

'ASIPELI 'AMINIASI KEFU

**RECENT CONSTITUTIONAL DEVELOPMENTS IN
TONGA: WHERE TO NOW?**

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0	ABSTRACT

The Kingdom of Tonga is the last remaining kingdom in the Pacific and has enjoyed undisturbed autonomous rule for many centuries. It has never been conquered or colonised by any foreign power. Its form of government is therefore moulded on Tongan culture and has been unchanged since it was established under the Tongan Constitution in 1875. Recent developments in the judiciary and the executive however have launched Tonga into an evolutionary process. Based on the recent judicial and executive developments, the history of Tongan governance and the current political climate, it is assessed that the evolutionary process should consider cultural identity, shared governance, good governance and judicial independence as a basis for future government. It is however cautioned that the evolution should not be made in haste.

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In the last three decades however some controversial Executive decisions has created political discussion which has developed into a popular political reform movement. Political tension reached high levels in 2003 and 2004 when Executive decisions and legislation were challenged in the Tongan judiciary.¹ The ensuing judicial decisions clarified that the Monarch's political authority was limited by the Constitution. This provided a further platform for the political reformists. The Monarch and the Executive however decided to look internally and, surprisingly, reconfigured the constitution of the Executive by appointing four

¹ Clause 82 of the Tongan Constitution provides that, "The Constitution is the supreme law of the Kingdom and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void." Clause 86 provides the Supreme Court jurisdiction in all cases in "Law and Equity arising under the Constitution and Laws of the Kingdom". The Act of Consolidation of Tonga (Cap. 2) (as amended) *Laws of Tonga* (1988 Revised Edition) [The Constitution]

I INTRODUCTION

The Kingdom of Tonga is the last remaining kingdom in the Pacific and has enjoyed autonomous rule for centuries. It has never been subjected to control by a foreign power. In 1875 modern Tonga was created when King Siaosi Tupou I granted the existing Tongan Constitution. Tupou I achieved this after unifying Tonga under his rule using Christianity as his banner. The government created under the Tongan Constitution is a constitutional government “under” the Tongan Monarchy. It has the three normal limbs of the Executive, the Legislative Assembly and the Judiciary.

The Executive is headed by the Monarch as the chair of the Privy Council. The Privy Council consists of all the Ministers of the Crown and two Governors, who are all appointed and retain office at the whim of the Monarchy. The daily administration and implementation of Executive policy however rests with Cabinet, which is chaired by the Prime Minister, and consists of the Ministers and the two Governors. The unicameral Legislative Assembly comprises of the Cabinet, along with nine representatives elected by around 100,000 people, and nine representatives elected by 29 nobles who hold the 33 noble titles. The Judiciary is independent and consists of a three-tier court structure, with expatriate judges sitting in the highest court, the Court of Appeal, and the penultimate court, the Supreme Court. Tonga is therefore unique in having a Monarchy that is the Head of State, the Head of the Executive, and the cultural head of the people and the land. This form of government has remained unchanged in the last 130 years.

In the last three decades however some controversial Executive decisions has created political dissension which has developed into a popular political reform movement. Political tension reached high levels in 2003 and 2004 when Executive decisions and legislation were challenged in the Tongan judiciary.¹ The ensuing judicial decisions clarified that the Monarch’s political authority was limited by the Constitution. This provided a further platform for the political reformists. The Monarch and the Executive however decided to look internally and, surprisingly, reconfigured the constitution of the Executive by appointing four

¹ Clause 82 of the Tongan Constitution provides that: “The Constitution is the supreme law of the Kingdom and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.” Clause 90 provides the Supreme Court jurisdiction in all cases in “Law and Equity arising under the Constitution and Laws of the Kingdom”: The Act of Constitution of Tonga (Cap. 2)(as amended) *Laws of Tonga* (1988 Revised Edition) [The Constitution]

elected Ministers to sit in Cabinet and the Privy Council. It was unexpected and welcomed by most people. However, calls for further political reform still exist, and is more vociferous, direct and prevalent than before. The obvious result is that Tonga is experiencing constitutional evolution. The challenge is to evolve peacefully. The question then is: Where to now?

Part II of this paper will discuss the recent constitutional developments in Tonga and identify governance principles from these developments that may be used in the future. In Part III the history of Tongan governance and the present form and operation of the Tongan government will be briefly outlined, together with an assessment of the political climate. The purpose is to fully understand where the evolution is moving from, and whether there are some principles to retain. In Part IV some principles of governance that could be considered for the future will be adduced from the recent developments, the history of Tongan governance and the present political climate. Options for the structure of government will then be discussed together with the ways in which these changes may be implemented.

It will be suggested that Tonga's form of government should provide for cultural identity, shared governance, good governance and judicial independence. Tonga may either: fully provide for these principles in the present system; have a government based on partnership between the Monarchy, the nobles and the people; or, embrace full democracy with limited involvement of the Monarch. It will ultimately be suggested that the significant constitutional changes in the future should not be made in haste.

It is not within the scope of this paper to pass judgment upon the decisions made by the Tongan Government in the course of the developments that are discussed here. They are referred to only for the purposes of analysing how the Tongan system of Government may be evolving. All Governments evolve, and the Tongan government is no exception. While the paper does discuss options for change it is not intended to provide a systematic critique of any proposal or to pass any relative judgments on them from a normative point of view. The end point of the evolution never arrives. Constitutions are a continuous work in progress. Rather, the paper is concerned to relate what has occurred in recent times to the constitutional heritage and culture of Tonga. The hope is that this may clarify the issues that are under debate in Tonga.

II RECENT CONSTITUTIONAL DEVELOPMENTS IN TONGA

A The Judiciary: Guardians of the Constitution

1 The Lali Media Cases

In February 2003 the Tongan Government decided to ban the Auckland published newspaper *Taimi 'o Tonga (Taimi)* from circulation in Tonga. This was based on a report submitted to Cabinet by the Special Branch of the Ministry of Police that the *Taimi* was responsible for stirring seditious feelings among the population.² The *Taimi* was a persistent and outspoken political critic focussing on exposing corruption, particularly involving Government.

The Government issued four bans. The first ban was under section 34 of the Customs and Excise Act which gives the Chief Commissioner of Revenue a wide power to prohibit the importation of any goods. The Chief Commissioner advised the *Taimi* that the ban was necessary because the *Taimi* was a foreign owned and published paper involved in domestic politics, and that its standard of journalism was unacceptable. The second ban, issued the next day, was a Declaration published in the Government Gazette under section 35 and Schedule II Part I(7) of the Customs and Excise Act made again by the Chief Commissioner of Revenue declaring that "all editions, volumes or part" of the *Taimi* to be "seditious or advocating violence, lawlessness or disorder" and therefore a prohibited import. Both bans were discussed by Cabinet beforehand and referred to the Chief Commissioner for consideration.

The third ban was an Order-in-Council issued some days later by the Privy Council. The Order-in-Council declared that under section 3 of the Prohibited Publications Act the

² Under section 47(1) of the Criminal Offences Act (Cap. 18) (as amended) *Laws of Tonga* (1988 Revised Edition) every person who "speaks any seditious words or makes, publishes, imports or distributes any seditious document or is a party to a seditious conspiracy" commits an offence punishable by a term of imprisonment not more than 7 years. Under sub-section (2) "seditious words are words expressive of a "seditious intention". Section 48 defines "seditious intention" as "an intention to do any of the following matters: (a) to excite disaffection against the King of Tonga or against the Government of Tonga or Legislative Assembly or Judiciary in Tonga; (b) to excite such hostility or ill-will between different classes of the inhabitants of the Kingdom as may be injurious to the public welfare; (c) to incite, encourage or procure violence, disorder or resistance to law or lawlessness in the Kingdom; (d) to procure otherwise that by lawful means the alteration of any matter affecting the Constitution, Laws or Government of the Kingdom".

importation of the *Taimi* was contrary to the public interest.³ The Government advised the *Taimi* that, in addition to the reasons for the first ban, this ban was based on the *Taimi* advocating against the Monarchy and the Tongan Government seditious feelings, violence, lawlessness and disorder, and that there were complaints from various groups.

The *Taimi* filed judicial review proceedings in the Supreme Court against the Chief Commissioner and the Government.⁴ In the judgment of the Court delivered on 4 April 2003 Chief Justice Gordon Ward clarified that under judicial review proceedings it was not the function of the Court to determine the merits of the allegations that the *Taimi* had advocated seditious feelings, violence, lawlessness or disorder.⁵ In dealing with the first two bans the Chief Justice held that the Chief Commissioner had not used his powers as a “back door method of press censorship” however the Chief Commissioner had issued the first two bans based on media and political concerns, which were irrelevant factors to be considered when exercising the statutory powers under the Customs and Excise Act, and so had therefore acted *ultra vires*.⁶ The Chief Justice also held that the actual decision was not made by the Chief Commissioner but by Cabinet and the Chief Commissioner was simply implementing Cabinet’s desire.⁷ The Chief Justice generally agreed that the statutory powers could not ban future publications but did not make a clear ruling as it was not argued fully.

In relation to the Order-in-Council the Chief Justice had, first, to deal with the issue of whether the Court had a right to review a decision of the Privy Council. The Chief Justice stated that Tonga was “unusual” compared to other countries because the King is “clearly included in the executive arm of Government” and it seemed that this was deliberate since the granting of the Constitution in 1875.⁸ The Court therefore ruled that the executive decisions of the Privy Council may be reviewed by the Courts. The Chief Justice went on to hold that

³ Under section 3(1) of the Prohibited Publications Act (Cap. 54) *Laws of Tonga* (1988 Revised Edition) His Majesty in Council may prohibit the importation of any publication if it is contrary to the public interest.

⁴ The structure of the Tongan judiciary consists of 3 levels: (1) the Court of Appeal (all appeals), the Privy Council (appeals from the Land Court concerning hereditary estates and titles only); (2) the Supreme Court (Criminal, Civil, Admiralty and Family Jurisdiction) and the Land Court (Land matters only), (3) the Magistrates’ Court (Summary Criminal and Civil matters, and may also sit as Court of Marine Inquiry, Prisons Court of Inquiry and Police Tribunal).

⁵ *Lali Media Group Ltd & ‘Akau’ola v ‘Utoikamanu & The Kingdom of Tonga* [2003] TOSC 14, 21 <<http://www.pacii.org>> (last accessed 24 August 2005) [*Lali Media I*].

⁶ *Lali Media I*, above n 5, 23.

⁷ *Lali Media I*, above n 5, 24.

⁸ *Lali Media I*, above n 5, 9-11.

the Order-in-Council was based on the same reasons as the first two bans and concluded that:⁹

The evidence demonstrates that the decision by Privy Council was not based on a proper consideration of the matters relevant to the decision about the public interest and further that the failure to discuss it and simply approve the decision of Cabinet was not a proper exercise of the Council's discretionary power under the Act.

The Chief Justice also held that the Chief Commissioner and the Privy Council had failed to provide the *Taimi* with the "right to know the charges against it" and the "right to be given a fair opportunity to answer them".¹⁰ The Order-in-Council was therefore held unlawful.

The Plaintiffs also claimed that the statutory powers used to produce the bans were unconstitutional as they were inconsistent with clause 7 of the Constitution. Clause 7 provides that:¹¹

It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation or the laws, official secrets or the laws for the protection of the King and the Royal Family.

The Chief Justice declined to make such a ruling in relation to sections 34 and 35 and the Schedule to the Customs and Excise Act because a proper exercise of the statutory powers would not breach clause 7.¹² However, in dealing with the constitutionality of section 3 of the Prohibited Publications Act, the Chief Justice held that section 3 was not inconsistent with clause 7 of the Constitution *per se* but it would be inconsistent where an Order-in-Council made pursuant to that section failed to set out "the factors relevant to determine the public interest".¹³ This meant that all Orders made under section 3 had to set out the reasons such an Order was made in the public interest. All three bans were therefore lifted.

⁹ *Lali Media I*, above n 5, 24-27.

¹⁰ *Lali Media I*, above n 5, 28.

¹¹ Before 2003 there was only one amendment to this clause in 1990 when official secrets was inserted as an exception by the Act of Constitution of Tonga (Amendment) Act 1990.

¹² *Lali Media I*, above n 5, 34.

¹³ *Lali Media I*, above n 5, 35.

However, on the date of the Chief Justice's judgment Government promulgated a fourth ban in the form of an Ordinance made by the Privy Council under section 7(a) and (d) of the Government Act, and clause 50(1) of the Constitution. The Ordinance was titled the "Protection from Abuse of Press Freedom Ordinance" which effectively prohibited the *Taimi* from importation and circulation in Tonga. The Ordinance also prohibited any judicial review of a decision by Cabinet to ban a publication.

