

# THE HEAD OF STATE AND THE LEGISLATURE: THE POWER OF VETO IN PACIFIC ISLAND STATES AND THE CASE OF TONGA

*Guy Powles\**

C'est avec une profonde tristesse que les membres des comités de rédaction et scientifique du Comparative Law Journal of the Pacific ont appris le décès du Dr Guy Powles, survenu le 20 juillet 2016.

Ils s'associent au chagrin de sa famille.

Unanimement reconnu par la communauté scientifique comme l'un des meilleurs connaisseurs de systèmes juridiques en vigueur dans le Pacifique Sud, son érudition n'avait d'égale que sa profonde humanité.

Constitutionaliste et comparatiste hors pair, encourageant sans cesse les initiatives de nature à promouvoir toutes les facettes de l'étude du droit dans le Pacifique, il avait bien voulu réserver au Comparative Law Journal of the Pacific, la première parution de ce qui allait rapidement devenir un ouvrage de référence, de son important travail sur les réformes constitutionnelles du royaume des Tonga *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2012) CLJP-HS vol 12.

La présence du Dr Guy Powles au sein du comité scientifique du Comparative Law Journal of the Pacific était un honneur mais aussi la plus belle des cautions scientifiques qu'une revue de droit comparé ait pu espérer dans le Pacifique Sud.

Aujourd'hui encore le Comparative Law Journal of the Pacific a le privilège de pouvoir publier dans ce volume qui est dédié à sa mémoire, les deux derniers articles qu'il avait rédigés quelque temps avant son décès.

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\* Dr Guy Powles, latterly of Monash University, 1934-2016.

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*Cet article rédigé par le Dr Guy Powles est la version complète de la présentation qui en a été faite par le Professeur T Angelo en lieu et place de son auteur, à la conférence de ALTA tenue à Wellington (NZ) du 7 au 9 Juillet 2016.*

*L'idée de cette contribution est née après les intenses et souvent passionnés débats qui ont accompagné la principale réforme constitutionnelle intervenue au Royaume des Tonga en 2010.*

*Les structures anciennes du régime monarchique, le rôle de la noblesse et du Parlement n'ont pas véritablement été affectés par cette réforme, laquelle a néanmoins offert l'opportunité à la population tongrienne de s'interroger sur l'adéquation apparente ou réelle de ses aspirations avec un système de gouvernement que d'aucun présente comme archaïque.*

*Ainsi les débats se sont cristallisés sur le bienfondé du maintien du droit de veto du Roi sur des lois votées par le Parlement.*

*L'importance de la culture politique d'un peuple sera le fil conducteur des développements de l'auteur. Fin connaisseur des systèmes politiques et juridiques du Pacifique Anglophone, l'auteur fut aussi celui qui devait présider à la rédaction du projet de la nouvelle constitution du Royaume des Tonga.*

*Il souligne combien le poids des traditions, influe encore aujourd'hui sur la culture politique des habitants du Royaume des Tonga et demeure un frein à une véritable réforme de ses institutions*

*This paper was presented for Dr Guy Powles by Tony Angelo at the ALTA conference held in Wellington 7-9 July 2016.*

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## **I    **OUTLINE****

Thinking about this paper was stimulated by recent vigorous discussion in the Kingdom of Tonga around the role and status of an established monarchy in the 21<sup>st</sup> century - discussion that has continued after the major constitutional reform of 2010 was completed. Certain of the longstanding constitutional provisions concerning the Monarch, the noble families and the legislature remain intact. One of these, the authority of the King, at his own discretion, to withhold assent from a Bill passed by Parliament – to veto the Bill – has divided public opinion. It has also raised the question about where Tonga stands in an assessment of the 'Head of State and Legislature' relationships that exist in the Pacific island region.

