

APPENDIX 4

(FAKALAH I 4)

SUBMISSION TO THE ROYAL LAND COMMISSION OF TONGA

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'seek justice, rescue the oppressed, defend the orphan, plead for the widow'
(Isaiah 1:17)

'let justice roll down like waters, and righteousness like an ever-flowing stream'
(Amos 5:24)

*You [the chiefs] should show love to the people you have under you . . . and . . .
you should divide to each one of them land for their own use, that each one may
have means of living, of supporting his family, procuring necessities, and of
contributing to the cause of God. (Tupou I: 1839 Vava'u Code, clause 3)*

My respects and good wishes to the Commissioners.

I wish to make a submission to the RLCT as a Tongan-born person and as an internationally known historian of Tonga.

1. Executive Summary

The work of this Royal Commission (RLCT) follows the recommendations of the National Committee for Political Reform (NCPR) and the Constitutional and Electoral Reform Commission (CEC), which were the basis of the democratic reforms introduced in 2009-2011.

Tonga is now represented at the United Nations, and Tonga should be at the forefront of Pacific Island nations in the implementation (not only ratification) of international declarations and conventions that protect the rights of citizens. 'Culture' has been given by some countries as a reason for failing to ratify some of the international declarations and conventions. I believe that continuance of the work of Tupou I and Queen Salote Tupou III in Tonga today will find that the best of Tongan culture is compatible with these international guarantees of human rights. The necessity for the Tongan Government is that it returns to the spirit and intent of these great reformers.

Tonga has recently declared itself to be a democratic country. Although not all countries that aspire to be democracies have a good record of social justice and equity, Tonga has a proud history of social justice reforms implemented by Tupou I and Queen Salote Tupou III. The same are worthy goals for the Government of Tonga today.

The terms of reference of the RLCT state that the basis of land tenure should be retained. This means that it is essential to establish clearly what the basis of land tenure is, and the starting point for this must be the historical reforms of land tenure introduced by Tupou I. Then there should be consideration of how these principles may be expressed to meet the needs of Tonga and Tongans in the twenty-first century.

The historical record shows clearly that land tenure in Tonga is based on certain fundamental principles articulated by Tupou I, especially between 1839 and 1862 and in a speech in 1882. Subsequent amendments made to the Constitution as well as to land laws and regulations have typically deviated from these principles in that they have reflected the interests of already privileged parties, rather than the needs of the Tongans as a whole. It is

appropriate as well as necessary that the Constitution as it affects land and the land laws be reviewed and revised not only in light of the needs of the people of Tonga today but also to be consistent with Christian principles about the equality of people under the Law and within civil society.

My recommendations are that the principles articulated by Tupou I himself should be retained, with new administrative arrangements to deliver practical measures to ensure that changes are actually carried out. Such changes in laws relating to land should be transparent and apply justly to all Tongans. This would contribute to ensuring food security for the kingdom as well as delivering an equitable system of land tenure for Tongan citizens.

2. The Principles of Land Tenure - Tupou I

There is clear evidence that Tupou I's vision for Tonga was based on his recognition that security of tenure of smallholders was necessary to ensure that food would be assured and plentiful. This was a part of his vision not only for peace and stability in the kingdom, which he would unite under a central government, but also of equality and equity for all Tongans. Tupou I's codes of law show his determination to ensure that Tonga would change and were based on three key factors:

- Prior to the land wars of the late eighteenth century and early nineteenth century Tongan society consisted of a class of privileged chiefs and the remainder – ordinary Tongans – being, at best, inferior *kāinga*. The land wars resulted not only in a ravaged land, massacres, and fratricide, but also in famine caused in large part by the strategy of destroying a rival's crops and killing his workers.
- These events demonstrated the need for inalienable land rights for those who *actually cultivated the land*, rather than control of land being status indicators of chiefs whose privileges were perpetuated by the *fatongia* and *kavenga* of the people they 'possessed'.
- The poverty and homelessness that Tupou I witnessed alongside great wealth during his visit to Sydney in 1853 strengthened his determination that no Tongan would be homeless or without food in his own – notably fertile – country.

