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**TONGA AS A NEW MEMBER OF THE INTERNATIONAL LABOUR
ORGANISATION: THE WAY FORWARD**

LAWS 546: COMPARATIVE LABOUR LAW



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Abstract

Labour standards in Tonga are far from being near perfect. This largely leans towards there being gaps in its current national laws and inaction from Government in establishing coordinating mechanisms, policies or programs to address this. Despite this, Tonga's recent decision to become a member of the International Labour Organisation (ILO) in early 2016 provides hope. This essentially means that there is now commitment from Tonga to lifting its labour standards. This paper seeks to address what Tonga should do now and more particularly in relation to labour law since it has become a member of the ILO. The paper will firstly take a descriptive approach and set out the background of Tonga which will shed light on the country, particularly its geography, political structure, economy, and workforce. The paper will also set out Tonga's obligations as a new member under the ILO Constitution. The paper will then focus on the principles governing the four fundamental rights that are subject of the eight ILO Conventions covered under ILO's Declaration on Fundamental Principles and Rights at Work and its Follow-up. These principles bind all members irrespective of whether they have ratified or not any of the relevant ILO Conventions and set out the minimum international labour standards. The paper will analyse this against particular circumstances in Tonga to answer two further research questions (1) to what extent are any of the principles and rights under the Declaration observed; and (2) what would be required to meet the standards in the Declaration. A normative approach will be included in the analysis to reflect the way forward for Tonga. This paper argues that Tonga's commitment to respecting, promoting and realising ILO's international labour standards requires it to address the current deficiencies and gaps within its national laws reflecting labour standards. A key contribution would include the passing of the Employment Relations Bill which has been in the pipeline for over a decade.

Key words:

International Labour Organisation, Obligations, Tonga

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises exactly 7,357 words.

I Introduction

Employment is about the relationship between employers and employees: it is a binary relationship of two elements in association but also in opposition; but not oppression...at least I have yet to see oppression in Tonga.

–Paul Karalus, 2013.¹

The labour standards in Tonga could be considered sub-standard in comparison to the international labour standards that have been identified by the International Labour Organisation (ILO). There is currently no employment relations legislation in Tonga despite an Employment Relations Bill being in the pipeline for over a decade.² There are also various gaps in its current legislations which have an impact on most, if not all, of the principles that govern the four fundamental rights identified under the ILO’s Declaration on Fundamental Principles and Rights at Work and its Follow-Up (Declaration).

Examples of some of the gaps in Tonga’s current legislation include the ineffective Trade Union Act 1964 (Tonga). Reports indicate that it is due to there being lack of any accompanying regulations to give it effect.³ As such no official unions have been established. There are however groups that act as *de facto* unions such as the Friendly Island Teachers Association, Tonga Nurses Association and the Public Service Association who have all been incorporated under the Incorporated Societies Act 1988 (Tonga). Another example is the weaknesses in some of the legislations like the Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) and the Criminal Offences Act 1926 (Tonga) that do not fully and adequately address child labour including its worst forms.⁴

Tonga having recently become a member, 187th, of the ILO brings hope to labour standards and related issues within the country. Not only is the Government now committed to lifting labour standards in Tonga, they are also committed to the “decent work principles and the progressive realisation of international labour standards” promoted by the ILO.⁵ With this agenda in mind, Tonga is further committed to “encouraging decent employment opportunities, enhancing social protection and strengthening dialogue on work-related issues”.⁶

¹ Paul Karalus “Lets fix the Employment Relations Bill” (23 June 2013) Matangi Tonga <<http://matangitonga.to/2013/06/23/lets-fix-employment-relations-bill>>.

² “Government to Introduce Employment Relations Bill 2013” (6 May 2013) Tonga Ministry of Information and Communications <<http://www.mic.gov.to/government/latest-decisions-and-bills/4382-government-determined-to-introduce-the-employment-relations-bill-2013>>.

³ “Tonga 2016 Human Rights Report” (2016) US Department State <<https://www.state.gov/documents/organization/265592.pdf>> at 11.

⁴ “2016 Findings on the Worst Forms of Child Labour” (2016) <<https://www.dol.gov/agencies/ilab/resources/reports/child-labor/tonga>> at 2.

⁵ “Kingdom of Tonga has become the 187th International Labour Organisation (ILO) Member State” (4 March 2016) Tonga’s Ministry of Information and Communication <http://mic.gov.to/index.php?option=com_content&view=article&id=5871&lang=en>.

⁶ Above n 5.

To date, Tonga has yet to ratify any of the ILO Conventions since its membership. Despite this, Tonga has various obligations under the ILO Constitution and also arising simply because of its membership with ILO. Under the Declaration member states must “respect, promote and realise the principles governing the four fundamental rights that are subject of relevant ILO Conventions” irrespective of whether they have or have not ratified any of relevant ILO Conventions.⁷

The paper is divided into three main parts. The first part will set out the Tongan background to gage a better understanding of its geography, its economy, political structure and its workforce. These I consider are the key components that impact on how Tonga deals with labour issues currently and in the future. The second part will discuss the obligations that Tonga has as a member under the ILO Constitution. It will include the obligations under ILO’s 1998 Declaration on Fundamental Principles and Rights at Work and the 2008 Declaration on Social Justice for a Fair Globalisation and its Follow-Ups. The third part will focus on the principles governing the four fundamental rights that are subject of the eight ILO Conventions under the 1998 Declaration. An analysis will be carried out on Tonga’s current national laws and practices to determine how far they have observed these principles and at the same time provide some solutions on the way forward for Tonga. These principles bind all members irrespective of status in ratifying any of the relevant Conventions and sets the minimum international labour standards.