This paper is an attempt to answer that question. It will begin with a brief explanation of the Tongan reform, in which the author was engaged from time to

time as a consultant.<sup>1</sup> The importance of the political culture of a people will be seen as a dimension of the subject to be followed up. By political culture is meant the way in which people generally in a society are accustomed to thinking about power and influence, by whom it is used and in what ways. The paper will look at the situation beyond Tonga, to understand the nature of the royal Head of State's dilemma, and how the veto is used generally in the Pacific island region today. Also, what further roles does political culture appear to be playing?

## II THE KINGDOM OF TONGA

By way of background to the Tongan case, after warring ceased in the 19<sup>th</sup> century, the notion of a European-style single monarchical dynasty was implemented and expressed in accordance with the terms of the Constitution of 1875. King Tupou I led a homogeneous mono-cultural people who were bound together by class distinctions and family ties. Under a remarkable amalgam of two legal cultures, that is to say – i) the authoritative elements of Tongan chiefly law, and ii) the command theory of English jurisprudence together with the Christian notion of individual responsibility, the Tongan legal system sustained the country's independence for over a century (with both help and interference from the British).<sup>2</sup>

Until reform in 2010, the Monarch was both Head of State and Head of Government, and appointed the Prime Minister (usually a relative) and Ministers from outside a Parliament where 9 nobles represented some 30 title-holders, and 9 people's representatives represented the rest of the adults. The reform of 2010 saw the noble elite reduced to a minority in a larger Parliament (9 representatives out of 26) which includes the Ministers. Cabinet Ministers must now, first, be elected as members of Parliament and appointed by their chosen Prime Minister for a term. Now, the King, His Majesty Tupou VI, is no longer Head of Government, and most executive authority has passed to the Prime Minister and Cabinet.

Nevertheless, the social influence, the *mana*, of the hereditary Monarchy is a very considerable political force, respected the more for being held in check by the incumbent most of the time.

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- 1 Guy Powles carried out doctoral study on the significance of Polynesian chiefly systems for the development of modern government, taught and practised law in Pacific Island states and held judicial positions.
  - 2 Guy Powles 'The Early Accommodation of Traditional and English Law in Tonga' in Herda, Phyllis, Terrell, Jenny and Gunson, Neil (eds) *Tongan Culture and History* (Department of Pacific History, Australian National University, Canberra, 1990).

Significantly, the King also retains certain responsibilities of an executive nature, and is part of the law-making process. Thus, the veto. His assent, at his own discretion, is still necessary before Bills passed by the Legislative Assembly can become law (cls 41, 56). If the veto is exercised, further discussion is precluded until the next sitting of the Assembly (cl 68),<sup>3</sup> but no further sitting has the power to overcome the veto. Further clauses make it clear that the King is in a position to block any amendment to the Constitution, which would include any alteration to the privileges of the Monarchy and the nobility.

Tongan opinion is divided on the veto issue, and this may be symptomatic of deeper tensions. There have been recent examples of well-supported petitions to His Majesty, permitted by the Constitution (cl 8) that threaten to draw the respected King into the public political arena.<sup>4</sup> The Tongan Monarchy faces a dilemma, if it wishes to preserve its role as representative of the best of Tongan cultural values while at the same time adopting a supervisory role in relation to Government, and Parliament in particular. The exercise of some oversight is favoured by citizens holding privileged positions or successful businesses, on the ground that the newly elected Prime Minister, Ministers and members of Parliament are inexperienced. On the other hand, it is feared that engagement by the King in political debate would lower his standing and permanently damage the Monarchy in the eyes of most of its subjects.

This paper will look at the situation beyond Tonga, to understand the nature of the royal Head of State's dilemma, and how the veto is used generally in the Pacific Island region.

### **III WHY DO WE HAVE HEADS OF STATE? WHAT IS THE RATIONALE?**

The easy answers refer to symbolic roles in the interests of nationhood, stressing common aspirations and the unity of purpose of the nation. Continuity and stability of government, and social order, are thus served. In most countries, the Head of State (H/S) is not engaged in party politics, and personifies 'the national interest' while elected leaders come and go.

Leadership may need to be shown in a crisis, internal or external. The H/S is usually 'Commander-in-Chief' of the nation's armed services.

