APPENDIX 28

(FAKALAHI 28)

Submission to the **Royal Land Commission**

Nuku'alofa

Kingdom of Tonga

by ***Guy Powles** dated 4 June 2011

Introduction

I respectfully offer this brief submission, which arises from my reading of the material provided by the Royal Commission, including the detailed Interim Reports. My earlier study of Tonga's land administration system was in the 1970s, when I was particularly interested in how it had developed since its inception in response to Tonga's needs. Today, it seems that the context in which the land system operates has changed again over the past 30 years. Not only has pressure on operation of the system greatly increased but the impact of recent political reforms may be felt in this sector, as in others.

For these reasons, I am led to suggest that thought be given to the establishment of an independent, standing statutory commission, perhaps called a 'Land and Development Commission', or 'Board'. The suggested detail of such a commission or board will be fleshed out towards the end of this paper. That is my first submission.

There is a second matter that I wish to raise. This concerns the distribution and securing of land rights, beginning with the scheme under which young (16 yrs and over) male residents were to be granted allotments. The scheme, which drew much praise when it was introduced as part of the vision of King George Tupou I for a new Tonga, developed into a legal regime of rights which was administered under statute. The land rights scheme proved difficult to implement. It so happens that I did some research on it, in effect reviewing it up to 1976, and I feel I should provide my data and assessments to the Royal Commission. The findings were that a number of problems could be identified which led to conclusions of some concern. For example, in 1976, less than half the land area of Tonga (45%) was held under registered allotments (*'api* and town), while 29% was occupied informally as allotments. Sixty per cent of eligible males held the registered allotments.

Although the situation has by now changed significantly, I respectfully suggest to the Commission that, if it has not already done so, it should consider how the regime of land rights stands today. I will discuss my earlier research in the Appendix to this submission.

In opening my submission, I wish to make it plain that I believe your Royal Commissioners are considerably more knowledgeable in these matters than I am. I apologise if I bore you with trite statements. Apart from my 1970s research, I cannot present to you any new facts, and I regret that there may be errors, but for this submission to make any sense, I am obliged to assemble

material to support it, as best I can.

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Why is a commission suggested at this time? In its first Interim Report, your Royal Commission has indicated its desire to see major functions of the present Ministry transferred to associated bodies, which, with respect, would seem to be highly desirable. The Royal Commission is also considering new technologies for computerisation, security and guarantee of land records. These reforms, if adopted, will bring Tonga's land system into the 21st century. A great deal of re-organisation and training of staff would be required. However, are there also fundamental matters concerning underlying responsibility for the system which could be addressed during a period of re-organisation? The following submission, by an outside observer of Tongan history, law and society, takes a broad look at this question.

Philosophy of the basic land tenure

The Terms of Reference of your Royal Commission would exclude recommendations which would change 'the basic land tenure of the Kingdom of Tonga'. The suggestions I am making accept the land system's design and tenure principles, and look at the area of authority and responsibility behind their implementation.

Initially, authority to control rights and use of the archipelago of Tonga originated in kinship descent groups and larger *ha'a*, subject to rights of conquest. As I understand it, the foundation premise concerning lands in the 19th century was that the islands and island groups of the archipelago belonged to the victor in wars, from which King George Tupou I emerged as the architect of a new form of government and system of land tenure. His objectives shaped the future. He sought to control the extent and manner of land-holding by competing chiefs, and at the same time to introduce far-reaching innovations, such as the prohibition on the alienation of land (ruling out both 'freehold title' and access to land by foreigners) and eventually the rights of all males to obtain securely registered allotments on *tofi'a* or Government land near where they resided. Productivity and revenue were also considerations.

The first steps taken by Tupou I were –

- to divide the total area of Tonga between the Monarch and Royal Family, the Government, and *tofi'a* holders (predominantly Nobles);
- to declare a system of tenure based upon life interests inherited according to strict rules of succession (which came eventually to be interpreted by the courts); and
- to establish a Government under the Constitution and Laws containing a Ministry of Lands which would be the legal edifice within which all land would be administered.

At the outset, the authority for declaring ownership of all land and carrying out those first steps was the natural right of the conquering

King. Then, when he created an independent state, the Kingdom of Tonga, under laws which bound every Tongan including himself, Tupou I ceded general authority in land matters, among others, to that state entity (of which, of course, he was the head).

Eventually, conventions developed around the use of terms such as 'the Crown' and 'Crown lands', to denote the roles of Monarch and Government, both acting on behalf of the Tongan Kingdom and its people. Examination of the legal history shows that the Monarch's only remaining personal authority relates to hereditary estates which might revert to him, and, of course, to the estates of the Monarch and Royal Family.[1] Today, the land system is the responsibility of Government, with the reservations discussed below.

The land scheme's rules of tenure are of essence to it. Adoption of the inheritable 'life interest' concept instead of 'freehold' meant that there was always a reversionary interest, which was resumed if succession to the life interest failed or other statutory requirements caused the land to be resumed by the holder of the reversionary interest. In the case of *tofi'a*, the reversionary interest was held by the Government or Monarch (depending on the stage in history) and for allotments it was held by the relevant *tofi'a* holder or the Government. Once a grant was registered (of a *tofi'a* or an allotment), strict rules of succession applied. Land held as a life interest could be leased for limited periods by individuals and enterprises, thereby perhaps creating another category of persons, lessees, with a 'stake' in the land system – a stake that could have importance for economic development.

For its success, the 'allotments' component of the system depended on a policy-driven, efficient, equitable and productive distribution scheme that delivered a registered and secure title – and the history and recent data tell us that this has proved very difficult to achieve. As far as the law is concerned, the land system remains largely unchanged today, but its implementation is being reviewed by your Commissioners, and, in this regard, I have submitted that the distribution and security of rights deserve attention.

Impact of political reforms

It is submitted that the question should be asked - Is this now the right time to review how the interests of the different 'stakeholders' in the system are recognised, given expression to, and taken into account? Allied to this would be an examination of where authority lies, with associated responsibilities, for the maintenance of the basic tenure system.

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[1] For some historical treatment of this subject, see the Appendix below – 'Historical note on two concepts: 'the Crown', and land rights policy'.

To begin with, it would seem that current political reforms would, in the ordinary course, have some impact on the laws that provide for the land system, just as they do in the case of health, education, finance and other sectors of government. However, the land system has been temporarily insulated from change by two decisions of the former Cabinet under Lord Sevele.

First, reforms concerning the changed powers and functions of the Monarch, Privy Council and Cabinet as seen generally in the amending legislation last year were not made to apply to the Land Act.[2] Second, special provision was made to ensure that, during this first four-year term of the Legislative Assembly under the new political arrangements, the Minister of Lands would continue to be a Noble.[3] It is not clear to me whether your Royal Commission will examine matters arising from political reform, but it is part of my submission that such matters may be very relevant to the future of Tonga's land tenure system, especially long term.

Perhaps it is helpful to summarise the recent general changes to the powers and functions of Tonga's Executive and Legislature, together with some exceptions. My understanding (always subject to correction) lies in the following five broad propositions –

i). The Monarch [4] has ceded almost all of his executive powers to the Prime Minister and Cabinet. The Monarch's Privy Council is merely advisory to him, no longer includes Cabinet and has ceased to be part of the Executive (possessing no law-making, rule-making or executive powers).

ii). Law-makers in the Legislative Assembly comprise nine Noble representatives elected by the Nobles and seventeen ordinary representatives by universal adult suffrage (excluding Nobles). The Monarch appoints a Noble representative as Speaker. The Assembly's term is four years.

iii). After a general election, the 26 Assembly members recommend a member to be Prime Minister. The Monarch appoints that member as PM, and then, on the nomination of the PM, appoints elected members as Ministers, plus up to four from outside the House – so that the total number of Cabinet Ministers (including the PM) is less than half the number of elected members (excluding the Speaker) – i.e. a

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[2] The *Land Act* was not included in the large number of statutes that were amended by the *Miscellaneous Amendments (Privy Council) Act 2010* or the *Miscellaneous Amendments (General) Act 2010*.

[3] Under the *Government (Amendment) (No2) Act 2010* which came into force on 8 October, the Minister of Lands must be appointed from one of the Nobles' representatives in the House.

[4] I am using this term respectfully to include His Majesty, the present King, and his successors.

minority in the House of not more than 12 members out of 25.

iv). Subject to certain powers reserved for the Monarch, the elected Cabinet is the supreme executive authority of the Kingdom. The PM and Cabinet, bound by rules of collective responsibility, are accountable to the House, and no longer to the Monarch. 'Government' means the Cabinet, which remains in office for four years, unless earlier removed by a successful motion of 'no confidence'. [5]

v). In addition to his roles as traditional *Hau* and Head of State, and functions relating to hereditary and honorary titles, the areas in which the Monarch has retained certain authority include land (as discussed here), the judiciary and the legislature. As to the last, the Monarch continues to have power to withhold assent to legislation and to dissolve the Assembly. (Constitutional limitations remaining on the making of laws relating to the King, Royal Family, and titles and inheritances of the Nobles are mentioned below.)

Before the reforms

Turning back to a reading of the 19th century pre-reform Constitution and Land Act, most of which had been operative for so long as to be almost traditional, one is led to the conclusion that it was always intended that the interests of the Monarch (including the Royal Family) and the *tofi'a* holders would be protected from change in several ways. Principally, this would be achieved –

i). in the Executive, by the Monarch's power to appoint all Ministers and preside at Privy Council;

ii). in the Legislature, by reliance on a majority of votes easily obtained through a combination of appointed Cabinet Ministers who sat in the House, and Nobles' representatives;

iii). by a constitutional guarantee to the Monarch and Nobles that Nobles in the Assembly had the exclusive right 'to discuss or vote upon laws relating to the King, Royal Family, and titles and inheritances of the Nobles' (cl.67), together with constitutional wording which would, on its face, prohibit any amendment on such topics (cl.79); and

iv). by the Monarch's power of veto (cls 56 and 68).

The last two protective measures have not been affected by last year's reforms.

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[5] As the Land Act has not yet been reviewed to take into account the reforms, s 19 declaring the Minister of Lands to be 'the representative of the Crown in all matters concerning the land of the Kingdom' may perhaps be looked at, with these paragraphs and the Appendix in mind.

Unresolved provisions of the Constitution and Land Act

In light of the political reforms introduced and safeguards removed, it may be important to consider what approach to take to those provisions that have been left out of scrutiny so far – see text around footnotes 2 and 3 above. As I understand it, the Privy Council and/or Cabinet as constituted under the pre-reform law (Constitution and Land Act) were involved in dealing with aspects of matters such as approval of leases and renewals, fixing rental rates, 'acceptable' mortgagees, compulsory redemptions, adequacy of land for allotments, subdivisions, surrender and exchange, use of foreshore, and cultivation.

Will questions now arise? Should a new advisory Privy Council be involved? Should Cabinet, which is responsible for land policy, be bothered with the detail of its administration? Or could most of these matters be handled by an independent, statutory commission or board acting under policy guidelines, and using procedures designed to ensure outcomes such as legality and fairness between *tofi'a* and allotment holders, and the promotion of economic development?