This paper attempts to explore the extent in which Tonga has observed the principles and rights under the Declaration. Once this is established, the paper will assess what Tonga would need to do in order to meet the standards in the Declaration. Essentially, the main research question to be answered is: what Tonga should do now and more particularly in relation to labour law since it has become a member of the ILO. I argue that the first step for Tonga is to address the deficiencies and gaps within its national laws reflecting labour standards. An ideal contribution would be the Employment Relations Bill which is yet to be passed but should be. This would set the foundation for Tonga respecting, promoting and realising the minimum international labour standards required under the 1998 Declaration.

II Tonga: The Background

A Its Geography

The Kingdom of Tonga (Tonga) comprises 170 islands many of which are uninhabited.⁸ It lies in the central south-west Pacific surrounded by Fiji, Tuvalu Kiribati, Samoa and Cook Islands from the West and by New Zealand from the South.⁹ “The 36 inhabited islands cover 670 square kilometers out of a total land area of approximately 750 square kilometers”.¹⁰ There are 3 main island groups which include Tongatapu (and ‘Eua), Ha’apai and Vava’u. Then there are the Niua (Niuatoputapu and Niuafo’ou) which is a “remote group of coral atolls several hundred

⁷ Frank Hendrickx, Axel Marx, Glenn Rayp and Jan Wouters “The architecture of global labour governance” (2016) 155 ILR 339 at 345.

⁸ Dr Mili Kaitani and Dr Chris McMurray *Tonga: A Situation Analysis of Children, Women and Youth* (Government of Tonga with the assistance of UNICEF, Tongan Report, 2006) at 2.

⁹ “Tonga” (2017) The Commonwealth <<http://thecommonwealth.org/our-member-countries/tonga>>.

¹⁰ Kaitani and McMurray, above n 8, at 2.

kilometers north of Vava'u". Nuku'alofa, which is located on the main island of Tongatapu, is the capital.¹¹

Tonga's climate which is mainly "warm, moist and semi-tropical" is an advantage for agricultural production and allows people to live comfortably.¹² Tongatapu's clay soil requires very little effort to produce good crops due to its high fertility. On the contrary, 'Eua and Vava'u soils are mainly sandy and less fertile but can still be used for cropping. Ha'apai's coral soils and atolls are not suitable for cash cropping however, they have plenty coconuts and fruits which is common in the rest of Tonga. Due to the landscape of the islands and its origin from coral, it has no mineral resources of commercial worth. As such, it depends largely on its people, land and the sea for its economy.¹³

B Its Political Structure

Tonga is the only surviving monarchy in the South Pacific with its 1875 Constitution considered as being the oldest in the Pacific Islands.¹⁴ It is unique in that it has never been formally colonised by any other country and as such has been able to hold on to its monarchical system of government together with its traditional and cultural values.¹⁵ This is despite being a protectorate of Great Britain from 1900 to 1970.¹⁶

Prior to 2010, the Constitution was mainly King George Tupou I's Constitution of 1875, under which executive power was completely under the monarch.¹⁷ The major reforms that were implemented in 2010 had the King relinquish most of his powers. Alongside this, the legislative body was realigned with the number legislators in the 26-seat chamber elected by commoners expanded from nine to 17. The remaining seats were reserved for members of the country's nobility. Previously the Prime Minister and Cabinet were appointed by the King but the reforms also created a system where these positions would be elected by the members of parliament instead. Today, the Prime Minister is nominated by the Legislative Assembly and appointed by the King.¹⁸ Thereafter the Prime Minister selects his cabinet who are then appointed by the King.¹⁹

Amendments to Tonga's Constitution in 2010 have reflected these major reforms to the government structure and has defined Tonga as a Constitutional Monarchy.²⁰ Essentially, the King remains the head of state while the executive authority of the country is entrusted to the Cabinet under the leadership of the Prime Minister. The Prime Minister has an obligation to

¹¹ At 2.

¹² At 2.

¹³ At 2.

¹⁴ "Tonga – Politics, government, and taxation" (2017) Nations Encyclopedia

<<http://www.nationsencyclopedia.com/economies/Asia-and-the-Pacific/Tonga-POLITICS-GOVERNMENT-AND-TAXATION.html>>.

¹⁵ Kaitani and McMurray, above n 8, at ix.

¹⁶ Above n 14.

¹⁷ Above n 9.

¹⁸ Act of Constitution (Amendment) (No. 2) 2010 (Tonga), cl 50A (1) [Tonga Constitution].

¹⁹ At c 51(2).

²⁰ At c 30.

report to the King on matters arising with the government and on the state of the country.²¹ This is to be on a regular basis and when required. The Cabinet is responsible to the Legislative Assembly for the executive functions of the Government.²² The Legislative Assembly is comprised of the nobles and people's representatives and all members of Cabinet.²³ They make their own rules of procedure for how their meetings are conducted.²⁴ In accordance with their set procedures, any member of the Legislative Assembly can introduce a Bill, propose a motion for debate or present a petition to the Assembly.²⁵ Apart from this and under the Constitution, the King maintains his other various powers. Of relevance to this paper is the Kings powers to make treaties with Foreign States.²⁶ The final consent to any treaty or international agreement with Tonga remains with the King.

C Its Economy

Tonga's economy is largely through subsistence agriculture. The weather and the world commodity prices are key factors in which the economic performance of the country relies upon.²⁷ Despite this, the country faces various challenges to sustaining economic growth which include there being "relatively small endowment of land and natural resources, vulnerability to natural disasters, substantial dependence on imports, relative isolation from major markets and the high cost of public administration and infrastructure".²⁸ Despite this, the formal money economy has grown as farmers move towards cash crop productions, like squash which has been exported to Japan dating back to the 1900s.²⁹

This success however has not always been favourable and reflects the weaknesses of small agricultural economies like Tonga.³⁰ The first half of the 20th century saw events leading from one to the other such as the rapid shift to cash crop, overproduction, collapse in the local prices, unsold stocks and finally the drought in 1995 which contributed to the consistent fall in exports.³¹ Despite this, squash and increasingly fish products are the most important exports with squash remaining more profitable than traditional crops like copra and bananas.³²

Remittances from Tongans living abroad remains the main source of the country's foreign currency and then tourism.³³ The requirement of economic reforms to expand the private sector and diversify have now been recognised by the government who is working to gain public and civil service support.³⁴

²¹ At c 50A (3).