Clause 50(1) of the Constitution provides that:

- (1) The King shall appoint a Privy Council to assist him in the discharge of his important functions. The Privy Council shall be composed of the Cabinet in accordance with the fifty-first clause and the Governors in accordance with the fifty-fourth clause and any others whom the King shall see fit to call to his Council. *No Ordinance which may be passed by the King and Privy Council shall have any effect until the signature of the minister to whose department such Ordinance relates is affixed thereto and if such Ordinance shall be illegal such minister alone shall be responsible and when the Legislative Assembly shall meet it may confirm or amend such Ordinances and make them law or rescind them.* [Emphasis added]

Section 7 of the Government Act provides that:¹⁴

The King and the Privy Council may between the meetings of the Legislative Assembly pass Ordinances –

- (a) enacting regulations which may be required in consequence of circumstances arising between meetings of the Legislative Assembly; or...
(d) enforcing the prerogative of the king which may have been proposed by the King;

...

Again judicial review proceedings were filed in the Supreme Court by the *Taimi* but this time it was against all the Privy Councillors, except the King.¹⁵ In dealing with the argument the Ordinance was based on section 7(a) of the Government Act Chief Justice Ward in his judgment of 26 May 2003 stated:¹⁶

¹⁴ Government Act (Cap. 3)(as amended) *Laws of Tonga* (1988 Revised Edition) [Government Act]

¹⁵ *Lali Media & Others v Prince 'Ulukalala Lavaka Ata & Others & The Kingdom of Tonga* [2003] TOSC 30 <<http://www.paclii.org>> (last accessed 24 August 2005) [*Lali Media II*]. The King was excluded out of respect.

¹⁶ *Lali Media II*, above n 15, 8-9.

The modern position of the prerogative is that it is limited by the common law and the Monarch can claim no prerogative that the law does not allow. When the prerogative is defined by statute, as occurs in our Constitution, it is thereafter subject to that law.

...
The Ordinance did not enforce any personal prerogative of the King and insofar as Privy Council passed it under subsection (d) it was clearly ultra vires the section and is therefore void.

In relation to section 7(d) the Chief Justice held that “there was no circumstance which had arisen requiring an Ordinance”.¹⁷ The Plaintiffs also claimed that the statutory powers used to produce the Ordinance was contrary to clause 7 however the Chief Justice held that they were not inconsistent with the Constitution, although the way they were used was unconstitutional.¹⁸

Government appealed both Supreme Court decisions to the Court of Appeal.¹⁹ On 25 July 2003 the Court of Appeal dismissed the appeals and confirmed the decisions of the Chief Justice. In relation to the first two bans the Court of Appeal held that sections 34 and 35 of the Customs and Excise Act “could not ban future editions of a newspaper”.²⁰ In relation to the Order-in-Council the Court found it sufficient to dismiss the appeal on the basis that the *Taimi* was denied natural justice.²¹

In dealing with the Ordinance the Court made two observations concerning clause 50 of the Constitution. First, the Court held that:²²

[clause 50] does not lend support to any idea that an Ordinance may be passed under some prerogative power outside the ordinary operation of the Constitution; on the contrary, the Ordinances to which it refers do not have “any effect” except upon compliance with the Constitution, and it is expressly contemplated that a particular Ordinance may be found to “be illegal”, in which case the relevant minister is made “responsible”.

The second point was that:²³

¹⁷ *Lali Media II*, above n 15, 9-10

¹⁸ *Lali Media II*, above n 15, 10-12.

¹⁹ *‘Utoikamanu and ors v Lali Media and ors* [2004] TOCA 6 <<http://www.paclii.org>> (last accessed 24 August 2005) [*Lali Media III*].

²⁰ *Lali Media III*, above n 19, 8.

²¹ *Lali Media III*, above n 19, 11.

²² *Lali Media III*, above n 19, 14.

...Clause 50 regulates the making of Ordinances which the King and Privy Council are otherwise empowered to make; it is not itself an independent source of power. That is quite clear from the words "which may be passed", words assuming that power has been granted in a particular case to pass an Ordinance. For the grant of power, it is necessary to go to a law enacted, as clause 56 provides, by the King and the Legislative Assembly, the law making body under the Constitution. An Ordinance made pursuant to an Act is, of course, a form of delegated legislation, and its validity will be subject to review on that basis...The purported exclusion of judicial review in certain cases cannot be effective to prevent the Supreme Court exercising its constitutional function of determining whether or not there has been violation of the Constitution.

In dealing with the legality of the Ordinance the Court of Appeal held that "there was no evidence that this was an Ordinance that had been proposed by the King", and it was not possible "to see in the Ordinance an enforcement of any prerogative"; also "there is no prerogative power to ban the publications of opinions or information".²⁴ The Court also opined that there was "no evidence of any circumstances arising between meetings of the Legislative Assembly" that could have justified the Ordinance.²⁵

In dealing with the constitutionality of the Ordinance the Court of Appeal interestingly held that the Ordinance was not punishment without trial contrary to clause 10 of the Constitution as pleaded by the *Taimi*, however the Ordinance did breach clause 7 of the Constitution and stated that:²⁶

In a system of responsible government which includes the participation of regularly elected representatives of the people and of the nobles, public discussion is an essential element...

These three judicial decisions had constitutional significance regarding the structure and procedure of the Executive. First, the judiciary confirmed that the direct involvement of the Monarchy in Executive decision making was subject to judicial scrutiny. Decisions made by the Privy Council are decisions of the King and the Privy Councillors as a whole. The implication of the decision was that if the Monarchy is involved in Executive decision

²³ *Lali Media III*, above n 19, 15.

²⁴ *Lali Media III*, above n 19, 15.

²⁵ *Lali Media III*, above n 19, 15.

²⁶ *Lali Media III*, above n 19, 16-17.

making that can be challenged and struck down by the judiciary, political dissension may rise to unprecedented levels threatening the Monarchy's stature among its subjects.

Secondly, the courts clarified that the Monarch's royal and legal prerogatives are limited by the Constitution in their source and use, particularly in relation to the Monarch and the Executive's law making powers. This was a critical statement on the Monarch's prerogative powers, and naturally staunch royalists viewed the decision as concerning.²⁷ However to most the decision was well received because it confirmed that the Tongan Constitution remained a check on executive government. The *Taimi* was allowed back into Tonga and continued its circulation. But that was short lived.

2 The Constitutional Case

After the Court of Appeal confirmed the bans on the *Taimi* were unlawful in July 2003, Government decided to regulate the media to ensure the public received a high standard of journalism. Government thus introduced three bills to the Legislative Assembly: the Act of Constitution of Tonga (Amendment) Bill 2003, which proposed eight additional limitations to freedom of speech and press²⁸, the power to enact laws to regulate the media, and that the remedy for breach of the Constitution to be a declaration only; the Media Operators Bill 2003, which proposed that operation of media outlets be limited to Tongans or corporations with majority shareholdings held by Tongans; and the Newspaper Bill 2003, which proposed the establishment of a licensing regime for licensing newspapers including the power to control contents of a newspaper. The Bills were passed by the Assembly in October 2003. Cabinet and Privy Council unanimously approved the Bills in November 2003 and the King gave Royal Assent at the end of November 2003, giving the three bills legal force.²⁹

In response, over 150 plaintiffs, including a number of political reformist campaigners generically known as the 'pro-democracy movement', issued judicial review proceedings

²⁷ Matangi Tonga Online "Tonga's law are there to protect the people who have no power: Justice Ward" 2 July 2004 <<http://www.matangitonga.to>> (last accessed 18 July 2005) [Ward Interview]

²⁸ Clause 7 of the Constitution already provided limitations for the law of defamation, official secrets and laws protecting the King and the Royal Family.

²⁹ A petition was submitted to the Legislative Assembly not to pass the Bills. When this failed another petition was submitted to the King not to give royal assent.

challenging the validity of the Acts.³⁰ The essence of the action was however the constitutionality of the Acts and the case was referred to as the “Constitutional case”. The Plaintiffs claimed that the three Acts infringed the entrenched freedom of speech and press (freedom of expression) contained in clause 7 of the Constitution, and their enactment breached clause 79 of the Constitution which provides for the amendment of the Constitution as follows:

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 the Privy Council 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. [Emphasis added]

An amendment to the Constitution is normally instigated by the Executive through a policy directive. It may originate as a result of a directive from the Monarch, a proposal from a Minister or as a result of a court ruling.³¹ In this case the decision to amend the Constitution was proposed by Cabinet and was furthered with the approval of the Monarch, which at this time was occupied by the Crown Prince as Prince Regent.

On 8 October 2004 Tonga’s new Chief Justice, Robin Webster MBE, handed down his judgment together with a summary for the benefit of the media and the public.³² The Chief Justice first clarified the status of Tonga’s legislature which consists of the King and the Legislative Assembly:³³

³⁰ *Taione and ors v Kingdom of Tonga* [2004] TOSC 48 <<http://www.paclii.org>> (last accessed 24 August 2005) [Taione]

³¹ The normal process for ordinary legislation is: a policy directive is issued by Cabinet, then the matter is referred to the Crown Law Department to draft the amendment in English and Tongan. The draft is then submitted to the Law Committee for vetting. It is then submitted to Cabinet and then Privy Council for approval for tabling before the Legislative Assembly. The amendment must be passed by simple majority three times by the Assembly. It is then returned to the Cabinet and Privy Council for unanimous approval. The final version of the Bill is then submitted to the Monarch for Royal Assent. After Royal Assent is given the Act is returned to the Prime Minister’s Office for promulgation in the Government Gazette. If the bill is an amendment to the Constitution the only difference is that there is a requirement for “unanimous approval” in Cabinet and the Privy Council before submission to the Monarch for Royal Assent.

³² Chief Justice Ward resigned in April 2003 and left in June 2003 to take up the post of President of the Court of Appeal of Fiji. The reasons for his resignation are discussed below.

³³ *Taione*, above n 30, 16.

... in Tonga the legislature has supreme power to enact laws but, unlike the Westminster Parliament... that is not an unfettered power because Tonga has a written Constitution, so the legislature can only make laws within the terms of the Constitution and its powers within the Constitution.

The Legislature's power to enact laws includes power under Clause 79 of the Constitution to amend the Constitution itself, but only according to the terms of Clause 79 of the Constitution, and in particular any restrictions contained in it as to the procedure to be followed and any specially protected provisions, ie entrenched provisions.

The Chief Justice then set out the principles for determining whether the Constitution has been validly amended.³⁴ When the Chief Justice came to interpret the Constitution he held that Tongan culture was not a relevant factor for interpretation, "except to the extent that it formed part of the context when the Constitution was adopted in 1875" and so it had to be interpreted in a Western sense.³⁵ The Court also held that the context of and circumstances giving rise to the *Lali Media* cases were "neutral and not of any particular help in relation to consideration of the amendments to the Constitution".³⁶

In dealing with the Constitution (Amendment) Act 2003 the Chief Justice held that the exceptions introduced to the right to freedom of expression in clause 7 of the Constitution concerning "national security", "public order", "morality", "parliamentary privilege" and "contempt of Court" did not breach the entrenched provisions of clauses 7 and 79 because they were fetters on that right recognised by the common law.³⁷ The Chief Justice however established a caveat of necessity by stating that:

But I add the rider ... that the sub-clause may only allow laws to be made if they are necessary in terms of a pressing social need, provided they are no more than proportionate to the legitimate aim being pursued and do not involve prior restraint of freedom of expression except in cases of clear and present danger. I repeat, and emphasise as important, that any individual law made under the umbrella of sub-clause (2) [the new exceptions] would have to fall properly within those standards and it would always be liable for scrutiny for inconsistency in terms of Clause 82 of the Constitution [power to strike down laws inconsistent with the Constitution].

³⁴ *Taione*, above n 30, 17.

³⁵ *Taione*, above n 30, 26.

³⁶ *Taione*, above n 30, 28.

³⁷ *Taione*, above n 30, 32-33.