Essentials of the system, and associated social values

Under the heading 'Philosophy of the basic land tenure' above, I set out my understanding of the essentials of the system, as they appeared from early accounts, mainly from the point of view of the Monarch and Government. What is harder to do, as an outsider, is to assess how the different stakeholders in the system regard their respective roles today. I am not qualified to say much about social values, but, relying on my research, which includes submissions made by others to this Royal Commission as well as to the Constitutional and Electoral Commission, I have formed the tentative view –

> i). that the Monarch retains the respect and loyalty of the people, as a 'core' value. The foundation role of the Monarch's ancestors is appreciated, but today there is little, if any, expectation that his authority should be exercised directly in land matters;
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> ii). that the focal point of people's expectations is the Government (primarily the Ministry of Lands). Such expectations are that the resources and expertise of Government will be organised so as to safeguard the rights of all concerned in a fair and business-like manner, resisting all attempts to influence decisions;

iii). that *tofi'a* holders are accorded traditional respect when they show leadership, know their people and pay close attention to the interests of allotment holders. Where this does not occur, complaints are made and tensions rise. The secure position of *tofi'a* holders under the law may be resented. I have heard conflicting opinions as to whether loyalty to one's *tofi'a* holder, although it may be expedient, is a 'core' value today;

iv). that, for their part, *tofi'a* holders frequently feel reliant on the support of the Monarch in the political sphere. Their status in land matters appears secure under the Constitution, but the political reality is that, under an elected Government, that could readily be changed, unless the Monarch intervenes;

v). that people living on the land include –

- registered allotment holders,
- 'holders' of allotments allocated but (for a variety of reasons) not registered,
- people who aspire to, or merely share, an allotment,
- those who live in one place and control land in another,
- people who borrow land or pieces of it, and
- those who hold a lease,

all of whom have interests that they want to protect, but often lack the knowledge or means to do so;

vi). that claims, disputes and general dissatisfaction over rights to land have polarised viewpoints and helped to bring the Ministry bureaucracy into disrepute, and a major consequence has been a sense of uncertainty, anxiety, even fear, over loss of rights or livelihood, or limitations imposed on them;

vii). that the economic development of land-based resources, whether through holder-managed agricultural endeavour or leasing to entrepreneurs, requires stimulation by Government; and

viii). that, as a sector of activity, the land system is of the utmost importance. Its overhaul should reflect changes in the political system and development needs. In the eyes of many, land reform is as crucial to Tonga today as political reform.

Guardianship of the land system

In what directions might the Royal Commission be looking in its search for leadership, and a blueprint under which a revised and greatly improved land system might endure, with its principles intact and objectives achievable, into the future?

The Monarch: Clearly the Monarch has been the rock upon which Tonga's unique system has rested. As in the case of the political system, the concept of hereditary Monarchy provides a foundation which enjoys almost universal loyalty from the people. The question here, I submit, is whether reliance on the Monarch – and reliance on his remaining constitutional powers and unparalleled influence – to safeguard the land system and steer it through a period of administrative upheaval and political change, is a wise policy. I would suggest that it is not.

Recent history tells us that the most enduring monarchies reigning [6] over educated populations have been those that have remained aloof from government and politics, while fulfilling traditional leadership roles. When His Majesty King George Tupou V came to the throne, he made it clear that he would devolve his executive powers upon Cabinet and divest himself of financial interests that might conflict with his status as independent impartial leader of the people.

Unfortunately, overhaul of the land system is potentially a highly contentious arena, and, even although the present Minister of Lands and Cabinet will strive to handle reform without too much debate, there is the prospect that, from time to time, members of the Assembly may be divided on a number of issues, and public opinion may become polarised. It would be unfortunate for the Monarch to be in a position of authority where he would be exposed to the 'rough and tumble' of political contests.

***Tofi'a* holders:** This group has already been under pressure to make concessions in the political reform process, and is perceived to be rather on the defensive. Logically, it would seek to 'hold the line' in the course of the Royal Commission's review of the land system. However, the bold action taken by the Honourable Noble Fakafanua in the Assembly on behalf of *tofi'a* holders goes further and seems to make a sweeping claim to assert a right (instead of the Minister) to make the grants of allotment from *tofi'a*, and the power to decide all relevant aspects of leases of *tofi'a* land (original approvals, transfers, renewals, etc). [7] Other changes in the law are also proposed.

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[6] Recognition of the recent change in role of His Majesty is seen in the use of 'reign' in place of 'govern' and 'rule' in Clauses 17 and 41, respectively of the amended Constitution. (I had to consult the dictionary to find that the difference in meaning is quite significant – 'to reign' is 'to be king', while the other two verbs usually connote 'exercising decisive influence' or 'keeping under control'. I am not sure that many people normally bother with the distinction, but, in English, it clearly has constitutional significance. Amendment to the Tongan version of the Constitution was not considered necessary.)

[7] It is not clear from the summary provided by the Royal Commission whether the reversal of authority sought by *tofi'a* holders would deprive

Instead of submitting reasoned proposals to the Royal Commission, Lord Fakafanua, as Ha'apai representative No. 1 in the Legislative Assembly, has apparently tabled Amendment Bills to the above effect – which might seem to be a pre-emptive and rather improper move, having regard to the widely publicised Terms of Reference of the Royal Commission. Naturally, the Assembly has referred the Bills to the Commission.

There is evidence that *tofi'a* holders have acted selfishly in the past (see Appendix to this submission). If relations with people on their land are very much better now, there nevertheless remains the likelihood that it would be unacceptable today for the fate of key land rights to be controlled by one group of stakeholders. The action of Lord Fakafanua is an indication, if such is needed, that issues of land reform are likely to become politicised, if not now, in the not too distant future.

The Ministry of Lands: The Royal Commission has indicated the direction of its thinking in relation to the core functions, future structure and staff training within the Ministry. When these objectives have been accomplished, one expectation – a possible view – might be that, under the close watch of Cabinet through the Minister, the Ministry would be entrusted with full responsibility for achieving the broad goals of a fair, equitable and productive land tenure system. The main difficulty with this line of thinking is that, historically, the Ministry has been seen as part of the problem. Further, in relation to dealing with a wide range of matters, including allotments on Government land, the granting of leases and the taking of land for public purposes, the Ministry is 'judge in its own cause'.

Another matter of concern is perhaps that the interests of people residing on the land (*tofi'a* or Government), or desiring to do so, who do not have registered allotments may be different from those with registered rights. Is the Ministry responsible for taking into account (as a matter of public interest?) the needs of such people?

Finally, it seems possible that the Monarch and *tofi'a* holders would be successful, to a degree, in retaining a controlling – or at least – very influential role in aspects of the system as administered by the Ministry.

Could such a Ministry then be seen to be independent and incorruptible so as to enjoy the confidence of the people at large? This could only be achieved through being accountable. In terms of constitutional authority, the Ministry is accountable through its Minister to Cabinet and so to the Legislative Assembly. There, however, it is always possible that the law relating to the Ministry,

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allotment holders of all access to the Minister – such as an appeal against a *tofi'a* holder's refusal to grant an allotment. It should also be noted that, at no time in the history of the land rights scheme have the *tofi'a* holders been recognized as the appropriate authority – see Appendix.

and the land tenure system, may be changed with an ease not hitherto experienced in Tonga.

An independent standing commission / board: It is submitted that the best option is for key aspects of the land tenure system to be supervised by an independent, standing statutory commission or board. For the sake of present discussion, such a commission would have the following functions, but others may come to mind.

The commission would inquire into, and make recommendations to His Majesty the King, the Minister and Cabinet from time to time on, the following subject matter –

i). **major policy issues**, and specific cases when they arise, concerning such matters as the availability of land for allotments, the size of allotments, holders ceasing to live on their allotments, abandonment of holdings, the rights of absentee holders, categories and terms of leases, leasing between Tongans, land use priorities for productivity and development (in conjunction with Ministry of Agriculture, etc.);

ii). **the numerous matters** which are currently the responsibility of the Privy Council and Cabinet. These have been mentioned above under 'Unresolved provisions of the Constitution and Land Act', and a few are noted again in the footnote to the next paragraph iii).;

iii). **review of administrative decisions** made by the Minister in areas where officials are entrusted with discretions in the implementation of policy [8]; and

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[8] A quick tour of the Act threw up the following administrative decisions involving exercise of discretion – whether land 'has become available', s 7; what amounts to 'prior consultation', ss 8, 34(2); 'projects of general public interest and benefit', s 10; whether 'such portions of the estate as ... will not, in the opinion of the Cabinet, be required for allotments within the term of the lease', s 33(1); whether to reverse *tof'ia* holder's refusal to agree to grant, s 34(2); meaning of 'belonging to another locality', s 35; whether to reverse *tofi'a* holder's refusal to grant new lease, s 36(1); what amounts to 'without reasonable cause' if refusing to accept the land granted, s44(1); whether there is 'sufficient land for the purpose' when considering the amount of land available for tax allotments, s 47(1); 'to facilitate survey of the prescribed areas', s 49; land available for allotments, s 50; 'whenever it is possible so to do' to subdivide, s 53(1); 'discretion' to permit exchange, and 'the benefit of a minor', s 55; consent to renewal of lease, s 60; 'planting and upkeep' of the allotment, s 62; whether he has not maintained the allotment 'in the average state of cultivation for tax allotments in the district', s 68; whether he desires to 'remove permanently', s 72; whether land in the estate or Crown Land is 'available', s 73; the 'state of cultivation', s 94; 'compliance with planting' and the 'ability and character' of the applicant, s 95; for the purposes of 'improvement of the allotment', and whether the 'use to which the loan or advance or consideration is to be put constitutes an improvement', s 100;

iv). **the handling of complaints** received by or lodged against the Ministry of Lands, which the commission would oversee, and where an administrative appeals tribunal (see below) would make final decisions..

On a day-to-day basis, the commission would work closely with the Minister, particularly with regard to developing policy and providing advice. However, in relation to some matters mentioned above, mainly under categories ii)., iii). and iv)., it may well be that independent investigation and decision are desirable, in which case the determinations of an administrative appeals tribunal attached to the commission would be final, requiring the Minister to act on them.

An annual report on all the above matters would be laid on the table of the Legislative Assembly.

As to composition and term, this suggestion is tentative. The proposed commission could consist of representatives of the Monarch and Royal Family, the Government, *tofi'a* holders and registered allotment holders as the four sources of interest in the administration of land in Tonga (the four 'stakeholders', to use current jargon). If each had a representative, and a chair was added, the commission would total five, with perhaps a full-time chair and part-time members. In the interests of containing cost, suggestions for a larger commission should be resisted.

With reference to concerns expressed earlier, if the interests of the other three stakeholders mentioned above are separately represented before the commission, the Government / Ministry through its representative would be free to make submissions in the broader public interest, for example to present information and expert evidence on the operation of the distribution scheme, access to land and policies relating to its use.

All commissioners would be appointed by His Majesty, for a fixed term of say, six years (to avoid political association with the Assembly's four-yearly elections). In the case of the representative of the Government, appointment would be on the recommendation of Cabinet, while in the case of *tofi'a* holders and registered allotment holders, His Majesty would act on the recommendation of those *tofi'a* holders and allotment holders respectively, who sit in the Legislative Assembly at the time of appointments. The commission would be serviced and funded by the Ministry of Lands, under the instructions of the Minister.

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what constitutes an 'unallocated part' of a *tofi'a*, whether the total amount of all land mortgaged 'does not exceed five per centum of the total land comprising the *tofi'a*', and whether the use to which a loan or advance or consideration is to be put constitutes 'an improvement', s 101; 'whether to dispense with the consent of the mortgagor', s 105.

A commission tribunal: The idea of an administrative appeals tribunal associated with the commission requires some explanation. Ministry officials regularly make the decisions required of them by the Land Act. The vast majority of the decisions involve simply applying the detailed statutory rules, but there is also a considerable number of decisions that require the assessment of facts and application of policy – thus the exercise of administrative discretion. Examples of such decisions are listed in footnote 8. Where the consequences of these latter decisions can affect people's livelihoods, etc, it is essential that the principles of natural justice should apply and that the decision-maker is impartial. The practice in most Commonwealth countries is for there to be a process of review available if required.

The Land Court is not the appropriate forum for such review functions. The Land Act has assigned a large range of disputes to the Land Court, particularly concerning title, succession and boundaries, together with the hearing of offences and proceedings for enforcement of the Act. However, in situations where the law is an instrument of public policy, as is the Land Act in giving effect to long-standing principles (such as that of the distribution and protection of land rights and the productivity of land across Tonga), administrative discretions exercised under the law are not the province of a Court of Law. The review of administrative decisions in a policy-driven area such as land administration is best carried out by a specialist tribunal.