²² At c 51(1).

²³ At c 59 (1).

²⁴ At c 62 (1).

²⁵ At c 62 (2).

²⁶ At c 39.

²⁷ Above n 9.

²⁸ Kaitani and McMurray, above n 8, at 3.

²⁹ Above n 9.

³⁰ Above n 9.

³¹ Above n 9.

³² Above n 9.

³³ Above n 9.

³⁴ Above n 9.

In the late 20th century, the economy grew steadily at 2.2 per cent per annum but slowed from the mid-21st century as a result of high debt, low private investment and the global financial crisis in 2008 when remittances dropped and tourism was unresponsive.³⁵ Growth of about 3 per cent per annum resumed in 2009-2011 moderating to 0.8 per cent in 2012, 0.5 per cent in 2013 and an estimated 2.4 per cent in 2014.³⁶

D Its Workforce Demography

The 2011 census recorded Tonga's population at 103,252 with the composition indicating slightly more males (51,979) than females (51,273).³⁷ Out of this, the employed population was at 33,422 with more males (19,695) recorded than females (13,727). This was a decrease from the 2006 census which recorded the employed population at 35,290. While there were still more males (19,956) than females (15,334), the figures indicate the female employed population having significantly decreased from 2006 to 2011 by 1,607 females in comparison to the slight decrease in the male employed population by only 261. The labour force participation rate which refers to the proportion of people who are of working age (15 years and over), are classified as either employed or unemployed. The labour force participation rate for the employed Tongan population in 2011 had dropped by 4.3% since 2006 with a rate of 52.3 per cent. The unemployment rate remained the same between 2006 to 2011 at 1.1 per cent. This is based on the international definition of unemployment.³⁸ If this was to be disregarded, the unemployment rate would increase.

These indicators while showing a decrease in the employed workforce for the mentioned period also shows a male dominance workforce. This could be as a result of various reasons including advanced development which has seen a growth in jobs requiring males more than females such as construction work, farming and engineering. On the other hand, the possible result of the population decrease could be due to the increased migration of Tongans abroad,

III Tonga's Membership in ILO and its Obligations

A Introduction

Tonga's membership with ILO was effective on the 24th February 2016. Tonga became the 8th Pacific Island country to join ILO in the past 15 years and is the 187th member.³⁹ This followed

³⁵ Above n 9.

³⁶ Above n 9.

³⁷ Sione Lolohea, Lu'isa Kolomatangi and Nicholas McTurk Tonga 2011 *Census of Population and Housing, Volume 2: Analytical Report* (Tonga Department of Statistics and the Secretariat of the Pacific Community, January 2014) at xiii-xiv; Sione Lolohea and Andreas Demmke Tonga 2006 Census of Population and Housing Volume 2: Analytical Report (Tonga Department of Statistics and the Secretariat of the Pacific Community, 2008) at xiii-xiv. At the time of writing this paper, I was still unable to obtain the most recent census report from Tonga's Department of Statistics despite it already being launched earlier this month. Bureaucracy and lack of reciprocal communication from the office were great challenges faced in terms of trying to obtain official and recent national information.

³⁸ ILOs definition of unemployment covers people who are: out of work, want a job, have actively sought work in the previous four weeks and are available to start work within the next fortnight; or out of work and have accepted a job that they are waiting to start in the next fortnight.

³⁹ "Kingdom of Tonga becomes 187th ILO member State (25 February 2016) International Labour Organisation <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_455305/lang--en/index.htm>

Tonga formally accepting the obligations under the ILO Constitution through a standard letter addressed to the Director General of ILO from the Ministry of Commerce, Tourism and Labour on behalf of the Government of Tonga.⁴⁰

Tonga has always been interested in lifting its labour standards and improving compliance with the international labour standards. The concerns raised by the former Minister of the Ministry of Commerce, Tourism and Labour in 2013 on the prolonged absence of labour legislation is partly evidence of this.⁴¹ Further to this was the wide consultations on the draft Employment Relations Bill in 2013 which was seen to “progressively implement ILO’s 8 fundamental Conventions”.⁴² The ILO have even assisted Tonga prior to becoming a member, with technical assistance relating to the review and development of Tonga’s draft Employment Relations Bill.⁴³ This includes training on the ILO, its Constitution and fundamental Conventions in 2013.⁴⁴ Since 2013, Tonga has never made it a secret of its interest in becoming a member of the ILO as part of its program to work to improve compliance with international labour standards. It however had to ensure that proper consultations were made with the relevant stakeholders in order that working goals of ILO and what they promoted were clear and understood by all that would be affected.

B Obligations under the ILO Constitution.

Under the Constitution, the ILO consists of a General Conference of representatives of the Members (International Labour Conference); a Governing Body comprised of 28 representing governments, 14 representing employers and 14 representing employees;⁴⁵ and an International Labour Office controlled by the Governing Body.⁴⁶ There are various obligations that Tonga is obliged to comply with as a new member under the Constitution. The obligations can be divided into two categories, financial and constitutional obligations. Tonga as a new member also has commitments under the 1998 Declaration on Fundamental Principles and Rights at work and the 2008 Declaration on Social Justice for a Fair Globalisation.⁴⁷

The financial obligations require a new member to make financial contributions to the budget of the ILO. This is determined by the International Labour Conference following the receipt and review of proposals from the Governing Body⁴⁸. The said proposal is to be based on the UN rate of contribution and the assessment is expressed in terms of a percentage of the total budget.⁴⁹ The financial contribution which is due annually will be contingent on the above-mentioned

⁴⁰ Above n 39.

⁴¹ “Draft employment relations bill debated in Tonga” (20 May 2013) International Labour Organisation <http://www.ilo.org/suva/WCMS_213833/lang--en/index.htm>.

