

## “Democracy by stealth: the role of the law in democratising Tonga”

### Introduction

1. **Background** – context is the late 1980s-early 1990s

#### Introduction<sup>1</sup>

Tavake<sup>2</sup> comes from central Tongatapu on the main island of Tonga. He lives with his wife and kids on his father’s family plot of 8.25 acres that had been passed down from his grandfather to his father. And now it has come to him as the eldest in the family. He understands that the land belongs to him and his family because his family’s right to it is guaranteed under the law. He understands vaguely that this right to the land was enshrined in the 1875 constitution by the great King George Tupou I who unified Tonga and saved it from colonisation by outside powers– a fact that he often alludes to with pride when talking with fellow Tongans or particularly when talking with non-Tongans. He also knows, again generally, that Tonga – its land and people – was given by Tupou I to Jehovah.

Religion, in this case Christianity, and monarchy (and by extension the nobility) are important elements in his identity and being. Tavake considers himself to be a pious member of his local Free Wesleyan church. In addition to being a committed lay preacher, he ensures that he observes his duties to the church by contributing to its maintenance and growth with money and other forms of support. He does all this because he feels that it is a part of who he is – of being a Tongan in Tonga. And he does them because he is encouraged to do them and that he is allowed to do them. He does not know about the specifics but he has a feeling that it is lawful to do this.

Tavake has grown up with the monarchy – the idea of kingship- and he understands that Tonga has always had a King or Queen as in the case of the much-loved Queen Salote Tupou III. Indeed, the monarch is known to be the head of Tongan culture and it is because of this position that everyone is thought to be linked to the monarch through the various bloodlines – it is through this relationship that Tonga is unified and everyone knows who they are in *relation* to everyone else. He has seen demonstrations of this at funerals (including royal funeral), birthdays, weddings and the like. In addition he has heard that the monarch has extensive political powers making him also the head of both state and government. He had always taken for granted that the monarch had real power and authority.

His plot of land is part of a noble’s estate and so he feels there is a link between him and the noble<sup>3</sup>, though he has grown sceptical about his noble’s *’ofa* (affection, love) for him and his neighbours as he often resides in town and mobilises the people only when there is work to be done or duties to

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<sup>1</sup> the idea here is to discuss the 1875 constitution by getting this fictional Tongan to talk about what the constitution has meant to him. Then moving onto providing the context to Pohiva’s court case

<sup>2</sup> Tavake is a fictional ‘ordinary’ Tongan male

<sup>3</sup> The noble’s ‘estate’ is often understood to be the people living on his estate rather than physical land by itself

be observed. But he understands that there are good and bad nobles. He has seen some questionable conduct on the part of his noble and he has heard rumours of many other indiscretions. However, despite all this Tavake feels that the monarchy, of which the nobility is a part, is the natural form of rule and authority for Tonga. Tonga has never known any other form of rule.

#### Economy/livelihood/employment:

- Like other Pacific islands, Tonga suffers from the lack of natural resources, isolation and great distance from markets, high transport costs, lack of diversification in export products, migration ie brain drain(about 100,000 Tongan live overseas) etc. But on the other hand, there were also opportunities with the boom in the export of squash and vanilla for example. And basically , tonga's economic system is based on individual enterprise and there are no restrictions on what someone wants to do (indeed the preamble to the 1875 constitution emphasises the idea that everyone is free to do as they please with the fruits of their hands ie it is very much focussed on encouraging economic activity, specifically it links freedom and industriousness)

#### Health:

- Free health care is a cornerstone of Tonga's development

#### Education:

- Education is another of the cornerstones of Tonga's economic and political development. And Tonga's achievement in education is often characterised in terms of Tonga having the most PhDs in the world per head of population.

#### Rights:

- Tongans had always understood, perhaps imperfectly and imprecisely, that they had a bundle of rights and freedoms that was guaranteed to them under the 1875 constitution. These included the freedom of worship, freedom of speech, freedom of association, freedom to vote, freedom of petition, right to habeas corpus, right to a fair trial. But they were happy to know that they had these rights without really pushing for their enforcement in law and their extension into other areas, for example, Tongans did not really see the right to vote extend into the right to participate in government...BUT this was about to change because of these new developments...

