The Pacific islands region is home to 14 independent and associated states each with its own distinct constitution.
- 3 I carried out doctoral research in Tonga 1974–77 and have visited on many occasions — for example, to gather Tongan contributions for edited books and to present papers at conferences. Since 2001, I have been engaged from time to time as constitutional consultant to the Attorney-General, the government, the Constitutional and Electoral Commission and the Royal Land Commission. I should add that nothing of a confidential nature is revealed here by me, and facts recorded are from sources accessible to any member of the public who searches for them.
- 4 See the previous note.
- 5 One such item is a small book (Powles 2013) which this paper aims to complement. The book is more comprehensive on the subject of the reforms themselves, the rationale for them and how they were pursued. Questions discussed, such as those surrounding the status and roles of nobles, in politics and as hereditary landlords, and factors contributing to concerns over the independence of the judiciary and the attorney-general, which are merely mentioned here, are more fully considered in the book. The companion book also contains, as an appendix, the Constitution of Tonga as an unofficial consolidation of all reform amendments as at 30/11/2010. At the time of writing, no such consolidation has been published in Tonga. Also included in the References are web addresses for certain major reports, such as those of the Constitutional Commission, as it seems that the government has removed these addresses from their original locations in Tonga.
- 6 See list of References under 'Government of the Kingdom of Tonga'.
- 7 The number of noble titles was 33 but with multiple title-holding by some individuals, the actual number voting was 28–30. Independently of the reforms, in 2008 King Tupou V appointed four Law Lords to advise him and in 2010 appointed nine Life Peers, to be called 'Lords', in recognition of service to Tonga. These two types of Lord were given the right to vote as nobles in elections, but not to be candidates (*Press Release*, Office of Prime Minister 25/7/2008; and *Matangi Tonga* 29/12/2010).
- 8 The number of non-noble voters registered for the election in November 2010 was 42,067 (*Matangi Tonga* 4/11/2010). Adult males have voted since the first Assembly under the 1875 Constitution, joined by women in 1951. Registration is compulsory but voting is not.
- 9 *Matangi Tonga* 11/11/2004.

- 10 The late King's father, King Tupou IV, died on 11 September 2006. Only a few days later, King Tupou V endorsed a dramatic declaration of support for the devolution of executive authority (A King Well Prepared to Lead, 26/9/2006. Office of the Lord Chamberlain, Palace Office, Nuku'alofa). A second statement, made by Prime Minister Sevele at the King's request, followed on 19 October 2006 (King Voluntarily Cedes Constitutional Authority. Palace Office, Nuku'alofa). Incidentally, it should be noted that these announcements were made, but not widely publicised, before the damaging riot of 16 November 2006, in Nuku'alofa.
- 11 King Tupou VI, now 55 years, is well educated (the UK; US naval college; University of NSW); and has a Bond University MA in International Relations, served as prime minister 2000-06, and as Tonga's high commissioner to Australia from 2008 until his succession.
- 12 Unless otherwise indicated, 'rec.' will hereafter refer to a numbered recommendation of the CEC's Final Report and 'para' will refer to a numbered paragraph.
- 13 'cl.' and 'cls' will hereafter refer to the clauses of the Constitution of Tonga amended as at 30 Nov 2010 (for which see the consolidation appended to Powles 2013).
- 14 Compare Latukefu, 1975, Appendix A with Powles, 2013, Appendix.
- 15 On the death of King Tupou IV, his eldest son ascended directly to the throne by virtue of this clause. Despite some media conjecture, there was no vacancy, hiatus or possible legal intervention. The same occurred in March 2012, when Tupou V died and his brother took the throne immediately, with the coronation to follow some considerable time later.
- 16 Lord Tu'ivakano is a former speaker of the Assembly and minister. He had succeeded to the hereditary noble title Tu'ivakano in 1986. He holds an honours degree in political science from Flinders University, Adelaide. His eldest son is married to the second daughter of Princess Pilolevu, the King's sister (who is married to the Noble Lord Tuita).
- 17 After deliberating for several days, 'Akilisi Pohiva decided not to be a minister.
- 18 *Matangi Tonga* 5/1/2011.
- 19 For example, Pesi Fonua, Challenges for Tonga's More-Democratically-Elected Government in 2014 Election Year. *Matangi Tonga* 17/1/2014.
- 20 This introduction to the background of Tonga's leadership system is offered to those readers in the western Pacific and Australia who are less familiar with Polynesia.
- 21 The Polynesian groups of Tonga, Samoa and Hawai'i shared many characteristics, from homogeneity to centralised hierarchies and constitution-making that incorporated degrees of unchecked monarchical power (Ghai 1988, 3-4, 90-92).
- 22 The translation of 'eiki as 'chief' is of little use, as the context is needed to determine whether the person referred to is an aristocrat from history, a noble, a *matapule* (senior administrative chief) or any relative of higher rank (James, 1997, 52).
- 23 This account of how the thinking developed around 'law-making for a nation' is drawn from Campbell 2001, 85-91, and Latukefu 1974, 118-79. The texts of the three codes of laws discussed here may be found in Latukefu 1974, Appendices A, B and C.
- 24 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 diverged dramatically when the Hawai'ian monarch was overthrown in 1893, mainly by American 'business revolutionaries' (Powles 2007b).
- 25 Tupou II was great-grandson of Tupou I.
- 26 For a critical assessment of the role of nobles in the system of land tenure and administration, see Royal Land Commission *Final Report* online.
- 27 The population was estimated at 32,000 in the 1930s, then exploded to reach 77,500 in 1966 and 97,800 in 1996 (Small and Dixon 2004).
- 28 As part of my doctoral research program, in 1975 I examined Colonial Office reports, the codes of laws, government gazettes and annual reports of the Tongan Chief Justices in order to assess the degree of implementation and enforcement of these laws. The information provided in these paragraphs is drawn from the data I obtained. Greater detail and sourcing are provided in Powles, 1990.
- 29 The Town Regulations Act 1888 defined the *fono* as 'a meeting at which orders and admonitions are given to the people but at which no discussion takes place'.