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3 References in this paper are to the clauses, sections or articles of the relevant Constitutions.

4 Guy Powles *Political and Constitutional Reform Opens the Door: the Kingdom of Tonga's Path to Democracy* (2<sup>nd</sup> edition, University of the South Pacific Press, Suva, 2013).

And there are functions commonly carried out by a H/S to demonstrate that the legal and moral weight of the nation is engaged. These include the appointment of Ministers, judges and other holders of high office, and, of course, functions in relation to Parliament. When performed only on the advice of others, the role is symbolic.

It is suggested that the success of the role lies in the degree of respect that both the office and the incumbent enjoy nationally. This in turn is dependent on two principal factors.

The first is personal to the particular H/S. What qualities does he or she bring to the office? Relevant for today's discussion is ascribed status, which applies to holding the highest traditional title in the country. The H/S has been born into an hereditary hierarchy which he or she heads. This applies to the notion of monarchy.

In the Pacific islands, some of the political cultures of Polynesia have been recognised as monarchies, from Tahiti (King Pomare to 1880) and Hawai'i (House of Kamehameha to 1893) to Tonga (from 1875 to date). Three chiefdoms in the French Pacific territory of Wallis and Futuna are recognised by France today as kingdoms (namely Uvea,<sup>5</sup> Sigave and Alo<sup>6</sup>). In the larger island groups of Samoa and Fiji, the competitive nature of the few highest-ranking chiefly dynasties was such that no single title could claim supremacy and therefore monarchy, when pacification occurred in the 19<sup>th</sup> century. In Samoa four such titles (the *Tama'Aiga*) were recognised on independence in 1962, and since then one of such title-holders has been H/S, now elected by Parliament for five-year terms. Similarity with a conventional monarchy is enhanced by the constitutional creation of a Samoan title for the H/S as such, namely *O le Ao o le Malo* (the highest Chief of the Government).

For the purpose of this paper, the significance of the status of monarch or chief who holds high office is that the current political culture of society may vest the office with authority that derives from traditional elements of that culture. In other words, while the King of Tonga's role and powers are set out in the Constitution, they are not exhaustive, and people talk of the King's 'royal prerogative'. Indeed, Pacific states have recognised the 'traditional authority' of chiefs when it has suited them to do so.

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5 'Two Kings installed in Wallis; France must pick legitimate one' (Radio New Zealand International, April 18, 2016).

6 'King of Alo in Futuna abdicates' (Radio New Zealand International, May 17, 2016).

The second factor upon which respect for the H/S will depend concerns his or her powers, and, when the H/S may act in his or her own discretion, and the quality of the decisions the H/S makes.

This involves consideration of:<sup>7</sup>

- the extent to which the H/S is required, or may choose, to exercise executive power,
- how the discretion is exercised – eg what information and suggestions does the H/S seek, and to whom does the H/S listen?

#### ***IV BRIEF OVERVIEW OF SYSTEMS OF GOVERNMENT OF THE REGION***

The total of 14 independent and freely associated governments of the Pacific island region can be categorised in several ways. Two of them, Federated States of Micronesia and Republic of Palau, are federations of states called "republican presidential" or "Washington" style, meaning that the President and Cabinet are independent of Congress, and that a hostile reaction to the use of the veto by the President is unlikely to threaten his political survival.

Twelve states are "Westminster" style, meaning a style of government under which the Executive, usually a PM or President, and Cabinet Ministers are all elected by the people and are thus collectively responsible to the Parliament, and individually responsible to the electorate. As the Executive is responsible to the Legislature it requires the latter's confidence to remain in power.

The Westminster states are either monarchies or republics.

##### ***A The Pacific Westminster Monarchies***

Monarchies are mainly 'Dominions' of the Australia and New Zealand style of relationship, with the 'distant' Queen in England acting as H/S through her local representative.

Tonga's is a "traditional" monarchy in the sense that it is very much part of the fabric of society, having been both H/S and H/Govt as well as holder of the '*Hau*' title (denoting the highest traditional status) since the adoption of the Constitution in 1875.