The Chief Justice added the same caveat to sub-clause (3), which makes it lawful to enact laws to regulate the media, after he held that sub-clause (3) was not inconsistent with clause 7.³⁸

However the Court held that the “public interest”, “cultural traditions” and “the commission of offences” exceptions to clause 7 “did not come within the common law understanding of implied exceptions to freedom of expression” because “they may restrict and will inevitably affect the freedoms of expression, and so conflict with the entrenching provisions and absolute prohibitions” in clauses 7 and 79.³⁹

The Chief Justice also went on to hold that the Media Operators Act was inconsistent with clause 7 because “it prevents certain people from exercising freedom of the Press, and thus prevents the public from having access to information and comment freely”.⁴⁰ In relation to the Newspaper Act the Chief Justice held that substantial parts of the Act “are clearly in direct conflict with and inconsistent with clause 7”.⁴¹

Two points of relevance require attention from the case. The Chief Justice did not use Tongan culture to interpret the Constitution because Tongan culture is not mentioned in the Constitution, nor was it supported by Tongan case law.⁴² The decision of the Chief Justice was not only supported by the text of the Constitution but also the historical context in which the Constitution was adopted in 1875. As will be discussed below, the Constitution was intended primarily to fend off colonial aspirations relating to Tonga through recognition by the colonial powers of Tonga’s sovereignty and independence. A Constitution that provided Western notions of rights and a western model of government provided the basis for that desired recognition. However, Western notions of freedom and human rights were absolutely mysterious to Tongan culture around this time. It was only when Christianity and Western education started to mature in the early 1900s that rights became fully indulged by Tongan culture. The implication is that the place of Tongan culture in Tongan laws has to be considered in order to maintain laws in Tonga are Tongan. Obviously there will be conflicts

³⁸ *Taione*, above n 30, 35.

³⁹ *Taione*, above n 30, 33-34.

⁴⁰ *Taione*, above n 30, 37-38.

⁴¹ *Taione*, above n 30, 40.

⁴² *Taione*, above n 30, 26.

between Tongan culture and principles of law. However that is outside the scope of this paper. Suffice to say for the purposes of this paper that the Constitution has provided political authority in a cultural context by giving the Monarchy a central political role.

Secondly, the Chief Justice recognised that it was not an easy task for the Courts to strike down legislation when he stated:⁴³

... I very much regret having to make such a finding in relation to legislation which has had the approval of the Legislative Assembly, the Cabinet, the Privy Council and His Majesty The King, but again it is the clear duty of this Court under the Constitution to do so and thus to uphold the Constitution.

The judgment cemented judicial independence in Tonga in a case which may be simply the most important judicial case ever in Tonga's legal history. The case also symbolised the height of the on-going political tension that exists between the Executive and the political reformists. Although the political reformers had won in stopping the media reforms, the more significant result was that the whole of Tonga had won, including the Executive. This was because the judiciary had upheld the Constitution and again confirmed that the Tongan form of government works. Although the Executive holds overwhelming political power, the judiciary is an effective check on Executive power through the Constitution. At the end of the case freedoms were intact. The Executive accepted the result.

Both parties found it unnecessary to appeal the new Chief Justice's decision.

B The Executive: Changing Ministers

1 Cabinet Reshuffles

In August 2004 His Royal Highness the Prime Minister asked three Cabinet Ministers to resign.⁴⁴ In effect these were dismissals that were termed "Government's proposed

⁴³ *Taione*, above n 30, 41.

⁴⁴ They were: Hon. William Clive Edwards, Minister of Police, Prisons and Fire Services; Hon. Masasso Paunga Minister of Labour, Commerce and Industries; and Hon. 'Aisea Taumoepeau, Attorney General and Minister of Justice.

reorganisation to incorporate economic development".⁴⁵ The Ministers had disagreed with economic policies proposed by the Prime Minister. One of the Ministers who resigned claimed they were asked to resign because of their opposition to a 'one domestic airline policy' that the Executive had approved.⁴⁶ A reshuffling then followed with new Ministerial appointments.⁴⁷

Two points with this reshuffling are of constitutional significance. First, there was some doubt as to who actually decided to dismiss the Ministers.⁴⁸ One of the Ministers asked to resign claimed that the decision was "unlawful" because it was not a decision of the King, and under the Constitution only the King could dismiss Ministers.⁴⁹ This claim created heated public debate and, in an unprecedented way, His Royal Highness the Crown Prince became involved, providing a fascinating and rare insight to the workings of the high-levels of the Executive.⁵⁰ There was also a sense of uncertainty within Government and also the public as to who actually was running the country.

Secondly, a sense of uncertainty infected the Ministers who were reminded firsthand that their mandates were not for life, as perceived by some. The last major sacking of Ministers occurred in September 2001 when two Ministers were both asked to resign over the failed investment of the Tonga Trust Fund in the United States.⁵¹

⁴⁵ Matangi Tonga Online "Three Tongan Cabinet Ministers fired" 28 August 2004 <<http://www.matangitonga.to>> (last accessed 17 August 2005).

⁴⁶ Matangi Tonga Online "I was accused of a coup plot," reveals Edwards: Interview with Clive Edwards, Part One" 17 January 2005 <<http://www.matangitonga.to>> (last accessed 11 March 2005) [Edwards Interview I] According to personal communication to the author by the former Attorney General and Minister of Justice he was told he was being asked to resign on the basis that he was responsible for the alleged misconduct by the Solicitor General during legal proceedings concerning the 'one domestic airline policy'. The allegation against the Solicitor General to date has never been processed or established.

⁴⁷ Tonga's Ambassador to the United Nations, Sonatane Tu'akinamalohi Taumoepeau-Tupou was recalled and appointed Minister of Foreign Affairs. The Tongan High Commissioner to the United Kingdom, the late Colonel Fetu'utolu Tupou was recalled and appointed Minister of Defence. The Commissioner of Public Relations, Siaosi Taimani 'Aho was appointed Attorney General and Minister of Justice. The Labour, Commerce and Industries portfolio was assigned to the Deputy Prime Minister, Hon. Cecil Cocker.

⁴⁸ Edwards Interview I, above n 46, 2.

⁴⁹ The Constitution, above n 1, cl 51.

⁵⁰ His Royal Highness the Crown Prince and William Clive Edwards, the former Minister of Police, Prisons and Fire Services wrote several letters to the editor on the Matangi Tonga Online website concerning the resignations. <<http://www.matangitonga.to>>.

⁵¹ Kerry James "The Recent Elections in Tonga: Democratic Supporters Win but Does Democracy Follow?" (2002) 37(3) *Journal of Pacific History* 313, 316. [James]

The Executive's next political change was however unexpected to say the least. On 26 November 2004, His Royal Highness the Prime Minister announced that after the March 2005 elections the King had agreed to his "advice" to appoint two Ministers each from the Peoples' and Nobles' elected representatives as Ministers.⁵² The appointments were termed as "grace and favour" appointments and that their tenure of office would depend on their holding their electorate mandate.

In announcing the appointments the Prime Minister stated that it would "reflect the democratic principles" of the Tongan Constitution, and that this was a "natural progression of the Kingdom's political system". Clearly the rationale behind these appointments was recognition of the need for participation, albeit limited in numbers, by the Peoples' and Nobles' Representatives in Executive decision making. It may also have been seen as an attempt to silence the vociferous criticism of the Executive after the media reforms and the forced resignations of the Ministers.

Although welcomed with open arms by the advocates of political reform, some saw the appointment as "out of date" and that Ministers who feel free to "speak out" is what is actually needed.⁵³ This criticism is based on clause 83 which requires a new Ministers to take an oath of loyalty to the "Monarch and his Government", whereas a new Representative's oath is an expression of "zealously discharging ones duties as a member of the Legislative Assembly". A Minister is therefore, first, loyal to the Monarch and his Government. An elected Minister may therefore be accused of losing sight of his or her electorate. Even among the Peoples' Representatives there was mixed feelings with one Representative claiming that it was like "worshipping two gods", and others claimed it was an "opportunity for the people" and the "beginning of genuine political reform, allowing people to elect their leaders".⁵⁴

⁵² Government of Tonga Media Release "Four New Ministers from Elected Parliamentarians" <<http://www.pmo.gov.to>> (last accessed 11 March 2005).

⁵³ Matangi Tonga Online "Edwards rejects system of "puppet ministers": Interview with Clive Edwards, Part Two" 18 January 2005 <<http://www.matangitonga.to>> (last accessed 11 March 2005)

⁵⁴ Matangi Tonga Online "People's Reps differ on Ministerial appointments" 15 November 2004 <<http://www.matangitonga.to>> (last accessed 17 August 2005).

On 21 March 2005 His Royal Highness the Prime Minister announced the new appointments.⁵⁵ Two Nobles' Representatives were appointed Minister of Police, Prisons and Fire Services⁵⁶ and Minister of Works⁵⁷, respectively. Two Peoples' Representatives were appointed Minister of Labour, Commerce and Industries⁵⁸ and Minister of Forestry⁵⁹, respectively. In announcing the appointments His Royal Highness the Prime Minister described the day as one of "great expectations", "solidarity" and a "time for us to further strengthen our co-operation as a nation". It was indeed a "new chapter in our history". After the appointment of the elected Ministers a by-election took place to replace the elected Ministers with new representatives.⁶⁰

The appointments of the elected Ministers were quite significant. From a political standpoint Cabinet and Privy Council had opened its doors to two Peoples' Representatives who were members of the "Human Rights and Democracy Movement in Tonga", the group whose main objective is to advocate political reform particularly to the structure and power of the Executive.⁶¹ Moreover, it was uncertain whether the new Ministers from the elected Nobles' Representatives would always support the Executive. The new Minister of Works, while the Speaker during the 2002-2004 Legislative Assembly session, had voted and spoke against the media reforms proposed by the Executive in the previous Parliament session.⁶² Interestingly the new Minister of Labour, Commerce and Industries was made Acting Prime Minister shortly after his appointment illustrating that the elected Ministers were fully

⁵⁵ Government of Tonga Media Release "Historic Ministerial Appointments from Elected Representatives to parliament" <<http://www.pmo.gov.to>> (last accessed 22 March 2005)

⁵⁶ Hon. Nuku, the Nobles' Representative for 'Eua.

⁵⁷ Hon. Tu'ivakano, Number 1 Nobles' Representative for Tongatapu, and the Speaker of the House in the last Parliament Session, who is a former secondary school teacher.

⁵⁸ Dr Feleti Sevele, Number 2 Peoples' Representative for Tongatapu, owner and operator of various businesses.

⁵⁹ Sione Peauafi Haukinima, Peoples' Representative for Niuafo'ou and Niuatoputapu, who is a former civil servant who worked in the Forestry Division. Interestingly, under the 2004-2005 Budget the Forestry portfolio was combined with Agriculture as per normal. The separation of the portfolios illustrates an extra effort to provide an appropriate Ministerial portfolio for the Representative, but at the same time not giving him both.

⁶⁰ William Clive Edwards, the former Minister of Police who was asked to resign in August 2004, was elected in the May by-elections and is currently the Number 3 Peoples Representative for Tongatapu. With his legal and Ministerial background he undoubtedly will be an effective Peoples' Representative.

⁶¹ Human Rights and Democracy Movement in Tonga, Brochure 2003 <<http://www.planet-tonga.com>> (last accessed 17 August 2005).

⁶² Minutes of the Legislative Assembly of Tonga, Numbers 20/2003 of 29 July 2003, 35-36, 51-52; 57/2003 of 16 October 2003, 29-31; and 59/2003 of 20 October 2003, 19, 24-25. Two other Nobles voted against the reforms including the late Hon. Ma'atu, the King's second son, whose royal title and privileges were removed in 1980 after he married without the King's consent, contrary to clause 33 of the Constitution.

embraced by the Monarchy and the Executive.⁶³ But it remains to be seen whether such early expression of trust means that the elected Ministers have been lost from their electorate.⁶⁴

Secondly, the new Ministers increased the number of the Cabinet from the traditional membership of 12 to 16.⁶⁵ As will be discussed below, this gives the Executive further voting strength in the Legislative Assembly. Thirdly, from an economic and social perspective the portfolios granted to the People's Representatives meant placing a large portion of the economy in the hands of the political reformists.

C Beginning of Political Evolution

The consequence of these developments is that Tonga's structure of Government is undoubtedly evolving, particularly its Executive branch. The evolution process has been helped in the context of the judicial decisions in the *Lali Media* and *Taione* cases. Within a space of 18 months the powers under the Constitution of the King, Privy Council, Cabinet, the Legislative Assembly and the Judiciary were outlined and confirmed. In hindsight it was a peculiar foreshadowing of the political evolution. It was also timely in clarifying the legal framework of Tonga's government. No doubt the judicial decisions would be a compass during the evolution.

It is most likely that the judicial decisions provided the instigation for the Monarchy and the Executive to agree to the recent developments in the Executive branch. The participation of elected Ministers in the Privy Council can be seen as the Monarch wanting to share responsibility of Executive decision making. Another view is that ingeniously the Monarch has eliminated the risk of being solely blamed for unpopular Government policies. Disaffection towards Government policies can now be laid equally at the Monarch, the Ministers, and the elected Ministers. Another view however is that in resigning as a Peoples' or Nobles' Representative and taking the oath of a Minister, the Representatives have elected

⁶³ Matangi Tonga Online "Dr Feleti Sevele becomes Acting Prime Minister" 21 April 2005 <<http://www.matangitonga.to>> (last accessed 23 April 2005).

