

# **Constitutional and Political Reform in The Kingdom Of Tonga: New Wine in Old Bottles?**

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## Introduction

For a country that is still in its infancy with a new democratic system, Dr Guy Powles generously and selflessly contributed his time, experience, expertise and knowledge to our understanding of our unique legal development and political journey. The Kingdom of Tonga has indeed lost a great friend.

The 25<sup>th</sup> day of November 2010 will probably stay as a milestone date that represents a ‘new dawn’ in Tonga’s modern history. It is the day that marked the implementation of a major political reform under which the powerful Monarch, both Head of State and Head of Government, opened a new page in Tonga’s political life. He agreed to devolve most of his executive powers upon a Cabinet of Ministers chosen by an elected Prime Minister from an Assembly comprising for the first time, a clear majority of elected people’s representatives.

The style of government of the Kingdom of Tonga that had been adopted in the 19<sup>th</sup> century has now, in the 21<sup>st</sup> century, been found unsuited to the needs and aspirations of the people, resulting in this major political reform in 2010. Instead of relying entirely on foreign models, the philosophy underpinning this reform seems to allow a blending of Tongan tradition with foreign concepts that are found to be adaptable and conducive for the strengthening of the Tongan system of government. After briefly reviewing the nature of the reforms, this article will examine the issues and particular concerns that arise from the changed role and powers of the Monarch in this new constitutional setting.

## Constitutional reform in Tonga

The 2010 reform focused on the devolution of executive power, abolition of the Monarch’s exclusive power to appoint cabinet ministers, and reform of the legislature. However, the devolution of power was not total, and the constitutional outcome sets up a degree of sharing of executive authority between the Monarch and Cabinet; and retains the traditional privileges that

are entrenched in the Constitution.<sup>1</sup> Any further amendments are likely to be difficult due to the constitutionally entrenched nature of these privileges.

As a kingdom, which has chosen a unique path towards democracy, Tonga, while preserving important elements of its old cultural heritage, has to meet new and broader approaches to development that includes political changes.

### The Constitutional Framework Prior to 2010

The Constitution of Tonga<sup>2</sup> details the basic elements and the foundation of a Constitutional Monarchical System of Government by defining the principles of equality and social justice; the structure of the legal system; the roles, responsibilities and powers of the Executive, the Legislative Assembly and the Judiciary; and details related to land.<sup>3</sup>

The Constitution provided for the King to be the Head of State as well Head of the Executive and Commander-in-Chief of the Forces. All land in Tonga is the property of the Monarch.<sup>4</sup> The Monarch also secured perpetual succession under clause 31 of the Constitution. He may make treaties with foreign states<sup>5</sup> and he cannot be impeached.<sup>6</sup> The Constitution cannot be changed without his consent.<sup>7</sup>

However, in Tonga, much like every other country that uses the parliamentary cabinet system of government, the Executive's relationship with the Legislature is an essential ingredient of its role and function under its Constitution.<sup>8</sup>

### The Executive/Ministry

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<sup>1</sup> These privileges will be elaborated on later in this article.

<sup>2</sup> 1988 Revised Edition of Laws of Tonga.

<sup>3</sup> *Constitution* (Tonga) 1988: c 30, 31.

<sup>4</sup> Clause 51.

<sup>5</sup> Clause 39

<sup>6</sup> Clause 41.

<sup>7</sup> Clauses 67 and 79.

<sup>8</sup> *Ibid.* 1988: c 51.

Prior to recent reform, the Privy Council was the chief instrument of the Executive power where the King received advice but his views prevailed. It was comprised of the King with an appointed Privy Council who were members of Cabinet, Governors and any others whom the King saw fit.<sup>9</sup> Privy councillors were also members of the Legislative Assembly and served at the pleasure of the Monarch.

Because the Constitution conferred political power and authority on the Monarch as Head of Government and as Head of State,<sup>10</sup> the Cabinet consisted of the Prime Minister and the Ministers of the Crown as the King appointed. The King had substantial power over the Prime Minister and the Ministers who were responsible to the Monarch for administering the government in Privy Council and Cabinet. This was because the Monarch could appoint and dismiss Prime Minister and Ministers at any time.<sup>11</sup> This is no longer the case today because under the Constitution, the members of the Legislative Assembly nominate one of their members to be appointed by the King as Prime Minister who in turn form a Cabinet of Ministers from elected members of the Legislative Assembly.

