

THE CONSTITUTIONALITY OF CLASS INEQUALITY IN TONGA: *FATAI HELU AND PAULA PIVENI PIUKALA V THE ELECTORAL COMMISSION AND LORD NUKU* (AC 22/22) TOCA

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The case of Fatai Helu and Paula Piveni Piukala v The Electoral Commission and Lord Nuku (AC 22/22) TOCA examines the privileges accorded to nobles that are not available to the commoner class, specifically concerning being a candidate for a seat in Parliament. The ruling affirms that despite a constitutional guarantee of equality under the law for all classes, provisions that discriminate based on class will remain valid in Tonga.

L'affaire Fatai Helu and Paula Piveni Piukala v The Electoral Commission and Lord Nuku (AC 22/22) TOC, a permis à la Cour de statuer sur les privilèges accordés aux membres de la noblesse de Tonga dont ne bénéficient pas les roturiers, en particulier celui de pouvoir se porter candidat à un siège de député au Parlement. Cette décision souligne que malgré la garantie constitutionnelle garantissant l'égalité de toutes les classes sociales devant la loi, les dispositions spécifiques coutumières qui discriminent certaines classes sociales demeurent en vigueur aux Tonga.

Tonga is unique amongst South Pacific nations as the only country historically retaining sovereignty and self-governance. In 1875, the architect of the modern Tongan state passed into law a constitution that, for the most part, codified traditional forms of governance. It perpetuated the dominance of the ruling 'eiki classes. The government could, in essence, be classed as an absolute monarchy.¹ Resistance to Tonga's classist political structures began in the 1960s with members of the

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1 For example, Cabinet Ministers were appointed by the King to govern at his pleasure.

commoner or *tu'a* classes calling for political reform to integrate human rights and implement democratic forms of governance.² The resistance culminated in the constitutional and statutory reforms of 2010.³ Dialogue addressing Tonga's resulting unique brand of “democratic” governance continues to fuel controversy and conflict. The case of *Fatai Helu and Paula Piveni Piukala v The Electoral Commission and Lord Nuku*⁴ is significant as it contributes to defining the parameters of Tonga's democracy post-2010.

I THE CASE

Fatai Helu and Paula Piveni Piukala v The Electoral Commission and Lord Nuku was heard in the Court of Appeal of Tonga in March 2023.

On 18 November 2021, Lord Nuku was re-elected as a Nobles' Representative in Tonga. At this time, Lord Nuku had an unpaid judgment debt of TOP\$ 3,380,335 dating back to 6 September 2017.

Clause 65 of the Constitution bars the candidacy of any person with an outstanding judgment debt. The clause 65 bar applied in practice only to candidates for People's Representatives. The appellants argued that clause 4 of the Constitution (same law for all classes) required the clause 65 bar to apply to all candidates, including the Nobles' Representatives candidates and specifically Lord Nuku.

On 14 December 2021, subsequent to Lord Nuku's election, the appellants' lawyer, Mr Fonua, wrote to the Electoral Commission questioning Lord Nuku's election based on the outstanding judgment debt against him. The Supervisor of Elections responded that the clause 65 bar applied only to People's Representatives.

In August 2022, the appellants filed an application in the Supreme Court for leave to apply for a judicial review of the Supervisor of Elections' decision. The appellants sought a declaration that clause 65 applied to the Nobles' Representatives and that Lord Nuku's election was invalid. The Supreme Court found that the appellants contravened provisions of the Electoral Act (regarding the basis, timing and the

2 Sione Latukefu "The Pro-Democracy Movement in Tonga" (1993) 28 (3) *The Journal of Pacific History* 52 at 53, 54.

3 Sixty-three pieces of legislation were passed between May and November 2010. Further information on these reforms can be found in Guy Powles *Political Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (CLJP/JDCP, Wellington, Monograph XV, 2012), and in Mele Tupou Vaitohi *The 2010 Constitutional Reform in Tonga* (CLJP/JDCP, Wellington, Ex Professo Vol VII, 2025).

4 *Fatai Helu and Paula Piveni Piukala v The Electoral Commission and Lord Nuku* (AC 22/22) TOCA.

persons bringing the claim) and Supreme Court Rules because the question before the Court was hypothetical and could not be subject to judicial review.

The Supreme Court found that a proper interpretation of clause 65 validated the Supervisor of Elections' decision, that there was no one law for all Tongans as prescribed in clause 4, and that clause 4 did not constrain the application of clause 65. The Supreme Court dismissed the appellants' application for leave to apply for judicial review.

The appellants appealed the Supreme Court decision to the Court of Appeal. The Court of Appeal had to decide whether the appellants had established an arguable case warranting the grant of leave to apply for judicial review.

II THE COURT OF APPEAL'S RULING

The appeal focused on two constitutional provisions: Clauses 65 and 4.