⁶⁴ The elected Ministers appointed from the Peoples Representatives recently had to publicly denounce criticisms that they were doing nothing for the people inside Cabinet: Matangi Tonga Online "New Ministers reject criticism" 22 September 2005 <<http://www.matangitonga.to>> (last accessed 26 September 2005)

⁶⁵ The number however came down to 15 after the new Minister of Defence Col Fetu'utolu Tupou unexpectedly died of heart failure in April 2005. The Defence portfolio was taken over by the new Minister of Foreign Affairs. Cabinet membership was normally at eight when there were only seven representatives in the Assembly.

to disengage themselves from their electorate mandate and be subjected to the whim of the Monarch.

These changes however, realistically, are still experimental and should not be viewed as permanent, nor are they a guarantee of the direction of the evolution process. The changes have not been expressly provided for under the Constitution and the laws of Tonga as the permanent structure of the Executive, and so they may be removed as fast as they came in. The changes however are not inconsistent within the present legal framework. They are practical and politically acceptable to many, and so are likely to be given a fair opportunity to produce results.

Although it is clear that the changes are part of Tonga's political evolution, it is also significant in proving whether change is necessary. The experimental nature of the changes offers an opportunity to test whether it is appropriate for Tonga to have fully, or some, elected Ministers. It remains to be seen whether the elected Ministers working under a fixed tenure of office will provide valuable, independent contributions to Executive policies.

Attention however must be afforded to the principles that anchor these developments because they may be principles that the Monarchy and the Executive may engage in the future. What can be gathered from these developments is that representation or participation of the people and nobles in the Executive is acceptable. It also seems clear that firm accountability of Ministers is a concept that may also be acceptable. The judicial independence of the judiciary is also respected. Where to now?

To answer that question we will need to look deeper into the history and structure of the Tongan Government to determine what Tonga is evolving from, and whether there are some principles that should be retained for the future. Moreover, it would also be fair to consider the arguments for political reform in order to consider any compromise with the reformists. After that, we may be able to have some perspective of where Tonga is heading, and maybe even, of the direction in which it should move.

III THE TONGAN FORM OF GOVERNMENT

A Historical Background

The Kingdom of Tonga is the sole surviving kingdom in the Pacific. Tonga's 170 islands are divided into five island groups. The major island groups are Tongatapu, Vava'u, Ha'apai, with two smaller island groups of 'Eua and the Niuas. These islands have never been conquered or colonised by any foreign power. Tonga was once the centre of a maritime empire that included Niue, Samoa, Tokelau, Wallis and Futuna, Rotuma and the Lau Group in Fiji.⁶⁶ Ancient Tongan rulers were therefore accustomed to holding immense and constant power.

The seat of power in this ancient empire was occupied by the *Tu'i Tonga* (King of Tonga). They were the first kings to unify and rule over the whole of Tonga. The first *Tu'i Tonga*, 'Aho'eitu, was believed to be the son of a god and an earthly mother. This gave the *Tu'i Tonga* kings both temporal and spiritual status. In Tongan culture a person's social rank is determined by how close their lineage is to the *Tu'i Tonga* bloodline.⁶⁷ In a Christian society this of course is not based on deity blood but on the fact that the *Tu'i Tonga* title is the most prestigious ranked title in Tongan society, and therefore is owed the most respect from all Tongans.

The *Tu'i Tonga's* rule was often cruel and oppressive, which became a norm in ancient Tongan culture. The subjects were devoted to their rulers for the sake of survival. However, in return the rulers treated their subjects inhumanely as mere chattels. Tongan commoners therefore had absolutely no rights nor privileges. For instance, when a king or a chief died a handful of servants would be clubbed to death and buried with the king so the servants could continue their servitude in the afterlife. The *Tu'i Tonga's* empire however began to disintegrate because of the vast maritime distances between its lands, administrative difficulties and the need for decentralisation of authority due to growth in population.

⁶⁶ Sione Latukefu *The Tongan Constitution, A brief history to celebrate its Centenary* (Tonga Traditions Committee Publication, Nuku'alofa, 1975) 2.

⁶⁷ Elizabeth Wood-Ellem *Queen Salote of Tonga: The Story of an Era 1900-1965* (Auckland University Press, Auckland, 1999) 17-18.

This began the shaping of the present form of government. There are significant events to highlight. First, the Tongan political structure underwent radical and abrupt reform twice which, it should be noted, were instigated by violence. The first was a result of a succession of assassinations of the *Tu'i Tonga* in the 15th century. This resulted in the 24th *Tu'i Tonga* appointing his younger brother as the *hau* or temporal ruler to be known as the *Tu'i Ha'atakalaua*. The *hau* was charged with the daily administration of the land, while the *Tu'i Tonga* became solely a divine leader.

This shift of real power was repeated in the 17th century when the 6th *Tu'i Ha'atakalaua* decided to emulate the *Tu'i Tonga* by appointing one of his sons to take over the responsibilities of the *hau*. The new temporal ruler was known as the *Tu'i Kanokupolu*. The *Tu'i Ha'atakalaua* king was thus elevated to a ceremonial role where the *Tu'i Kanokupolu* was responsible to governing the land and paying tribute to both the *Tu'i Ha'atakalaua* and the *Tu'i Tonga*. Eventually the *Tu'i Ha'atakalaua* title faded away with the last titleholder in 1799 and its duties were absorbed by the *Tu'i Kanokupolu* office. This left the *Tu'i Tonga* and the *Tu'i Kanokupolu*.

Growth in population meant decentralisation of power to chiefs who by the early 18th century held the real power in Tongan society. The chiefs held absolute and arbitrary power directly over the people they were supposed to govern on behalf of the kings. Their subjects in turn also grew more loyal to their chiefs rather than the *Tu'i Tonga* and the *hau*.⁶⁸ The growth in stature of the chiefs led to power struggles among the chiefs creating a turbulent state of affairs between the *hau* and the rebelling chiefs. In the late 18th century the *hau*, *Tu'i Kanokupolu* Tuku'aho, began to assert his rule over the whole of Tonga as rightly the temporal ruler. In 1799 however Tuku'aho was murdered, launching Tonga into a devastating civil war that would last for a century and a half.

The second event that was to shape Tonga's form of government occurred after the civil war. In 1820 Tuku'aho's grandson, Taufa'ahau, was appointed the *Tu'i Kanokupolu* and continued his grandfather's cause to rule over the whole of Tonga. By 1852 the last of the civil war battles were fought and Taufa'ahau emerged victorious thus unifying the whole of Tonga under his rule giving prominence to the *Tu'i Kanokupolu* title. Taufa'ahau was a

⁶⁸ Latukefu, above n 66, 2.

converted Christian and, in admiration for the English monarch of the time, King George III, he changed his name to *Siaosi Tupou I* (George Tupou I). Tupou I was a born leader who possessed legitimate lineage as King, and leadership qualities unequalled by his contemporaries.⁶⁹ Tupou I universally introduced 3 concepts to modernise his new nation: Christianity; the emancipation of commoners and the rule of codified laws. The last two concepts proved to be unpopular among the powerful chiefs as they lost their power base through emancipation of their subjects, and their arbitrary power was now restricted by written law.

Tupou I recognised this disaffection and appreciated that there was a risk that civil war may break out if no stability was guaranteed after his death. Tupou I also recognised that at this time the colonial powers were vigorously colonising Tonga's neighbours. Tupou I therefore desired a way to end any colonial aspirations for Tonga, and ensure recognition of Tonga's sovereignty and independence.

The King decided to grant his people a written Constitution which guaranteed not only his and his successors' rule of Tonga, but also liberty, rights, security and land for all Tongan people. As a result Tupou I surrendered his inherited absolute power. This event was not only ground breaking, but would have been a shock to the Tongans of the time. After a number of years of consultation with foreign lawyers, heads of states and advisors Tupou I introduced the final draft of the Constitution on 16 September 1875 to a meeting of the chiefs. At the opening of the meeting Tupou I stated:⁷⁰

... The form of our Government in the days past was that my rule was absolute, and that my wish was law and that I chose who should belong to the Parliament and that I could please myself to create chiefs and alter titles. But that, it appears to me was a sign of darkness and now a new era has come to Tonga – an era of light – it is my wish to grant a Constitution and to carry on my duties in accordance with it and those that come after me shall do the same and the Constitution shall be as a firm rock in Tonga for ever.

⁶⁹ Latukefu, above n 66, 18. See also Kenneth Bain *The Friendly Islanders* (Hodder and Stoughton Limited, London: 1967) 30, and Sione Latukefu "King George Tupou I of Tonga" in J W Davidson and Deryck Scarr *Pacific Islands Portraits* (A.H. & A. W. Reed, Wellington: 1973) 55.

⁷⁰ HM King Siaosi Tupou I *An Excerpt from the Speech of His Majesty Tupou I at the Opening of Parliament 1875* [1923-1962] Tongan Law Reports Vol II 1, 1.

The chiefs passed the Constitution with minor amendments. In closing the meeting on 4 November 1875, Tupou I stated:⁷¹

This then is the Constitution of Tonga, written in parchment to be kept in Parliament as proof and in memory of the work we have done today. I attach my name to it on this day, and it is now become law, and may you and your descendants be bestowed with blessings from generation to generation as long as you embrace this constitution and may the day never dawn on which any Tongan would do anything to undermine it but that this constitution be the foundation stone on which we built, the pillar, the impregnable bastion that fortifys our country and by it may we stand till doomsday. May it please the Omnipotent to lend us power to fulfil these our obligations.

Modern Tonga was thus born with its sovereignty intact and the establishment of its first civil government.

The Constitution however did not necessarily ensure political stability as expected, although the colonial powers did recognise Tonga's sovereignty. From 1875 until the middle of the 20th century Tonga's form of government faced regular political opposition although more subtly than recently. Political opposition is therefore not a recent phenomenon in Tongan politics. Even in pre-Constitution years the ancient kings faced political opposition and used political manoeuvrings and wars to maintain their power base when required. Tupou I realised the disaffection of chiefs in losing their power base to emancipation and so alleviated some disappointment by appointing a number of chiefs as nobles.

After the Constitution was granted, a multiple of factors existed that nearly destroyed years of toil by Tupou I. The Tongan constitution was a radical change to Tongan way of life and government. At the time a majority of the Tongan people were yet to fully indulge education to understand the workings of the Constitution. More importantly a quiet opposition group grew out of the disgruntled chiefs who were not made nobles. Europeans at the time also criticised the Constitution as "unsuitable, unworkable and abortive". The Constitution was however not yet finalised as evidenced by a number of fine-tuning amendments that were made in the early years of the Constitution that included giving the

⁷¹ HM King Siaosi Tupou I *The Speech of His Majesty Tupou I at the Close of Parliament on 4th November 1875* [1923-1962] Tongan Law Reports Vol II, 3, 3.

Executive more flexible powers.⁷² Tupou I's age also made him susceptible to influence from his closest advisors who took advantage of their power to deal with their enemies, resulting in the relegation of the Constitution to the backseat.⁷³ Even Government often ignored the basic rights entrenched in the Constitution.⁷⁴

Added to these factors were financial woes. In 1893 Tupou I died, and was succeeded by his 19 year old great-grandson Taufua'ahau, who became King Siaosi Tupou II. The new King and his government took the country to the verge of bankruptcy. The political pressure from some of the disaffected chiefs was further inflamed by their disappointment with the King's choice of consort. It even reached the stage where some chiefs planned for the removal of Tupou II through the British authorities.⁷⁵

The heightening financial, political and social problems led Tupou II to sign a treaty in 1900 with Great Britain where Tonga would remain a self governing state under British protection. Tupou II was initially reluctant to sign the treaty because he believed it usurped his authority. However, after threats of annexation Tupou II signed. Unfortunately matters did not improve. In 1905 a Supplement to the 1900 treaty was signed which basically set out procedures for the Tongan Government to comply with. Tupou II reluctantly signed the Supplement which slightly sidelined the Constitution.⁷⁶

In 1918 Tupou II died and was succeeded by his daughter who was crowned Queen Salote Tupou III. Queen Salote inherited a state tense with political, financial and social issues. The political opponents of her father continued their subtle opposition despite occupying high offices in the Government. Queen Salote later termed them as the "Reactionary Party".⁷⁷

However it would be Queen Salote's legacy that she reunited Tonga. Political opposition was ironed out. Social issues were calmed by leading a renaissance of Tongan

⁷² See Professor Guy Powles "The Early Accommodation of Traditional and English Law in Tonga" in P Herda (Ed) *Tongan Culture and History* (Research School of Pacific Studies, Australian National University, Canberra, 1990). [Powles]

⁷³ Latukefu, above n 66, 57-63.