Traditional Control of Land (before the Land Wars)

According to Queen Sālote Tupou III, as recorded in 'Discussions' with Elizabeth Bott Spillius and others in 1958-59,¹ traditional Tongan society was so ordered that a chief was dependent upon his people for survival, and if the chief did not look after his people, they would 'neglect' him, and another chiefly person would take his place. Such an organisation of society depended

¹ See the Bibliography at the end of this submission.

on the chiefs being 'fathers' of their people. This idyllic land of peace and plenty was described in 1643 by Tasman and in the 1770s by James Cook, both of whom commented on how well cultivated the land of Tonga was.

The Land Wars c.1784-1852

Before the land wars the Tu`i Tonga nominally 'owned' all the land, and he required a household of wives and servants, presentations of the best food and the best other desirable items on a regular basis from his subjects. In at least the century before the land wars, it seems that his acquiescence for the holding of land was an advantage, but not a necessity.

The peace of Tonga was disrupted when the Tu`i Tonga finally lost his 'sacred' status (c. 1874) and the land wars began, the chiefs fighting among themselves for control of pieces of land and 'possession' of the people living on the land. This was *not* a matter of reclaiming ancestral land, but of acquiring as much land as possible through conquest. The outcome of such conquest was that conquering chiefs were no longer 'fathers' of the people living on the lands but 'owners' (land and people being an entity known as *fonua*).

As a young man Tupou I had fought alongside his father, Tupouto`a, in land wars in Ha`apai, and in 1826 Tupou defeated the chief Laufilitonga (later appointed Tu`i Tonga) and became Tu`i Ha`apai. (His assumption of the title of Tu`i Vava`u title in 1833 was a matter of contention well into the twentieth century.) Having been installed as Tu`i Kanokupolu, he also assumed the other prestigious titles of Tu`i Tonga and Tu`i Ha`atakalaua.²

The accounts of George Vason and William Mariner, who lived in Tonga for some years during the land wars,³ show that at this time the majority of the people were enslaved. Since lands changed hands more than once, neither life itself nor 'tenancy' of land (if there were any such) was secure. Treachery and betrayal were common.

In addition to the wars, there were severe hurricanes early in the nineteenth century, and war and hurricanes led to widespread and recurrent famines. Not only did massacres occur, but casual killing became commonplace. According to Mariner, cannibalism was in part the result of a desperate shortage of food.⁴ Tupou I came to believe that peace and security could be assured only if

² The speech of His Majesty Tupou I at the Closing of the Legislative Assembly on 4 November 1875. *Tongan Law Reports*, vol. 2 (1962) p. 4. An account by Elia Malupō is quoted in Gifford, 1929, p. 59, of the installation of Tupou I as Tu`i Tonga in Vava`u (later confirmed by a 'big meeting' of chiefs). See also Kalaniuvalu v. Minister for Lands, *Tongan Law Reports*, vol. 2 (1962) pp. 40-4.

³ Vason lived in Tonga 1797-1801 and Mariner 1806-10. Vason describes not only the wars but the famine, 1810, pp. 192-6; also John Martin (who recorded Mariner's memories), 3rd edition 1827, vol. 1, pp. 109-11, 184, 200.

⁴ *Ibid.*, pp. 107-10, 172-3, 184; the victorious side in battle killed not only their enemies but also their enemies' 'friends and relations' (p. 240) and took their food away (pp. 183-4). Chiefs also put a *tapu* on certain foods, thus denying access to them by the common people (p. 111).

Tonga was a united kingdom under a central government and ruled by laws where neither people nor land were owned by chiefs.

3. Evolving Codes of Law 1839-62

As early as 1833 Tupou I urged the chiefs to distribute land among their people and ensure that the land was cultivated and food crops planted and harvested.⁵ The laws he enacted were advanced for their time not just in the Pacific but internationally.

The principles behind the land reforms Tupou I repeatedly advocated are seen most clearly in the codes of law he enacted in 1839, 1850, and 1862. (That the Constitution of 1875 was much less clear is probably explained by the need for constitutions typically to provide a general framework for other laws.)