Under the former constitutional arrangements, 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 and the nine of the nobles come and go;
- councilors held 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 as members of the Privy Council, were directly responsible and accountable to the Monarch and not to Parliament or the people of Tonga.

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<sup>9</sup> Constitution, under clause 50.

<sup>10</sup> Ibid. 1988: c 31.

<sup>11</sup> Constitution, clause 51.

In reality, the Constitution conferred absolute powers on the Monarch who could choose whether to exercise them in person or to delegate them to others. He had the constitutional power to intervene at will in the day-to-day running of the government.<sup>12</sup>

### **The Legislative Assembly of Tonga**

The Legislative Assembly was composed of Privy Councillors (as many Cabinet Ministers as the Monarch appointed plus two Governors), nine elected representatives of the nobles, and nine elected representatives of the people. Common Cabinet Ministers were sitting as nobles although they were not nobles.<sup>13</sup>

The Assembly was and is comprised of a single chamber, based on the Westminster model. However, instead of the four years term that we have today, it had a life of three years, subject to the King's power to revoke or dissolve the Assembly at any time.<sup>14</sup> The Assembly still makes its own rules of procedure and it was presided over by the Speaker of the Legislative Assembly, who was appointed by the King. It has the power to pass Bills, which only become law after being signed by the King<sup>15</sup> and published.

Despite the autonomy which the Assembly enjoys in the control of its own proceedings, it lacks full control over the law-making process. The Monarch's assent is still required and thus, he retains ultimate authority through royal powers of dissolution of the Assembly and dismissal of Ministers and Governors.

Further, there is the limitation on the powers of the Assembly to deal with certain areas of law such as those relating to the Monarch, the Royal family and the titles and inheritances of the nobles.<sup>16</sup> While, in practice, the nobles have not insisted that peoples' representatives be excluded

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<sup>12</sup> Guy Powles, 'Testing Tradition in Tonga; Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynésienne*, p 115.

<sup>13</sup> *Ibid.*, p.116.

<sup>14</sup> Constitution, under clause 38.

<sup>15</sup> Constitution, clause 56

<sup>16</sup> Constitution of Tonga 1875 cl. 67.

from the voting process on these matters, the reality is that the legal status of the Monarch and nobles is protected against changes in the law.

The Constitution also entrenched the status of the hereditary nobles to control parliament. In reality, the Assembly was dominated by nobles and because they were responsible and accountable to the Monarch, the King's wishes influenced the laws that were passed.

### **The Judiciary**

The Judicial branch of Government is made up of the court system. It is composed of the Court of Appeal, the Supreme Court, the Magistrates' Courts and the Land Court. Before the reform, the King with the consent of the Privy Council, effectively the Cabinet, appointed the judges of these courts.

### **Movement for political reform**

Even if many Tongans have been shocked by the suddenness and the amplitude of the changes allowed by the King, the reform will not come as a surprise to close observers of Tongan modern history.

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.<sup>17</sup> This was compounded by the alleged royal family's meddling in politics and their business interests at the same time which made the late Prince Tupouto'a, who was later King Tupou V, and his sister, Princess Pilolevu Tuita, 'controversial figures for their major involvement in commerce and accumulation of wealth'.<sup>18</sup> Further, frustrations built up, as although Tonga has a parliament, a cabinet, and free elections, they were not democratic in their operations.<sup>19</sup> Hence, even though the people are represented in government, a feature of Tongan politics is that general

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<sup>17</sup> Sione Latukefu, 'The Pro-Democracy Movement in Tonga' (1993) 28(3) *Journal of Pacific History* 52.

<sup>18</sup> Guy Powles, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007)13 *Revue Juridique Polynésienne* p112.

<sup>19</sup> *ibid.*

elections cannot result in a change in government.<sup>20</sup> The King's agenda and his decisions were not affected by the elections to parliament.