It is suggested that an administrative appeals tribunal attached to the commission within the Ministry would –

i). provide experienced and impartial review of administrative decisions;

ii). encourage Cabinet through the Ministry to formulate policy and relieve it of the need to spend time on supervising its implementation; and

iii). act as an appeal body in respect of complaints against the Ministry.

The decisions of the tribunal would be final and not reviewable in a court, leaving the Land Court to deal with matters that should properly be before it.

As to its composition, the tribunal would comprise at least the commissioners representing *tofi'a* and allotment holders, a senior Ministry official and a lawyer or judge experienced in land matters as chair.

Constitutional status: Finally, it would seem essential that the independence of the commission should be secured by giving it constitutional status with a brief provision in the Constitution, and a detailed statute of its own, or at least a separate division of the Land Act.

Conclusion

For the reasons provided above, I respectfully submit –

1. that it would be in the country's best interests for the Royal Commission to investigate the feasibility of recommending the establishment of an independent, standing, statutory commission, as guardian of Tonga's land tenure system; and

2. that the Royal Commission examine Government policy and its implementation in relation to the distribution, registration and productivity of land, having regard to -

> **a).** whether all land that should be made available for allotments under the Constitution and Land Act has in fact been surveyed and made available,
>
> **b).** whether acceptable progress is being made in the registration of grants of allotments, and
>
> **c).** whether adequate use is being made of powers under the Land Act to stimulate and support productivity across the Kingdom.

Appendix to submission of Guy Powles:

Historical note on two concepts: 'the Crown', and land rights policy

Note on the Monarch and the Crown: The establishment of Tonga's first Government proceeded on the assumption that King George Tupou I was entitled to deal with land in any way he wished, since he 'owned' all the land in the Kingdom. He then chose to devolve most of his authority and accept limitations under the original *Constitution 1875*. This gave Government significant powers and responsibilities in relation to land: for example, Government owned all townsites, foreshores and roads (1875:cls 110 and 119) and *tofi'a* reverted to Government on failure of succession (1875:cls 126-7). The 1875 Constitution declared – 'The King is the Sovereign of all the Chiefs and all the people. The Kingdom is his.' (cl 47), and the 1882 Constitution put it this way – 'To the King belongs all the land, soil, inheritances and premises' (cl 109). In that year a change in the King's thinking provided that *tofi'a* without an heir would revert to the King, [9] which remains the position today (cl 112).

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[9] For further examination of the ways in which the laws developed, see Guy Powles, 'The Early Accommodation of Traditional and English Law in Tonga' in P Herda, J Terrell and N Gunson, eds *Tongan Culture and History*, ANU, 1990, pp145-169.

Your Commissioners are more familiar than I am with regard to interpretation of the Constitution and Land Act. In seeking to assess the role of the Monarch in land matters, one feature I wish to mention is the use of the terms 'the Crown', 'Crown land' and 'land of the Crown'. They first appear in the revision work of Basil Thomson in 1891 and published in 1907 as the *Law of the Government of Tonga 1903*. Chapter II:Administration, of this *Law* declared the Minister of Lands to be 'His Majesty's representative in all matters concerning land', giving him six major powers (ss 90-99), subject to review by Cabinet and/or Privy Council (ss 92,94,95 and Chapter XVIII). Chapter XVIII:Land, used 'the Crown' and 'Crown land' (e.g. ss 539, 557, 571-73) in different contexts. Thomson was aided and abetted retrospectively by successive British judges who carried out revisions of the laws of Tonga. The term 'Crown' crept into the Constitution and appears today in ten clauses. In the *Land Act 1928* one can see today some 40 provisions containing the term in one context or another.

I suggest there are at least three contexts in which 'Crown' is used, none of which refers specifically to the Monarch in his personal prerogative-carrying capacity. If this is correct, what meanings should be attributed to terms incorporating 'Crown'?

i). The most obvious meaning is that which goes with 'Throne' and indicates the status of the Monarch – e.g. succession to the Crown and Throne (Constitution cls 32-3, 35).

ii). 'The Crown' is a way of referring symbolically to the highest authority in the Kingdom, which is used in political and legal traditions associated with monarchies elsewhere, particularly in the British Commonwealth. Hence, Cabinet comprises 'Ministers of the Crown' even though they are appointed on the recommendation of the PM and are not responsible to the Monarch. Similarly, enforcement of the law is in the hands of 'Crown prosecutors', despite the fact that it is contrary to the 'separation of powers' for the Monarch to be involved.

iii). For a land and people governed by a Government under laws for all, the underlying title to the land is recognised as that of 'the Crown', now held by Government on behalf of the people as a whole – or the state, or the Kingdom. For example, when land is taken compulsorily by Government for public purposes it is called 'Crown land'.

The land of the Kingdom is divided, entirely, between three primary titleholders – the Monarch and Royal Family, the Government and *tofi'a* holders. The Royal Estates and the Royal Family Estates (*Land Act* Schedules II and III) belong to the Monarch's hereditary line, but, in the language developed in Tonga, and to distinguish them from the rest, they are not 'Crown land'. 'Crown land' means Government land. The Monarch's connection with such Government land is solely through the Minister of Lands, and that relationship is

determined by the political system, which currently requires the Cabinet to be collectively responsible to the legislature.

In recent times, it seems that underlying title to land is held by the 'Crown' in the sense of the Monarch as Head of State, on behalf of the State, i.e. the Kingdom of Tonga. The Monarch is no longer Head of Government, and thus, unless specific powers are conferred by Constitution or statute, the Monarch has no lawful authority generally in relation to land. This makes the Monarch's discretionary relationship with *tofi'a* holders special and unique (cl 104), as it is with the holders of titles of honour (cl 44). The Land Act offers an example -

> Section 41 Rules of succession.
> Upon the death of a holder of an hereditary estate the succession to the estate shall be as follows —
> .....
> (h) if upon the death, insanity or conviction for an indictable offence of
> any holder there is no heir to succeed to the title and estates, the
> estates shall revert to the Crown and shall be dealt with as Crown
> Lands until such time as the King grants the title of honour when
> such estates shall be granted to the holder of the title.

Today, the Monarch's authority to appoint a new Privy Council to advise him may also be significant (cl 50). Much will depend on whom he appoints. In this way, the influence of the Monarch may be enhanced, despite the devolution of executive powers.

Note on the *tofi'a* and land rights: As far as the public are concerned, the immediate 'owners' of land, with whom they deal on a regular basis, are either the *tofi'a* holder or the Government, depending on where their allotments lie. For a number of reasons, the relationship between *tofi'a* holder and allotment holder is said to be unique.

Traditionally, hereditary chiefs exercised power and influence over kinship groups, whether related or not. It is noteworthy that when the Assembly passed the historic *Hereditary Lands Act 1882* that established the far-seeing tax allotment reform, the scheme was imposed upon *tofi'a* holders, who were not given any say in the grant of allotments, and this was made explicit in the *Law of the Government of Tonga 1891* (reprinted 1903), which provided that *tofi'a* holders could neither refuse the Minister's grants of allotments nor dispossess holders (1891: ss 557-8, 561 and 563). The Minister was fully in charge of the scheme until 1915 when an amendment to the *Hereditary Lands Act* required him to consult the *tofi'a* holder before making a grant.

Importantly, the *tofi'a* and allotment provided fundamentally different legal environments. The *tofi'a* holder as chief could provide for his extended family, and often ensure that relatives and *matāpule* and their families could have permanent land with homes. Subject to heirs being found within the extended family, tenure was group-oriented and secure. On the other hand, tax and town allotments appeared to have been designed primarily for the benefit of the individual and his nuclear family.

The history of attempts by Government to encourage the distribution and securing of land rights throughout the Kingdom reveals the difficulties inherent in the enterprise. Rev. Dr Sione Lātūkefu was harsh in his comments on the entrenched constitutional *'eiki* status accorded to Nobles and the inequities of the scheme.[10] However, it is not my concern to relate such historical judgments to the present day, and, in any case, I am not qualified to do so. My research in the mid 1970s included a survey of the distribution of land rights (1954-76) and a study of the roles of Nobles and other *tofi'a* holders. This revealed data and concerns by informants as to the means by which the allotment scheme was used to the benefit of *tofi'a*

holders and to the detriment of people living on their land.[11] For example, in 1976 when registered 'tax' and town allotments accounted for 45% of the total area of Tonga, allotments allocated but not registered accounted for 29%. Research showed that in many cases a form of 'customary' tenure existed under which the resident on a *tofi'a* paid rent or tribute to the holder, claiming a right based on the latter's informal allocation of the land – which could be of longstanding. Due to lack of recognition of such 'rights' under the Land Act, the resident had no third party (eg the

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[10] Dr Latukefu observed that, in recognising a landed aristocracy, 'the Constitution in effect gave the Nobles a form of indirect power over their people.' He went on to refer to the necessary observance of obligations upon which security of tenure depended, and wrote in detail of the inequality that such relationships with *tofi'a* holders perpetuated. (*The Tongan Constitution: A brief history to celebrate its Centenary*, Tonga Traditions Committee, Nuku'alofa, 1975, pp 54-5).

[11] Guy Powles, 'The Persistence of Chiefly Power and Its Implications for Law and Political Organisation in Western Polynesia', PhD Thesis, Australian National University, 1979. This thesis may be of little interest to the Royal Commission. (I recall presenting copies of the thesis 30 years ago to the Director of Education and the USP Campus). In case there is interest, I have scanned relevant sections and sent them in PDF to the Commission's Secretary.

Minister) or forum (eg the Land Court) to appeal to. The *tofi'a* holder was in a position to exploit the situation. [12]

Of course, these comments constitute no evidence as to the nature of relationships today. Some people have said to me that land distribution is 'a lost cause' because population numbers are such that even if the whole of Tonga were divided up into allotments there would not be nearly enough land to go around. With respect, that statement misses the point. In the interests of the current population of the archipelago, the issue is whether all possible land has been distributed – and that may require a review of existing holdings, both *tofi'a* and allotment.

Also I have read assertions that 'all available land in Tonga' was taken up with allotments several decades ago – end of story.[13] If the official figures quoted in my research as recently as 1976 were correct (for example, that 45% of the land was registered allotments) such assertions may not be justified. Indeed, unless statistics continue to make the distinction between registered and informal grants of allotments, it is impossible to assess whether the original objective of security of rights has been achieved. I am told that tensions do exist in a large number of cases, and much of the evidence revealed in the Royal Commission's first Interim Report seems to support this.

Again, I re-iterate that your Commissioners are more knowledgeable in these matters than I am. I have put forward material, mainly well-known, and assembled it in a way that I hope constitutes a coherent submission.
GP

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[12] Powles, footnote 11, pp 292-320. My Table showing **areas of land** under different types of holding (registered, allocated but not registered, *tofi'a*, Government) appears at page 301 in PDF Group 3.

[13] For example - 'There has been no land available for allocation of allotments for several decades' from Kingdom of Tonga, *Looking to the Future Building on the Past, Strategic Development Plan Eight, 2006/07—2008/09*, Nuku'alofa, 2006, p70.

Note on extracts from Thesis of Guy Powles

These extracts of some 40 pages were scanned for the Royal Land Commission on 24 May 2011. The Commissioners are respectfully requested to bear in mind the following points:

1. The research behind the thesis study was carried out 35 years ago, and does not necessarily reflect my thinking today. It was very much a constitutional lawyer's view of developments over the preceding 100 years, based on the writings of others, together with, for Tonga, the reports and statistics of the Lands Ministry. The study did not claim a deep understanding of Tongan society.

2. These extracts were chosen to provide information behind my submission to the Royal Commission, and could be misconstrued if read in any other context.

3. For these reasons, while the extracts may be used in any way the Commission thinks fit, I request that the 40 pages not be made available, as such, to any person without my consent. Of course, the whole thesis itself is a public document, and I have no concern about the thesis being widely available.

4. The whole thesis comprises - preface 12; eight chapters 369; appendices 24; bibliography 25; total 430 pages.

The following part of this Note contains a list of the references mentioned in the extracts. It is a short list (relating only to the extracts), taken from a 25-page bibliography.