You [the chiefs] should show love to the people you have under you . . . and . . . you should divide to each one of them land for their own use, that each one may have means of living, of supporting his family, procuring necessities, and of contributing to the cause of God. (1839 Vava`u Code, clause 3)

You shall work and persevere in labouring for the support of your family, as well as yourself, and in order to trade and contribute to the cause of God, and the Chief of the land; and each man shall seek his piece of land to cultivate. (1850 Code of Laws, clause 36)

Impact of Visit to Sydney

Tupou I's determination to share land and provide for his people after the 1850 Code was reinforced in 1853 by witnessing in Sydney the existence of wealth and extreme poverty side by side. In his *Overseas Missions of the Australian Methodist Church*, vol. 1 *Tonga and Samoa* [1975], Rev. Dr A. Harold Wood wrote:

He [Tupou I] was surprised to find poverty and to see some people sleeping in the parks of Sydney. This was in sharp contrast to the custom of his own country, which ensured hospitality and shared means of living for all. The most significant result of the visit was the king's resolve that there should be no sale of land in Tonga, but only a leasehold system that would retain ownership in the government itself. Preventing alienation of land to any foreigners was a vitally important policy for Tonga's future. (pp. 115-16)

Following an audience with Queen Sālote Tupou III at `Atalanga early in 1965, Sione Lātūkefu made the following notes about the information she gave him:

Ko e Hā`ele `a Tupou I ki Senē

`Oku pehē ko e fale`i `e Misa Lēpone ke hā`ele `a e Tu`i ki Senē koe`uhi ke `afio ai ki he anga `o e mo`ui mo e fa`ahinga me`a kebekehe `o muli

⁵ Peter Turner, *Journal*, 30 April 1933, quoted in Lātūkefu, 1974, pp. 98-9.

hei`ilo te ne `afio ai ki ha me`a `e `aonga `i he pule`i `o e fonuá, pea ke fakafālahi ange ai `ene `ilo etc. etc.

Mahino na`e labi `a e ngaahi me`a na`e mālie`ia mo `ikai sai`ia ai `a e Tu`i, ka `oku lau ko e taba `o e ngaahi fua `o `ene folau ko e tufa `o e kelekele ki he kakai `o Tongá.

`Oku lau `o pehē na`e mamata `a e Tu`i ki he toko labi `aupito `i Senē `oku nau teunga kovi, vala mahaehae pea `uli, ngali fiekaia, pea ne `eke pe koe hū `a e kakai ko `eni. Na`e fakaha ange ki ai ko e kakai masiva `oku `ikai hanau `api, pea `oku nau nofo holo pe he halá mo e ngaahi pāká. Na`e mamahi labi `a e finangalo `o e Tu`i `o ne pehē pe ko e hū `oku `ikai ai `oange ha kelekele `a e kakai ke nau nofo ai he ko e fonua labi `a `Aositelelia. Talu ai mo `ene fakapapau `e tufa `a e kelekelé ki hono kakai, ke nau taki taba nofo `i hono `api `o `oua `e hē holo `i hala `o mohe holo he `ata`ataá hangē ko e kakai `o Senē.

Tupou I's trip to Sydney (translation of above)

It is said that as a result of advice from Mr Rabone, the King made a trip to Sydney to observe, amongst other things, the way of life in foreign lands that he might find useful in his governing of the country, including a widening of his knowledge, etc. etc.

While it is evident that there were many things that impressed the King and others that did not, it is said that one of the fruits of his trip was distribution of land to the people of Tonga.