- 30 In 1914, when the population was 23,120, the number of criminal cases actually tried was 14,200 (about one for every adult. The annual average for criminal and civil summonses and rent claims issued over the eight years 1922–29 was only a little lower (Powles 1990, 164).
- 31 Chief Justice Horne observed: ‘It is appalling to think that 1,178 people were sent to prison by magistrates last year for the non-payment of fines’ (*Annual Report of Chief Justice*, 1927).
- 32 Representation in Courts Ordinance 1914, No.5.
- 33 NCPR Report 2006, 31 August.
- 34 CEC Interim Report 2009; CEC Final Report 2009.
- 35 For details of the amending legislation and a consolidation to 30/11/2010, see Appendix to Powles 2013.
- 36 Questions around providing advice for Pacific island heads of state are reviewed in Ghai and Cottrell 1990, 102–104.
- 37 NCPR Report, 2006, Chapter 4.
- 38 Tongan Prime Minister, Radio New Zealand International 19/2/2009.
- 39 Details of these clauses are cited in the summary of identified reforms in section 2 above.
- 40 A situation like this raises questions about how the Monarch should be advised in legal matters. Until repealed in 1990, clause 93 of the Constitution had required since 1875 that the judges give opinions on important matters to the King, Cabinet or Assembly if requested to do so.
- 41 Act of Constitution of Tonga (Amendment) Act 2014, and Judicial and Legal Service Commission Act 2014, were passed by the Assembly on 28 August 2014 and in October were awaiting royal assent (*Matangi Tonga* 9/10/2014).
- 42 As to the likelihood that dealings with a member of the judiciary might be difficult, or perhaps involve a dispute threatening judicial independence, see Powles 2013, 33–44.
- 43 Parliamentary Committee Starting Public Consultations. *Matangi Tonga* 18/11/2012.
- 44 A powerful plea for courage to stand up for what you believe to be right was made by former attorney-general, Mrs ‘Alisi Taumoepeau, during her evidence to the inquiry into the loss of the ferry *Princess Ashika* (reported by Sean Dorney on ABC Radio National’s *Correspondents Report* 31/1/2010; *Matangi Tonga* 2/2/2010).
- 45 *Matangi Tonga* 9/6/2013.

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