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 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.<sup>21</sup> 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 (NCPR) by the Legislative Assembly which was endorsed by the King in October 2005. The Committee produced a report and recommendation for change and proposed a timetable for the reform.<sup>22</sup> The report reflected the people's wish to retain the structure of monarch, nobles and people with changes to the structure and administration of government. It was recommended that parliament should consist of 17 People's Representatives elected by the people, 9 Nobles' Representatives elected by the nobles themselves. The appointment of the Prime Minister from the 26 elected members by

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<sup>20</sup> Campbell (1994) argued that the contemporary political debate in Tonga during that time was focused on the role of the elected representatives and their relationship with the hereditary head of state, who is also the head of government. As such, the core of the debate is not the inevitable process of cultural evolution, but a series of events involving personal conflict and allegations of abuse of power.

<sup>21</sup> The announcement made by Tupou V in September 2006 that he would dispose of all his commercial businesses was perhaps a positive move by the monarchy towards maintaining his prestige and constitutional position.

<sup>22</sup> NCPR Committee report.

the King and the appointment of the Cabinet on the advice of the Prime Minister were intended to act as ‘a bridge between the elected parliament of the people and the Privy Council.’<sup>23</sup>

The NCPR made it clear that its aim was for the Government ‘to proceed and amend legislation in order for a fully elected parliament for the people, by the people, to be established’.<sup>24</sup> The chairman of the NCPR made it clear that the only way ahead was for ‘the report to be read, understood, shared before action is taken’.<sup>25</sup> There was also a real sense of recognition that the way ahead must accommodate both tradition and modernity: ‘We are trying to look at an appropriate reform ... to a complex duality, the structure of society, which is in the nature of our own identity of who we are as Tongans.’<sup>26</sup>

The Tonga Legislative Assembly discussed the findings and suggestions of the NCPR report but then released their own statement on political reform.<sup>27</sup>

### The ‘Road Map’ For Change

Following the announcement and parliamentary discussion on the recommendations made by the NCPR; the Government issued its response to it described as ‘a Roadmap for Political Reform’. The Government’s Roadmap was issued by the Prime Minister, Dr. Sevele on 19 October 2006. When introduced, it was described as a mechanism that provides ‘for a fine balance between the three pillars of Tongan society – His Majesty the King, the Nobles and the People.’<sup>28</sup> The Roadmap was clearly the Government’s response to the NCPR’s proposal for political and constitutional reform.

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<sup>23</sup> Pesi Fonua, ‘MPs question NCPR proposal for new 26 member parliament’, <http://www.matangitonga.to/archives.pireport.org/archive/2005/may/05-30-02.htm>.

<sup>24</sup> Pesi Fonua, ‘Fully elected parliament for the people, by the people, Tonga’s NCPR proposes’. 2006. [http://www.matangitonga.to/article/tonganews/parliament/article\\_print\\_ncpr\\_report05](http://www.matangitonga.to/article/tonganews/parliament/article_print_ncpr_report05)

<sup>25</sup> *ibid.*

<sup>26</sup> Pesi Fonua, ‘Tonga steps forward with a new roadmap for political reform’. 2006. [http://www.matangitonga.to/article/features/interviews/article\\_print\\_halapua\\_161006](http://www.matangitonga.to/article/features/interviews/article_print_halapua_161006).

<sup>27</sup> Pesi Fonua, ‘Tonga steps forward with new road map for political reform’ [http://www.matangitonga.to/article/features/interviews/halapua\\_161006.shtml](http://www.matangitonga.to/article/features/interviews/halapua_161006.shtml).

<sup>28</sup> Prime Minister, Dr. Sevele.

The 'road map' reflected the willingness of the late George V to share his power to govern with the elected members of Legislature.

In October 2006, the new King George V publicly announced his support for political reform and volunteered to relinquish his constitutional authority. It seems that the willingness of the late King Tupou V to consider devolving executive authority upon an elected Cabinet 'increased many people's feelings of respect towards the institution of Monarchy.'<sup>29</sup> It is interesting to note that although the roadmap was described in terms of something that had been granted as a benevolent response by the king, he was criticized by many for insisting on retaining 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 retaining 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).<sup>30</sup>

The roadmap suggested that the number of the People's Representatives be 14 (up 5 from the former system and down from the NCPR's 17), retains the Nobles' Representatives at 9 and maintains strong monarchical power in Cabinet appointments. While this may be an improvement on the current structure, it dilutes the level of participation offered to the people by the NCPR report.