⁴² Above n 41.

⁴³ “Tonga Update” (9-13 September 2013) International Labour Organisation <http://www.ilo.org/suva/WCMS_220173/lang--en/index.htm>.

⁴⁴ *Application of International Labour Standards 2014 (II)* (International Labour Office, Third item on the agenda Report III (Part 2), 2014) at 27.

⁴⁵ Constitution of the International Labour Organisation art 7 (1) [ILO Constitution].

⁴⁶ At art 2.

⁴⁷ *Membership in the International Labour Organisation* (International Labour Office, Information Guide, 2014) at 4.

⁴⁸ At 2.

⁴⁹ At 2.

assessment, the total level of budget approved by the International Labour Conference and the date of the new members official membership with the ILO.⁵⁰

Tonga's 2016 financial obligation to ILO assessed following its admission to membership was 3,229 swiss francs. As of the 31st December 2016, this financial obligation had yet to be met by Tonga.⁵¹ It is important that Tonga complies with this obligation as it could stand to lose its voting rights should it have arrears in payment of contributions.⁵²

The first Constitutional obligation involves Tonga agreeing to send its tripartite delegations to the meetings of the International Labour Conference.⁵³ The delegations must comprise 2 Government delegates, 1 delegate representing the employers and 1 delegate representing the employees of Tonga.⁵⁴ Each delegate is independent of one another and is entitled to vote individually on the matters to be considered in the International Labour Conference.⁵⁵ Tonga must nominate the delegates representing the employers and employees in agreement with the industrial organisations who should mostly be representative of employers and employees in the country.⁵⁶

This obligation has been met by Tonga following the attendance of its tripartite delegation to the 105th session of the International Labour Conference between 30 May to 10 June 2016 in Geneva, Switzerland. This was Tonga's first meeting since becoming a member of the ILO. The Government delegations included the Minister for Commerce, Tourism and Labour who led the team. The second government delegation was Tonga's Acting High Commission in London. The non-government delegations included the President of the Tonga Chambers of Commerce and Industries for the employers and the Secretary-General of the Public Service Association for the employees.⁵⁷

The second Constitutional obligation for Tonga is in relation to the Conventions and Recommendations.⁵⁸ Conventions are legally binding international treaties that are subject to ratification by member countries.⁵⁹ Recommendations on the other hand are "non-binding guidelines" and not subject to ratification.⁶⁰ The Conventions set out the basic principles to be applied by the members that ratify it while a Recommendation can supplement the Convention

⁵⁰ ILO Constitution, above n 45, art 13 provides for the financial and budgetary arrangements of the ILO and are supplemented by ILO's Financial Regulations which has been adopted by the International Labour Conference.

⁵¹ *Financial report and audited consolidated financial statements for the year ended 31 December 2016 and Report of the External Auditor* (International Labour Office, 2016, ILC.106/FIN, 2017) at 76.

⁵² ILO Constitution, above n 45, at art 13 (4).

⁵³ Above n 47, at 2.

⁵⁴ ILO Constitution, above n 45, at art 3 (1).

⁵⁵ At art 13 (4).

⁵⁶ Above n 47, at 2.

⁵⁷ Rita Narayan "Tonga attends its first ILO Conference since becoming member in February" (14 June 2016) Loop <<http://www.looptonga.com/content/tonga-attends-its-first-ilo-conference-becoming-member-february>>.

⁵⁸ ILO Constitution, above n 45, at art 19 (5) and (6).

⁵⁹ "Conventions and Recommendations" (2017) International Labour Organisation <<http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>>.

⁶⁰ Above n 59.

with detailed guidelines on how it could be implemented.⁶¹ Recommendations could also be unrelated to a Convention. To date, there are 189 Conventions and 205 Recommendations.

This obligation can be divided into sub-categories of new, ratified and non-ratified Conventions and Recommendations. All members are not required to ratify the Conventions adopted by the International Labour Conference, however, they are strongly encouraged to.⁶² Since Tonga has yet to ratify any of the Conventions, I will only focus on Tonga's obligation on new and non-ratified Conventions and Recommendations. Despite this, once Tonga ratifies any of the ILO Conventions, it will have the reporting obligations set out under Articles 19 and 22 of the ILO Constitution in relation to ratified Conventions to comply with.

A new Convention or Recommendation adopted by the Conference, will require Tonga to bring the relevant instrument before its relevant national authority within one year of the closing session of the Conference during which the Convention was adopted.⁶³ The purpose is for consideration of ratification and related action. Tonga must then report to the Director-General on the measures it has taken to bring the instrument before its relevant domestic authority and any actions that have been taken by the authorities.⁶⁴

Tonga having yet to ratify any of the Conventions is obligated to report to the Director-General when requested, on their national laws and practices in relation to matters covered by a particular Convention. The purpose is to show the degree in which the provisions of the Convention has been given effect or is proposed to be given effect through the national legislation, administrative action, collective agreement or otherwise.⁶⁵ It is equally important that Tonga indicate any difficulties that are preventing them or causing the delay in its ratification of any Convention.

Similarly, for Recommendations, Tonga is required to report showing the degree to which the provisions of the Recommendations have been given effect or is proposed to be given effect. The additional requirement includes reporting on any modifications to the provisions found necessary in doing so.⁶⁶

For Tonga, because the Conventions are international treaties, the King has the ultimate power to approve or endorse any ratification by Tonga.⁶⁷ There are no set procedures found however the process involved will require the participation of the relevant Ministries together with the Cabinet and Privy Council. The concerned Ministry being the Ministry of Commerce, Tourism and Labour will need to obtain Cabinet approval before working with the Ministry of Foreign Affairs on any requirements they may have. The Attorney General who is appointed by the King and is the principal legal advisor to Cabinet and Government⁶⁸ may be involved in the provision of any legal analysis that may be required. Consultations is a must and where appropriate before resubmitting to the Cabinet for further approval. Since there are no set procedures, the extent in

⁶¹ Above n 59.