⁷⁴ Latukefu, above n 66, 59.

⁷⁵ Wood-Ellem, above n 67, 28.

⁷⁶ See *Re "Tonga Ma'a Tonga Kautaha"* [1908-1959] 1 Tonga LR 5, 6.

⁷⁷ Wood-Ellem, above n 67, 7.

culture and values. Financial hardship was lessened with skilled governance. This was possible due to a variety of factors. Queen Salote was highly respected by the chiefs and people of Tonga because as a woman under Tongan culture she was afforded pre-eminent social status. As a woman of high chiefly rank she exercised privileges over most of the chiefs because of her lineage. Moreover, there was an increase of well educated personnel to help Queen Salote rule, in particular the Royal Consort, Tungi Mailefihi.

Disaffection of chiefs also fizzled because of her marriage to Tungi Mailefihi. Socially the union unified the three ancient lines of kings: The Queen inherited the *Tu'i Kanokupolu* title from her father, and was a direct descendent of the *Tu'i Tonga* line through her mother; Tungi Mailefihi was the direct descendent of the *Tu'i Ha'atakalaua* line. Their children would therefore represent the union of the three dynasties returning the Tongan Monarchy to the highest social rank since the ancient *Tu'i Tonga* kings. As a result of the calm that Queen Salote provided, the Constitution began to play a more prominent role in governing the affairs of the country. It also started the period where Tongan modern government was attaining a maturity that would end its British protectorate status in 1970 under the present Monarch.

In hindsight, it is clear that the radical political reforms of the past were instigated and engineered by the Monarchy. For the *Tu'i Tonga's* and the *Tu'i Ha'atakalaua's* they preferred to distance the Monarchy from the headaches of every-day governance, to preserve the regal status of their respective offices but more importantly recognised the dissatisfaction of their subjects. For Tupou I, his granting of the Constitution was for the future of his people and land. Tupou II had to accept the protectorate status demanded by the British in order to protect Tonga. Queen Salote unified and calmed political opposition, and gifted the present Monarch with both strong social and political powers. The present Monarch faces the same challenges of dealing with political reform, and has already, to an extent, risen to the challenge by providing seats for elected representatives around the Executive table. The Monarch will therefore continue to be a source of ensuring political stability. The challenge for the present situation is the timeliness of Royal action.

It is also evident that after all the political reforms of the past the sanctity of the Monarchy is preserved. Despite the limitations introduced by the rule of law, the stature of the Monarchy was maintained by the people. Over the years the people tacitly and expressly

accepted the concept of having a Monarchy. No reasonable justification has been made for its abolition. The Monarchy seems therefore to be a concept that Tongans will always retain.

In summary, history reveals that Tongan political stability has always revolved around the Monarchy and the people. The Monarchy has made radical political change not only for its perennial benefit, but it has recognised since the ancient *Tu'i Tonga* kings that change was necessary for the benefit of the people as well. Under the Tongan political structure the Monarchy must therefore co-exist with the people. The entities complement each other. The Monarchy provides stability through direction. The people provide legitimacy through recognition. It is imperative that this relationship should be observed at all times by both parties for the continued existence of the Tongan way of life. It will be seen that the modern form of Government introduced by Tupou I reflects this relationship.

B *The Modern Form of Government*

The Constitution of Tonga today is slightly different from the original Constitution. However, the amendments made over the years did not alter its structure or substance. The Constitution is an entrenched statute officially cited as the Act of the Constitution of Tonga. There are 3 parts to the Constitution: the Declaration of Rights; the Form of Government; and the Land. The first and second parts only are relevant to this paper.

The Government is divided into three bodies:⁷⁸ The Executive, which consists of the King, Privy Council and Cabinet; the Legislative Assembly, the law making entity; and the Judiciary, comprising the Court of Appeal, the Supreme Court, the Magistrates' Court and the Land Court.

1 *The Declaration of Rights*

The Declaration of Rights entrenches basic human rights that the Executive is obligated to respect and enforce. The first clause guarantees freedom to all Tongans and any person who visits Tonga.⁷⁹ The other basic rights include: freedom from slavery; equal application of the law; freedom of worship; freedom of expression; freedom to petition the

⁷⁸ The Constitution, above n 1, cl 30.

⁷⁹ The Constitution, above n 1, cl 1.

King and the Legislative Assembly; freedom to meet peaceably and discuss petitions; the law of habeas corpus; due process; right to jury trial; double jeopardy; unbiased judiciary; justified search warrants; Government impartiality; Government protection of life, liberty and property; and prohibition of retrospective laws.⁸⁰

These rights could be deemed collectively as laws relating to liberty. Under clause 79 laws concerning liberty are fully entrenched and can never be repealed. However according to the decision in *Taione*, the law of liberty can be repealed if clause 79 is first repealed by removing the protection given to those laws.⁸¹ This position is consistent with the doctrine of parliamentary supremacy where no parliament can bind a future parliament.

2 The Executive

(i) The King: Political Royal Prerogative Powers

Under clause 31 the form of government is a Constitutional Government under the Monarch and "his heirs and successors". Under clause 41 the person of the Monarch is "sacred" and "governs the country but his ministers are responsible". In the event of travel overseas the Monarch has to appoint a Prince Regent, who takes over all royal duties until the Monarch's return. Royal powers have been exercised regularly by the Regent.

As mentioned above Tupou I relinquished his authoritarian powers when he granted the Constitution. However some royal prerogative powers were maintained and some were created for the operation of a modern government. These include the royal prerogative to suspend the writ of habeas corpus in times of war and rebellion,⁸² conscripting military service,⁸³ the right to consent to marriages of heirs to the throne,⁸⁴ the right to make treaties with Foreign States⁸⁵ conferring titles of honour and honourable distinctions,⁸⁶ declaring martial law in times of civil war with another state,⁸⁷ and the right to grant land to nobles.⁸⁸

⁸⁰ The Constitution, above n 1, cls 2, 4, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 20.

⁸¹ *Taione*, above n 30, 17.

⁸² The Constitution, above n 1, cl 9.

⁸³ The Constitution, above n 1, cl 22.

⁸⁴ The Constitution, above n 1, cl 33.

⁸⁵ The Constitution, above n 1, cl 39.

⁸⁶ The Constitution, above n 1, cl 44.

⁸⁷ The Constitution, above n 1, cl 46.

⁸⁸ The Constitution, above n 1, cl 104.

Thirdly, The main royal prerogative powers that are political in nature are powers to appoint a Prince Regent,⁸⁹ the power to appoint any other person to the Privy Council,⁹⁰ the power to appoint and dismiss Ministers of the Crown and Governors,⁹¹ the right to convoke and dissolve the Legislative Assembly,⁹² the right to appoint the Speaker of the Legislative Assembly⁹³ and the right to give royal assent or veto legislation.⁹⁴ These will be discussed further below.

(ii) The Privy Council

The Monarch is the chair of the Privy Council, the highest executive body.⁹⁵ The Privy Council is therefore the source of all executive power. The Privy Council consists of all the Ministers of the Crown, and the two Governors of Vava'u and Ha'apai.⁹⁶ The Monarch appoints the Ministers of the Crown and the Governors at his pleasure. The Monarch may also call on any other person to be a Privy Councillor. The Ministers and Governors therefore have no guarantee of tenure of office.

Decisions made by the Privy Council, as confirmed by the *Lali Media* cases, are made collectively by the King and the Ministers. Executive decisions of the Privy Council are reviewable by the judiciary, however pure royal prerogative decisions are not. This arrangement is often criticised as providing opportunity for the Monarch to rule as he wishes because the Ministers are reluctant to disagree with the royal commands. Although that situation may arise constitutional checks and balances exist to prevent this.

First, under the Constitution the King governs the land in accordance with the Constitution and the laws of Tonga.⁹⁷ The Judiciary therefore has the power to review executive decisions of the King and the Privy Councillors. Secondly, under the Constitution it is the Ministers who are responsible for executive decisions. Ministers are therefore aware

⁸⁹ The Constitution, above n 1, cl 43.

⁹⁰ The Constitution, above n 1, cl 50(1).

⁹¹ The Constitution, above n 1, cl 51 and 54.

⁹² The Constitution, above n 1, cl 56.

⁹³ The Constitution, above n 1, cl 61.

⁹⁴ The Constitution, above n 1, cls 56 and 68.

⁹⁵ Government Act, above n 14, s 2.

⁹⁶ The Constitution, above n 1, cl 50(1) and 54. Governors are appointed by the Monarch with the consent of Cabinet:

⁹⁷ The Constitution, above n 1, cl 41.

that they may be held liable, albeit not personally, for unlawful decisions they support. Thirdly, the Privy Council has a legal advisor in the form of the Attorney General.⁹⁸ So although Executive power is overwhelmingly located in Privy Council, there are checks that are in place to prevent abuse.

However lawful decisions may still be objectionable if made contrary to good governance principles. Again, there are Constitutional requirements in place. Under clause 17 the Monarch is to govern “without partiality for the good of all the people” and not to “enrich or benefit any one man or one family”. The office of the Commissioner for Public Relations, Tonga’s equivalent of an Ombudsman, was established in 2002 to deal with complaints concerning the public service and public enterprises.⁹⁹ A Code of Conduct for the public service has also been approved under the Public Service Act 2002 and various public service strengthening projects have been implemented.¹⁰⁰ Good governance is therefore a priority of the Executive. However as will be seen below compliance is an issue.

The Privy Council also has delegated legislative power as described above. Ordinances the Privy Council is able to make are limited to dealing with consequences that arise between meetings of the Legislative Assembly, the suspension of any law requested by the Chief Justice, giving effect to any treaty with a foreign country, enforcing the prerogative of the King proposed by the King or the authorisation of any extraordinary expenditure. Such Ordinances will become law upon promulgation however it must be presented in the next session of the Legislative Assembly for confirmation, amendment or rescission.¹⁰¹

The Privy Council also has judicial powers. It was once the highest Court of the land in relation to all matters except criminal matters. In 1966 an amendment to the Constitution was made to set up a Court of Appeal. However that amendment did not come into force until 1990.¹⁰² The Privy Council, however, remains the last appellate court in relation to disputes

⁹⁸ Tonga has not always had the luxury of an abundance of Government lawyers, however up to 2004 it had four overseas qualified lawyers in Privy Council including the King who is a law graduate. At present there is only one overseas qualified lawyer in Cabinet but he is not the Attorney General

⁹⁹ Commissioner for Public Relations Act 2001, s 11.

¹⁰⁰ Public Service Act 2002, s 19.

¹⁰¹ Government Act, above n 14, s 8.

¹⁰² Act of Constitution of Tonga (Amendment) Act 1966 – Act 13 of 1966. Act 14 was the Court of Appeal Act 1966 which came into force in 1990. The first Court of Appeal sat in the later parts of 1990 consisting of judges from New Zealand and Australia.

concerning hereditary estates and titles. In such an appeal the Chief Justice, the Monarch and the Privy Councillors constitute the Court.

(iii) The Cabinet

The Cabinet consists of the Ministers of the Crown and the two Governors.¹⁰³ The Cabinet is chaired by the Prime Minister. Throughout Tonga's modern history the Prime Minister has always been a member of the Royal Family, with the exception of three.¹⁰⁴ The present Prime Minister is the Monarch's youngest son.

At present there are currently 13 Ministers of the Crown and the two Governors making 15 members of the Cabinet. Cabinet decisions are collective. All policy proposals are submitted to Cabinet by the relevant Ministry, and if required may be submitted to the Privy Council for final executive approval. Matters passed by Cabinet therefore already have the backing of the Ministers and Governors, and would only require the final decision of the King. However this does not bar some Ministers or Governors who may want to speak on the matter in the Privy Council.

Ministers and Governors may be held directly accountable to the nobles and the people under clause 75 of the Constitution which provides for impeachment of any "Privy Councillor, Minister, Governor, or Judge" by the Legislative Assembly. Impeachment proceedings may be lodged on the grounds of "breaching laws or resolutions" of the Assembly, "maladministration, incompetency, destruction or embezzlement of Government property, or the performance of acts which may lead to difficulties" in foreign relations. This is a procedure that has not been effectively used against the Executive despite claims of Executive corruption.