The Government wanted to establish constituencies, something the NCPR avoided on the grounds that the focus of ministers should be the welfare of Tonga as a whole. The NCPR report was not very specific but its recommendations were clearly set out to reduce the powers of the Monarch to that of a ceremonial figure to enable greater participation of the people in making decisions and policies in government.<sup>31</sup> To do that, all members of parliament (both the people and the nobles) were to be elected by the people and candidates were to stand on island group

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<sup>29</sup> Guy Powles, *The Tongan Monarchy and the Constitution: Political Reform in a Traditional Context* p1.

<sup>30</sup> *Constitution (Tonga)* c 36, 38, 83B.

<sup>31</sup> Pesi Fonua, 'Fully elected parliament for the people, by the people, Tonga's NCPR proposes', 2006, <http://matangitonga.to/2006/10/05/fully-elected-parliament-people-people-tongas-ncpr-proposes>, Accessed on 11 November 2016.

platforms. The view was that a constituency system risked disunity and less representative government.

The Government opted not to vote on the NCPR report and the Prime Minister vaguely referred to the possibility of a referendum 'later on' if the people do not agree with its Roadmap.<sup>32</sup> Hence, the Government took the too-cautious step or the delaying tactic of not voting on the NCPR report but instead proposing to establish a Tri-partite Committee to consider the way forward and report back in a year's time. This was not like the NCPR report which recommended various phases of action and a definite timeframe in which to accomplish actions proposed in those phases.

The Tri-partite Committee set up by the government in July 2007 was an excellent move by the government to bring together different parties to continue the dialogue on the kind of political reform that would be appropriate for Tonga.

The retention of a fairly powerful monarchy was probably a reflective of Tonga as a traditional society. The fact remains, however, that successful government under a constitutional monarch will require substantial sharing of power between the monarch and the people.<sup>33</sup> However, because neither the pro-democracy leaders nor the people themselves wanted the monarchy removed, it was fairly clear that democratic reform in Tonga would proceed in the context of some form of restructured constitutional monarchy as was indicated by the NCPR report.<sup>34</sup>

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<sup>32</sup>Pesi Fonua, 'Cabinet calls for new committee on Tonga political reform'. 2006. [http://www.matangitonga.to/article/tonganews/politics/article\\_print\\_sevele\\_211006.shtml](http://www.matangitonga.to/article/tonganews/politics/article_print_sevele_211006.shtml). Accessed on 31 October 2016.

<sup>33</sup> According to Aristotle, 'monarchies are preserved by tending towards greater moderation. The fewer those spheres of activity where a king's power is sovereign, the longer the regime will inevitably survive undiminished'. *Politics*, V xi, 1313a18. This was echoed by Pohiva when he declared that 'the monarchy which surrenders power is bound to continue.' Stephanie Lawson, *Tradition Versus Democracy in the South Pacific*, 105.

<sup>34</sup> The NCPR report clearly outlines a better 'middle way' forward for Tonga at the present time than the Government's Roadmap for reform. It begins with the present system yet clearly defines a way ahead which promises real opportunity for the people to fully participate in political life – 'to rule and be ruled'. It also recognizes the principle of unity-in-diversity, reconciling differences and offering shared participation in the common purpose of forging the best future possible for Tonga at this watershed in the country's history. Furthermore, it strives to blend the

## Constitutional and Electoral Commission

In January 2009, the Constitutional and Electoral 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.<sup>35</sup>

Among the specific matters that the Commission was established to focus on was enquiry 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.’<sup>36</sup>

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.<sup>37</sup> This report contained accounts of its analysis of the constitutional issues and how members of the Commission weighed up the ‘competing considerations and offers advice as to where, in the Commission’s view, the best solution lie.’<sup>38</sup> 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 these, led by the Prime Minister and Ministers who held a majority, there were 18 important recommendations that were not accepted and 8 which were modified to a major extent.<sup>39</sup>

### The Content of the Reform

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best of tradition with modernity. The Government, on the other hand, does not seem to have grasped the need to act swiftly to bring about political change. Earlier it was said that some feared that change would bring violence in its wake. It is more likely that inability or unwillingness to bring about constitutional reform would wreak havoc on the already troubled and choppy water that is Tonga today.

<sup>35</sup> Powles, above no 1, 10–11.

<sup>36</sup> *Constitutional and Electoral Commission Act* (Tonga) sch 2.

<sup>37</sup> *Constitutional and Electoral Commission Final Report* (5 November 2009). This report also contained 82 recommendations and draft legislation.