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<sup>7</sup> See Powles, 2013, Ch VI.

## ***B The Pacific Island Republics***

The six Republics are of two sorts - either called 'parliamentary presidential' and combined because the one person is both Head of Government and H/S, or the offices of H/S and Head of Government are separated and held by different persons.

### ***V THE HEAD OF STATE AND LAW-MAKING - HISTORY AND PRINCIPLE***

The addition of the H/S's signature or seal to a Bill passed by the legislature affirms and finalises the law-making process as an act of the state. The H/S is thus part of that process, and it is an underlying principle of the form of government adopted, in most 'common law' countries at least, that the process is incomplete without it. The 1875 Constitution of Tonga provided – "It is with the King and the Legislative Assembly to enact all laws" (then cl 60).

The following review of the Pacific island states demonstrates the range of constitutional provisions that deal with the question whether the H/S has the power to withhold assent – in other words, to veto the proposed legislation – and, if so, in what circumstances.

#### ***A Two approaches***

Since the Magna Carta of year 1215 put restraints on the absolute discretion of the King of England, two approaches seem to have developed. One is that the above-mentioned principle (that the signature of the Monarch is a necessary final step in law-making) should be applied in accordance with a rather strict constitutional convention that Parliament is supreme (subject of course to a written constitution), and the Monarch or the Monarch's representative is required to assent to all Bills as a matter of course, without question – leaving no room for a veto. This convention is most apparent in monarchies that have adopted the British system of parliamentary government.

However, the second approach to the role of the H/S in relation to Bills passed by the legislature rather contradicts the first. It contemplates that the H/S may have a sort of supervisory role, usually to ensure that the proposed laws comply with the constitution, but other conditions may be applied. In other words, the convention of 'no veto' by Heads of State does not apply if a H/S is carrying out a specific supervisory responsibility. This responsibility may be expressed in constitutions, established by convention, or may be just lying unused, but possibly to be called on one day. On this point, it is noted here that countries with unwritten constitutions more easily find room for such conventions and approaches. The United Kingdom, Australia and New Zealand are in this category. They adhere to the convention that

the Queen (and her representative) has no veto, while academic discussion around the possibility has not disappeared. On the other hand, where the constitution is written, the powers of the H/S are limited to those expressed in the document.

### ***B The Wider Relationship***

It must also be noted, when considering the express constitutional powers, that the H/S's relationship with the legislature may, in some countries, involve responsibility for summoning and dismissing sessions of Parliament and for appointing and dismissing the Prime Minister. In the absence of political conflict, one can say that these functions are generally performed in accordance with the scheduled terms for parliamentary sessions or on the advice of the Prime Minister or a resolution of Parliament.<sup>8</sup> In some countries the H/S is not involved or the role is symbolic (eg Papua New Guinea and Vanuatu); in Tonga the King is given the last word in these matters.

### ***C No Assent Required***

This review of the use of the veto begins by noting that three Pacific countries constitute variations to the underlying principle referred to. In these three, the blessing of the state is conferred on Parliament's Bills by the Speaker, not the H/S. In the case of the Republic of Nauru, only the Speaker is required to assent, and the Speaker also has a supervisory role. In this tiny state, the President, who is a member of Parliament chosen by ballot of members of Parliament and who presides at Cabinet meetings, is H/S. The Speaker can refuse to sign a Bill into law if it is a 'money Bill' and the purpose of the withdrawal of money has not been recommended to Parliament by the Cabinet (Arts 47 and 59 (3)). So long as Cabinet regularly recommends money Bills, there is no veto in Nauru.

Niue similarly authorises the Speaker to affix to a Bill his Certificate of Compliance with the Constitution and Standing Orders, and the Bill becomes law when the Clerk of the Assembly countersigns (art 34). Papua New Guinea's H/S is the Queen (through her representative); the H/S plays no role in law-making. As in Nauru, a Bill becomes law when the Speaker signs the certificate (ss 109, 110). The Constitution does authorise Parliament to pass a law, if it wishes, that would empower Cabinet to resubmit a Bill to the legislature for consideration of suggested amendments (s 110 (3)). No such law appears to have been enacted.

