

CONSTITUTIONAL DEVELOPMENT IN TONGA: TONGA'S IDEA OF RESPONSIBLE EXECUTIVE

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In 2010, as part of the process of political reform, constitutional amendments were instituted to the 1875 Constitution of Tonga¹ to an extent and depth that have never been done before in Tonga's constitutional history.² It was a reform of the constitutional system³ involving a fundamental shift from a monarchical government system to a system in which the executive is responsible to a representative parliament—where legislative and executive powers are exercised by elected representatives who are ultimately responsible to the electorate. This was a process that was not only political, but also impacted culture and tradition in the sense that the traditional and cultural powers of the Monarch were enshrined and preserved in the Constitution since its promulgation in 1875. Guy Powles attributes the stability record of Tonga to the 'unique amalgam of Tongan chiefly authority and British forms of government and law' which was adopted and accepted by the people of Tonga since 1875.⁴

The main purpose of this paper is to provide a short overview of how the 2010 reforms adopted by consensus approach diluted the power of the Monarch by amending the Constitution to effect the devolution of some of his Constitutional executive power to the Legislative Assembly. It should be noted that this approach ensured a relatively peaceful transition and reform in Tonga.⁵ However, in looking at the new changes instigated in 2010, there are two aspects of this system that invite close scrutiny, namely:

- Chain of responsibility connecting power holders to the electorate. For example, many parliamentarians are now elected by people; parliament now chooses the prime minister, who in turn appoints ministers from parliament; and Cabinet is now controlled by parliament.
- Nature and extent of the power and influence of the Monarch in the new form of government. For instance, the King's discretion to appoint influential people to his Privy Council, to use his influence through appointments, and to bargain with the Government over the use of his veto to block Government bills.

However, before examining these Constitutional developments of the new executive system, this paper will examine the executive system prior to 2010 political reform and the path that led to the reform.

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¹ Guy Powles, 'Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy' (Research Paper No. 27/2011, *Comparative Law Journal of the Pacific/Journal de Droit Comparé du Pacifique* in conjunction with the *New Zealand Association for Comparative Law Hors serie/Monograph XV*, 2012) <http://ssrn.com/abstract=2149911> (Accessed 21 January 2013).

² For example, the form of government—Clauses 30 and 31 of the Constitution were challenged in the past on the basis as to whether the Tongan government was a genuine constitutional monarchy. It is now established that the Tongan government is indeed a constitutional monarchy under His Majesty and his successors. Both the government and His Majesty are created, empowered and sustained by the Constitution.

³ Under Clause 31, the Executive no longer includes His Majesty and the institution of Privy Council as it was in the past. The Executive is now the Cabinet alone. This is a fundamental reform of the system of government of Tonga, which made Tonga's government more democratic.

⁴ Powles, above n 1, 7.

⁵ This is relative in comparison with the revolution happened in the Middle Eastern countries like Egypt.

THE EXECUTIVE SYSTEM PRIOR TO 2010

The Constitution of Tonga laid down the foundation of government of a Constitutional Monarchical System where it enabled a government of three main bodies of Executive, Legislature and Judiciary.⁶ However, much like every other country, the Executive's relationship with the Legislature is an essential ingredient of its role and function as is the case in Tonga under its Constitution.⁷

The Constitution conferred political power and authority on the Monarch as Head of Government and as Head of State.⁸ This meant that the King and Cabinet comprised the Privy Council which served as Executive. The Executive of Prime Minister and Cabinet (which made up the Privy Council) was appointed by and responsible to the Monarch, and could be of as large a number as he chose. The Privy Council's real impact in the overall scene was that:

- it sat permanently in the Legislature, pursuing its policies, and watching the nine elected representatives of the people come and go;
- their permanent seats in the Assembly which, with the support of the nine representatives of the Nobles, could dominate the Assembly; and
- the Monarch had a substantial degree of control over Government especially the prerogative powers to appoint and dismiss the Prime Minister and Crown Ministers at the Monarch's pleasure. This suggests that the Crown Ministers were directly responsible and accountable to the Monarch and not to Parliament or the people of Tonga.