⁶² Above n 47, at 3.

⁶³ ILO Constitution, above n 45, at art 19 (5) (b).

⁶⁴ At art 19 (5) (c).

⁶⁵ At art 19 (5) (e).

⁶⁶ At art 19 (6) (d).

⁶⁷ Tonga Constitution, above n 18, at cl 39.

⁶⁸ At cl 31 (1).

which consultations are held are not clear. Following this lengthy process, the matter is forwarded to the Privy Council who are the King's advisors.⁶⁹ The Privy Council will then have to continue the process in obtaining the Royal Assent from the King. Once this is completed, the matter would be naturally returned to Cabinet who would then work with the concerned Ministry on signing the relevant instrument with ILO. Such a lengthy process, if indeed accurate, will take time and will depend on the level of priority and available resources of the concerned Ministry to push this through.

The 106th session of the International Labour Conference in June of this year adopted the 205th Recommendation for the Employment and Decent Work for Peace and Resilience.⁷⁰ In line with the above explanations on new Recommendations, Tonga is required to put this before its relevant national authority and report back to the Director-General of ILO within one year from the 106th session. It also has further obligations to report as explained above. Despite this, the current political situation in the country with the King having exercised his Constitutional right to dissolve the Legislative Assembly in August of this year⁷¹ will impact these obligations in relation to both Conventions and Recommendations. The country's elections will not be until the 16 November 2017. This again will take time and may delay these obligations being fulfilled. However, once completed, should bring back normalcy to the functioning of the government to have any real progressive impact on these obligations.

The third Constitutional obligation involves the legal protection of ILO and would require Tonga to recognise ILO's full juridical personality.⁷² This includes ILO's capacity to contract, acquire and dispose of property and to institute legal proceedings.⁷³ Further, Tonga must grant within its territory privileges and immunities to the ILO and its staff to the extent necessary for the ILO purposes to be fulfilled.⁷⁴ There is an expectation on Tonga to accept and implement the Conference's approved separate agreement that defines such privileges and immunities.⁷⁵ In addition to this, Tonga must also grant privileges and immunities to individuals serving as delegates to the Conference and members of the Governing Body to the extent necessary for the exercise of their independent ILO related functions.⁷⁶ These privileges and immunities serves to secure ILO's independence and enable it to perform its relevant services thereby encouraging efficiency of its operations and stable relations with not only Tonga but the other member States.⁷⁷

Tonga's compliance with this obligation can be seen to have been prior to its membership. This is given effect with Tonga having acceded to the Convention on the Privileges and Immunities of

⁶⁹ At cl 50 (1).

⁷⁰ "Employment and Decent Work for Peace and Resilience Recommendations" (16 June 2017) International Labour Organisation
<http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R205>.

⁷¹ Grant Wyeth "King of Tonga Dismisses Prime Minister Pohiva's Government" (31 August 2017) The Diplomat
<<https://thediplomat.com/2017/08/king-of-tonga-dismisses-prime-minister-pohivas-government/>>.

⁷² Above n 47, at 6.

⁷³ At 6.

⁷⁴ ILO Constitution, above n 45, at art 40 (1).

⁷⁵ At art 40 (3).

⁷⁶ At art 40 (2).

⁷⁷ Above n 27, at 6.

the Specialised Agencies of the United Nations adopted in 1947 by the General Assembly of the UN. In 2006, Tonga's accession to the Convention and acceptance of Annex 1 which includes the ILO as a Specialised Agency was identified.⁷⁸ This Convention reflects the privileges and immunities discussed above which binds Tonga to date.⁷⁹

C Obligations under ILO's 1998 and 2008 Declarations and their Follow-Up

The Declaration on Fundamental Principles and Rights at work was adopted by the International Labour Conference in 1998 and binds all members regardless of whether they have ratified or not any of the 8 relevant Conventions.⁸⁰ This is reflected under part 2 of the provisions of the Declaration that:

All Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation, to respect, to promote and to realise in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

- (a) freedom of association and the effective recognition of the right to collective bargaining;
- (b) the elimination of all forms of forced or compulsory labour;
- (c) the effective abolition of child labour; and
- (d) the elimination of discrimination in respect of employment and occupation.

This in itself is self-explanatory of Tonga's first obligation under the Declaration. This is further supported by the Follow-Up procedure to the Declaration revised in 2010 by the International Labour Conference.⁸¹ The follow-up procedure comprises the annual review and the global report. The annual review is relevant to Tonga as it involves the annual review of its efforts as a member that has yet to ratify any of the 8 fundamental Conventions. This is based on the reports which Tonga is obligated to submit on non-ratified Conventions as explained in the previous minor heading. The purpose is for the Governing Body to gather information from the member that has yet to ratify any of the 8 fundamental Conventions and further consider any submissions of both the employers and employees organisations.⁸² The annual review will allow the ILO to examine the extent to which Tonga has made any changes in law or practice that will deem it compliant with the provisions of the non-ratified Convention.⁸³ The Global Report on the other hand indicates how far member States have promoted the fundamental principles and rights at work. In Tonga's case, the global report will be particularly based on the findings of the annual review. The report serves three purposes. The first is "to provide a dynamic global picture" in relation to the fundamental principles and rights at work during the previous year; secondly to

⁷⁸ *The status of privileges and immunities of the International Labour Organisation in member States* (International Labour Office, GB.297/LIL/3, November 2006) at 4.

⁷⁹ See generally United Nations Convention on the Privileges and Immunities of the Specialised Agencies 128 UNTS 33 (signed 17 March 1976, entered into force 2 December 1948).

⁸⁰ Above n 47, at 4.

⁸¹ "The text of the Declaration and its follow-up" (2017) International Labour Organisation <<http://www.ilo.org/declaration/thedeclaration/textdeclaration/lang--en/index.htm>>.

⁸² Above n 47, at 5.