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8 Yash Ghai and Jill Cottrell, *Heads of State in the Pacific* (Institute of Pacific Studies, University of the South Pacific, 1990) 148-162.

### ***D The Head of State must Assent***

In the next category are states where the H/S is required to assent to Bills passed, and has no power to interfere. In Solomon Islands, the Queen acts through her representative the Governor-General (s 30) and when a Bill has been passed by Parliament, the Governor-General is required to assent to it "forthwith" (s 59). The Queen is similarly H/S of Tuvalu (ss 48-60), where the G-G is required to assent "promptly" (s 86) and, if he fails to do so, the Constitution "considers him to have assented" (s 53). The Fiji Constitution 2013 requires the President to assent within 7 days and, if that does not happen, assent is taken to have been given (art 48).

## ***VI FACTORS AND CONSIDERATIONS WHEN DECIDING TO INTERFERE WITH PARLIAMENTARY AUTONOMY***

### ***A Discretion as to Whether to Assent – Several Veto Situations***

When it comes to states where law-making requires the assent of the H/S but there is some discretion with regard to it, there seem to be several types of veto process in Pacific island constitutions. Each country has its own particular circumstances and constitutional wording. Distinguishing characteristics appear in questions such as the following.<sup>9</sup>

#### ***B Can the H/S Refuse to Assent?***

At one end of the spectrum of Pacific island states, the H/S need declare no reasons for his refusal. The discretion is absolute. The Kingdom of Tonga is the only example (cls 56, 67, 68, 79 and 80). The King is clearly part of the law-making process. Of course, in practice His Majesty may be developing processes which prefer discussion to confrontation. However, a longstanding provision in the Constitution that forbids discussion of a vetoed Bill until the next parliamentary session might seem to run contrary to such processes (cl 68).

The interests of the King, royal family and the holders of 30 noble titles are further protected by the longstanding cl 67 which restricts discussion of them in the Assembly to the nobles' representatives alone.

#### ***C May the Refusal of Assent be Final and Conclusive of the Matter?***

Only in the case of Tonga (cls 41, 56).

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<sup>9</sup> The states identified here are the only examples of each, indicating little indication of 'cross-fertilisation' of ideas.

Where the H/S must act on advice to grant or refuse assent to a Bill, can the H/S be required to reconsider that advice?

Uniquely in the Pacific, Samoa and the Cook Islands provide the H/S (the Queen's representative in the case of the Cook Islands) with the opportunity to call a meeting of the Executive Council (comprising the H/S and the Prime Minister and Ministers) to require Cabinet to reconsider any decision it has made. After reconsideration, the decision may stand, or be changed accordingly, and the second decision is final (Samoa arts 37-40; Cook Islands ss 18, 19, 25). On this basis, a Prime Minister could persuade his or her colleagues to change their minds about a Bill for which they had secured passage through the House! Of course, someone may have discovered a mistake or unintended provision.

### ***D Can Parliament be Required to Reconsider the Bill?***

In the case of the Cook Islands above (but not Samoa), the Queen's Representative or the Executive Council may return the Bill to Parliament for reconsideration. Whatever the House decides, in this situation, the Queen's Representative must assent (art 44).

In the Federal Constitution of the Federated States of Micronesia, it is provided that the President may return a Federal Bill to Congress with his or her objections. If that is not done the President is deemed to have approved the Bill. Congress may override or accept the veto, and so it has the final say (art IX s 22). If the President of Palau vetoes a Bill it must be returned to the legislature with the reason for the veto. If the Bill is not changed, the legislature may overcome the veto if two thirds of the members vote again to support it (art IX s 15). The Marshall Islands Constitution contains similar provisions, enabling the President to return the Bill to the Congress with the reasons for the veto. Ultimately, Congress can over-ride the veto with the vote of three quarters of the State delegates (art IX ss 2, 22).