As the driver of Executive policy Cabinet has obviously taken the initiative to pursue both political and economic reforms. Cabinet has made significant strides to modernise the civil service by establishing a Commissioner for Public Relations, a Public Service

¹⁰³ The two Governors are members of Cabinet by virtue of section 12 of the Government Act, above n 14.

¹⁰⁴ Shirley Baker, 1880-1890, Solomon Ata, 1941-49 and Baron Vaea from 1991-1999. Members of the Royal Family who were Prime Ministers were HRH Prince Tevita 'Unga 1876-1880, Queen Salote Tupou III's Consort Tungi Mailefihi 1923 - 1941, the present King when he was still HRH Prince Tupouto'a-Tungi, 1949-1965, the King's late younger brother HRH Prince Fatafehi Tu'ipelehake 1965-1991.

Commission,¹⁰⁵ public service training, corporatisation,¹⁰⁶ reorganising public enterprises,¹⁰⁷ fiscal reform, financial-sector reform and private-sector reform,¹⁰⁸ and private sector strengthening. In February 2004 the Monarch began the appointment of senior public servants, usually the Head of Department, as Acting Ministers when a substantive Minister is away overseas. This was to ensure that competent persons were always available to assist Privy Council and Cabinet, and also continue the work of the Ministry for the people.

These developments provide optimism for the future. They are developments that provide a basis for providing accountability and transparency in the public sector. They were approved by the Executive confirming that the Executive is dedicated to responsible government and is willing to change the ways in which it operates. They were, moreover, confirmed in legislation suggesting that the Peoples' and Nobles' Representatives were supportive. However, one point that must be highlighted is that these developments were economic based and not strictly political in nature.

3 The Legislative Assembly

The Legislative Assembly is a tri-partite body consisting of representatives of the nobles, the people and the Executive. Nine representatives are elected by the nobles. They are elected by the 29 nobles who hold the 33 noble titles. This includes the King who still holds the noble title *Tungi*, which he inherited from his father, and His Royal Highness the Crown Prince who holds the noble title *Tupouto 'a*, which is the title of the Heir Apparent.¹⁰⁹ The nobles are chiefs who were appointed by the Monarchy, and hold the titles based on the law of succession.¹¹⁰ The Monarchy has no power to disentitle a noble's title.¹¹¹

¹⁰⁵ Public Service Act 2002

¹⁰⁶ For example the communications sector was corporatised and competition introduced under the Communications Act 2000.

¹⁰⁷ Public Enterprises Act 2002.

¹⁰⁸ Public Finance Management Act 2002, Revenue Services Administration Act 2002, Consumption Tax Act 2004.

¹⁰⁹ The Royal Estates Act (Cap. 6), s 4, *Laws of Tonga* (1988 Revised Edition). The current Prime Minister holds the titles of 'Ulukalala, Lavaka and Ata. No successor has been appointed to the title *Ma'atu* after the late Hon. Ma'atu, the King's second son who was disinherited for marrying without the Monarch's consent, passed away in 2004. The legitimate heir is still under the age of 21. No trustee has been appointed.

¹¹⁰ The Constitution, above n 1, clause 111. The title passes to the eldest legitimate male child of every titleholder.

¹¹¹ A noble's title only goes to the King for the appointment of a new noble, and that occurs when a noble is convicted of treason or sedition (clause 71) or when there are no legitimate heir to the noble title (clause 112).

The nine representatives elected to represent the people are elected by an estimated 100,000 Tongan population living in Tonga.¹¹² There are three members for the main island of Tongatapu, two representatives each for the respective island groups of Vava'u and Ha'apai, and one representative each for the respective smaller island groups of the Niuas and 'Eua. The same distribution of seats exists for the Nobles' Representatives.

The 15 members of the Executive appointed by the Monarch make up the Assembly and sit as nobles.¹¹³ These are the only members of the Legislative Assembly appointed by the Monarch. At present there are a total of 33 seats in the Assembly.

The Monarch has a power of veto over the laws passed by the Legislative Assembly. If the Monarch exercised his veto, the Legislative Assembly would be precluded from further discussing such laws until the next session.¹¹⁴ The Monarch appoints the Speaker at his pleasure.¹¹⁵ The Monarch also has the power to summon and dissolve the Legislative Assembly at his pleasure.¹¹⁶ Under clause 69 the quorum of the Assembly is one-half of the membership.

The main power of the Legislative Assembly is to pass legislation, including legislation that approves Government's budget and further supplements, the collection of taxes, and also approval, amendment or rescission of regulations. In addition, the Assembly:

- (a) may also impeach Ministers, Governors or judges for abuse of public office;
- (b) "unseat" Representatives who are proven to have been elected based on threats and bribery;¹¹⁷
- (c) has the power to prosecute any person who commits offences against the Assembly;¹¹⁸

¹¹² The last census in 1996 set a population of 94,288 Tongans out of a total of 97,784: Tonga Statistics Department Website <<http://www.spc.int>> (last accessed 27 August 2005). Tongans living overseas have to travel to Tonga to register and vote. An estimated 100,000 Tongans live overseas mainly in New Zealand, Australia, the United States, the United Kingdom and Japan.

¹¹³ The Constitution, above n 1, cl 51.

¹¹⁴ The Constitution, above n 1, cl 68. The author knows of only two occasions when the veto was exercised. A law was introduced to take away land belonging to Tongans living overseas was vetoed. In 2001 the Princess Regent vetoed legislation that made amendments relating to jury trials.

¹¹⁵ The Constitution, above n 1, cl 61.

¹¹⁶ The Constitution, above n 1, cl 38.

¹¹⁷ The Constitution, above n 1, cl 66.

- (d) receives annual reports of Government Ministries and Departments; an opportunity for the Representatives to evaluate Ministerial and Executive performance. Questions by Representatives are also a tool to abstract information from the Executive for the public;
- (e) conducts national visits twice a year to electorates and Government bodies to gather information and identify issues that require Assembly attention.

The normal common law parliamentary privileges are available to members of the Assembly. Television and radio coverage of debates are available in summary. Minutes of the Assembly are published but only in the Tongan language. Media coverage is therefore rife and is of great interest to both the native and expatriate community. In the last session the Assembly underwent cosmetic developments to its infrastructure with the provision of offices for the Representatives. Planning is still underway for a new Assembly building.

The main issue concerning the Legislative Assembly has been representation. Under clause 63 of the 1875 Constitution, the Legislative Assembly consisted of the Executive, the 20 nobles appointed by the King, and 20 representatives of the people, and it met bi-annually.¹¹⁹ In 1914 however Tupou II amended the Constitution and reduced the number of representatives from 20 to seven each, and the Assembly was convened annually. The power of the Monarchy to appoint his Ministers however was not affected. This meant that the Monarchy possesses the ability to create and maintain a majority in the Assembly. In 1982 the present Monarch amended the Constitution increasing the number of peoples' and nobles' representatives from seven to nine, but still retained the power to create a majority.¹²⁰ Before the appointment of the elected Ministers, the Monarchy has traditionally maintained the numbers of the Ministers at 12.

¹¹⁸ The Constitution, above n 1, cl 70 (as amended by Act 18 of 1999). The old clause 70 was last used in 1996 when a Peoples' Representative and two journalists were sentenced to be imprisoned for 30 days for "disrespecting" the Assembly. The Supreme Court later declared the conviction and sentence unconstitutional: *Moala & ors v Minister of Police (No. 3)* [1996] Tonga LR 211 [*Moala*]. The result amended clause 70 in 1999 to its present detailed form. In 2003 the Court of Appeal granted the representative and the two journalists normal and exemplary damages for the unlawful imprisonment: *Edwards v Pohiva (Cross Appeal)* [2003] TOCA 8 <www.paclii.org> (last accessed 28 August 2005)

¹¹⁹ Latukeyu, above n 66, 103.

¹²⁰ Act 17 of 1982 increased the number of nobles and peoples representatives to the present number of 9.

The Executive was therefore always meant to be a minority government inside the Assembly. His Royal Highness the Crown Prince recently explained this feature of the Tongan Assembly while writing concerning the media reforms:¹²¹

Eventually, when all the ministers are elected representatives, their numbers in parliament shall maintain proportions traditionally maintained in the past ie a minority in the house. Neither the People's Representatives nor the Nobility should alone have the ability to out vote the government but the government, alone, should never be permitted to out vote the Nobility and the People's representatives should they decide to vote together. This is necessary because Tonga does not have an Upper House and is a natural non-legislative restraint on the use of Executive power. Among the virtues of these reforms is that they can be implemented immediately without Constitutional change.

The balance has served Tonga well for a century and a half. To change this formula would mean an alteration in the terms of the social contract which ended our Civil Wards and which manifests itself in our land tenure system.

This "balance" is therefore a concept entrenched in Tongan governance. It may explain why ordinary legislation is passed only by simple majority three times rather than by special majority, except for the special rules in clause 79.¹²² In order to pass legislation support from the other tables is therefore required. It should be noted however that when laws "relating to the King, the Royal Family or the titles and inheritances of nobles" only the nobles are allowed to discuss and vote on such laws.¹²³

The impact on proceedings of the "balance" concept is that the Peoples' Representatives effectively play the role of the opposition party, and the Nobles Representatives hold the balance of power. This has been attributed to the occupation by the supporters of the "Human Rights and Democracy Movement in Tonga" of most of the seats at the Peoples' table, thus often presenting a united and constant opposition to the Executive when required. The Nobles, in contrast to the other two tables, vote on an individual basis, which is sometimes difficult to predict. This was demonstrably lucid during the voting in the Assembly for the media reform bills. The Executive were united in their stance for the media

¹²¹ Matangi Tonga Online, Letter to the Editor by His Royal Highness Crown Prince Tupouto'a "Edwards Interview: Media Bills had become a cause celebre" dated 25 January 2005 <<http://www.matangitonga.to>> (last accessed 11 March 2005)

¹²² The Constitution, above n 1, cls 56 and 79.

¹²³ The Constitution, above n 1, cl 67.

reform bills and represented 12 out of the 30 votes. The Peoples' Representatives were all against the media reform bills, and with one of their number being absent overseas, they had only eight votes. The Executive needed four votes from the Nobles. During the voting four Nobles' Representatives supported the bills, and three Nobles' Representatives voted against. One Nobles' Representative was absent, and one chaired the Whole Committee during the voting. With the increase of the Executive table to 15, a simple majority is now 17, which is an easier threshold for the Executive to achieve legislative latitude.

4 The Judiciary

The Monarch appoints the judges of the Court of Appeal and the Supreme Court with the consent of the Privy Council.¹²⁴ The Chief Justice is the head of the judiciary as the President of the Court of Appeal, and sits in that Court with three other justices.¹²⁵ The Chief Justice ordinarily sits in the Supreme Court as does a second Supreme Court Judge.¹²⁶ Both judges of the Supreme Court also sit in the Land Court, along with a Land Assessor to provide assistance on Tongan customs.¹²⁷ The judges of the Court of Appeal and the Supreme Court have always been expatriates which hopefully will continue in the future.¹²⁸

The jurisdiction of the Supreme Court is cast very wide to include "all cases in Law and Equity arising under the Constitution and the laws of the Kingdom", and "land matters" are dealt with by the Land Court.¹²⁹ Clause 82 provides the Judiciary the power to strike down legislation:

This Constitution is the supreme law of the Kingdom and if any other law is inconsistent with the Constitution, that other law shall, to the extent of the inconsistency, be void.

The Chief Justice was a member of the Privy Council as legal advisor after the 1875 Constitution,¹³⁰ and at times was allowed to sit in the Legislative Assembly.¹³¹ During Queen

¹²⁴ The Constitution, above n 1, cls 85 and 86.

¹²⁵ Burchett J of Australia, and Tompkins and Salmon JJ of New Zealand.

¹²⁶ Ford J of New Zealand.

¹²⁷ Land Act (Cap. 132), s 146 (as amended) *Laws of Tonga* (1988 Revised Edition)

¹²⁸ Ward Interview, above n 27, 5.

¹²⁹ The Constitution, above n 1, cl 90.

¹³⁰ Latukefu, above n 66, 100. This was under clause 54 of the 1875 Constitution.

¹³¹ See Powles, above n 72.