<sup>38</sup> Powles, above note 1, 11.

<sup>39</sup> *Ibid.* 15.

On the face of the constitutional reform in 2010, the late King Tupou V's attitude towards political structures can be described as flexible. In this respect, the reform is coherent with the changes that he made when he came into power in 2006. However, it should be underscored that it not only represents a significant step in the process of adapting political structures to new challenges, but it also strengthens some aspects of traditional authority as 'hau'.<sup>40</sup> The reform is described as a confirmation of Tonga's status as a constitutional monarchy under His Majesty. Both attributes, when used to describe monarchical systems in the West, have specific meanings. None of them, however, seems to correspond to the Tongan system which is best described as a Constitutional Government borrowing from many different models including democracy.

In 2010, as part of the process of political reform, a large set of constitutional amendments were approved by Parliament and the King. The reforms were enacted following public consultations in 2009 by the Constitutional and Electoral Commission, which produced a final report and recommendations for consideration. The political reform amendments were contained in the Legislative Assembly Act (2010), the Electoral Act (2010) and the three constitutional amendment Acts which were also passed in 2010.

The constitutional reform that was adopted in 2010 is four-fold.

**A. Sharing of Executive Power of Government – The extent of the Power and Influence of the Monarch in the New Form of Government**

Tongan politics have always functioned along informal lines. Tradition and practice are always there to fill in the blanks left by constitutional texts. As far as devolution of the executive is concerned, a compromise solution was considered to ensure that such powers formally belong to the King who delegates some of its executive authority to the Cabinet. Such is the nature that can describe the sharing of executive power between the King and the Cabinet.

Although King Tupou V initially expressed some desire to relinquish his powers in favour of Cabinet, his later assertions to appoint the judges were a clear indication that the Monarch was not ready to release some of his prerogatives under the Constitution or the laws of Tonga.

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<sup>40</sup> 'Hau' is the Tongan translation of 'traditional leader' which is an important factor in the constitutional pre-eminence of the King as Head of Government as well as Head of State.

From the outset, the devolution of some executive powers of governance by the King is a very significant change in Tongan politics. Since the establishment of the monarchy in 1875, the King, who has been both Head of State and Head of Government, had been vested with all the executive powers. The 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. There was overwhelming public support, as shown by the Constitutional and Electoral Commission's final report, for enshrining the Monarch's position in the Constitution, recognizing that the Monarch can operate as a safety measure to guard against unconstitutional actions by the Government.

One of the major reforms of 2010 was to make explicit in Clause 31 the separation of powers between the three branches of the Government, namely, the Cabinet, the Legislative Assembly, and the Judiciary. Separation of powers means that each branch has its own set of independent powers, and in addition, has powers to check the other branches of government. However, unlike the US-presidential system, the Tongan system of government is not a 'pure' separation of powers, because the members of the Executive sit inside the legislature. This can make the relationships of accountability between the two branches more complicated because the Executive is usually quite dominant in the Legislative Assembly.

Following the 2010 reforms, the Executive no longer directly includes His Majesty and the institution of the Privy Council, as was the case in the past. The Executive is now comprised of the elected Cabinet. Cabinet is headed by the Prime Minister and a number of Ministers that are members of the Legislative Assembly and must always be less than half the membership of the Legislative Assembly. This is a fundamental reform of the system of government of Tonga.

Perhaps the most significant altered institution in accordance with clause 50 of the Constitution, is the Privy Council. It was once the primary decision-making body of government, but it now exists solely as an advisory board to the King. Whereas members of Cabinet were previously included in the Privy Council, the King now selects his own advisors and Cabinet is completely separated from the Privy Council. However, the Privy Council remains as a higher court of appeal to hear cases regarding hereditary estates and titles.<sup>41</sup>

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<sup>41</sup> Constitution, clause 50(2).

Where once the King in Council had control of the Judiciary and the prerogative to appoint judges, the King in Council now performs these executive functions after receiving advice of the Judicial Appointments and Discipline Panel.<sup>42</sup> This Panel comprised the Lord Chancellor, the Lord Chief Justice, the Attorney General, and the Law Lords.<sup>43</sup> The Lord Chancellor is independent executive position established to look after and administer the Judicial court system and the maintenance of the rule of law.<sup>44</sup> However, it should be noted that the Lord Chancellor is only responsible and accountable to the King and not the Legislative Assembly and Cabinet.