It is said that the King saw many people in Sydney who were poorly dressed, with torn and dirty clothes, as well as appearing to be undernourished, and he inquired after these people. He was informed that they were poor people who had no homes and hence lived on the streets and in the parks. This was of very great concern to the King as he was perplexed as to why these people weren't given land to live on because Australia is a big country. He resolved therefore that the land in Tonga would be distributed among his people so that, unlike the people of Sydney, they could each live on their own piece of land and not wander the streets and sleep outside.⁶

As a consequence of Tupou I's visit to Sydney in 1853, the 1862 Code of Laws was even more emphatic than that of 1850. It is also quite possible that Tupou I heard from the increasing number of foreigners visiting (some settling in) Tonga about evictions in Britain, Scotland, and Ireland of tenants with small farms, where estate-holders had arbitrarily taken possession of the lands of their tenants – even common land – so they (the estate-holders) could use the land to graze sheep/cattle or for cash crops. These dispossessed British, Scottish, and Irish tenants were left with nothing, and the outcomes were

⁶ Copy of Sione Lātūkefu's notes were given to the author by Ruth Lātūkefu in 1996. The translation is by Helen Taliai. See also Lātūkefu, 1974, pp. 162-3; also Wood-Ellem, 1999, pp. 18-20.

starvation, an increase in crime (and transportation to Australia as convicts), and the emigration of millions of people. In eighteenth-century Britain 75 per cent of the land was owned by 10 per cent of the population, and this did not improve much in the nineteenth century.

The 1862 Code (also known as the Edict of Emancipation) included: (a) the emancipation of the people from slavery and from *fatongia*, (b) a guarantee of security of tenure, and (c) distribution of land among the people who would cultivate it.

All chiefs and people are to all intents and purposes set at liberty from serfdom, and all vassalage . . . and it shall not be lawful for any chief or person, to seize, or take by force, or beg authoritatively, in Tongan fashion, any thing from any one. (1862 Code of Laws, clause 34:2)

All the chiefs shall allot portions of land to the people as they may need, which shall be their farm, and as long as the people pay their tribute, and their rent to the chief, it shall not be lawful for any chief to dispossess them. And the King affectionately recommends that that the size of the farms be increased according to the number of the family. (1862 Code of Laws, clause 34:6-7)

4. The Constitution

Although the Constitution of 1875 is celebrated as the cornerstone of the Government of Tonga, its clauses (109-131) under the heading 'Lands' do not reflect the promises of the earlier codes. They refer to leases but provided no clear mechanism for land distribution other than the goodwill of the *tofi`a*-holders. Clause 1 echoed the Emancipation Edict of 1862:

Seeing it appears to be the Will of God for man to be free, as He has made one blood of all nations of men, therefore shall the people of Tonga be for ever free, and all people who reside or may reside in this kingdom. And the lives and bodies and time of all people shall be free to possess and acquire property, all doing as they like with the fruit of their hands, and using their own property as they may see fit.

In his speech at the Closing of the Legislative Assembly in 1875 Tupou I acknowledged that some of the chiefs whose names had not appeared among the 20 *kau nōpele* would be 'bitterly hurt, factions caused and you will inevitably be like a pack of carnivorous young wolves'.⁷ He also promised that those whose claims to estates were not be recognised would be compensated in other ways (the compensation took the form of salaried appointments to the government, either as a member of the Legislative Assembly or with a position in the Civil Service).

⁷ 4 November 1875, *Tongan Law Reports*, vol. 2 (1962) pp. 4-5.

Some of these lesser chiefs continued to hold quite large pieces of land, and did not register them as they exceeded the legal limit.⁸ In theory, without the security of registration there were no legal rights to inheritance. Such customary title-holders would take their place in the *taumafa kava* for some years, but generally faded away.⁹

The founding of the 'Mu`a Parliament' by disaffected young chiefs in the early 1880s, the attempted assassination of Premier Shirley Baker, and the persecutions of the mid-to-late 1880s were as much the outcome of the exclusion of lesser chiefs from former privileges as they were a matter of religious differences.¹⁰

The *Hereditary Lands Act* of 1882¹¹ and amendments to the Constitution up until 1888 provided the clarification of entitlements that was lacking in the Constitution. Those appointed *kau nōpele* by Tupou I were paid an annual salary and would sit in the Legislative Assembly along with an equal number of 'Representatives of the People'. The *kau nōpele* were supposed not only to be leaders of the people in their districts but also to implement Tupou I's policies and be active on his behalf. Tupou I intended them to be a working élite. Like Queen Sālote during her reign, he would be disappointed: neither these privileged chiefs nor their heirs saw themselves as 'leaders', only as beneficiaries.