### ***E Non-compliance with the Constitution is the only stated ground for refusal of assent in the Pacific***

In Kiribati, Bills require the assent of the Beretitenti who may refuse and return the Bill in question only if he or she considers that it would be inconsistent with the Constitution. If the Maneaba (Parliament) continues to support the Bill and the Beretitenti again refuses assent, the Beretitenti must refer the Bill to the High Court for a declaration, which finally determines the matter (s 66).

Vanuatu has the same provisions as Kiribati, except that, if the President considers the Bill is inconsistent with a provision of the Constitution, the President must refer it directly to the Supreme Court (art 16).

## **VII TRADITIONAL INSTITUTIONS AND LAW-MAKING**

For the purpose of the veto discussion, the monarchy is the only traditional political institution to have been shown in a relationship with the legislature.

However, the examination of Pacific constitutions and related legislation has revealed traditionally-empowered individuals, institutions and processes that have the capacity to impinge upon law-making, without involving the H/S.

Indeed, the role of four of the six seems to assume that Parliament may from time to time need advice on matters of custom and tradition, language and land.

The Cook Islands has a House of Ariki, a council of traditional chiefs appointed to represent islands and communities, for the purpose of considering matters submitted to it by the Legislative Assembly. The House is required to make recommendations on matters concerning the welfare of Cook Islanders, and may make them on its own initiative upon any question affecting the customs or traditions of the Cook Islands (s 8).

Article III of the Constitution of Marshall Islands permits the Council of Iroij (comprising Irojlaplaps or chiefs representing islands and communities) to formally request the reconsideration of any Bill before the Nitijela (legislature) that affects customary law, traditional practices, land tenure or related matter.

Reconsideration processes include joint sittings of the Council and the Nitijela. At the conclusion of all process, the Nitijela may prevail.

The State of Yap, one of the four states of the Federated States of Micronesia, requires that all Bills be considered by the Council of Pilung and Council of Tamol who may disapprove a Bill concerning the role and function of a traditional leader as recognised by tradition and custom – of which the Councils shall be the judge. The Councils may return the Bill to the legislature for reconsideration and amendment to meet the Councils' approval (art III, ss 1, 16, 17).

The National Council of Chiefs of Vanuatu is entitled to make recommendations regarding Bills concerning the preservation and promotion of ni-Vanuatu culture and languages (art 30). It is a vigorous and increasingly influential organisation, particularly due to the stretching of the state's resources to the extent that many island communities are left to govern themselves.

By contrast, the longstanding strength of traditional structures and processes of local government in Samoa is such that the Ali'i ma Faipule, chiefs and orators, of each of the 350 villages still exercise traditional authority recognised by the

Constitution, and disputes are handled by the unique Land and Titles Court which applies customary law exclusively (arts 100, 101, 103).

The local government system in Tuvalu is built around the concept of island chiefs organised into an administrative framework called Falekaupule that engages traditional Polynesian lines of authority to produce services and keep order for the people.

### **VIII CONCLUSION**

This review has examined all 14 Pacific states through a narrow lens. Ideally country-by-country studies would offer assessments of the historical background and the systems of political culture and government of each. It seems that, by and large, the states have respected the autonomy of parliamentary law-making. Nevertheless, the case of Tonga alerts the observer to the influence, potential and real, of long-standing institutions that represent political culture across the Pacific region in the 21st century. They are part of the character of the state and the identity of its people.

No H/S in the region has the powers in relation to Parliament possessed by the King of Tonga. At this time there appear to be good grounds for further reform in Tonga, which is likely to be opposed. Divisions in society are deepening, and it is foreseeable that the King may be called upon to use his veto. During times of such political activity and the likelihood of difficult issues demanding solution, the King is likely to tread carefully – relying on advice and avoiding unnecessary conflict, thereby retaining the dignity of the Monarchy and the respect for it. Alternatively, if he chooses to use his status to enter the fray and regain active leadership as King in order to impose political solutions to problems, reform may be set back years and his *mana* may be severely diminished.