1. 'Akilisi Pohiva, the acknowledged leader of the prodemocracy movement, was elected to parliament for the first time in 1987. He entered parliament on the back of serious allegations, some of them true some not, which were related to how government had conducted itself
2. There were claims of mismanagement of public funds by ministers of the crown; illegal sales of passports to foreigners; unfair distribution of economic gains where some sections of

society were benefitting at the expense of the poorer sections; corruption and nepotism were rife in government; the royal family was working to reap benefits from national assets; the King was looking after his own family ahead of national interests; the King was acting dictatorially; commoners were being excluded from government unfairly and unjustly, among other things

3. Several processes and events helped to bring these claims and grievances to Tongans' ears in a way that was unprecedented in Tongan history. These included the fact that Tongans were now mobile and were able to move between Tonga and outside jurisdictions and back again bringing new knowledge; Tongans achieving at higher levels of education meant that they were able to analyse and recruit phenomena to support their struggles in new ways; modernisation and globalisation were reaching Tonga's shores in various forms; the information revolution had reached Tonga. But two specific processes were at the forefront of bringing information to Tongans' attention in a new and provocative way: these were the evolution and proliferation of the media that saw an explosion in the number of newspapers and broadsheets in Tonga and amongst Tongan communities overseas; and the specific rise of the prodemocracy movement which was to be formalised as a movement in 1992.
4. These processes and events linked public grievances over government misconduct to demand for legally enforceable rights to a greater demand for political participation to the demand for greater democracy. This is the context in which Pohiva's case was heard and decided.

## **2. The cases and their legal significance**

### ***Pohiva v Prime Minister and Kingdom of Tonga*** - Pohiva v Prime Minister of Tonga

Facts: In 1988, 'Akilisi Pohiva brought a case of wrongful dismissal before the Supreme Court. He had been appointed to the Dept. of Education in 1964, where he served for 21 years in a series of positions. This culminated in promotions to Senior Education Officer in 1984 and 1985. Pohiva set up a current affairs programme on the local radio station in 1981. The views and thoughts expressed on the programme caused concern in high places. One programme in particular caused distress – 26<sup>th</sup> December 1984 - during the programme, comment was made adverse to alleged salary increases for Ministers.

Cabinet resolved that Pohiva be summarily dismissed without warning. No official explanation was given and the court stated that he was given no opportunity to exonerate himself. Alongside wrongful dismissal, this case also contain claims pertaining to breach of contract, tortious interference with constitutionally protected rights of free speech, and breach of principles of natural justice as applied to the exercise of a statutory power.

Held: 1) plaintiff has no claim for breach of contract, as the Crown has the power to dismiss at will; 2) the defendant has breached a duty to permit the exercise of constitutionally protected rights of free speech; 3) the defendant, whether acting under statutory power or the prerogative, has breached the principles of natural justice; 4) measure of damages is lost salary for 27 months.