Another major change codified by the amendments relates to the composition of the new Legislative Assembly. Clauses 59 and 60 states the increase in the number of people representatives. As was previously the case for the Privy Council, the King now appoints the Cabinet Minister on the advice of the Prime Minister, who may nominate to ministerial posts, not more than four people who are not elected representatives.<sup>45</sup> The Prime Minister and elected representatives of Cabinet remain as representatives of their constituencies. This is an important development towards democracy in Tonga as parliament is the visible symbol of participatory democracy. It represents the nexus between the people and the government. Therefore, it is important that the work of parliament aligns with the overall objective of participatory, accountable and transparent democratic government as it was the shining theme from proponents of the reform.

Despite the aforementioned significant changes, the King retains full executive authority under the Constitution and legislation, and may act with or without advice, as he wishes in the following areas:

- Relationship with the Legislative Assembly – The King may convoke and dismiss the Assembly at any time, and may call general elections<sup>46</sup> and may withhold his assent to legislation and further discussion may be denied until the following session.<sup>47</sup>

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<sup>42</sup> Clauses 83C, 84, 85, 86, 86A and 88 of the Constitution.

<sup>43</sup> Constitution, clause 83C.

<sup>44</sup> Constitution, clause 83B.

<sup>45</sup> Clause 51(2).

<sup>46</sup> Clauses 38, 58 and 77 of the Constitution of Tonga

<sup>47</sup> Ibid, clauses 41, 79, 68.

- The Privy Council – The King may appoint whomsoever he thinks fit to the Council to advise him.<sup>48</sup>
- Armed forces and martial law – The King is Commander-in-Chief of the armed forces and he may proclaim martial law and may raise a militia.<sup>49</sup>
- International Affairs – The King may make treaties with other states and appoint diplomatic representatives.<sup>50</sup>
- Honours and distinctions – The King may confer titles of honour and honourable distinctions.<sup>51</sup>
- Succession to the throne – A member of the Royal Family who is likely to succeed to the throne may not marry without the King's consent, and if such marriage occurs, the member's right to succeed may be canceled.<sup>52</sup>

The consequences of the sharing of power between the institution of Monarch and Cabinet are:

- The King remains, and always will be, the *Hau*, or traditional leader of all Tongans, a role that today is still associated with deep and pervasive social influence, and remains unaffected by current reforms.
- The King is the constitutional Head of State, but no longer the Head of Government.
- The form of government is no longer a ‘Constitutional Government’ under the King but a ‘Constitutional Monarchy’ under him.<sup>53</sup> It is still questionable whether this can be claimed because as shown above, the King still retains a substantial amount of executive power.
- In the list of the government’s three bodies, the first body is no longer the King and Privy Council but it is now the Cabinet.<sup>54</sup>

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<sup>48</sup> Ibid, clause 50.

<sup>49</sup> Ibid, clause 36, 46, 22.

<sup>50</sup> Ibid, clause 39.

<sup>51</sup> Ibid, clause 44.

<sup>52</sup> Ibid, clause 33.

<sup>53</sup> Clause 30 of the Constitution of Tonga.

<sup>54</sup> Clause 31

- The Privy Council has suffered the greatest transformation, from comprising King and Cabinet where the important decisions of government were made, to a purely advisory body appointed by the King to assist him when he asked for advice.

As shown above, the devolution of executive powers was incomplete due to the retention by the Monarch of several specific powers that have remained defined in the Constitution ever since its promulgation in 1875. The clauses are those preserved by the reform, which in fact, protect the power, influence, and entitlements of the Monarch in prescribed and significant ways. They stand alongside the principal political reform, namely the devolution of executive authority, to create a sharing of power, between the Monarch and Cabinet. However, it should be noted that although the executive authority of Government is vested in the Cabinet, the reality is rather different because the King's discretionary powers may still take precedence over those of the Legislative Assembly and the Cabinet.

## **B. The Composition of Cabinet and its Empowerment as the Executive**

It is important to remember that, for a long time, one of the key political demands has been the call for greater political participation by people not only in parliament but also in government. The composition of both the present parliament and government goes some way to addressing this concern.