The *Hereditary Lands Act* of 1882 made it clear that an area would be set aside as the personal *tofi`a* of an estate-holder.¹² The size of an *`api`uta* was set out (8.25 acres). However, there were no mechanisms whereby the personal *tofi`a* would be determined or allotments registered, and Alaric Maude comments that first registration of allotments appears to have been recorded in 1898.¹³ In areas where land was scarce, such as Hihifo and Ha`apai, smaller pieces of land were registered.

The *ngaahi tofi`a* were described by the names of villages within them. The boundaries of the personal *tofi`a* were not defined, although it was clear that Tupou I intended that most of the land was to be held *in trust* by the *tofi`a*-holders pending distribution to the people. Once registered, the personal *tofi`a* and *`api* were still *not* 'owned' by anyone except the Crown, but both could be

⁸ Maude, 1971, pp. 113-14, says that before the Cadastral Survey of 1957-62 there were numerous holdings of between 10 and 30 acres.

⁹ See, for example, Burley, 1995, on the decline of the Mata`uvave title.

¹⁰ Wood-Ellem, 1999, pp. 20, 102-3; Rutherford, 1971, pp. 109-21.

¹¹ TGG no. 14 (22 November 1882).

¹² Powles, 1990, p. 152 (i).

¹³ Maude, 1971, p. 127, note 7.

held for life and passed on to the heir (determined by the rule of primogeniture¹⁴).

The boundaries of the personal *tofi`a* were never defined or gazetted. That the *tofi`a*-holders intended to grab as much land as they could, against Tupou I's wishes, is shown in a speech by the King in 1882.

The tofi`a-holders are beginning to seize the tax-lands of the people: but when I said the hereditary lands of the chiefs should be determined, it did not mean that chiefs should seize the tax lands of the people, or to divide the lands afresh, or give it to other persons, or for the chiefs to please themselves concerning the same – for the day when the chiefs shall be allowed to please themselves concerning the hereditary lands, that day will Tonga most certainly be lost – because if any chief should be vexed with his people he can eject them and lease the their tax lands to foreigners, and Tongans will become strangers in this land; but this is my mind concerning the same:

(1) *For it to be defined, what shall be termed the hereditary lands of the chiefs to be kept for hereditary titles, for them to receive payment of same, for as people are now free from compulsory work for the chiefs, it is right for the chiefs to receive some payments for their land.*

(2) *For the tax lands of the people to be protected.*

(3) *Seeing that some have no lands, and lands of others are small, and others have two or three plantations, it is right to adjust these, so that any man who pays taxes for him to have his tax land, and anyone who prepares his land, for him to be able to bequeath it to his children; and in defining each one of the hereditary lands of the chiefs, I would again remind you of my words: 'those lands which you now hold, those you shall hold', for if we commence to trace hereditary lands, a great deal of ill feeling will arise . . . (TGG no. 12 (26 October 1882) p. 3 – an extract from the King's speech to the Legislative Assembly)*

Alaric Maude sums up the practices of the twentieth century, which other sources confirm:

In practice on hereditary estates an applicant approaches the estate-holder or his representative for permission to use and register a tax allotment, having prepared the way with gifts of food. If there is land to spare the applicant will probably be allowed to garden it, but will be told to apply for registration in a year or so. One reason for the delay in approving registration is to ensure the applicant works the land and meets his responsibilities to the village. All too often, however, estate holders have delayed registration for reasons of

¹⁴ Inheritance was previously determined by close relatives and this continued to be the case with minor chiefs who did not have a *tofi`a* (e.g. Lātūkefu and Tau`atevalu). There were many claims made by chiefs to *tofi`a*-holding titles on the grounds that they were descended from a more senior line. See *Tongan Law Reports*, vol. 2 (1962).