Accompanying the Note are the following three PDF documents –

PDF Group 1 = 9 pages – Front page; List of contents; Abstract

PDF Group 2 =13 pages – pp 252-266

PDF Group 3 =16 pages – pp 292-307 (pp 292 and 293 may be in the wrong order)

For my Land Areas Comparative Table see page 301.

Guy Powles

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LIST OF REFERENCES – only those mentioned in the attached extracts

Aoyagi, Machiko 1966, 'Kinship organization and behaviour in a contemporary Tongan village', *JPS, 75*, 141-176.

Beaglehole, Ernest 1947, 'Government and administration in Polynesia', in Coulter, JW

(ed) 1947.

Chambers, HE 1896, *Constitutional History of Hawai'i*, Johns Hopkins Press, Baltimore.

Coulter, JW (ed) 1947, *Specialised Studies in Polynesian Anthropology*, Bishop Museum
Bulletin No 193, Honolulu.

Gifford, EW 1929, *Tongan Society*, Bishop Museum Bulletin No 61, Honolulu.

Grattan, CH 1963, *The Southwest Pacific to 1900*, University of Michigan Press, Ann
Arbour.

Henley, Thomas 1930, *A Pacific Cruise*, John Sands, Sydney.

Koch, G 1955, *Sudsee-Gestern und Heute*, Vewrlag, Braunschweig (translation: *The*
Pacific Yesterday and Today, Klarwill, PE, Wellington).

Latukefu, Sione 1974, *Church and State in Tonga: the Wesleyan Methodist Missionaries*
and Political Development: 1822-1875, ANU Press, Canberra.

Liversage, V 1945, *Land Tenure in the Colonies*, CUP, Cambridge.

Luke, Harry 1962, *Islands of the Pacific*, Harrap, London.

Maude, Alaric 1971, 'Tonga: Equality overtaking Privilege' in Crocombe, Ron (ed), *Land*
Tenure in the Pacific, Oxford University Press, Melbourne.

Maude, Alaric 1965, *Population, land and livelihood in Tonga*, PhD Thesis, ANU,
Canberra.

Maudslay, Alfred P 1930, *Life in the Pacific Fifty Years Ago*, Routledge & Sons, London.

Meek, CK 1968, *Land, Law and Custom in the Colonies*, Frank Cass & Co, London.

Mouat, H and Davis, EJ 1913, 'Engineering experiences in the south seas 1906-1910'
Northern Engineering Institute of New South Wales, Newcastle, 60-79.

Nayacakalou, RR 1959, 'Land tenure and social organization in Tonga', *JPS, 68*, 93-114.

Neill, JS 1955, *Ten Years in Tonga*, Hutchinson, London.

Rogers, Garth 1975, *Kai and Kava in Niuatoputapu: social relations, ideologies and contexts in a rural Tongan community*, PhD thesis, Auckland University.

Rutherford, Noel 1971, *Shirley Baker and the King of Tonga*, OUP, Melbourne.

St Julian, Charles 1857, *Official Report on Central Polynesia*, John Fairfax & Sons, Sydney.

Sevele, FV 1973, *Regional inequalities in socio-economic development in Tonga*, PhD thesis, University of Canterbury, Christchurch.

Simkin, CGF 1945, 'Modern Tonga', *New Zealand Geographer, 1, (2),* 99-118.

Thomson, Basil 1894, *The Diversions of a Prime Minister*, Blackwood & Sons, London.

Walsh, AC 1967, 'Politics, culture and resource utilization in Tonga' *Proceedings of the 5th N.Z. Geographical Society Conference,* Auckland, 119-124.

THE PERSISTENCE OF CHIEFLY POWER
AND ITS IMPLICATIONS FOR LAW AND POLITICAL ORGANISATION
IN WESTERN POLYNESIA

Charles Guy Powles

Thesis submitted in partial fulfilment of the
requirements for the degree of
Doctor of Philosophy

Australian National University

Canberra

August 1979

This thesis represents the original research of the author, except where otherwise acknowledged.

THE PERSISTENCE OF CHIEFLY POWER
AND ITS IMPLICATIONS FOR LAW AND POLITICAL ORGANISATION
IN WESTERN POLYNESIA

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ABSTRACT

Chiefly authority has been exercised in Western Polynesia for at least 2,000 years. This thesis examines the transformation of chiefly power from its origin to the present-day function it exercises as a constituent element of the political and legal framework of the state. Western Samoa and Tonga are the focus for this study of the interaction of indigenous and introduced elements of politics and law.

The approach is necessarily interdisciplinary, and the study commences with a reconstruction of the Samoan and Tongan societies prior to Western contact. Primary and secondary historical sources are then drawn on to recount the processes of the impact of Western ideas and the response of the chiefly systems. Much of the interest centres around the manner in which chiefly power has been recognised in constitutional and statutory provisions over the past 140 years, and the significance of its recognition. Western Samoa and Tonga are treated separately, and the consequences of early differences in political organisation become apparent within the broadly comparative framework.

With the persistence of chiefly power as its theme, the study proceeds to examine the nature and role of that power in the political and constitutional settings of the independent states. Challenges to power, such as those posed by Western forms of government and administration, and by institutions for the maintenance of order, the settlement of disputes and the regulation of landholding, are considered in relation to the Western Samoan matai system and the Tongan monarchy and nobility. In response, Western models have been adapted to accommodate some of the realities of chiefly authority, with the culmination, in each state, of a political order in which such authority

is entrenched in different ways. The study concludes with a review of the historical processes and a comparison of chiefship in the two societies, and with a discussion of implications for their future political organisation.

his throne by providing that it should go to his only son (David 'Uga) and to that son's son (Wellington 'Ngu), and from then on by rules which favoured male children according to age and failing them, female children in the same manner. If the line should become extinct, the throne would pass to Henele Ma'afu or his heirs[1]. Tupou thus dispensed with the traditional method of selection of the Tu'i Kanokupolu by a 'college' of chiefs, and laid the foundation for a dynasty - one which could include queens. In fact it was vital to his plans for a stable Tonga that succession to all titles should be decided[2]. He also recognised the threat from descendants of the Tu'i Tonga and Tu'i Ha'atakalaua lineages and the leading Ha'a Ngatatupu line (the Fīnau 'Ulukālala's of preceding generations) by giving them special mention in his closing address and conferring titles which would place them on the same footing as all other titled nobles[3].

2. Noble titles

The Constitution created the concept of a noble title after the fashion of the English barony - that is to say, although it was an honour or dignity held from the monarch[4], it was inalienable (except for treason[5]), hereditary[6] and was permanently associated with estates[7]. The principle

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1 1875: 35. Ma'afu was the son of Tupou's predecessor who had been despatched to Fiji.

2 Succession remained a live issue, however, because Tupou survived both son and grandson and also Ma'afu. The name of 'Uliame Tungī was substituted for Ma'afu (1888: 35), but it was Tupou's great grandson who succeeded him in 1893.

3 For the Tu'i Tonga, the title Kalaniuvalu was conferred (extant today). For the Tu'i Ha'atakalaua, the title Tungī was conferred (held by the present King). For the Ha'a Ngatatupu, the title went to Tupoutoutai, then to Siaosi Fīnau (and is today called by the old name of 'Ulukālala, but is vacant).

4 1875: 48.

5 Ibid.

6 1875: 125.

7 1882: 109. The Tongan concept was undoubtedly influenced by the Hawai'ian nobility over which their King retained control. The Hawai'ian Constitution of 1840 provided for fourteen hereditary nobles and the 1852 Constitution increased the number to a maximum of thirty (Chambers 1896: 15 and 16).

of succession primarily in the male line was consistent with traditional thinking in relation to ha'a leadership, but to confine the principle in a constitutional straitjacket was not[1]. Thereafter, the usual adjustments of segmentation and re-alignment were to be impossible. Rules requiring marriage and legitimacy were in keeping with the new Christian morality, but the exclusion of adoption was not necessarily so, and it eliminated the accepted practice of inheritance by an adopted son for his lifetime[2].

Tupou named another ten nobles in 1882 and at the same time created an intermediate category of six matāpule who would have hereditary estates but not the political privileges of nobles[3]. If the three further noble titles created in later years are added[4], the total of 33 noble titles which exist today may be explained in terms of their ha'a affiliations by reference to Figure 1[5]. The selection of nobles and estate-holding matāpule from the chiefly families of Tonga[6] was an exercise, vital for the future stability of his kingdom, which demanded all Tupou's political skill. Processes of fission and the withering away of early ha'a meant that some ha'a possessed only one or two powerful

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1 Succession was the same as for the monarchy with two important exceptions - (a) in the absence of children and heirs, brothers and heirs, and failing them, sisters and heirs, could succeed; and (b) should a female be next in succession, the title would pass not to her but to the next male in succession, and if that male was not her heir and she subsequently had a male heir, then, on the death of the former, succession would go to the latter. The female heir had limited rights as to land, but could not inherit the noble title (1875: 125).

2 Idem. Succession rules remain in force. Questions of adoption and legitimacy created problems in the next century.

3 T.G. Gazette Vol. II No. 12, 25 October 1882. Political and other functions will be discussed below.

4 Lasike in 1894, Veikune in 1903 and Tupouto'a in 1924.

5 See Chapter 1.

6 Gifford lists some 40 chiefly titles which were not elevated by the King, but he found that a large proportion of them had lapsed or were vacant by the time of his study (1929: 132-140).

chiefs, and others several[1].

By choosing those who had most support (his stated ground) and those other men whose inclusion was dictated by political considerations, the King gave due recognition to some, elevated the status of others, and devastatingly demoted a great many more. The effect of this remarkable reform was not only to create a nobility at law, but also to exclude many chiefs from any legal status other than that of Tongan citizen. It was some time, of course, before their traditional status was affected.

3. Land

The ancient spiritual relationship of the Tu'i Tonga to the land and its fruits is brought to mind by Tupou's assumption that "the kingdom is his"[2]. However, the King exceeded traditional authority by taking the power, to be exercised "should he so please", to grant to the nobles and matāpule, "such to whom he may wish", areas of land to become their "hereditary inheritances" or tofi'a[3]. Certainly, the tofi'a were, together with the noble titles, inalienable except for treason (and they would revert to the Government in the absence of legitimate heirs[4]) but, in the same way as the titles had been, the tofi'a were deprived of any prospect of adjustment or of being used to accommodate changes in lineage structure.

Again, the King assumed the task of deciding what land should be allocated to each title, and the recognition of six matāpule as tofi'a-holders without noble status gave him some flexibility. It was necessary, of course, that all land in Tonga be distributed among the various title-

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[1] Reference to Figure 1 (Chapter 1) indicates, for example, that one title represented the Tu'i Tonga line as such; one the Fale Ua; one the Sina'e; six the Fale Fisi; and so on. The monarchy, or Tu'i Kanokupolu line, was descended direct from Ngata, while the chiefs of Ha'a Ngatamotu'a and Ha'a Havea were well represented. The six matāpule who were to hold estates also had ha'a affiliations.

[2] 1875: 47. Although land was not mentioned in this context in 1875, no doubt was left by the insertion in 1882: 109 of "To the King belongs all the land, soil, inheritances and premises".

[3] 1882: 109.