### **Points of legal significance**

- **Cases referred to in judgment:** 17 cases, of which 2 were Tongan. The other 15 were from England or NZ. One particular example which struck me as interesting is the way in which Martin CJ used or chose not to use cases: when talking about the development of the natural justice principle, his Honour stated “I should add that I derive no help from the one Tongan case cited – *Tu’akoi v Deputy Premier* – or the Tuvalu case of *Toafa v Attorney-General* – as the courts in those cases did not specifically address the issues of breach of constitutional rights or administrative law remedies.
- **The language of the judgement** – quite vociferous in tone; the court found that the defendant breached the principles of natural justice with regards to the procedure for dismissal. When talking about the Cabinet meeting which led to Pohiva’s dismissal, we find out that Pohiva did not know that they were discussing his “future”. “He was given no warning. He was given no opportunity to explain or to make representations. *He was dealt with in a manner which can only be described as arrogant and arbitrary*” – this, in my humble opinion, is a very strong statement.
- **The use of common law:** carrying on with the dismissal procedure, there was an issue as to who had the power to do it. Section 17 of the Govt. Act gives the power to the Premier in Cabinet to dismiss Government officers. The Civil Service regulations give the power to the Privy Council. Due to the fact that regulations do not have the force of statute, section 17 would prevail.
- However, the procedure for dismissal was not set in statute at the time so the common law was used to “fill the gap”. Civil Law Act – sections 3 and 4 – common law of England applies, but only as far as there is no other provision in Tongan law. Martin CJ then proceeds to take us through an analysis of the common law as it relates to Pohiva’s claims; in contract, tort and administrative law.
- **Natural justice:** natural justice requires that a person is entitled to know what complaint is made against him and to have an opportunity to give his explanation. “Whether the plaintiff was dismissed under a statutory power contained in the Government Act or, as the defence argue, under the Crown prerogative, the exercise of that power may be reviewed by the court – not as to the decision itself” but to the way in which that decision was reached
  - Refers to the usual cases – *Ridge v Baldwin*, our public law favourite *CCSU v Minister for Civil Service*, specifically Lord Diplock’s third head of “procedural impropriety” in terms of grounds upon which administrative action is subject to control by the courts; and Lord Fraser’s “legitimate expectation” doctrine.
  - If Pohiva had a legitimate expectation that he would be given notice of any complaints and the opportunity to put forward his explanations, the Court may set aside any decision where that expectation was not met – referred to Australian and NZ decisions of *Dixon v The Commonwealth*; and *Bradley v AG*
  - Came to the conclusion that because Pohiva was denied the opportunity to answer the allegations or defend himself, the decision-making process was flawed, meaning the decision itself was invalid.
- **Significance:** it is clear that this was a significant case politically and legally – the latter being in the sense that Pohiva was successful in an action against the government, at such a crucial time for Tonga in the late 1980s – the use of natural justice principles, other common law precepts and cases gives it significant legal weighting.

- One of the presentations relating to expatriate judges made a salient point with regards to whether judges' deference to local custom or culture gets in the way of judicial independence.
- Through some form of extrapolation – this could be applied in Pohiva's case; were the judges going to defer to what Tonga was used too (people losing cases against the government, King's power etc) or was it going to go a different way? It seems that the court began to pull away from this. I'm not even getting into the debate between custom and law, this is more a law against itself approach.
- Whereas some may be sceptical about the use of common law in certain situations, in my humble opinion it was used effectively here and for good reason.

### ***Tu'ipeatau v Kingdom of Tonga***

This concerned an application for leave to seek judicial review of a decision made by Cabinet. The decision was a decision to dismiss the applicant from the civil service. So similar to Pohiva's one, the applicant in this claimed that he was not given an opportunity to put his case before the decision was made – it was a case of natural justice.

- Tu'ipeatau was the Registrar of Cooperative and Credit Unions. In 1994, he was away on duties in Niuatoputapu. During this time, his staff delivered a letter consisting of complaints and allegations about him. He returned and was transferred to other duties – and was subsequently given a copy of the latter on March 21<sup>st</sup>. In answer to the allegations set out in the letter, he wrote a full explanation on 29 March.
- This case deals with a memo written about the applicant a year earlier, to which he had no opportunity to respond – it contained 8 allegations against the applicant. Then this whole correspondence began between the applicant and the Secretary of Labour, Commerce and Industries – where the applicant questioned the legality of various matters, resulting in an Auditor-General's report on the situation. That report referred to some money (this is where it all begins to make a little more sense) – and the applicant had to account for it.
- In June 1995, Cabinet decided to dismiss him upon allegation of favouritism, unauthorised use of government property and misappropriation of public funds. In the end, this application for leave was dismissed as it was clear to the court that the applicant was aware that he was under scrutiny - he had plenty of time to respond to the various memoranda and letters – there was however a breach of natural justice with the critical memorandum sent in 1993. The way in which those later allegations were responded to must have directly affected the cabinet's decision to dismiss him in 1995.
- In coming to a decision, Finnigan J referred to the case of *R v Civil Service Appeal Board ex parte Cunningham* – which dealt with statutory decision making tribunals not employers who are dismissing employees. Because of its statutory basis and judicial function, the CA in that case held that natural justice required the board to give sufficient reasons for the parties to know the issues which it considered.
- **Crucial point here:** the present case, Cabinet was not an appeal tribunal, not carrying out a review function or acting as a judicial body. The lower courts had rejected the principle which counsel for the applicant suggested should become a natural justice principle in Tonga

– this is the claimed general rule of common law/natural justice that a public law authority should give reasons for its decisions.