Salote's reign the Chief Justice was however removed from the Privy Council in 1942 for obvious reasons.¹³²

The main issue for Tonga's judiciary is maintaining expatriates as judges, and appropriate technical support. After the *Lali Media* decisions in the Supreme Court there were calls from the public for the dismissal of the Chief Justice based on a supposed Executive anomaly in the procedure used to approve the Chief Justice's salary from previous years, and impeachment proceedings were threatened but never carried out.¹³³ The proponents called for the appointment of Tongan judges. Their heavy criticism of the Chief Justice resulted in the instigation of contempt of court prosecutions.¹³⁴ However the pressure eased when the Chief Justice resigned and took up an offer as President of the Fiji Court of Appeal.¹³⁵ After the departure of the Chief Justice the call for changes in appointments interestingly disappeared and Government appointed another expatriate as the present Chief Justice. This episode and the political impact of the *Taione* case raised the question of judicial independence. To most people the judiciary is seen as the last bastion in enforcing the Constitution and protecting rights.¹³⁶ The *Taione* case protected the public's right of freedom of expression. Another vivid example was when the Supreme Court in 1996 declared unconstitutional the imprisonment for 30 days of a Peoples' Representative and two journalists by the Legislative Assembly for contempt under clause 70.¹³⁷ It is therefore vital for the judiciary is allowed freedom from any social or political pressure to make the legally tough decisions.

To its credit the Executive recognise this. The Executive is devoted to providing the necessary technical support to improve the prestige of the Tongan judiciary. Refurbished court facilities have been provided under Australian funding, and a new court building is underway together with judicial strengthening projects. It should be noted that these improvements had been planned several years before. The Executive also ensures reasonable

¹³² Latukefu, above n 66, 81. Act 25 of 1942.

¹³³ 'Etuete Lavulavu MP and Mumui Tatola, "Check it Out" Oceania Broadcasting Network, 19, 21, 26, and 27 May 2003.

¹³⁴ *Attorney General v Lavulavu and ors*, Cr. 329/03, Nuku'alofa Supreme Court Registry.

¹³⁵ Matangi Tonga Online "Tonga's laws are there to protect the people who have no power: Justice Ward" <http://www.matangitonga.to/article/features/interviews/article_print_ward020704.shtml> (last accessed 11 March 2005)

¹³⁶ Ward Interview, above n 27, 5.

¹³⁷ *Moala*, above n 118.

remuneration is provided to maintain quality judges. The Attorney General is also vigorous in upholding the law of contempt of court.¹³⁸

Recently the Executive agreed to the appointment of two New Zealand District Court judges who separately served three months appointments under New Zealand funding to help clear a substantive backlog of cases in the Supreme Court. The private bar consists mainly of locally qualified lawyers.¹³⁹ There are a few tertiary qualified lawyers, but most are employed by the Executive or based overseas. The Tongan Law Society has enrolled most of the locally qualified lawyers on a correspondence course from the United Kingdom to study for law degrees. Library facilities for lawyers are modest and access to electronic legal databases is scant.

Despite the apparent technical weaknesses in the judiciary, the future appears favourable, and judicial independence in Tonga is virtually guaranteed.

C Challenging the Executive

The above description of the present form of Tonga's government illustrates that the King remains the central political authority in Tonga. The opportunity for the Monarchy to rule as it wishes is vividly present. Fortunately, that power has not been utilised to the extreme, as in dictatorial systems of modern times. Moreover, the judiciary remains an effective check on the Executive and the rest of government. Reverence for the rule of law therefore continues to be a cornerstone of Tonga. This has been complemented by the progressive modernisation of the Judiciary and the Legislative Assembly. The theme was also taken to unexpected level with the Executive's decision to undergo slight restructuring. This is hardly a sign of an absolute monarchy, or authoritarian or feudalist government. The social contract was therefore Monarchy and its people therefore were intended to co-exist in harmony. The social contract was that the Monarch governs for the people and, the people

¹³⁸ Contempt of court law is still based on the common law and it has been accepted by the Court of Appeal as an exception to freedom of expression: see *Namoa v Attorney-General* [2000] TOCA 14 <www.paclii.org> (last accessed 27 August 2005) There have been 10 contempt of court cases since 1998. Two have been scandalising the court and four have been interference with the administration of justice cases. Four cases have yet to be adjudicated.

¹³⁹ Locally qualified lawyers are local persons who were admitted to the bar after passing law exams set by the judges. They were appointed to provide a legal profession for the public in the first half of the 20th century. The last was appointed around 2002. The appointments in the 1980s hold diplomas in law from the University of the South Pacific.

enjoy the governance of the Monarchy. The Constitution would then provide the foundation to quell any injustice through the judiciary.

Tonga's form of government however does not possess the normal features of responsible government under the Westminster system. This is clearly so in three areas. The Ministers are appointed by royal favour, rather than being elected and periodically subject to change at elections. Secondly, the Monarch exercises ultimate freedom in exercising his political prerogative powers such as in appointing Ministers and giving royal assent to legislation. Thirdly, the representation in the Assembly is disproportionate to the population, although based on a "balanced" proportion. This form of government is unique to Tonga and is a hybrid of the Westminster system and Tongan culture. It is what the Constitution terms as a "Constitutional Government under" the Monarch.¹⁴⁰

These are the exact features of the Tongan system that is targeted by political reformists. The problem however may not be structural, but the ways in which the system has been used. According to Campbell it was "the quality of governance, not the directions of development" that created the political reformists.¹⁴¹ The last three decades were beleaguered with political dissension relating to nepotism, favouritism, passport sales, "royalised" government entities,¹⁴² satellite slots, extravagant *per diems*, lack of financial reporting, failed projects, loss of investments and conflicts of interests.

Dissension was initially voiced through radio programmes and newspapers in the late 1970s and 1980s. In 1992 it became more visible with the first pro-democracy conference held in Tonga, followed by seminars, meetings and follow-up conferences but on a smaller scale.¹⁴³ With the introduction of television in the late 1990s a more wide-ranging medium became available. Today all media are frequently used to advocate political change and as a result the public are more politically conscious. Elections have constantly returned candidates who stand for political reform and have cruelly disposed those who have opposed the reformists or who failed to pursue reform once inside the Assembly. However, according to

¹⁴⁰ The Constitution, above n 1, cl 31.

¹⁴¹ Ian C. Campbell "The Quest for Constitutional Reform in Tonga" (2005) 40(1) *Journal of Pacific History* 91, 97. [Campbell]

¹⁴² Foreign Affairs, Defence and Trade Committee *Inquiry into New Zealand's relationship with the Kingdom of Tonga* August 2005, 29.

¹⁴³ Matangi Tonga Online, "Human Rights seminar looks at Constitutional Monarchy" 21 July 2004 <<http://www.matangitonga.to>> (last accessed 17 August 2005).

James voting for the political reformists “does not mean that the nation is crying out for the changes they have in mind let alone a fully-fledged, Western-style form of government”.¹⁴⁴ James premises this on the decreasing number of voter interest and votes for the political reformists in the five elections between 1990 and 2002. In the 2005 general election however the political reformists gained more support by winning eight of the nine Peoples’ Representative seats.¹⁴⁵

Recently reformists are becoming more organised by regularly petitioning the Legislative Assembly and the Monarch, and using television, protests marches and appeals to foreign governments to publicise their cause. Some reformists have created political parties recognising success is more likely to be achieved by presenting a united front as a party rather than standing as individuals.¹⁴⁶

The biggest protest so far has been the recent six week industrial action by aggrieved public servants as a result of the Executive’s recent salary revision exercise. Although the revision was genuinely based on economic reforms, its implementation was derisory and presented a foul perception of Ministerial self-interests. The strike was therefore never a political strike but with the stalemate in negotiations it became a platform for political reform. Some students resorted to vandalism and arson.¹⁴⁷ In Auckland Tongan expatriates were involved in a melee with staff at the Royal Residence while the King was in residence.¹⁴⁸ A historical royal residence was burnt down in Tonga. The Princess Regent twice visited the strikers to persuade them to return to work, and outsiders assessed that the Kingdom was “crumbling”.¹⁴⁹

¹⁴⁴ James, above n 51, 322.

¹⁴⁵ Matangi Tonga Online “Results of the Tongan General Elections” 18 March 2005 <<http://www.matangitonga.to>> (last accessed 19 March 2005)

¹⁴⁶ Matangi Tonga Online “Tonga’s first political party registers” 13 July 2005 <<http://www.matangitonga.to>> (last accessed 18 July 2005). There have however been groups with political objectives such as the Human Rights and Democracy Movement in Tonga (a pro-democracy movement still trying to register) and the Kotoa Movement (pro-monarchists group that is no longer active).

¹⁴⁷ Matangi Tonga Online, “Students smash Tonga College as Govt removes striking principal and head tutor” 17 August 2005 <www.matangitonga.to> (last accessed 27 August 2005)

¹⁴⁸ See Angela Gregory “Protests turns ugly at royal residence” (22 August 2005) *The New Zealand Herald*, Auckland, A3, Nick Venter “It’s no picnic for Tonga strikers” (23 August 2005) *The Dominion*, Wellington, A6.

¹⁴⁹ See Nick Venter “King’s old house burns to ground” (24 August 2005) *The Dominion*, Wellington, A3; Nick Venter “Royal plea at strike demo” (26 August 2005) *The Dominion*, Wellington, A3; and Nick Venter “The Crumbling Kingdom” (27 August 2005) *The Dominion*, Wellington, E1.

Fortunately an agreement between the Executive and the public servants was reached. The Executive agreed to accept the demands of the strikers for salary increase and, due mainly to the stalemate in negotiations, "consideration" would be given to setting up a "Royal Commission to review the Constitution to allow for a more democratic government".¹⁵⁰

Following the resolution of the strike the political reformists continued the momentum by organising a large political march. It culminated in the submission to the Palace Office of a petition to the Monarch calling for the dismissal of all the Ministers and also full democratic reforms.¹⁵¹ A second petition was also submitted requesting the Monarch to authorise a referendum on democratic reform. The Monarch however has not responded to the petitions. As a result the reformists have decided to carry out an unofficial referendum.

These incidents illustrate that constant airing of political dissension and the ignoring of opportunities for constructive dialogue may lead to unwanted violence. Mass violence and lawlessness however remains unlikely due to the apparent unity and overwhelming preference for peaceful protest. However that should not mean complacency and political dissension should therefore be treated more seriously by both the dissidents and the conformists.

Proposals for political reform are united in calls for responsible government in the Executive.¹⁵² Political reformist front their proposals based on change to the political architecture however, the core desire is for political leaders to practice good governance. It is the perceived decadence of the leadership that is fuelling political dissension. As Campbell has assessed, the reformists "care about the outcomes, not about the process or structure".¹⁵³ However for those who want to ensure desired "outcomes" the appropriate structure must

¹⁵⁰ Matangi Tonga Online "Strike ends! PSA signs MOU calling for democratic reforms" 4 September 2005 <<http://www.matangitonga.to>> (last accessed 6 September 2005).

¹⁵¹ Matangi Tonga Online "Big March for dismissal of Tongan Prime Minister" 6 September 2005 <<http://www.matangitonga.to>> (last accessed 6 September 2005).

¹⁵² See Matangi Tonga Online "PDP calls for elected Prime Minister" 11 August 2005 <<http://www.matangitonga.to>> (last accessed 17 August 2005); Matangi Tonga Online "Lopeti pushes for Tongan Constitutional Review" 3 February 2005 <<http://www.matangitonga.to>> (last accessed 17 August 2005); Lopeti Senituli "Basic Proposal for an Alternative Structure of Government for Tonga (Draft 4)" 30 August 2002 <<http://www.planet-tonga.com>> (last accessed 6 June 2005), William Clive Edwards "Proposal for Constitutional Changes to Provide for a Democratically Elected Government for the People of Tonga" 27 July 2005 <<http://planet-tonga.com>> (last accessed 13 September 2005)

¹⁵³ Campbell, above n 141, 102.

also exist. Structural change may therefore be necessary. Although the Executive has implemented measures towards achieving some responsible government, they obviously are insufficient as illustrated by the increase in recent petitions, public protests and sporadic violence.¹⁵⁴ The reformists and their supporters have therefore highlighted their core political need is to have an Executive established in a political structure that provides for accountability, transparency and the rule of law.

In order to ensure peaceful existence and to continue the perpetual state of stability, the Monarchy and the Executive must fully appreciate the reformists' stance and the risks of inadequate dialogue and responses. They must provide opportunities for constructive dialogue and be prepared for some compromise, particularly to the structure of the Executive. On the other hand, the dissidents should fully appreciate the traditionally entrenched political values held by the Monarchy and most Tongans, and voice their views constantly in a peaceful and composed manner. That is the Tongan way. That is the way that would obtain support from the people, and endorsement from the aristocracy. That is the way to share power with the Monarchy. That would be the peaceful way.

IV WHERE TO NOW?