[4] 1875: 127. This was soon changed to require reversion to the King (1882: 118).

holders (including the sovereign by virtue of his title) and the government, as Crown land. Tofi'a were described by name[1] and, as many of the islands were divided among several tofi'a, without survey, disputes as to areas and boundaries have been endemic down to the present time. It is estimated that Tupou allocated nearly two thirds of the land area of Tonga, retaining the balance as royal and government land[2]. The fragmentation of tofi'a throughout the archipelago is most striking, as Figures 2 and 3 show for Tongatapu and Vava'u[3]. While chiefs laid claim to the villages constructed on their lands, and, in the main, these were recognised, one has the impression from the pattern of diffusion of interests in non-residential land that the King had tried as far as possible to prevent the acquisition by powerful chiefs of large contiguous holdings of land. A number of large blocks exist, but, of the 39 estate-holders, 28 have two or more non-contiguous blocks and nine have four or more[4]. Fourteen holders have blocks in two or more distinct groups of the archipelago. The ha'a are also fragmented, although certain areas of Tongatapu contain a preponderance of the members of one ha'a or another. For example, the western tip of Tongatapu is mainly Ha'a Ngatamotu'a, the mid-west and part of the centre is Ha'a Havea, and Ha'a Vaea is to be found mainly in the centre, south and mid-east of the island. If the 12 ha'a groupings shown in Figure 1[5] are considered in terms of the three main island groups, namely

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[1] A list was published with title-holders in T.G. Gazette Vol. II No.12 25 October 1882.

[2] Precise figures are not available. The classification of land today will be described in the next chapter.

[3] These maps were compiled by Maude (1965) and are reproduced with his permission. Because of boundary changes, some not yet finalised, the maps are for visual effect rather than accuracy. Some small blocks are not shown. Ha'apai, for which there is no map, is fragmented by numerous small islands.

[4] Lasike has nine blocks, Veikune 12, and the royal interests total 47 (Land Act Ch.63 The Law of Tonga 1967). See next chapter and also Table 6.

[5] For this exercise, the first three titles on the left of Figure 1 are separate ha'a.

(1) Tongatapu and 'Eua,

(2) Ha'apai, and (3) Vava'u and the two remote Niuas, then it appears that six ha'a hold land in all three groups and three hold land in two groups. The spread of royal interests is evident when the three islands, 'Eua and the Niuas, are regarded as separate units to make a total of six groups or islands, for those interests are represented in all six[1].

The Constitution affected the rights of tofi'a holders further through the control exercised by Cabinet over all leases to white residents[2], and by the declaration that all foreshores belonged to the State[3]. More immediately ominous was the well-known intention of the King to find some means of securing an interest in land for every man. Despite indications in two of the earlier Codes, the 1875 Constitution made no such provision[4]. None was made in the 1880 session of parliament either, although taxes were fixed by statute at $8 for every male of 16 years or over, regardless of land rights[5]. Then two years later, in the same session as the announcement of the allocation of tofi'a to titles, parliament passed the Hereditary Lands Act, a statute of lasting significance in the history of Tonga.

This Act was the culmination of a period of over thirty years during which Tupou had developed his thinking with regard to checking the power of chiefs and extending the productive capacity of the people. As to the origin of the concept of distribution of equal allotments to every male citizen on an hereditary leasehold basis, it seems that Tupou's 1853 visit

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1 Ha'a Ngatamotu'a has tofi'a in five of the six. The spread of ha'a interests is also seen in the fact that, leaving aside government land, Tongatapu and Vava'u are each divided among 10 of the 12 ha'a, and Ha'apai group is divided among seven.

2 1875: 114, 118, 120, 121 and 130.

3 1875: 119. The Constitution had also required that all town sites (principal villages) be held by Government, but opposition was such that the provisions were repealed, leaving tofi'a-holders in control (King's speech, July 1880, T.G. Gazette Vol.II No.6 10 November 1880).

4 It would have meant pushing the chiefs too far at a crucial time. In fact, the Constitution at first provided that it was lawful for chiefs to lease land to Tongans, and that people on the land who declined to take leases could be required to pay rent anyway (1875: 128).

5 1875: 27, and T.G. Gazette Vol.II No.5 27 October 1880.

to Sydney was a significant factor[1].

The Hereditary Lands Act 1882[2] succinctly states the fundamentals of the new land tenure system - and one can understand the optimism of outside observers for it appeared that Tonga had devised a fair and practical system which was most progressive by world standards. After reciting the background of ownership by the King and grant of tofi'a to nobles and the chosen matāpule, the Act provided that -

a. out of each tofi'a an area could be set apart for the tofi'a holder, and areas for matāpule of the holder[3];

b. the size of the "tax allotments of the people" was fixed[4];

c. allotments were hereditary in the male line except that a widow had a life interest subject to marrying or committing adultery;

d. rent of two shillings was payable yearly to the tofi'a holder;

e. a taxpayer was entitled to only one tax allotment but could also have a "town allotment";

f. both allotments would be "protected by the Government";

g. when youths left school and paid tax, Government could "request" the tofi'a holder where they resided to apportion allotments to them; and

h. if there was land remaining "after the tax lands of his people had been apportioned", the tofi'a holder could lease it to others.

The King congratulated the chiefs in parliament "on your being willing to grant the request made by the Premier [Baker] to allow the tax lands

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1 Lātūkefu 1974: 162. According to Consul Neill, it was the leasehold system of tenure which impressed Tupou in Sydney. He studied it, realised how land could be granted without alienation of freehold, and "resolved to adopt the leasehold system in Tonga" (1955: 93). Of course, precedents from Huahine and Hawai'i were also before him.

2 T.G. Gazette, Vol.II No.14 22 November 1882.

3 As this and many other of these original provisions have been subsequently changed, the law relating to land tenure will be discussed later in relation to the 20th century.

4 100 x 100 fathoms (8¼ acres), except in some more crowded areas where, for a period, the size was 50 x 50 fathoms.

of the people to be hereditary"[1]. It was significant for the future of the system that no machinery was provided whereby a tofi'a holder could be required to grant an allotment to a particular taxpayer. Indeed, in the light of the subsequent difficulties over implementation of the scheme, it is apparent that tofi'a holders were most reluctant to regard themselves as having such an obligation to individuals on their lands. Reform progressed slowly[2], but the King did not waiver from his policy.

Immediate opposition to the new law came, of course, from those chiefs who had been disinherited by exclusion from the list of 36, but land was only one of a number of grievances aired at Mu'a on Tongatapu between 1881 and 1883. Minor chiefs met in a "Mu'a Parliament" to object to many laws introduced by Baker[3]. When Tungī, Tupou's most dangerous rival, gave the chiefs support[4], the King reacted in typically firm fashion with warriors from Ha'apai and Vava'u and some Mu'a leaders were arrested. The land distribution question was not settled, however, and in 1891 the King felt obliged to urge parliament "My own wish is that every Tongan shall have an hereditary plot of tax land", which would be forefeited on neglect to pay". As it transpired, the 1891 Code[5] approved by parliament provided the first effective recognition of an entitlement vested in "every Tongan male subject" to both types of allotment[6], and the Minister of Lands was to make the grant and record it[7]. A tofi'a holder could not refuse an

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1 T.G. Gazette Vol.II No.12 25 October 1882.

2 No leases were issued under 1875: 128 (Rutherford 1971: 99).

3 Rutherford 1971: 110-121.

4 On hearing of the death of Ma'afu in 1881, Tungī's hopes for himself and his son Tuku'aho rose. Old enmities were revived, involving Ha'a Havea as well as Ha'atakalau allegiences.

5 The Law of Tonga, 1891 (revision by Thomson) - see Appendices C and D.

6 Ibid. s. 454.

7 Ibid. s. 460.

allotment to a person lawfully residing on his land and it was his duty to report to the Minister all cases of persons holding more than one tax allotment[1]. In spite of these measures, which were statutory and not in the Constitution, there were no proper surveys and little distribution was carried out[2]. Provision in the Constitution remained ambiguous until 1928[3].

4. Structure of government

The Constitution was framed to recognise the three divisions - (1) King, Privy Council and Cabinet, (2) Legislative Assembly, and (3) Judiciary[4]. Although the Chief Justice had security of tenure[5] and was subsequently given the power to suspend until the following Assembly session any law passed "contrary to the spirit of this Constitution"[6], human resources were so limited (as one would expect in such a small state) that the Chief Justice sat in the Privy Council[7], it was made possible for Judges to sit in the Assembly[8], and in 1882 the words "these three [divisions of government] shall always be distinct" were deleted[9]. Ministerial portfolios were established. The Premier and Ministers who constituted Cabinet were entitled to seats "as nobles" in the Assembly[10]. The Privy Council, which comprised the King sitting with Cabinet, the Chief Justice and the Governors of Ha'apai, Vava'u and the Niuas, was the effective decision-making body, with power to make ordinances (having force until the next Assembly session) and was also the highest court in civil

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1 Ibid. ss 458 and 459.

2 Surveyors arriving in Tonga in 1906 observed of the taxpayer's entitlement " ... patronage and sycophancy [have] long since rendered the law a dead letter " (Mouat and Davis 1913: 62).

3 See Appendix D for further details of the development of the land legislation.

4 1875: 33.

5 1875: 88.

6 1880: 85.

7 1875: 54.

8 1882: 33 - by deletion of the prohibition in 1875: 33.

9 1882: 33.

10 1875: 55.

matters (including land)[1]. The Legislative Assembly by 1882[2] comprised the 30 nobles (appointed by the King), an equal number of people's representatives (elected by the people) and the King's Ministers (most of whom would already be in the Assembly as nobles). It was, in theory, a total break with tradition, not so much because noble and 'commoner' sat together (most of the people's representatives were matāpule and other chiefs) but because the rules of parliamentary debate and decisions by voting[3] opened up new possibilities for political activity. Although the Assembly did not initiate legislation it had control over the Government's fiscal measures[4]. In one important respect, the unicameral appearance of the parliamentary system was a sham. The interests of the royal lineage and of the titled and landed gentry were not to be determined by the Assembly but by the nobles alone, and ultimately by the King himself[5].

The nobles of Tonga were accorded privileges, and received an annual stipend from the Treasury[6]. Nevertheless, the King had appointed as nobles the men of prestige and power, and they were expected to fulfil a leadership role - in short, they were to govern the country under the guidance of the monarch.

5. "A constitutional government under His Majesty"[7]

In view of the evident transformation of hau into sovereign and the preservation in its essentials, of the 1875 structure to the present day, the King's status and functions require further examination. The

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1 1875: 54, 55, 58 and 123.

2 1882: 63. The Hawai'ian legislature of 1852 was bicameral with a Nobles' house of 30 and Representatives' House of 40, but the two sat together for some purposes (Chambers 1896: 15 and 16).

3 1875: 60.

4 1875: 19 and 81.

5 All laws relating to the King, the Royal Family or the titles and inheritances of the nobles could become law only after the nobles in the Assembly had passed them three times and the King had approved (1875: 70). In 1914, the present provision was added that only nobles may discuss such laws (Act 1914 No.1 - and see 1967: 67).

6 T.G. Gazette Vol.II No.6 10 November 1880. It was $100 Tongan, or £20, p.a.

7 1875: 34.

constitutional pre-eminence of the sovereign arises first from the fact that the source of authority which gave the Constitution has secured perpetual succession[1], and is immune from impeachment, under a charter which cannot be changed without his consent[2]. Secondly, the King may act unilaterally and is not bound by convention to act on the advice of Ministers in respect of the following powers:-

a. to appoint and dismiss Ministers including the Premier[3];

b. to summon and dissolve the Assembly at any time[4] (although, if he did not intervene, it would sit at regular intervals) and to appoint its Speaker[5];

c. to refuse to assent to any law[6];

d. to appoint nobles and grant tofi'a[7];

e. to suspend habeas corpus[8], proclaim martial law[9], make treaties[10] and command the forces (short of declaring war)[11]; and

f. to control marriages of the royal family[12].

While, in practice, Cabinet is concerned with the day-to-day government of the country, the King may dominate the Privy Council and may delegate to his Premier and Ministers what he chooses. These are the laws in conformity with which the sovereign, on coronation, swears to govern[13]. Of course, he may decide to allow the institutions of parliamentary and cabinet government to operate in the Westminster manner. However, the

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[1] Like the British monarchy, it is a corporation sole in perpetuity.

[2] 1875: 44, 70 and 82 (unlike the British monarchy), (1967: 41, 67 and 79). In the case of each of these provisions, the modern equivalent, appearing in the latest, 1967, revision of the law, is given in brackets.