In accordance with the 2010 reforms, clause 60 of the Constitution now requires that the Legislative Assembly of Tonga comprises:

- 17 People's Representatives who are elected from 17 individual constituencies by general voters. The Boundaries Commission determines and recommends the boundaries of the electoral constituencies for the election of representatives of the people.
- 9 Noble's Representatives, who are elected from amongst the 32 Noble families of Tonga. The Legislative Assembly determines the boundaries of the electoral district for the election of representatives of the nobles.

- All members of Cabinet. The majority of these will be elected members, but it is possible to appoint up to 4 members of Cabinet from outside of the Legislative Assembly.
- The King is empowered to nominate four (4) additional members from outside the Legislative Assembly as members of Cabinet in accordance with clause 51(2) of the Constitution. These members sit in the Legislative Assembly and have voting rights but clause 51(6) of the Constitution makes it explicit that they cannot participate in a vote of no confidence in the Prime Minister.

The 2010 constitutional reforms entrenched changes to the way that the Prime Minister, who is the leader of the Executive Branch of Government is identified and appointed. In accordance with clause 50, within 7 days from the declaration of election results, the King will appoint an Interim Speaker, who is not from amongst the elected members of parliament. Within 14 days from the declaration of election results, nominations for the Prime Minister must be given to the Interim Speaker. It is now clear, following the 2010 reforms, that the Prime Minister can only be selected from amongst the 26 elected members of the legislative assembly. The Prime Minister can be a People's Representative or a Noble's Representative.

Once nominations are received, the Interim Speaker will call a meeting of all of the elected members of the Legislative Assembly. A voting process will then be undertaken, in order to select a candidate who has the support of a majority of members of the Legislative Assembly. Once a majority candidate is endorsed, the Interim Speaker is required to inform the King who the Prime Minister Designate is. The recommendation for the position of Prime Minister is not finalized until it is consented to by the Monarch. Immediately following the vote in parliament, the Interim Speaker has to request an audience with His Majesty to inform him of the House's nomination for the position of Prime Minister.

Following the 2010 reforms, clause 50 makes it clear that the executive authority of the Kingdom vests in the Cabinet. In accordance with this clause, Cabinet shall consist of the Prime Minister and such other Ministers who are nominated from amongst the Members of the Legislative Assembly by the Prime Minister and then appointed by the King. The Prime Minister may also nominate as Cabinet Ministers not more than 4 people who are not elected representatives. The

Constitution also makes it explicit that the Prime Minister and Cabinet must consist of fewer than half of the number of elected members of the Legislative Assembly excluding the Speaker. Cabinet Members remain as members of the Legislative Assembly.

The Privy Council is no longer recognized as part of the Executive. The Constitution makes it explicit that Cabinet shall be collectively responsible to the Legislative Assembly for the executive functions of the Government. This means that Cabinet members must respond to questions in the House in their subject areas and must take responsibility for the decisions and activities of the Ministries and agencies for which they are responsible.

### **C. Electoral change and, in the Legislative Assembly, the Transfer of Parliamentary Numerical Superiority to the Representatives of the People**

Following the reforms of 2010, the first parliament was faced with managing a time of transition for Tonga. The general elections before 2010 served as a sensing mechanism that gauged what the electorate was thinking about an issue at any particular moment. The results of past elections have pointed to a clear need for greater political change or political reform in the form of democracy.

Based on the recommendations of the Constitutional and Electoral Commission, parliament in 2009 confirmed the increase in the number of people's representatives from nine to seventeen while the number of noble's representatives remained at nine. The Royal Constituency Boundaries Commission was created to draw up the geographical boundaries and to redistribute the number of electorates in the country. It confirmed the residential qualification of voters to vote in certain areas and it reconfirmed the natural right of Tonga nationals residing overseas to take part in the election.<sup>55</sup>

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<sup>55</sup> Clause 65 of the Constitution (as amended) provide an important aspect where it states that a person outside of Tonga can vote and stand in the election but only if that person is present in Tonga for a period of three months within the six months before the election. The issue is whether an effective way can be found to tap into the overseas talent pool. Overseas Tongans play a significant role in the economic, social and political lives of the local Tongan people.

In late 2009, the parliament resolved as recommended by Government to reject the single transferable vote system as an electoral system for Tonga. As it was, the 2010 election was conducted under the first past the post system. The only difference to past elections was that there were now more electorates as a consequence of the increase in the number of people's representatives.