HOW POLITICAL REFORM WAS POSSIBLE - THE 'ROAD MAP' FOR CHANGE

The political reform in 2010 is a product of the political history of Tonga where in the early 1990s reform was initially directed at bringing about greater accountability rather than a demand for change.⁹ However, because of the lack of Government responses to these concerns, the peoples' representatives and their supporters then pushed for change (elaborated further below) and for a more democratic government. The pressures for change eventually led to Government's launching of its 'road map' for change and ultimately to the reform introduced in 2010. The 'road map' reflected the willingness of His Majesty George V to share his power to govern with the elected members of Legislature.

The first official step toward reform occurred after the general election in March 2005, when His late Majesty King Taufa'ahau (Tupou IV, who died on 10 September 2006) appointed to Cabinet two elected nobles' representatives and two elected people's representatives and appointed one of the people's representatives as Prime Minister in March 2006. This was the first 'commoner' to hold the position of Prime Minister. The pressure on Government and the Monarch came from the public service strikes and protest marches which concerned public service reforms and utility costs as well as political change between 2005 and 2006. This prompted the commissioning of the National Committee for Political Reform (Committee) by the Legislative Assembly which was endorsed by the King in October 2005. The Committee

⁶ *Constitution (Tonga)* c 30, 31.

⁷ *Ibid.* c 51.

⁸ *Ibid.* c 31.

⁹ Sione Latukefu, 'The Pro-Democracy Movement in Tonga' (1993) 28(3) *Journal of Pacific History* 52.

produced a report and recommendation for change and proposed a timetable for the reform.¹⁰ In October 2006, the new King George V publicly announced his support for political reform and volunteered to relinquish his constitutional authority. It is interesting to note that although George V is credited with his immediate support for political reform, he is criticized by many for insisting on some areas of influence, particularly in the appointment of key people such as all the judiciary, the Attorney-General, the Lord Chancellor, the Police Commissioner, in addition to existing powers such as ‘to pardon’, to appoint the Commander of the armed forces, and the powers in relation to law-making (assent/veto) and the legislature (convoke/dismiss).¹¹ This could explain why, on 16 November 2006, riots in Tonga broke out. One of the many reasons was due to Government’s failure to accept a reform formula presented by certain representatives of the people. The pressure eventually led to the establishment of the Constitutional and Electoral Commission under the *Constitutional and Electoral Commission Act* in July 2008, which was passed in the Assembly and assented to by the King on 23 July 2008.

THE CONSTITUTIONAL AND ELECTORAL COMMISSION

In January 2009, the Commission was assembled and started almost immediately to meet their tight schedule under the legislation. This Commission comprised Tongans, most of whom had already been associated with reform in one way or another—the only *palangi* was the Chairman, a former Chief Justice well known in Tonga who had also been the Chief Justice in the Solomon Islands and was experienced in working with written constitutions.¹²

Among the specific matters that the Commission was established to focus on was to enquire into the ‘roles, functions, powers, duties of, and relations between, the Monarch, the Privy Council, the Prime Minister and Cabinet, and the Relationship between the Executive and the Legislature, the composition of the Legislature.’¹³

In November 2009, as part of the requirements of the enabling Act, the Commission produced its final report which was submitted to the Privy Council and the Legislative Assembly and was made available to the public.¹⁴ This report contained accounts of its analysis of the constitutional issues and how they weighed up the ‘competing considerations and offers advice as to where, in the Commission’s view, the best solution lie.’¹⁵ The report proposed 82 specific recommendations and draft amendments to the Constitution and other relevant statutes. Most of the recommendations were accepted (52), but as the Assembly worked through it, led by the Prime Minister and Ministers who held a majority, there were some important recommendations that were not accepted (18) and some were modified to a major extent (8).¹⁶

THE NEW EXECUTIVE SYSTEM

Tonga’s form of government before 2010 was usually challenged as to whether it was a genuine constitutional monarchy. This was premised on the understanding that when the

¹⁰ Alisi Taumoepeau and Guy Powles, ‘Constitutional Change in Tonga’ (Paper presented at Australasian Law Reform Agencies Conference, Port Vila Vanuatu 2008), 3.

¹¹ *Constitution* (Tonga) c 36, 38, 83B.

¹² Powles, above n 1, 10–11.

¹³ *Constitutional and Electoral Commission Act* (Tonga) sch 2.

¹⁴ *Constitutional and Electoral Commission Final Report* (5 November 2009). This report also contained 82 recommendations and draft legislation.

¹⁵ Powles, above n 1, 11.

¹⁶ *Ibid.* 15.