[3] 1875 and 1882: 55 (1967: 51). [4] 1875: 41, 62 and 80 (1967: 38, 58 and 77).

[5] 1875: 65 (1967: 61).

[6] If he refuses to assent to a law, the Assembly may not debate the matter further until the following session (1875: 71, 1882: 71 and 1967: 68).

[7] 1875: 48 and 1882: 109 (1967: 44 and 104).

[8] 1888:9 (1967: 9). [9] 1875: 50 (1967: 46). [10] 1875: 42 (1967: 39).

[11] 1875: 39 (1967: 36). [12] 1875: 36 (1967: 33). [13] 1875: 37 (1967: 34).

expression "He governs the land, but his Ministers are responsible"[1] renders his Ministers responsible to him rather than to parliament. Although the Assembly may impeach Ministers for cause[2], the King may dismiss without reason.

Given the inevitable introduction of Christianity and European political ideas, the Constitution of 1875 was a doubly remarkable document. On the one hand, Tupou, having unified the group by traditional means, was able to establish and secure himself and his lineage in a manner and to an extent which, measured in the light of the constitutional restraints envisaged by those ideas, was extraordinarily successful. In the guise of a "constitutional monarchy", an expression used by historians and commentators to describe his achievement[3], he had created a constitution under a monarchy[4]. On the other hand, Tupou realised that the ultimate guarantee of supremacy was his traditional status, maintained through association with chiefs, people and land. His use of the Constitution to deprive some chiefs of their power, to constrain others, and to bring a wider group of people into contact with government, relied on that status for its effectiveness - and ultimately enhanced the monarch. Monarchy and Constitution were to be the foundation of a stable Tonga.

6. Chiefs and people

The Declaration of Rights carried forward much of the Western philosophy which missionaries and other advisers had been seeking to

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[1] 1875: 44 (1967: 41). [2] 1875: 55 (1967: 51).

[3] E. Beaglehole 1947: 62; Luke 1962: 189-190; C.H. Gratton 1963a: 506; and Lātūkefu 1974: 219 and 1975: 49.

[4] Having regard to both Tupou's non-constitutional traditional authority and the extent of his powers as expressed in the Constitution, it is incorrect to apply to his reforms the term "constitutional monarchy" - which is today the usual description of the monarchies of the United Kingdom and other British Commonwealth countries, Scandinavia, the 'Low Countries', and modern Japan (see Huntington 1968: 150).

promote in Tonga[1]. However, the various 'freedoms' and 'rights' were accompanied by no means of enforcement and, in respect of the 'equality' clause, the Constitution in which the clause appeared was itself a recognition of traditional inequality[2]. In fact there were to be three levels of privilege 'under the law' - (1) the King, (2) nobles and (3) tofi'a-holding matāpule, and their respective immediate families. As has been shown, their interests were not identical, but it was likely that they would become more so, particularly as the importance of local support diminished in a society at peace, and as the privileged met together on national business. In constitutional terms, the position of the chosen chiefs was entrenched in the three areas of land tenure, executive action and parliamentary process[3]. In so far as their position was also founded in tradition, particularly in relation to land and executive-type authority, the new law served to entrench the old.

A separate category of former chiefs who were able to find some benefits under the new scheme were those matāpule who held their titles from high chiefs now elevated to nobility. So long as the distribution of tofi'a lands as allotments to commoners was not enforced, nobles would be able to look after the interests of loyal matāpule[4].

Finally, the advantages conferred by the Constitution on the 'commoner' were substantial. If he was not a 'disinherited chief', he

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1 1875: 1-32. The Hawai'ian Constitution of 1852 which the Tongan drafters had before them contained a Declaration of Rights of 21 articles (Chambers 1896: 17).

2 "There shall be but one law in Tonga, for the Chiefs, and commoners, and Europeans and Tongese. No laws shall be enacted for any special class to the detriment of another class; but one law equally the same for all persons residing in this land" (1875: 4 - changed slightly 1891: 4 - see Appendix D - to become 1967: 4).

3 Entrenchment was affected not only by 1875: 70 restricting voting (and, later, 'discussion' - see p. 262 note 5 above), but also by the apparent prohibition on any amendment of the Constitution affecting "the laws of liberty, the laws with reference to foreigners, succession to the throne, and the inheritances and titles of the Nobles and Chiefs of the land" (1875: 82 - reference to "foreigners" omitted 1891: 82 and see today 1967: 79). See Appendix D for further examination of amendment provisions.

4 Legal authority to reserve land for the matāpule of the holder was repealed in 1891 - see Appendix D.

had gained potential benefits, under a land distribution system (which looked good on paper), the opportunity to be represented in parliament and a governmental framework which could prevent the worst abuses of warfare and upheaval. In 1875, the price for the 'commoner' did not seem high. Indeed, he had a degree of political recognition which no Samoan would have understood.

Government and independence

The Constitution, as a symbol of unity under government, had achieved its immediate object in that none of the powers (Great Britain, Germany and the United States), was prepared to annex Tonga during the latter part of the century when most of the Pacific groups were being apportioned between them[1]. Also Tupou's perseverance with the prohibition of land sales had prevented the intrusion of European landowners. However, the totality of the new structures and processes introduced was rather too radical in concept to be applied in the manner intended. Emphasis was inevitably on the forms and trappings of institutions and there was much criticism that the Constitution and laws could not be understood by the people[2]. The process was bound to be slow and controversial.

Immediately the Constitution was promulgated, the drive to appoint officials and set up machinery was vigorous. District and town officers throughout Tonga were required to call fono and read out a detailed summary of all the laws[3] as to families, worship, schooling, curfew, tax,

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[1] Events had demonstrated the value of the advice given by St Julian - "the only way for your Majesty to secure the permanent nationality of your country is by the establishment of a government upon such principles as are recognised as just and equitable by the great nations of the earth" (1857: 66). These treaties attempted to assert jurisdiction over foreign nationals but the only effective foreign court was that of the British High Commissioner late in the century.

[2] For example, the British vice-consul commented "The Government is on the latest 'civilized' (?) principles, and there is a long Constitution Act, which the native authorities neither read nor understand" (Maudslay 1930: 220).

[3] This was supplied to them (printed in Ko e Bo'obo'oi Supplement to Vol.II No.8 October 1876).

first-cousins is prohibited except that a man may marry his mother's brother's daughter) but do not recognise any permanent form of adoption (other than that of a child by its father or near relative, with the mother's consent)[1].

In short, the Tongan complementary concepts of authority and acceptance adapted themselves with vigour to "the judicial system of the British pattern, exactly organised with its laws, regulations and courts"[2]. However, in exclaiming "it is astonishing how all social classes of the Tongan population accept this judicial system without reservation and obey its laws"[3] and observing that the "once dreaded power of the tapu" had been replaced by the "notion of holiness"[4], Koch failed to examine the similarity between the negative tapu of earlier times and the countless prohibitions imposed by the agencies of government. As Gifford commented in 1924 (when the courts were particularly busy), the tapu idea had been transferred to another set of concepts and "the ancient heathen variety has a ready ally in Christianity"[5]. Of course, the strict enforcement of ordinances revealed "intolerant attitudes and even persecution", and the police had been introduced - "a new factor in Tongan society"[6].

Land tenure

Tupou I had sought to contain chiefly authority and to make limited rights of tenure available to the people. This involved the perpetuation of a new class of chiefs with responsibilities in relation to government and land. The gradual change in role of the nobility and matāpule with estates, from powerful chiefs to landed gentry with diminishing influence, is demonstrated in relation to the implementation of land policy.

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[1] See the following Chapter.
[2] Koch 1955: 172.
[3] Idem.
[4] Ibid.: 353.
[5] Gifford 1924: 284.
[6] Ibid.: 286.

The control and management of land in Tonga is set against the background of tenure as defined by Constitution and statute. If Chapter 5 is read as an introduction to the topic, it is now possible to describe tenure in terms of the Land Act 1927, which embodied the original concepts and is in force, with minor amendments, today[1]. At the outset, all land is vested in the Crown[2]. In order to distinguish the interests of the sovereign and his lineage from the Crown as Government, Royal Estates are "set aside" for the use of the sovereign for the time being, as is the Royal Family Estate, out of which the sovereign may grant a life interest to a member of his family[3]. Tofi'a, hereditary estates as defined by name and locality, are held from the Crown subject to the Act[4]. Allotments (tax, of up to 8¼ acres, and town, up to 1 rood 24 perches) are held from the tofi'a-holder, or, if on Crown Land, from the Crown, subject to the Act[5]. Tax and town allotments may be granted together, but no person may validly hold more than one of the same kind. Alternatively, since 1927, a person has been able to take a 'bush' allotment of 12-3/8 acres[6]. Finally, Crown land not set aside or held as above may be granted to tofi'a-holders, leased by the Minister of Lands, or used for public purposes[7].

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1 The Land Act 1927, No. 19, was drafted by Horne, C.J. in consultation with a Privy Council-appointed committee (Horne to Premier, 28 June 1927, PO MP 1927 Box 4/J18). See now Ch. 63, 1967.

2 S.3, Ch. 63, 1967.

3 Schedules II and III, respectively, ibid. (as amended by Acts 1972, No.4, and 1973, No.14). The royal family also controls three of the following tofi'a - see Chapter 7.

4 Schedule I, ibid. (as amended by Act 1973, No.14). The distribution of tofi'a has been described in the previous chapter - and see Figures 2 and 3. Table 6 gives details of the holdings of each tofi'a-holder and ha'a.

5 S.8 and Part IV, ibid.

6 Ibid. Hopes that the bush allotment would "induce people to return to the land" (Consul Neill to High Commissioner, 5 September 1927, WPHC 1927 MP 2628) were not realised, as people had grown used to community life (Neill 1955: 148-9).

7 Part III, Constitution 1967 and Parts II and VIII, Ch.63, 1967. Special provisions govern charitable and religious bodies, and foreigners.

A category of 'customary' tenure which is not recognised by statute is that of the resident on a tofi'a who pays rent or tribute to the holder and claims rights based on the latter's informal allocation of land - which may be of long standing. Such tenure by allocation has been recognised in traditional terms and by surveyors who have observed customary boundaries. However, customary holding is not, on its own, sufficient to establish rights under the Land Act and, by the nature of those rights - dependent as they are on the particular relationship between resident and tofi'a-holder - there is no third party or forum to which the claimant may appeal[1]. Traditionally, a superior chief would not interfere and there is no precedent for the sovereign to do so today[2].

Tofi'a and allotments share certain features in relation to succession and disposal[3], except that the rules of succession in relation to tofi'a (and noble title) are designed to keep tofi'a and title under the control of the males in line of succession[4]. Such chiefly custom was

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1 The Land Court requires evidence of a purported grant by the Minister (which could be verbal in the case of a town allotment prior to 1927 - Tekiteki v. Minister of Lands (1973) III T.L.R. 34 - approving earlier decisions), or, in a case where the tofi'a holder objects to a grant proposed by the Minister, evidence of a prior equitably enforceable promise to consent to the grant (Ha'afo'ou v. Fotu (1948) II T.L.R. 60 and personal communication from Roberts, C.J., October 1974), before it has jurisdiction under the Act. Of course, as between competing unregistered claimants, one or other of whom has taken some steps under the Act, the Court will consider long occupation as evidence of prior claim (described as the application of "Tongan custom" in Moala v. Tu'iafitu (1956) II T.L.R. 104 and 153, where occupation of the land in dispute had originated before 1900).

2 In purporting to recognise this category of holding by allocation, by including it in his Annual Reports since 1974 under the description of land "allocated but not registered", the Minister of Lands has run the risk of misleading the public into thinking that it is not still legally part of the tofi'a or Crown land, as the case may be. See below, and Table 5.

3 The interest of the holder is a life interest, succession is hereditary (primarily in the male line), sale or devise by will is void, and (by recent amendment) mortgaging and leasing are possible subject to controls (Divisions I and II, Part i, Ch.63, 1967, as amended by the Land Amendment Act 1976, No. 18, and the Constitution Amendment Act 1976, No.3). Previously, tofi'a only could be leased.