A Principles of Tongan Governance

Based on the recent developments, the history of Tongan governance and the current political climate the author can identify the following principles that should in form be part of any change to Tonga's form of government. However, it must be recognised that under the current Constitutional arrangements, and Tongan culture, Constitutional change for Tonga's political structure will be given effect only by the Monarchy. The Monarchy has the power to change the Constitution at his whim, of course subject to the Constitution. Some view it involving "quite emphatic change of royal heart" and "appears equally unlikely" from the present Monarch and the next.¹⁵⁵ The recent unexpected developments in the Executive call those views into question however. The recent developments illustrate change is possible, but that it must be in the interests of the Monarchy and the people together.

¹⁵⁴ For example, the Commissioner for Public Relations Act 2001 established Tonga's version of an Ombudsman, but it only has powers to make non-binding recommendations to the Privy Council.

¹⁵⁵ James, above n 51, 315.

between rules and culture and use rules models to help change attitudes about corruption.¹⁴

First, the cultural structure of authority has to be recognised but not replicated in a political structure. Tongan custom is embedded in Tongans and cannot be disregarded in any Tongan form of government. The cultural structure is vertical with the King at its head and the nobles and the people occupying the lower levels. The political structure must recognise these entities, but be horizontal with equal participation of the King, the nobles and the people on a level playing field. The infinite wisdom of the makeup of the Legislative Assembly illustrates this best with neither table ever being guaranteed the ability to out-vote the other two tables. Having one group more powerful than the other creates tyranny of the majority, and, for Tonga's small size, fragile economy and populist voters, it would provide a shorter pathway to instability and unrest.

Secondly, the Executive should be represented on a tripartite basis: the King, the Nobles and the people. Governance should therefore be shared. It allows the people and the nobles to feel involved and share responsibility in decision making. The appointment of elected Ministers illustrates this is acceptable to the Monarchy. Coalition Governments around the world have proven that parties with different interests can work together and provide uniform policy. The concept of a shared Executive should therefore be retained.

Thirdly, the obvious political climate shows that a responsible government is tantamount to stable government. Having an Executive that is accountable to its Monarch and people, and is transparent in decision making, produces less temperate political dissension. Leaders who appoint, and who are appointed, must strictly adhere to good governance principles. Human frailties of course may explain and allow for minor non-compliance however current practices that exist in Tonga must be seriously improved, and that applies to all levels of government. The Executive has made some strides towards good governance. The issue now is embedding the principles of good governance in every person in government: Ministers, heads of departments and public servants. It may be wise to take up the recommendation by James and Tufui to educate all about anti-corruption practices, identify the costs of corruption, strengthen relevant offices and institutions to implement anti-corruption practices, enforce existing rules and regulations, identify and deal with conflict

between rules and culture and use role models to help change attitudes about corruption.¹⁵⁶ This should ensure compliance with good governance principles inside the Executive.

Last but not least, judicial independence is vital. Government recognises this and should continue to vigorously provide technical support and protection of the judiciary. At the moment it may be best to continue the appointment of expatriates in order to provide an independent and more objective stance especially during this evolution process. Tongans have always revered and respected the judiciary because of their historical culture of subjection to authority. Although there have been signs of some discontent with the judiciary, public confidence in the judiciary will be maintained by political dissidents since it is the only weapon they have in limiting Executive power.

B Options for a New Form of Government

What form of government then could provide these principles of cultural identity, shared governance, good governance and judicial independence? Three options may be considered: retention of the existing system, shared governance or full democracy.

1 Retention of the Existing System

Retaining the form of government before the appointment of elected Ministers may be an option. Since it has been identified that the political problem has been about leadership rather than structure, and that the current arrangement is still experimental in nature, this option is still a possibility. The old system has worked for Tonga since 1875, and it is only recently that popular vociferous call for reform has erupted due to public immorality in leadership.

It would therefore be imperative for militating political dissension to abide strictly with principles of good governance and uphold judicial independence. Personnel in government must have a new direction. Decision-making practices must be improved and made more transparent. Relationships with the Peoples' and Nobles' Representatives should

¹⁵⁶ Kerry James and Taniela Tufui *National Integrity Systems: Transparency International Country Study Report: Tonga 2004* (Transparency International Australia and Asia Pacific School of Economics and Governance, ANU, Canberra, 2004)

be more consultative rather than confrontational. The Executive should also be more appreciative and timely in its response to criticism. The Executive should basically make itself politically and socially conspicuous instead of passively consigning itself behind closed doors when political incidents occur. The Executive must appreciate that the public does not only emotionally criticise but expects responses that are appreciative with reasonable and composed explanations. Such responses would go a long way to quelling dissension.

Under the present Constitutional arrangements Ministers may be held accountable to the elected Representatives through dismissal from office after impeachment in the Legislative Assembly under clause 75(5) of the Constitution. If there are genuine claims of mismanagement and corruption, this avenue should be pursued vigorously. Elected representatives should therefore ensure reliable and admissible evidence is gathered if impeachment proceedings are to be pursued. Petitions to the Legislative Assembly and the Monarch and legal action are other avenues, and can only be effective once a credible case is built.

In summary the present Constitutional arrangements provide avenues for accountability but they have not been effectively used. Moreover, until there is conviction to good governance principles through concrete political manifestos or regulation, it could be justifiable to retain the existing system. Amendments or new legislation are therefore unnecessary, and this would be the most cost effective option.

2 *Shared Governance*

This option involves the equal participation of the Monarch, the nobles and people in the Executive. This seems to be the system being considered after the appointment of the elected Ministers. This concept however may be developed further as follows: First, the number of the Nobles and Peoples Representatives could be increased to 12 each. This could be done by adding one representative each to the three main electorates of Tongatapu, Ha'apai and Vava'u. The Monarch could then appoint the Prime Minister from the elected representatives of the nobles and the people. The Prime Minister then selects six representatives each from the Nobles' and Peoples' Representatives to be appointed by the Monarch as Ministers of the Crown. These 12 representatives and the Prime Minister would form the Executive.

The selected Nobles' and Peoples' Representatives will therefore have to resign and be appointed as Ministers. They could then be replaced by the next candidate in their respective electorates with the most votes, rather than going through a time consuming and costly by-election. Candidates for the Nobles' and Peoples' representative seats must be prepared to accept the possibility of being appointed a Minister. The nobles and the people who vote must understand that they should vote for candidates who have the ability to work in the Executive for the country as a whole. The total number of the Executive would be 13 but would still be a minority government in the 37 seat Legislative Assembly. The Monarchy would still retain its seat in the Executive but will participate equally with the Nobles and Peoples' representatives who are appointed Ministers.

To ensure accountability, elections could continue to be held tri-annually. The Prime Minister however may not serve for longer than three concurrent terms. Elected Ministers may retain office depending on maintaining their mandate and selection by the Prime Minister. The Prime Minister could have the power to dismiss all Ministers, with the consent of the King. If this happens a replacement could be selected from the Representatives, but a by-election should be conducted to replace the selected Representative. The Prime Minister could be accountable to the King, through a vote of confidence or impeachment by the Legislative Assembly, or conviction of an offence punishable by imprisonment for a term of not less than 2 years.

Emphasising limited tenure and equal participation should ease political dissension regarding the absence of ability to change and influence the membership and policies of the Executive. On the other hand, the Monarchy will still retain the authority to appoint and dismiss Ministers, and will govern with Ministers who are accountable and therefore prepared to "speak out". More importantly members of such a government would find it in their best interests to be acute with good governance principles. Most of the cost would involve amending the Constitution, the Government Act, the Legislative Assembly Act and the Electoral Act 1989. It is submitted though that this is a cost that is miniscule compared to the profits of an effective and stable government.

This option involves the King no longer being directly involved in the Executive but retains the power to veto legislation passed by the Legislative Assembly. Veto power naturally accompanies the ceremonial role to give royal assent to legislation. Such power should therefore be real to recognise the stature of the Tongan Monarchy. The present Monarchy has proven that the veto power is used sparingly. However a significant safeguard may be imposed where the veto could only be exercised if the Monarch is petitioned by a substantial number of the population, or the Monarch deems the matter serious enough to be determined by referendum. This should ensure the veto will be exercised only in very exceptional circumstances fully justified by extra-democratic means. Retention by the Monarchy of veto power therefore recognises the Monarchy as representing Tonga as a whole if all the normal government hurdles fail to stop inappropriate legislation.

The Government will therefore be elected by the nobles and the people. Based on the experiences of New Zealand when it used a first-past-the-post system to elect its members of Parliament, it may be appropriate to have a mixed member proportion system to continue the theme of "balance" that is the basis of the current Legislative Assembly.¹⁵⁷ The composition of the Legislative Assembly will therefore have to be changed, and seats distributed in proportion to the various island groups. Party politics would therefore have to thrive, and the normal avenues of accountability should be established and used. All interests of the commoners, women, religion, the aristocracy, businesses, churches and maybe the youth, should therefore be represented, and with Tonga's homogenous ethnic population, race would not complicate representation.

The major benefit is that government will be totally accountable to the masses and strictly adhere to good governance. The Monarch will still be head of state and maintain some influence politically through conditional veto of legislation. However the hurdle is excluding the Monarch from the Executive. It is uncertain how Tongans would handle this. Tongans are still generally monarchists and to remove the Monarchy entirely from executive decision making may be too big a step.

¹⁵⁷ Geoffrey Palmer and Matthew Palmer *Bridled Power: New Zealand's Constitution and Government* (4ed, Oxford University Press, Melbourne, 2004) 9-18.

C *Methods of Implementation*

The method of implementation would be vital. First, it may be done incrementally until Tonga is comfortable with its system. The disadvantage is the duration and limited patience people may have. The benefit is that a system is produced at the end which has been proven to work.

Secondly, a Royal Commission may be established with a mandate to identify appropriate options for forms of government within a prescribed time period of two to three years.¹⁵⁸ These options should then be presented to the public to decide by referendum. The vital issue however is to ensure that people make informed rather than populist decisions. Vigorous education strategies must then be tirelessly implemented before any referendum. The disadvantages of a Royal Commission are ensuring independent and representative membership, limited consultation, untested options and costs. The benefits are public legitimisation and more informed decision making.

Thirdly, the Monarch could decide the model and make changes. Like the Monarch's ancestors, radical change can be implemented based on the Monarchy's beliefs of what is in the best interests of the people and peace. The disadvantages are likely to be the lack of consultation with the wider public, the possibility of self-interest and uncertainty as to when changes will occur. The benefit is that such a decision could be well thought out because the Monarchy appreciates that what is in the best interest of the Monarchy should be in the best interest of the people, and vice versa. It would be less costly in the planning process.

Whatever means that is adopted to implement political change to the form of government, it is submitted that it would be preferable that it be legitimised with overwhelming support of the Monarch and the public, and that it be, at the same time appropriate to Tonga by providing for cultural identity, shared governance, good governance and judicial independence.

¹⁵⁸ The Royal Commissions Act (Cap. 41) *Laws of Tonga* (1988 Revised Edition), s 2. There have been three Royal Commissions. In 1983 two Royal Commissions were established to separately look at the now defunct Tonga Commodities Board and at land practices, usage and law. In 2003 a Royal Commission was established to inquire into the now liquidated Royal Tongan Airlines.

V CONCLUSION

This paper has explained the recent constitutional developments that occurred in Tonga from February 2003 to April 2005, comprising the *Lali Media* decisions of former Chief Justice Ward and the Court of Appeal concerning the bans on the *Taimi 'o Tonga* newspaper, the *Taione* decision of the present Chief Justice concerning the Constitutional amendments and media reform legislation, the reshuffling of Cabinet and the appointment of elected Ministers. From these developments it was ascertained that first, shared governance is acceptable. Secondly, firm accountability of Ministers is pursued. Thirdly, judicial independence is respected.

This paper then analysed the historical background of Tongan government, and the present form of government and its operation. From this analysis it was found that Tonga has always endured political dissension and that the Monarchy has been responsible for maintaining a stable country. Moreover, significant developments have been made in the interests of good governance and modernisation of Tonga's government. The political climate however illustrates these are not sufficient. The main concern is constant compliance.

Based on the recent developments, the history of Tongan governance and the present political climate it was submitted that any form of government in the future should provide for the principles of cultural identity, shared governance, good governance and judicial independence. Three options were considered and the modes of implementing change were discussed.

Tonga is now taking the challenging road of reform after 130 years of modern government. Fortunately, preference is for peaceful change; although there has been small scale violence by isolated groups, not supported by the public, who are, perhaps naïve in the ways of the Kingdom. Although the recent constitutional developments have been a catalyst for constitutional change, one hopes that change will be timely and certain. The challenge now is to take the lessons from these developments and from Tonga's heritage to heart and to consider reforms positively. Patience and leadership will be the most important virtues for Tongans during these times.

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