Clause 65 of the Constitution bars the candidacy of any person with an outstanding judgment debt:

65 Qualification of representatives

Representatives of the people shall be chosen by ballot, and any person who is qualified to be an elector may nominate as a candidate and be chosen as a representative for the electoral constituency in which he is registered, save that no person may be chosen against whom an order has been made in any court in the Kingdom for the payment of a specific sum of money the whole or any part of which remains outstanding or if ordered to pay by instalments the whole or any part of such instalments remain outstanding on the day on which such person submits his nomination paper to the Returning Officer:

Provided that a person resident outside of Tonga who is qualified to be an elector will qualify as a candidate only if he is present in Tonga for a period of 3 months within the six months before the relevant election.

Clause 4 explicitly states that there shall be one law for all people:

4 Same law for all classes

There shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land.

The Court dismissed the appeal on the grounds that the appellants did not demonstrate an arguable case warranting the grant of leave to bring judicial review proceedings. In interpreting the constitutional clauses, the Courts applied a positivist analytical approach to statutory interpretation, taking account of the literal meaning

of the text, its context and comparison with other provisions in the Constitution, and the purpose of the legislation.⁵

Analysis of the text of clause 65 revealed that the disqualification ban applies only to People's Representatives. Clause 4 does not override clause 65 or constrain its interpretation. The Court stated that it was a matter for Parliament to decide whether the clause 65 ban should apply to Nobles' Representatives.

III COMMENTARY

Tonga is the only Pacific island nation that was never formally colonised; as a result, Tonga is the only Pacific island nation without a parallel customary law system. Tonga has instead incorporated elements of customary law into its Constitution and statutes, with inequality between the classes being a defining characteristic of customary law in pre-modern Tonga.

The dominance of the *'eiki* chief classes marked customary forms of governance. The chief held supreme authority over his *kainga*; law-making, dispute resolution, and military and executive action were the purview of chiefs.⁶ Chiefs governed Early Tonga through a *tapu* system (prohibitions/law/rules) that applied unreservedly to commoners and privileged chiefs.⁷ What was *tapu* was decided/sanctioned by chiefs. Unsurprisingly, the higher one's rank, the greater the corresponding *tapu* (sacredness), the fewer *tapu* (prohibitions/laws/rules) applied to you.

King George Tupou I converted to Christianity and, at face value, integrated Christian ideals of equality in Tonga. Clause 4 of the Constitution reflects this aspiration. Clause 4 was an attempt to remove the sacred right of chiefs to remain above the *tapu* (law) and privileges associated with their *tapu* (sacredness) and to have the law apply equally to all in Tonga. Tonga's 1875 Constitution founded the modern Tongan state and redefined Tongan society and culture. Inequality at law, or laws favourable to Tonga's ancient sacred ruling classes, remains a defining feature of Tonga's modern legal system.

The outcome of this case is not surprising. The constitutional provisions privileging the Noble and ancient ruling classes are clearly stated, and the intention

5 See above n 4 at [10], citing *Attorney-General v Ikamanu* [2021] TOCA 3 and *R v Schaumkel* [2012] TOCA 10.

6 Sione Latukefu *The Tongan Constitution: A Brief History to Celebrate its Centenary* (Tonga Traditions Committee, Nuku'alofa, 1975) at 12.

7 Christine Ward Gailey *Kinship to Kingship Gender Hierarchy and State Formation in the Tonga Islands* (University of Texas Press, Austin, 1987) at 64.

behind the drafting was obviously to bestow on that class the traditional preferential treatment customarily due. There is little room for the judiciary to rule otherwise.

The constitutional reforms of 2010 have done little to shift the status quo, as evident in the ruling in this case. The modern Tongan legal system echoes its ancient roots and reflects inequality and discrimination which is evident also in relation to gender and sexual orientation.⁸

IV CONCLUSION

Whether these provisions preserving class inequality should remain is a matter for Tongan society to decide. As at 2025, equality remains a foreign and undesirable concept for some portions of Tongan society. Discrimination is often framed as traditional and thus acceptable. However, whether Tongan society accepts or rejects introduced notions of class equality may be a moot point. In assessing the prospects for reform, class again comes into play because, as within the current political structures, the will of the Monarch and his Nobles is determinative to passing any further legal and constitutional amendments. The King retains the prerogative to veto any Bill that requires his royal assent to become law. The Nobles hold nine votes in Parliament, and the representatives of the People are barred from discussing and voting on any constitutional provisions pertaining to the rights and privileges of the King and Nobles.

8 The Constitution does not prohibit discrimination based on gender or sexual orientation. Clause 113 of the Constitution discriminates against women by conferring exclusively to males the right to land grants. Section 136 of the Criminal Offences Act (Tonga) prohibits consensual same-sex sexual relationships.