4 See Chapter 5.

regarded as inappropriate and unnecessary in the case of allotments, in which widows and unmarried daughters may have life interests. The principal difference between the tenure of a tofi'a and that of an allotment is that the former is relatively secure in relation to reversion to the Crown[1], while an allotment may revert to the tofi'a-holder (or, if on Crown land, to the Crown) for any one of a number of reasons, including the failure of an heir to succeed[2] or to lodge his claim to the allotment within twelve months of the death of the last holder[3], and other grounds of which tofi'a-holders and those seeking allotments may readily take advantage[4]. Furthermore, unlike the case of the tofi'a, which goes to the noble's successor on the holder's conviction for felony, the allotment reverts to the tofi'a-holder in all the above situations (except that of the widow's or daughter's adultery) even if there is a son (or widow or daughter as the case may be) to succeed the allotment holder.

Thus, tofi'a and allotment provide fundamentally different legal 'environments'. The chiefly tofi'a-holder may provide for his extended

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1 Reversion may occur only in the event that there is no heir to succeed in accordance with Division II, Part V, Ch. 63, 1967, which comes into operation on the death, insanity or conviction for felony of the holder. Any court action to assert a right must be brought within ten years (s. 148, ibid.).

2 According to the rules as to succession which were strictly enforced in Ma'afu v. Minister of Lands (1959) II T.L.R. 119.

3 S.81, Ch.63, 1967, which was enforced in Tonga v. Minister of Lands (1956) II T.L.R. 96.

4 These include "adultry or fornication" on the part of a widow or unmarried daughter, where there is no son to succeed (ss 74-6, Ch.63, 1967, which will be enforced if the claim is bona fide - Fa'okula v. Kalamatoni (1968) III T.L.R. 20); abandonment for two years or removal to another district (s.44(2) and Division IV, Ch.63, 1967); and ejectment by the Court for failure to pay rent, for more than two convictions for failing to plant and tend coconut trees, or for failure to maintain the allotment "in the average state of cultivation for tax allotments in the district" (ss 61 and 68, ibid., which, in view of the low rent, seldom bring about ejectment in rent cases).

family and, so long as he does not permit extensive sub-division and distribution (to be discussed shortly), he may ensure that relatives and matāpule and their families have permanent homes and land. Subject to heirs being found within the extended family, tenure is group-oriented and secure, and land is a basis of chiefly power. On the other hand, tax and town allotments appear to have been designed primarily for the benefit of the individual, and his nuclear family. If the distribution scheme were to operate as intended, all male children but the eldest would seek their own allotments, and other male relatives would also have their own land. Family groups would be divided, and allegiance would focus on the tofi'a-holding chief as local leader. In fact, families have retained a remarkable degree of cohesion and have learnt to manage dispersal and movement to their advantage, with members strategically placed in villages and towns[1]. The manner in which chiefs and people, for different reasons, have preserved traditional relationships by delaying and circumventing the operation of the statutory distribution scheme must be examined.

The distribution scheme

The contributions of Tupou I, Baker and Thomson, respectively, have been described. The ideas expressed in the Codes were spelt out for the chiefs in the 1882 Act, and were provided with legal machinery in the 1891 Act. The principle was that, on reaching 16 years of age, every male was entitled to the 8¼ acre tax allotment and also, if he wished, to the smaller town allotment. Today, approaching the centenary of the first Act, only 45 per cent of the land area of Tonga is held by the people under registered tax and town allotments as intended by the scheme, and thousands of taxpayers have no land rights. With five per cent on long-term leases, the balance is registered 30 per cent as hereditary tofi'a and 20 per cent

[1] The 'Apia matai' phenomenon in Western Samoa may be compared.

as government land[1]. Why is this so? The history of land distribution in Tonga must be abbreviated for present purposes and attention paid to the role of chiefs in relation to the scheme.

The land distribution scheme has been praised[2], but the more cautious official British view, that the scheme "was grafted upon the polity of a native people - a creature of law rather than of custom"[3], raised the question of the extent to which the holding of land by individuals was traditional, and therefore an acceptable concept[4]. Maude's view that the scheme "has significantly moved towards a more individualistic system"[5] is to be preferred in the light of the pre-contact group-based relationships referred to in Chapter 1.

Whatever the basis of tenure may have been, Tonga failed to respond to, and often resisted, a concept requiring the compulsory and progressive determination, survey and registration of boundaries and tenure. During the first 50 years, while there was no real pressure of population on land, there was little motivation[6], and, although the bare legal machinery was there, administration was inadequate. The first requirement was that the boundaries of tofi'a be agreed upon and surveyed, and it was also soon apparent that the registration of tax allotments[7] would not protect holders

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1 See Table 5. The figures for 1976 are the latest available, but the percentages will not have changed by more than one or two since then.

2 Critics have seen different attributes which have appealed to them (see Henley 1930: 35; E. and P. Beaglehole 1941; 20-21; Liversage 1945: 127; and Meek 1968: 215).

3 Report on Tonga Protectorate for 1927, British Colonial Office.

4 E. and P. Beaglehole (loc. cit.) and Nayacakalou (1959: 97) seemed to think so.

5 Maude 1965: 121.

6 Motivation remained lacking generally in land development and agriculture (Walsh 1967a: 120).

7 The following discussion will refer mainly to tax allotments, as town allotments were of less concern, but the same considerations applied to both types.

unless they also were surveyed. Survey was the key, but customary holdings and boundary disputes jammed up the lock. Tupou II argued with High Commissioner May that it was appropriate that the surveyors should only be surveying the then existing boundaries[1] because "they cannot take away the inheritance of any native and, before the surveyors arrival, all the men had their land and every man knew his boundary"[2]. The failure of tofi'a-holders to agree on boundaries and permit survey was a serious obstacle to the implementation of the scheme[3]. The British applied pressure to government, and particularly to the Minister of Lands, who had quite adequate statutory authority to grant allotments[4]. Nevertheless, in 1915, tofi'a-holders secured the right to be "consulted" before the Minister made any such grant[5]. As a matter of departmental practice, the Minister appeared to interpret the new right as a means by which the tofi'a-holder's

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1 One of the conditions imposed by Tonga on the 1906-1910 survey team from New Zealand was "to disturb existing boundaries as little as possible" (Mouat and Davis 1913: 63).

2 Notes of interview, 15 September 1911, BCT 1/43/69. The King was not impressed with the suggestion of a land commission of the Fijian type to settle tofi'a boundaries and contended that "the chiefs in the Privy Council understand and are acquainted with the land" (ibid.).

3 This was an obvious method whereby distribution to taxpayers could be delayed. There was also the common expectation that while boundaries remained unsurveyed, they could be re-negotiated or simply "shifted" - a practice noted by Gifford (1929: 176). For the extent and complexity of tofi'a boundaries, see Chapter 5 and Figures 2 and 3. A report in 1951 details tofi'a boundaries in nearly every part of the group which were unsurveyed. Because the large tofi'a of Tungī (6,940 acres) and Kalaniuvalu (6,460 acres) were not settled, "much land in Tongatapu cannot be surveyed" (Report on land utilization by Agricultural Inspector, 23 September 1951, PO MP 1950 File 1123).

4 S.460, 1891 and s.563, 1903.

5 Act 1915, No.3 - amending s.561, 1903, which, like s.485, 1891, before it, had provided that the noble had "no power to refuse a tax allotment to any person lawfully residing upon his land" - unless he belonged "properly to another place" or held tax lands elsewhere. The new right was possibly part of a quid pro quo in favour of those nobles who lost their seats in Parliament in 1915 when the number was reduced to seven elected representatives (see Chapter 7).

consent became a pre-condition to the processing of the application[1]. British officials, particularly the Judges, indicted the slow implementation of the scheme and its abuses by tofi'a-holders and taxpayers alike[2]. Indeed, progress was slow, and, by 1914, only 2,145 tax allotments had been surveyed[3]. Criticism led to the codification of statutes and regulations in the Land Act 1927 which has been mentioned. There was some progress, but difficulties continued and, by 1957, at which point only 2,564 lots had been surveyed over the previous 30 years[4], only 7,502 taxpayers - less than 50 per cent - had allotments[5]. Government had begun to take a firmer stance 1950-1954[6], and in 1958 commissioned a Tonga-wide cadastral survey to produce a thorough definition of boundaries and to endeavour to satisfy demand[7]. In theory, all allotments, registered and unregistered, were to be surveyed and excess areas subdivided. Achievements in this direction required that land tenure data and terminology be

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1 The applicant was required to obtain the tofi'a-holder's signature to a form declaring that there was no impediment to the grant (Ch.63, Title XIII, Vol.III, 1967). Although the Minister could overrule the tofi'a-holder's objection (subject to the latter's right of appeal to the Land Court - s.34, Ch.63, Vol.I, 1967), an applicant who was not prepared to run the risk of court proceedings was dependent on the goodwill of the holder as well as that of the Minister (usually in the person of the local town or district officer).

2 For example, Skeen, C.J. in 1906 (Report to High Commissioner, 19 July 1906, BCT 1/43/48) and Scott, J. in 1925, who referred to "the lax method adopted of granting tax apis [allotments]" and added "Many taxpayers hold apis in excess of statutory size - some over 100 acres. The Lands Department condones this situation by registering these interests from father to son. Registers are not kept in some areas. Often there is no description to identify the api or its area. I have seen no title deeds. Some api holders are being turned out for failure to pay rent (without prior demand and in spite of payment in goods and services) or failure to attend the church of the noble's denomination" (Report of Land Court, 1925, PO MP 1926 3/J11).

3 Reports on Tonga Protectorate for 1912/13 and 1913/14, British Colonial Office.

4 'Description of cadastral survey' by D.L. Leach, June 1959, PO, Official Papers, Group E, Box 12.

5 Annual Report of Minister of Lands for 1957.

6 The Reports for these years criticise the nobles for "lack of co-operation" and "reluctance to settle outstanding disputed boundaries: "Annual Reports of the Minister of Lands for 1950-1954).

7 'Description of cadastral survey', op. cit.

revised[1], but gross inequalities in distribution remained[2]. Although the number of registered allotments has doubled 1957 to 1976 to reach 15,554[3], the number of taxpayers (males 16 years and over) at 1976 is estimated at 25,000[4]. Continuing pressure[5] and criticism of the inequality of the system in 1974[6] caused the Lands Department to produce its annual figures so as to show the total area which tofi'a-holders and Government state is in fact allocated to people, but not registered. The following Table 5 reveals the magnitude of this area, 47,216 acres or 29 per cent of total in 1976, and indicates how, by this means, the previously high figures for land held by tofi'a-holders and Government, 52 per cent in 1971, can be reduced artificially to 21 per cent for 1974. The new figures substantiate the criticism that too many people are living on allotments which can and ought to be registered[7], and they do not explain whether the tofi'a-holders and

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1 Inconsistencies between departmental Annual Reports over the years, and changes in the bases of calculation, indicate that the official statistics should be used with the greatest caution. The Minister in 1949 claimed that 76,711 acres were distributed and held as tax allotments (Annual Report for 1949), whereas, in 1969, after the cadastral survey, the area was said to be 66,906 acres (Annual Report for 1969). Because the latest Census on which a report is available - that of 1966 - failed to specify whether the tax allotment which was the subject of the question was registered or not, the information produced, that 8,305 taxpayers 'held' tax allotments and that 11,553 did not, was of little value (Census Report 1966, Nuku'alofa). For comparison, the Minister's Report for 1966 gives 12,517 allotment-holders.

2 These were noted by Maude (1965) and soon rendered his valuable study out of date. His calculation, based on the principles of the cadastral survey, that the total arable land of Tonga could not provide more than 14,467 tax allotments (1965: 167) has been superseded by the present registered total of 15,554 (Annual Report for 1976) and many 'allocated' allotments may yet be registered.