⁸³ Above n 47, at 5.

show how effective the assistance from ILO is; and thirdly to identify the priorities for the following year.⁸⁴This report is submitted to the International Labour Conference for regular discussion on the strategic goals of the fundamental principles and rights at work.

By becoming a member of the ILO, Tonga has committed itself to the obligations under this Declaration. However due to the limited official information available, it would seem that Tonga has yet to comply with any of the reporting obligations under both the Constitution in respect of any of the fundamental Conventions that it has yet to ratify.⁸⁵ It may be in the pipeline however with the national administrative process perceived to be involved to getting any reports approved together with the current political situation in Tonga as earlier mentioned, any progress would now have been on hold.

The Declaration on Social Justice for a Fair Globalisation was adopted by the International Labour Conference in 2008. The Conference had identified that both ILO and the member's efforts and commitments to implementing the ILO's Constitutional mandate should be based on four equally important and interdependent strategic objectives which include "promoting employment; developing and enhancing measures of social protection; promoting social dialogue and tripartism; and respecting, promoting and realising the fundamental principles and rights at work".⁸⁶ The Declaration uses the Constitutional mandate of the ILO as the guideline to promoting fair globalisation based on decent work.⁸⁷This Declaration also has a Follow-up procedure which also includes annual regular discussions at the International Labour Conference. The Conference which will have a particular theme that addresses one of the strategic objectives mentioned. The purpose of this is to assess the movement and requirements of the members in relation to each strategic objective to identify and establish an action plan both nationally and internationally with the intention of promoting the objectives of the Declaration.⁸⁸

III The Principles Under ILO's 1998 Declaration Versus Tonga's National Laws and Practices

A Introduction

It has been established that Tonga has various obligations under the ILO Constitution and also under both the 1998 and 2008 Declarations discussed in the previous major heading. However, the uncertainty still lingering in Tonga's political environment., together with there being no official information to confirm the reporting obligations in relation to the non-ratified Conventions being complied with, leaves little room to satisfactorily confirm that they have in fact been complied with. In light of this, this part will assess the current status of the national laws in Tonga against the principles governing the four fundamental rights under the 1998 Declaration.

⁸⁴ Above n 47, at 5.

⁸⁵ I was unable to obtain any official information from the concerned Ministry in Tonga, Ministry of Commerce, Tourism and Labour and there have been no publications concerning this under the ILO website. I faced similar challenges to my attempts at obtaining information from the Department of Statistics in Tonga.

⁸⁶ Above n 47, at 6.

⁸⁷ Above n 47, at 6.

⁸⁸ Above n 47, at 6.

B Freedom of Association and the Effective Recognition of the Right to Collective Bargaining

In relation to the freedom of association and the effective recognition of the right to collective bargaining, Tongan employees would have the right to form unions under the Trade Union Act 1964 (Tonga). However, due to there being no accompanying regulations to set out the formation of unions, no official trade unions exist in Tonga.⁸⁹ There are however *de facto* unions that exist in Tonga which include the Friendly Island Teachers Association, the Tongan Nurses Association and the Public Service Association that looks after the interest of the public-sector servants. The Trade Union Act provides employees with the right to strike however does not provide any formal bargaining rights for employees. While the law does not forbid collective bargaining, the lack of any regulations to set out how they are to be implemented does not assist in its enforcement.⁹⁰

A civil servant strike which lasted for six weeks, had held government hostage and affected many public services in 2005.⁹¹ Due to the ineffective Trade Union Act, it was inapplicable to the said strike. The strike however would have to be the defining event which led to the realisation of the need for an Employment Relations Bill.⁹² The deficiency of the Trade Union Act was plainly obvious. The strike was a result of objections by civil servants to salary revisions at the time.⁹³ The salary revisions would see those in high positions in the public service being awarded with high pay raises while those in the bottom tiers received nothing.⁹⁴ The strikers which were mostly public servants comprised six percent of the national population at the time, an estimated six thousand people.⁹⁵ They rejected the salary revisions devised by a “Higher Salary Review Committee” and demanded that a change in the salary scale be carried out with the inclusion of actual public servants in the discussions.⁹⁶ As the initial discussions between the strikers and the government developed, there seemed to be a tug and war which had the strikers standing firm in their demand for salary scale review and the government insisting that formal processes within the Public Service Commission be followed.⁹⁷ This resulted in no immediate resolutions being met. Instead the strikers called for the dismissal of the Prime Minister at the time who was the King’s youngest son.⁹⁸ As the government continued to maintain their position, the demands from the strikers increased to include the resignation of the Cabinet and having a more democratic system in Tonga in which Tongans would take part “in running the country by having the right to elect the members of cabinet, including the government ministers”.⁹⁹ The memorandum of understanding that was signed between the strikers and government and that eventually put an end to the strike included the pay raise adjustment for public servants according to what they wanted, strikers being paid for the duration of their strike,

⁸⁹ “Tonga 2016 Human Rights Report” (2016) US Department of State <<https://www.state.gov/documents/organization/265592.pdf>> at 11.

⁹⁰ Above n 89, at 11.

⁹¹ Heather E Young Leslie “Tonga” (2007) 19 (1) CP 262 at 262

⁹² At 273.

⁹³ At 269.

⁹⁴ At 263.

⁹⁵ At 263.

⁹⁶ At 265.

⁹⁷ At 264.

⁹⁸ At 268.

⁹⁹ At 268.

no disciplinary action for those that were involved and provisions against government downsizing.¹⁰⁰ Lastly, but also an important part of the memorandum was the inclusion that those involved in the negotiations would raise the strikers demand for a fully elected government by the people with the rest of the cabinet ministers to be seriously considered.¹⁰¹

This event not only shook the government up in realising that improvements were needed to cater for employee's grievances and disputes but also saw the strength in unions with the Public Service Association at the forefront of the negotiations leading to the end of the strike. It is therefore no surprise that following Tonga's membership with ILO that the Secretary General of the Council of Pacific Education,¹⁰² Mr. Govind Singh in applauding the Tonga unions, particularly the Friendly Islands Teachers Association, stated:¹⁰³

It is a fundamental achievement for all of us...and shows how a determined group of unionists in a tiny country under the rule of a monarch can make their country finally acknowledge that workers matter and that workers' rights are human rights.