- **Rules of natural justice are not engraved on tablets of stone** – Lord Bridge in *Lloyd v McMahon* – meaning what the requirements of fairness demand depends on the situation, the character of the decision-making body, the types of decisions it makes and the framework within which it operates.
  - When a statute has conferred on any body the power to make decisions affecting individuals, the courts will require that the statutory procedure be followed. If fairness is to be attained, courts will also be able to find on the evidence that there were additional procedural requirements – such as stating reasons for a decision.
- Here though – Finnigan J applied the administrative law principle that reasons for decisions, even when required, need not be stated if they are obvious. His Honour cited Lord Lane CJ in *R v Immigration Appeal Tribunal, ex p Khan*, a 1983 English case.
- As we can see from here – there is a distinct interplay of Tongan and English law. In particular, when one reads the case – one can see particular engagement with different strains of administrative legal thought by counsel on both sides. The events of the case occurred in 1995, but had continued up until 1999.

**Other cases:**

- a. ***Siale v Fotofili*** – 1987 case - challenged procedures of the Legislative Assembly used to determine compensation for its members. Concluded that it could investigate whether the allowances paid out of public funds were calculated correctly – actions of individual members, so not considered internal proceedings. The court here did refer to the incorporation of English law in Tonga, stating that commonwealth decisions on parliamentary privilege were not binding in Tonga and only of persuasive influence. Because the Constitution and Legislative Assembly Act had statutory provisions relating to the issue, there was no need for importation. This was interesting for that reason.
- b. ***Sanft v Fotofili*** – challenged procedures used to pass a bill. The Court concluded that it had no power to rule on the validity of the Assembly’s internal proceedings

**There was a whole host of media-related cases in the late 1990s, early 2000s – relating to the freedom of speech and expression, and the oppression of the media. That requires another paper altogether!** Between 1987 and 1990 the reform movement began to draw followers. This resulted in its advocates’ success in parliamentary elections. Eventually seven of nine of the people’s representatives were members of the HRDM. At a time of growing public support for change, the Legislative Assembly ordered Clive Edwards, the Minister of Police, to arrest ‘Kalafi Moala, Filokalafi ‘Akau’ola, and ‘Akilisi Pohiva – the three leaders of the reform movement. The defendants were charged with contempt of the Legislative Assembly for publishing an article in the *Taimi ‘o Tonga*, a government opposition newspaper – **these cases are *Edwards v Moala; Edwards v Pohiva; Akau’ola v Kingdom of Tonga* – where all three tried several times to obtain writs of habeas corpus.**

- **Lali Media cases** – challenging the constitutionality of the *Protection from Abuse of Press Freedom Ordinance 2003* (PAPFO), arguing that it was contrary to freedom of opinion

and press. The court stated that ‘prerogative power is power which is possessed by the Crown but not its subjects.’ It is ‘based on the supreme sovereignty of the Monarch and the concept that the King can do no wrong.’

- a. However, the court noted, ‘the modern position of the prerogative is that it is limited by the common law and the Monarch can claim no prerogative that the law does not allow.’ The court concluded that when the prerogative is defined by statute – as occurs in the Tongan Constitution – it is thereafter subject to that law.
- ***Attorney-General v Namoa*** – contempt of court, ‘Esau Namoa stated that Chief Justice Hampton had no authority to pass judgment on cases dealing with land matters in Tonga. Additionally, Namoa asserted that ‘the Chief Justice had no authority at all to give judgment in [the case of PPEL v. Masima].’ Namoa was later arrested and charged with contempt of court for those statements.
    - i. The contempt alleged against Namoa was that his ‘comments scandalised the Court. The court further reasoned that in a small community, with few judges and a relatively undeveloped press and media, the level of criticism likely to undermine public confidence in the administration of justice is lower than in a larger community more familiar with and better able to evaluate the remarks of commentators in the media.
    - ii. The court concluded that the test to be applied to Namoa’s comments was whether they posed ‘a real risk of undermining public confidence in the administration of justice.’ In other words, the court examined whether Namoa’s comments had a tendency to undermine the authority of the court itself