3 Ibid.

4 The total number of taxpayers is no longer published, and information from the 1976 Census is not yet available.

5 For example, Queen Sālote's address to the legislative Assembly, T.G. Gazette, 21 September 1959.

6 Letters to the Tonga Chronicle by S. Taliai, published 22 August and 5 September 1974.

7 Ibid. From Table 5, about 27% of Tonga is tofi'a in this category and 8% is Government land.

TABLE 5

Land Distribution 1954-1976

Nature of Tenure	1954 Area acres	1954 % of total	1969 Area acres	1969 % of total	1971 Area acres	1971 % of total	1974 Area acres	1974 % of total	1976 Area acres	1976 % of total
Registered tax and town allotments	59,774	36	66,906	41	70,573	43	72,740	44	74,379	45
Allotments allocated but not registered	(included in government land and hereditary estates)						49,013	30	47,216	29
Government land[1]	not stated		34,380	21	34,084	21	21,019	13	21,019	13
Heretiary nobles' estates	n.s.		52,176	32	51,448	31	12,824	8	12,824	8
Leases to:										
Government	664	0.4	n.s.		n.s.		1,536	1	1,581	1
Tongan nationals	1,375	1	2,159	1	2,771	1	1,065	1	1,079	1
Commodity boards	n.s.		n.s.		n.s.		195	0.1	216	0.1
Foreigners	4,925	3	2,088	1	2,222	1	2,463	1	2,463	1
Churches	1,475	1	3,721	2	4,104	2	4,403	2	4,480	2
Total land area[2]	164,718	100	161,430	100	165,202	100	165,258	100	165,258	100

[1] Including uninhabited islands and forest reserves.

[2] The totals are those stated in each Annual Report, except that 'lakes and internal waters' and the Minerva Reef 'islands' have been deducted from those totals (since 1971) in which they were included. The remaining differences between the totals are unexplained.

Source: Annual Reports of Minister for Lands 1954-1976.

and Government propose to make more land available from their remaining 21 per cent (8 per cent tofi'a-holders and 13 per cent Government)[1]. In short, tofi'a-holders and Government have, to the present time, retained legal control of at least 50 per cent of the land of Tonga.

There are obviously weighty reasons why more land has not been surveyed and registered. They will be examined briefly.

1. In theory, the adult male's right to obtain allotments is a constitutional one[2] which ought to be enforceable against the Minister of Lands as the granting authority. Furthermore, the tofi'a-holder is obliged to admit into possession any person to whom an allotment has been granted[3] - provided that he can always refuse initially to allow a person to take up residence on his tofi'a who "belongs to another locality ... even though the wife of that person belongs to a village" on the tofi'a[4]. However, the Minister and his Department control the machinery. Before an allotment is granted, they must consult the tofi'a-holder who may not sign the form (as mentioned above) and who generally allocates allotments in such a way as to respect occupation of long-standing. Statutory rules require that the applicant be "lawfully resident" on the tofi'a or Crown land in respect of which the application is made, and that, in the case of a tofi'a, if there is no land "available", the allotment shall be taken out of the tofi'a of another noble who is "willing" to provide it. If no noble is willing, the applicant "may" have an allotment from such portion of Crown land as the Minister decides[5]. Although the Land Court has occasionally examined the

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1 The Act contemplates that a regulation will be made determining the area which a tofi'a-holder may reserve for the sole use of self and successors (S.34(2), Ch.63, 1967) but no such regulation has been made.

2 "Every Taxpayer shall have the right to hold ..." - s.113 Constitution, 1967.

3 S.34(1), Ch.63, 1967. The tofi'a-holder himself has no legal authority to grant allotments, or subdivide them once granted (Tu'iono v. Talua (1937) II T.L.R. 36 and Taufeulunaki v. Panuve (1948) II T.L.R. 70).

4 S.35, ibid.

5 S.50, ibid.

Minister's action, it will not interfere unless his Department applies the wrong principle in granting an allotment[1]. The complexity of the system, and the countless ways in which privilege and bureaucracy can delay and defeat claims, have so far successfully discouraged any applicant from taking action against the Minister to test the existence of a constitutional right, per se, to an allotment[2]. Furthermore, as an applicant who declines, without reasonable cause, to accept an allotment granted by the Minister is thereafter barred from making another application[3], the 'right' to receive whatever allotment the Minister and tofi'a-holder may choose to grant is unlikely to be regarded as worth pursuing in Court. Consequently, applications and court actions are in respect of specific named lots, failure in respect of one of which does not amount to a denial of the constitutional provision.

2. The reluctance of people to seek registration of 'api allocated to them - or of such other unregistered land as they may be using - has been due primarily to their preference for the inequalities and laxities which administration of the scheme has permitted[4]. Variations in the size of allotments due to registration before cadastral survey and to the acceptance of earlier 'api dimensions[5] have allowed the scheme to make some progress, but the threat of further survey and re-adjustments always existed. Studies reveal a wide range of land distribution

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1 To'ofohe v. Minister of Lands (1958) II T.L.R. 157. All the reported decisions on this topic involve competing claims for the same allotment. In the case of otherwise equally qualified applicants, the principles of 'first come first served' (Hafo'ou v. Fotu (1948) II T.L.R. at 62) and 'toss you for it' (decision by throwing dice - Veikuso v. Tu'ipulotu (1957) II T.L.R. 151) have both been approved by the Privy Council on appeal.

2 Personal communication from Roberts, C.J. October 1974.

3 S.44(1), Ch.63, 1967..

4 It is true, as Simkin pointed out, that some men preferred to wait for their fathers' holdings or to seek employment elsewhere (1945: 105) but there were more widespread reasons.

5 Neill quoted "numerous instances" of oversize allotments, in some cases exceeding 300 acres (Neill to High Commissioner, 5 September 1927, WPHC 1927 MP 2628), and customary holdings "a good deal larger than eight acres" still exist (Maude 1965: 116).

patterns[1]. Now that there is severe population pressure on land in some areas, much land is shared by households[2]. Distribution of land rights (customary and registered) within villages is grossly uneven[3]. Some households have several members with rights to allotments, some look after allotments for absent holders and some rely on kinship and other relationships in order to survive. However, while a 1959 study reported that, in the area reviewed, inequalities were marked and contributed to the continued - or even increased - dependence of people on their chiefly tofi'a-holder[4], generalisations cannot be made today in the face of widely differing situations as between tofi'a and Crown land, and between different tofi'a[5].

Such a state of affairs encourages those with some land (or prospects) to work 'within the system' - that is to say, on non-registered land - rather than draw attention to the fact that they may already have more land than the law provides. Knowing that the offer of an allotment cannot be refused and that registration is final, people defer application, hoping for something better. There are those who will avoid registration because it exposes the holder to the rigour of the statutory provisions, including reversion to the tofi'a-holder[6]. Cost is another factor[7]. Also, if there is no available 'api nearby, some are reluctant to move away from supportive relatives. While the opportunity to be free appeals to some, it disturbs others. Again, people who have workable land-sharing arrangements

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1 Nayacakalou 1959: 103-105; Maude 1965: 107-120; Aoyagi 1966: 159-160; and Sevele 1973: 111-116.

2 The household - comprising elementary family and only some relatives - is the persistent unit associated with the use of land (Nayacakalou 1959: 101).

3 Maude 1965: 109.

4 Nayacakalou 1959: 102-3 and 113.

5 Maude 1965: 107-120; Sevele 1973: 111-116 and Rogers 1975: 118-138 (as to the four estates on Niuatoputapu).

6 The views expressed here are those of people occupying tofi'a and Government land who were interviewed on 'Eua and Tongatapu, of people who spoke on their behalf at the Seminar on Land and Migration, September 1975, at Nuku'alofa.

7 Although rent is negligible (still $T0.80 per annum), on registration a survey fee of $T28 and registration fee of $T6 must be paid by the applicant.

have no incentive, under present economic conditions, to seek land for themselves.

3. The unwillingness of people to activate the registration processes strengthens the position of tofi'a holder or government representative. Some holders exploit the situation. "It is difficult to come to terms with tofi'a-holders over the matter of registration"[1]. There are those people who, over the years, have not satisfied their chief with "proper tribute in the traditional manner"[2]. There are others who are reluctant to indulge too far the practice of presenting food and/or cash in 'consideration' for the grant of land[3] - or who have unsuccessfully "sacrificed and lost a lot in the process of trying to persuade nobles"[4] and are unsure how much more is required. Ignorance of legal rights in relation to tofi'a-holders prevents people from applying to the Minister of Lands. Similarly, young men are unwilling to subject themselves to the selection systems imposed by the overseers of tofi'a and by town and district officers on behalf of government. The procedure is for these dignitaries to keep lists of eligible taxpayers without land and of those occupying unregistered land - and to report to their superiors on such matters as co-operation in the village, provision of tribute when called on (in the case of tofi'a) and general behaviour and demeanour. Such reports are considered by tofi'a-holders and the Minister when registration is sought[5].

4. From the tofi'a-holder's point of view, the existing inequalities and

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1 L. Fifita (Tonga Council of Churches 1975: 38).

2 Ibid.: 35.

3 Many examples have been recorded, including payments of up to $T1,000 for allotments. In 1975, one noble let it be known that he would make allotments available to all those who could produce $T1,000 in cash.

4 L. Fifita, op. cit.: 39.

5 Details of this system were examined in 1974 in respect of 'Eua, where the resident Magistrate, as the most senior official, was asked to collect such reports and make recommendations to the Minister and in respect of the Tungi tofi'a on Tongatapu. Reports from officials were often blatantly biased for or against an applicant (interview, Director of Lands, August 1975).

flexibilities offer advantages. He retains control of land until it is registered, and those views which have been recorded[1] are a clear statement that such control is believed to be necessary for the preservation of the traditional relationship of the chief and people which "is the essence of our culture"[2]. Furthermore, some holders allege that they use income from the larger leased areas in order to discharge their duties to the people on their land. Critics of tofi'a-holders do not accept that such altruism exists and point to the lucrative returns from long-term leases (and, in the case of tofi'a near expanding towns, the prospect of subdivision into more valuable town allotments) - the best exploitation of which requires the holder to retain a substantial area unregistered. Flexibility is desirable, as a holder may not lease more than five per cent of his total tofi'a at any one time[3]. As to the relationship between holder and Minister, tofi'a-holders will not concede that the latter is in the best position to consider the interests of tofi'a-holders and people alike. In their view, he already has too much power[4].

To summarise, the land distribution scheme has been implemented gradually under a code of universal application which, on the face of it, should leave little room for traditional concepts and practices. On the one hand, those concepts and practices have succeeded in subverting the scheme to a large degree, so that people who wish to do so can retain the local group basis for living, and the chiefly tofi'a-holder is able to preserve relationships with 'his people' which would otherwise have disappeared. In respect of the 30 per cent of Tonga still directly under the control of tofi'a-holders (22 per cent 'allocated but not registered' and 8 per cent retained[5])

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1 Three noble tofi'a-holders were interviewed on the subject of land, and the views of a further seven were recorded at the Seminar, 1975 (op. cit.).

2 Hon. Ma'afu (Tonga Council of Churches 1975: 2).

3 S.33(2), Ch.63, 1967.

4 Hons. Malupō, Niukapu and Tu'iha'ateiho

5 See Table 5.

and a further 30-35 per cent (estimated) where tofi'a-holders have residual rights in respect of registered allotments, the tofi'a-holder has a function under the land tenure and distribution schemes which he may combine with his chiefly role. On the other hand, the allotment scheme has secured a degree of individual tenure for those who wish it, and the population as a whole has been educated in the concept of personal land rights. The fact that complex rules for registration and succession, and chiefly opposition, have interfered with the implementation does not detract from the significance of a concept which is now regarded as Tongan. Furthermore, not only is a large proportion of the population living on Government land, but, as will be discussed, there is resistance on tofi'a to the idea that the tofi'a-holder may exploit his position. Generally speaking, opportunity has been provided for a considerable degree of individual freedom on the land.