Constitution was promulgated in 1875, the form of government under the constitutional principle of the rule of the Monarch was intended to reflect the Westminster model of responsible cabinet and independent judiciary.¹⁷ However, it was obvious that there were some areas that needed to be further developed in 2010, because the status of Tonga as a constitutional monarchy was re-confirmed in the amendments to the Constitution.¹⁸ This means that under Clause 30, the Government of Tonga will be a constitutional monarchy under His Majesty, his heirs and successions. It also means that there is an automatic succession under the Constitution, so that the successor assumes authority immediately, even if the coronation occurs later.

Monarch does not exercise executive power directly, subject to certain exceptions

The majority of the recommendations accepted were directly related to the reform in the devolution of royal authority and power, and vested in the people's elected representatives the choice of who would constitute the Executive, and thus hold office only until the next general election, when they would have to ask the people to vote for them again.¹⁹

For instance, Recommendation 2 proposed that the King and Privy Council shall no longer be part of the Executive Government of Tonga and the Executive Government shall be the Cabinet answerable to the Legislative Assembly. This was based on the understanding that the success of the responsible government requires that both the conduct of routine administration and the performance of specific statutory functions be entrusted to ministers who are accountable ultimately to the electorate.²⁰ It is important to note however, that there was an overwhelming public support shown in the Constitutional and Electoral Commission's final report, for enshrining the Monarch's position as a safety measure to guard against unconstitutional actions by the Government.

However, as a result of this recommendation, Clause 30 of the Constitution was amended to remove the King and Privy Council from the Executive as the first body of Government and replace with the Cabinet. Now the Executive is comprised by Cabinet only and it precludes the King from intervening directly in day-to-day conduct of the administration of ministries or government departments.²¹ It is important to note that the Monarch still has absolute discretion on the appointments to the Privy Council under Clause 50 and the power of pardon under Clause 37.

The big shift after 2010 was to an executive of Prime Minister and fixed-size Cabinet which did not get near the Legislature until its members were first elected by their own constituencies, whom they would have to face again in four years. This created the essence or principle of the reform, but exceptions have been created under Clause 51(7).²² The wording of this clause is interesting because the clause was necessary in order to prevent the

¹⁷ Guy Powles, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynésienne* 113–114.

¹⁸ Clause 30 provides that the 'form of government for this Kingdom is a Constitutional Monarchy under His Majesty King George Tupou V and his successors.' Before the amendment in 2010, Clause 31 of the Constitution provided that the 'form of Government for this Kingdom is a Constitutional Government under His Majesty King Taufa'ahau Tupuo IV his heirs and successors.'

¹⁹ Powles above n 1, 15.

²⁰ Constitutional and Electoral Commission Final Report, above n 14, [89].

²¹ *Constitution* (Tonga) c 51 as amended.

²² The arguments against this arrangement are clearly articulated by Powles, above n 1; however, the main proposition for its inception is to help the Executive acquire highly experienced people to run specific portfolios, but it will be interesting to see whether a different Prime Minister would keep the same people on after the next election in 2014.

devolution principle as expressed in Clause 51(1) from depriving the Monarch of all other powers. It is an acknowledgement that those other powers are indeed ‘executive’ in character but do not devolve.

These exceptions to the principle of the devolution of executive power can be looked at from two points of view. One view held by the traditionalist Tongan is that the people have trusted their Monarch for so long that the best course of action is to continue to do so. The Monarch’s wide influence as the *hau* or traditional leader entitles him/her to exercise royal prerogatives wherever there are gaps. This means that there is no need to scrutinize the law in great detail in order to define terms, to draw lines and pursue strictly correct answers. In fact, it is rather disloyal to do so.

Another view is that, one may feel that in this time of rapid change and globalization, the incumbent Monarch, whoever it may be, is also not immune from taking on new ideas and seeking new directions and policies for the nation. Accountability will be raised by an ever-vigilant population.

Government by Prime Minister and Cabinet

One of the major changes codified by the amendments relates to the composition of the new Legislative Assembly and Cabinet. These changes include increasing of the number of the representatives of the people from 9 to 17. The Prime Minister is an elected Member of Parliament who is elected by the members of parliament and appointed by the King according to the wishes of Parliament.²³ The King also appoints the Cabinet Ministers on the advice of the Prime Minister, who may nominate to ministerial posts, not more than four persons who are not elected representatives (Clause 51(2)) provided that the number of Prime Minister and Cabinet does not exceed half the elected members of Parliament minus the Speaker. Interestingly, both the Committee (NCPR) and the Commission disliked the concept, but the Government during the discussion of the reform, pushed it through. Today, the Prime Minister and elected representatives of Cabinet remain as representatives of their electorates.