**The media cases are particularly indicative of the political situation at the time – Pohiva and crew had found an avenue of redress in the courts – and began challenging oppressive media laws passed by Parliament in 2003, resulting in a jostling of sorts between the two sides.** Whereas in NZ, we may take this kind of thing for granted, it seems there was a real development going on ever since Pohiva’s case – it almost seems as if the courts became comfortable using administrative law language, especially where individual rights were concerned.

### **3. Political implications**

- The call for democracy, from the beginning, was a call for limited democracy. Limited democracy in the sense that there was not a demand for the overhaul of the system but for changes to be made within the framework of the 1875 constitution while the demands themselves were limited to calls for more accountability (government being accountable to a parliament that is fully or mostly elected by the people – an old Tongan term was used to describe this new idea *taliui*); transparency (decisions being made in an open and consultative way – a new term was coined to describe the idea *aata-ma’a*); democracy was understood to be the opening up of government to more political participation by commoners/majority of people. This was to be expressed through increasing the number of

people's representatives in parliament to make representation proportional to numbers in the various sections of society<sup>4</sup>.

- The Pohiva case began first principles such as the need to recognise individual rights vis-à-vis the government; justice; fairness; making government administration more transparent and accountable to agreed regulations and procedures. It was a very public case that tested the power of the state (in this case the authority of Cabinet). It was tested the power of the monarch, because there was an assumption on the part of Cabinet that their actions were an extension of the authority of the King. On the other hand, it tested whether Tongans had rights under the constitution and whether these were enforceable in the court. And if so, how were these rights to be extended to the political arena. This was the political significance of Pohiva's case<sup>5</sup>. Nothing before this had ever challenged the government and by implication the monarchy in this way.

#### **4. Commission set-up in 2008/Elections in 2010/constitutional amendments**

- These cases plus the style of constitutionalism Tonga had adopted and developed meant that politics have been conducted largely in constitutional terms<sup>6</sup>. The Constitutional and Electoral Commission was set up in 2008 to make recommendations on constitutional and electoral reform. After consultative meetings with Tongans in Tonga and overseas, its final report was submitted in November 2009. From its recommendations, parliament agreed to the following amendments to the 1875 constitution, among other things: the monarchy gave up its executive powers to Cabinet and parliament; a reconstitution of the privy council was completed; the majority of cabinet ministers had to be chosen from elected members of parliament<sup>7</sup> by the prime minister but confirmed by the monarch; to make government more accountable, a vote of no confidence motion on the prime minister and his Cabinet was institutionalised; to institutionalise greater participation by people in government and politics, the number of people's representatives was increased to 17 while the number of noble representatives remained at 9 – the prime minister was given the power to appoint up to 4 ministers from outside parliament. In addition, to give effect to the new parliamentary configuration, electoral boundaries were redrawn and increased to create separate constituencies that were meant to vote on local rather than national issues. The 2010 election was conducted on lines that resembled the ideas and structures that were first aired in the 1980s and particularly those arose from Pohiva's case

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<sup>4</sup> The old configuration was: in a 30 member parliament 12 were cabinet ministers and chosen by the king; 9 were chosen by the 33 noble titles and 9 were chosen by the 100,000 or so commoners who were the absolute majority in society. Yet this was not reflected in the numbers in parliamentary representation.

<sup>5</sup> Pohiva is the most prosecuted individual in the history of Tonga

<sup>6</sup> The riots of 16 November 2006 is regarded as an anomaly in the struggle for democracy and is certainly the exception rather than the rule

<sup>7</sup> Previously, the monarch was not restricted to appoint ministers from members of parliament. And he could appoint and dismiss without advice or reason