*power and personal advantage . . . Delaying registration, and threatening to expel those using unregistered allotments, ensures that those hoping to get land, or with sons or other close relatives hoping to get land, will conform to the wishes of the noble and provide food and other gifts on appropriate occasions. In some cases even money has been demanded, and paid, before registration was approved.*¹⁵

Maude adds that this situation was greatly improved during the Cadastral Survey of 1957-62, when land was surveyed and allotments supposedly registered.¹⁶ However, the 1966 census showed that only 42 per cent of taxpayers actually held an allotment.¹⁷

5. Implementation Issues

Far from being a 'working élite' the *tofi`a*-holders concentrated on their privileges and were inclined to encroach on each other's estates.¹⁸

The Constitution was not clear, the Parliament met only briefly in approximately every third year, and members were reputed to spend most of their time eating in the Fale Kai. Tu`ivakanō (Polutele), Premier 1912-23, was not the only person who believed that the Constitution had not truly expressed Tupou I's intentions. He commented rather acidly:

he who drew it up framed it from the Laws of the different Governments, therefore it is clear there are many Sections that are not in the least suitable to the Tongan people . . . he who framed it did so without seeing into or regarding the course of events of the period in which we are now are . . . it is the habit of all Governments in the world to keep with the times, and it is the real duty of the people of each period to adapt the Laws and Ordinances to those periods. It is a true saying that 'Change is the Great Law of the Universe'.¹⁹

The last comment is as relevant in 2011 as in 1914.

On the surface it seems that Tu`ivakanō was complaining only about the excessive numbers of members of the Legislative Assembly and the infrequency of genuine meetings. However, after an extraordinary meeting of

¹⁵ Maude, 1971, p. 114.

¹⁶ Ibid., p. 115. Maude comments that instead of the 'rent' many *tofi`a*-holders preferred gifts.

¹⁷ Ibid., p. 116. It is not clear from Maude's account whether the census figure was referring to registered allotments only, although this seems likely.

¹⁸ Gifford, 1929, p. 176. Islay McOwan made a similar observation, 26 February 1913.

¹⁹ Tu`ivakanō (Premier) to Tupou II, 30 October 1914, no. 1357/1914, copy in WPHC 2990/14. J. S. Neill, lawyer and British Agent & Consul to Tonga 1927-37, commented that 'The then King's advisers, who drafted the Constitution and the laws, were not lawyers, and it may be questioned whether they fully understood the legal effects of their draft.' (Neill, Report on the proposed Land Act in 1927 to WPHC, 28 September 1927, WPHC 2628/27, p. 3.) Tu`ivakano (Polutele) was well known for his ability to acquire more land for his *tofi`a*. Wood-Ellem, 1999, pp. 91-12.

the Legislative Assembly in December 1914 agreed to reduce the numbers, it soon became clear that in the reformed Legislative Assembly the *kau nōpele* plus six Ministers of the Crown appointed by the King would have a majority in the smaller, more easily controlled House.²⁰ Thus at its first annual meeting, in 1915, the law relating to allotments was amended so that instead of the Minister for Lands registering allotments, he now had to ‘consult’ with the *tofi`a*-holders. This consultation eventually became a requirement that the permission of the *tofi`a*-holder needed to be given in writing before an *`api`uta* could be registered. Prior to this amendment of 1915, clause 561 of Law 1903 read:

The Noble who holds a hereditary estate shall have no power to refuse a tax allotment to any person lawfully residing on his land nor to dispossess any person whom the Minister of Lands may have granted a tax allotment nor to dispossess any person of a tax allotment he has long occupied nor let or permit any Foreigner to reside on any part of his land without written permission from the Minister of Lands. His [the Noble’s] interest in the land is limited to receiving the rents for tax allotments and land leased to Foreigners. Provided that it shall be lawful for any Noble to order any person to leave his hereditary estate who belongs properly to another place or holds tax lands in another place even though he may have married a woman of a village upon such hereditary estate. (The Law of the Government of Tonga [1903] (1907) clause 561. Handwritten note in margin by A. H. Wood reads ‘Amended by Law 3/1915’. See TGG no. 2 (18 September 1916) p. 141)

With the removal in 1915 of the power of Minister for Lands to grant *`api`uta* without reference to the *tofi`a*-holders, the situation became that feared by Tupou I in his 1882 speech (see above), viz.