This is a remarkable development because before 2010, Clause 51 allowed the Monarch to appoint the Prime Minister and the Ministers at the King’s pleasure. Essentially, the King could hire and fire Ministers at will, and they were not elected Members of Parliament who the electorate could punish for bad performance by not re-electing to the Assembly. That was one of the situations that the reform sought to avoid or it would defeat the ideal of responsible government that the executive be responsible to parliament and therefore indirectly to the electorate.

It is important to note the considerable power and responsibility that is now given to the people. The most important power that people now possess is that their representatives make up the majority of parliamentarians, almost 70 percent. Arguably, this means greater accountability of government to parliament and the electorate.

However, it is important to emphasize that because of the new arrangement of Cabinet, there can never be a majority Government in Tonga which means that Government will always need the support of non-government members in order to pass business in the Assembly.

In reality, political parties may form out of the Government’s need to have consistent support to implement its policies. Similarly, Members of Parliaments who oppose the Government’s

²³ *Constitution* (Tonga) c 50A.

policies may form an opposition. However, it is interesting to note that during the political reform consultation process, neither the Committee (NCPR) nor CEC recommended in their report that there be formal political parties. Hence, when the reform legislation was debated in the House in late 2009 and 2010, the issue of establishing formal parties was never discussed or raised. Thus, political parties are not formally recognized. This means that elected members must discuss informally amongst themselves their nomination for Prime Minister. Such discussion will culminate in the official submission of nominations for Prime Minister to the Office of the Assembly within 14 days of return of writs. Within three days from the last date of receipt of nominations, a special sitting must be called by an Interim Speaker (appointed by the King) where elected representatives would formally elect a person who would be recommended to the King for appointment as Prime Minister.

Vote of No Confidence

The 'vote of no confidence' is a mechanism for regulating and making government accountable to the wishes of the people and such has never existed before in Tonga. Most other Pacific Islands countries provide for it.²⁴ However, what is not stated in the Constitution are the reasons whereby a vote of no confidence might be brought against a Prime Minister. It is usually regarded as a political decision.

Procedurally, a motion will not be effective if it is made within 18 months after a general election, within six months before the next general election, or within 12 months after a previous vote of no confidence. Further such a motion should not be moved unless at least five working days notice of the intention has been given to the Speaker.²⁵ Paragraph 174 of the CEC final report suggests that motions for vote of no confidence should be '...used only when there has been a clear loss of confidence and not simply for personal political advantage....' This is an ambiguous prescription because it is difficult not to act politically in a politically charged environment such as parliament. Perhaps Tonga will develop rules for such motions. A Bill to amend Clause 50B to require two-thirds majority vote was introduced in March of this year and referred to the Standing Law Committee. This would hopefully discourage motions that did not have overwhelming support.

CONCLUSION

In conclusion, Tonga is in the testing time of this new executive system.²⁶ The feature of vote of no confidence was put to the test in June 2012. The actual voting on the motion took place about four months later and it was not successful. Part of the reasons for this was blamed on the inability of the Constitution and relevant Standing Order and Rules to provide the procedure. On the other hand, this can be seen as a Government tactic to buy more time to make up the number to ensure that the motion will not succeed.²⁷ Whatever the reason may be, it just goes to illustrate the failure of the system to cater and accommodate for the new developments, which may have just damaged the confidence of the electorate in their representatives and the hope for a responsible executive. Similarly, this may have just provided the justification for Monarch's influence and retention of some of his executive powers. However, what is apparent so far is that, Tonga's idea of a responsible executive is to strike a balance in the exercise of executive powers between the Monarch and Cabinet.

²⁴ See, eg, *Constitution* (Nauru) and *Constitution* (Papua New Guinea).

²⁵ *Constitution* (Tonga) c 50B.

²⁶ Pesi Fonua, 'Events of 2012 Test Tonga's New System of Government', *Matangi Tonga* (Nuku'alofa), 23 December 2012.

²⁷ Pesi Fonua, 'MPs Block Public Consultation on Vote of No Confidence in PM', *Matangi Tonga*, 2 July 2012.