While the Employment Relations Bill continues to be in the pipeline, the Tongan Government has alternatively addressed the salary issue by confirming the implementation of the Remuneration Authority's recommended new remuneration structure.¹⁰⁴ This covers all public servants and publicly paid position and takes over a 34-year-old remuneration structure used by the Government since 1982. This however fails to cover salary issues within the private sector where employers and employees negotiate directly to establish the working conditions and salaries. In such a situation, collective bargaining is not possible with the lack of implementing regulations and would leave the employers with greater advantage in the negotiations. It could even become a 'take it or leave it' situation for the potential employee.

There is also no dispute resolution mechanism in place specifically for labour disputes, however aggrieved employees could take their cases to court for either judicial review applications or for a civil claim for a breach of contract of employment terms. Further aggrieved employees may take matters up with the Commissioner of Public Relations or the Public Service Tribunal in the case of civil servants.

The Employment Relations Bill once passed can address any gaps in Tonga being able to respect, promote and give recognition to this principle. The other alternative is for the relevant authority to work on drafting the relevant regulations which would give effect to the Trade Union Act 1964 (Tonga) that is already in place. The Bill can continue to assist and cover areas that are missing from the Trade Union Act but would be required to effectively respect, promote and give full recognition for this principle.

¹⁰⁰ At 269.

¹⁰¹ At 269.

¹⁰² This is the umbrella organisation of education unions in the South Pacific.

¹⁰³ Claude "Tonga joins the ILO" (9 March 2016) Education International <<https://www.ei-ie.org/en/detail/3555/tonga-joins-the-ilo>>.

¹⁰⁴ "New Public Service Remuneration Structure Approved by the Government of Tonga" (13 July 2016) Ministry of Information and Communication <<http://www.mic.gov.to/news-today/press-releases/6155-new-public-service-remuneration-structure-approved-by-the-government-of-tonga>>.

C The Elimination of All Forms of Forced or Compulsory Labour

In relation to the elimination of all forms of forced or compulsory labour, there are some provisions in the law that cater for this but does not substantially cover all forms of forced or compulsory labour. Forced or compulsory labour is defined under the Forced Labour Convention 1930 as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The Criminal Offences Act 1926 (Tonga) and the Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) criminalises trading in prostitution and trafficking in person respectively. The Counter Terrorism and Transnational Organised Crime Act s 68 and 69 covers trafficking as a transnational crime and fails to include all forms of trafficking. Tonga has recorded one successful trafficking case involving an Asian who had brought another two Asians into the country under false pretenses and subjected them to forced labour involving prostitution against their will.¹⁰⁵ This leaves out other potential trafficking cases that never made it to prosecution. The Government however has procedures and provides funding to the local NGOs to assist women and children victims in crimes. While trafficking victims are eligible to use this service, none were recorded to have made use of the service in the same year.¹⁰⁶ On the downside, there are no shelter facilities available to male victims who could be involved in the same situation.¹⁰⁷ This may be because of the perception that women are only involved in trafficking or forced prostitution however the global trend has changed seeing males involved as well.

The law does not cover other forms of forced or compulsory labour like bonding workers through debts and domestic workers who are exploited against their will. While there are no official cases that have been reported within Tonga, the Fiji Sun online reported in 2016 a complaint by a Fijian worker who claimed to have had come to Tonga with the promise of good working conditions which turned out to be false. The Fijian worker claimed that when she was working she was not allowed to do a lot of things including having days off to attend church and that when she wanted to leave her employer refused to give her back her passport.¹⁰⁸ The Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) at s 70 provides for situations of exploitation of people not legally entitled to work. It does not cover however, those that are legally entitled to work.

It is clear from here that there are various unreported forms of forced labour which are taking place in Tonga but is not sufficiently covered by the laws or government procedures. As such, the current laws mentioned need to be improved to provide for the other forms of forced labour that are not prescribed so that they are also criminalised. Further, the laws need to take into account that forced labour could equally happen to males.

The Employment Relations Bill is another option to promoting this principle. Since it has not been passed, there is opportunity to consider whether this principle could be reflected in total

¹⁰⁵ See Generally *R v Lirong Liu* SC CR117/10, 11 April 2011.

¹⁰⁶ “Tonga: Tier 2 Watch List” (2016) US Department of State
<<https://www.state.gov/j/tip/rls/tiprpt/countries/2016/258879.htm>>.

¹⁰⁷ Above n 106.

¹⁰⁸ Arieta Vakasukawaqa “In Tonga: Fijians ‘Mistreated’ (20 January 2016) Fiji Sun
<<http://fijisun.com.fj/2016/01/20/in-tonga-fijians-mistreated/>>.

under the Bill or whether amending the current laws will suffice. This will avoid duplication and causing confusion if the provisions are contained in different pieces of legislation and risks conflicting one another.

D The Effective Abolition of Child Labour

There is no one law in Tonga that prohibits child labour or specifies a minimum age for employment. Reports indicate that there have been no child labour in the formal wage economy. Despite this, school age children in Tonga are commonly known to work “in the informal sector in traditional family activities like subsistence farming and fishing”.¹⁰⁹ In the Tongan context, this would be considered a normal day to day activity for children not only in preparation for adulthood but also their contribution to the family as kinship ties are of paramount importance to the life of Tongans in its social structure. This is more commonly prevalent with children who have dropped out of school, not interested in going to school or the parents facing hardship in meeting the financial obligations in keeping the child at school. This is despite Government Policy that provides free education for children in primary school education.¹¹⁰ Such activities are seen as a preferred option of keeping the child pre-occupied and therefore less likely to fall into any unfavourable activities in the society. However, in line with the principle of the effective abolition of child labour, this would be considered an unacceptable form of child labour and goes against the aim of the principle to put a stop to all work by children that affects their education and development.¹¹¹

To assist in achieving the abolition of child labour requires laws in place to enforce a minimum age or ages at which children can enter into different types of work. These of course will depend on the national, social and economic circumstances of Tonga. The Employment Relations Bill that is still in the pipeline in Tonga would be an ideal option of achieving this provided it sets a minimum age for unsafe and safe work. Further, it would be beneficial if safe work and unsafe work is defined within the Act.