#### **D. The introduction of a Vote of No-Confidence in the Prime Minister**

The vote of no confidence is a new mechanism for regulating and making government accountable to the Assembly and the people. In essence, it is a vote by members to clarify whether the majority of members still have confidence in the leadership of the Prime Minister and the Government of the day.

Throughout the Pacific, votes of no confidence have often been over-used and have resulted in political instability which has undermined economic prosperity.<sup>56</sup> As such, it is important that it is employed with caution and only used when it is completely necessary. Such a mechanism has never existed before in Tonga. However, what is not stated are the reasons whereby a vote of no confidence might be brought against a Prime Minister. The Constitutional and Electoral Commission in its final report in November 2009, (paragraph 174) suggests that motions for a 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. At the very least, though, it is clear that Members have to be cautious when deciding whether to support a motion for a vote of no confidence.

A motion of no confidence will have no legal effect, if it was passed by the Legislative Assembly:

- Within 18 months of a general election;
- Within 6 months before the next general election; or

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<sup>56</sup> Lisepe Peaniu, 'How can Parliamentary Democracy Function more effectively in small Pacific Island Countries such as Tuvalu and Nauru?', (2012) 2 *Journal of South Pacific Law* 6.

- Within 12 months of a previous vote of no confidence.

A vote of no confidence in the Prime Minister cannot be moved unless at least 5 working days' notice of the intention to move such a motion was given to the Speaker. If procedural requirements are met, the Speaker must allow the motion to be debated and voted upon.

In an attempt to discourage destabilizing votes of no-confidence which leave the country leaderless, clause 50B(4) of the revised Tongan Constitution has strict guidelines on what happens once a vote of no confidence is successfully passed. If the vote of no confidence is passed, the Assembly has 48 hours to pass a motion that recommends a different elected member for appointment as Prime Minister-designate. The resolution will then be delivered to the King for an appointment.

If no resolution is passed within 48 hours, the King shall dissolve the entire Legislative Assembly and command an election on a date not exceeding 90 days. The King shall then appoint an interim Prime Minister from elected representatives (provided that it is not the Prime Minister in respect of whom a no-confidence motion was passed).

The idea of a vote of confidence in the Prime Minister is not meant to weaken in any manner the role and the influence of the Prime Minister and Cabinet. On the contrary, it can be seen as a contribution to the legitimization process of the reform and elected Cabinet which is a new thing. 'Legitimation under any political system is not achieved so much by the capacity to gain power as it is the ability to maintain and regularize the use of power over an extended period of time and to have a system broadly accepted.'<sup>57</sup> The performance of Cabinet and their capacity to carry out the executive role will be questioned. It is a concrete answer to those who could doubt inside and outside the kingdom the King's determination to adapt the government structures to changing realities. Because the legitimacy of the cabinet as the only executive branch under the Constitution is rather recent, the Prime Minister and his ministers have to be judged primarily on their performance record. Such record largely depends on their ability to master the reforms.

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<sup>57</sup> Xi.

## Conclusion

The above reflects the dynamics of socio-political developments and reforms in Tonga.

The old bottles consist of the Constitution and the traditional privileges that are entrenched in it, then the new wine of recent political reform and of hopes of further reform has been poured into the bottles, to be drawn out as required. The new wine is being drunk, but a point has been reached where the King exercises his discretionary and executive authority so the bottle-tops have been screwed on again so tightly they cannot be opened by the people who are still thirsty to refine the current system. The analogy here is that the old bottle still contains a lot of new wine that cannot be accessed because of some of the original entrenched powers and privileges such as the Monarch's power to veto bills, control both the armed forces and the judiciary. The new wine is the purported devolution of executive power from the King and the Privy Council. However the shift from an absolute monarchy to a democratically elected parliament has not been carried through to its fullest extent.

The style of government of the Kingdom of Tonga that was adopted in the 19<sup>th</sup> century has now, in the 21<sup>st</sup> century, been found unsuited to the needs and aspirations of the people, resulting in major political reform in 2010.

*Undoubtedly, Tonga's political journey will continue. Dr Guy Powles, through his work, has made a significant and definitive contribution to Tonga's political history. He has shown us the capacity of an individual to make significant contribution to Tonga's history.*