The Counter Terrorism and Transnational Organised Crime Act 2013 (Tonga) is deficient as it only identifies trafficking of children as a transnational crime and does not take into account situations in the local context. The Act also does not criminally prohibit other forms of child labour besides human trafficking.

The Criminal Offences Act 1926 (Tonga) provides for the prohibition of procuring women and girls under the age 21 for prostitution but does not include boys of the same age for prostitution. It also is deficient in prohibiting commercial sexual exploitation of children as it does not specifically criminalise the use of children under the age of 14 in the production of pornography. It further fails to specifically include the use of children for other illegal activities involving production and trafficking of drugs.

¹⁰⁹ Above n 89, at 12.

¹¹⁰ Vince Catherwood and Victor Levine *Final Draft Tonga Education Policy Framework 2004 – 2019* (Ministry of Education, 23 April 2004) at 7.

¹¹¹ “Effective abolition of child labour” (2017) International Labour Organisation
<<http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm>>

Due to the gaps in the existing laws, an option would be to revise them to incorporate the instances missing as mentioned. A similar way forward suggested for the previous principle would be advisable for this principle as well.

E The Elimination of Discrimination in Respect of Employment and Occupation

There are currently no laws that prohibit discrimination regarding race, gender, colour, religion, political opinion, national origin or citizenship, social origin, disability, age, language or HIV or other communicable disease status in the workplace. Part 5 of the Public Service Code of Conduct 2004 (Tonga) which is applicable to all government employees provides that the workplace is to be “free from discrimination and recognises the diverse background of employees”. Discrimination however is not defined. Similar code of conducts of other work places provide similar provisions although lacks a proper definition to cover the basis upon which discrimination is recognised under this principle.

In Tongan culture, a female is always considered high in rank than a male sibling despite land and title inheritance going through the male line. It is for this reason that the roles of females in the workforce have been perceived should only involve light and easy tasks mainly associated within the home while males are expected to do all the hard work outside of the home. Age on the other hand via respect given and shown to elders is an additional characteristic determining structure and social influence. Close familial ties within the Tongan society tends to influence people in exposing any discrimination against others. These traditional and cultural characteristics of Tonga remain an obstacle to the promotion of this principle. However, education and awareness on what discrimination involves and the importance of eliminating it and providing equal opportunity in the workplace can assist in influencing the mindset of Tongans. Notwithstanding, the global trend has had an impact and nowadays has seen a shift in Tonga with more women employed in tasks that were mainly perceived to suit males.

In giving effect to this principle, such barriers as traditional and cultural influences is required to be broken down so that equality in the workplace is can be ensured irrespective of the common basis upon which discrimination is usually made. Discrimination is both direct and indirect and can affect both males and females. The principle requires that the ability for a person to do a job should be guided by merit and not irrelevant characteristics.¹¹² While there have been no official reports on direct discrimination in Tonga, there is most likely indirect discrimination taking place taking place in the workplace but due to the traditional and cultural barriers, they have not been officially identified and reported.

The Employment Relations Bill that has yet to be passed in Tonga continues to be an ideal foundation even for the promotion of this principle. Provided that clear provisions are set out defining discrimination and equal opportunity and clearly setting out the instances that amount to discrimination. Equally important is the need for clear dispute resolution mechanism or any other effective avenues within the Bill that enable a person to exercise their right to challenge discrimination in the workplace when they occur. The provisions should take into account the Tongan context to ensure that while this particular principle is promoted, it is applicable to the Tongan setting.

V Conclusion

The labour standards in Tonga clearly require lifting. As a member of ILO, Tonga through its concerned Ministry, employers organisations and employees organisations have some heavy

¹¹² “Elimination of discrimination in respect of employment and occupation” (2017)
<<http://www.ilo.org/declaration/principles/abolitionofchildlabour/lang--en/index.htm>>.

lifting to do in order to meet its obligations under the ILO Constitution and the minimum requirements under the 1998 Declaration on Fundamental Principles and Rights at Work.

There are financial and constitutional obligations in which Tonga needs to comply with. Failing which they could either lose voting rights as a member or be named and shamed in front of the International Labour Conference. Despite Tonga not having ratified any Conventions to date, they can continue to face such consequences.

The national laws and practices reflecting the current labour standards in Tonga is the foundation that needs to be addressed and strengthened as a first step for Tonga to respect, promote and realise the principles governing the minimum international labour standards under the 1998 Declaration. It is evident that little to no changes at all have been made to lift labour standards in Tonga for the past decade. As such, the extent to which Tonga has observed the principles are very poor and is reflective of the deficiencies and gaps within its national laws and practices that hardly promote the four fundamental rights under the 1998 Declaration.

In strengthening the foundations through addressing the national laws and practices, Tonga must also be mindful of having the relevant mechanisms or avenues in place to cater for challenges and disputes but most importantly the implementation and enforcement of the four fundamental rights. A good start, albeit it being long overdue, is to address the ineffective Trade Union Act 1964 (Tonga) and the Employment Relations Bill that is yet to be passed before focusing again on other existing legislations.

The current political situation, lack of resources and cultural influences are common barriers. However, through the collective efforts of all relevant stakeholders, particularly the tripartite stakeholders, should be able to withstand these barriers. If Tonga does not commence being more proactive in its commitment towards applying the international labour standards nationally, the only ones affected in the long run will be Tonga and its people.

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