. . . when I said the hereditary lands of the chiefs should be determined, it did not mean that chiefs should seize the tax lands of the people, or to divide the lands afresh, or give it to other persons, or for the chiefs to please themselves concerning the same.

The 1915 amendment was a significant and major undermining of the basis of land tenure introduced by Tupou I.

6. Queen Sālote Tupou III on Land

Queen Sālote often referred to the reforms of Tupou I as being the basis of the modern government of Tonga. She had a great respect for the Constitution and the Law, even when these did not always work in her favour. Upholding the Constitution and Law and the freedoms guaranteed by them were essential, she knew, for the peace and stability of Tonga. Her detailed knowledge of genealogies and of relationships was invaluable when she was approached by people asking her to mediate concerning their differences before they resorted

²⁰ See also Wood-Ellcm, 1999, pp. 30-1.

to the courts. Otherwise she did not publicly express an opinion unless there was an appeal to the Privy Council, of which she was President. This restraint required considerable patience with some of the *papālangi* who were Chief Justices and/or Judges of the Land Court but who were ignorant of Tongan protocol and customs.

The general idleness of the *kau nōpele* were a matter of serious concern for her. They strongly defended the legal challenges over their titles, but the *kau nōpele* were not a working élite, as Tupou I intended. Instead they aspired to higher social status and wealth, some seeking influential ministerial appointment; also, especially during the reign of Tupou II, by encroaching on Crown Land (i.e. government land) and each other's *tofi`a*, especially when a neighbouring *tofi`a*-holder had just died. The Land Act of 1927 did not attempt to reverse the outcomes of these encroachments.

The Queen was unhappy about the fact that the heirs to titles were inclined to be playboys, waiting for their inheritances instead of engaging in study or useful work. In 1938 she established scholarships for the heirs to noble titles, in the hope that the heirs would then be better qualified for their future duties. She told Elizabeth Spillius that people blamed her for *not* overriding the Constitution and appointing the most suitable person to the title in the traditional way instead of young men who had no idea of what duties or obligations were.²¹

In many speeches during her reign (1918-65) Queen Sālote urged commoners to register (or apply for) land. She also urged *tofi`a*-holders and the Government to make land available. Of the many references to land in her speeches, I shall quote only a few. Some parts of her speeches to the Legislative Assembly followed a formula (e.g. deaths since previous meeting, legislation proposed) and were probably written for her, but there are paragraphs where she clearly spoke from the heart. It is especially significant that in her speech at the Closing of the Legislative Assembly in 1965 (see below), two weeks before she left Tonga for the last time, the distribution and cultivation of land were still of great concern to her.

The following extracts are from the translation into English of Queen Sālote's speeches as they appeared in the *Tonga Government Gazette* along with the original speech in Tongan. The Commissioners might like to read the original speeches in Tongan for themselves.

The first extract quoted (1920) may have been written by another person, as it seems harsh – but not necessarily unjustified. In the same year the Queen's speech at the Closing of the Legislative Assembly included a no-holds-barred

²¹ Bott Spillius, 1958-59, p.58; Wood-Ellem, 1999, pp. 20, 97-8, 134-5, 262.

scolding of the members of the Legislative Assembly for their disloyalty and bad behaviour.²²

[1920] *It is a matter of surprise that there are 800 tax-payers who are without their tax allotments, some through dearth of land, as in the case at Haapai, and others because they are downright lazy, for they do not want to plant or make the land useful; they are content to sit down and wait until the allotments planted by their parents or by others become vacant when they will rush to apply for them. It is very evident that this kind of tax-payer is on the increase these days, and I earnestly hope that strong measures will be taken to make every tax-payer accept a portion of the lands that are now lying idle and useless . . .* (Queen Sālote's speech at the Opening of the Legislative Assembly on 22 June 1920, TGG no. 23 (17 September 1920) p. 129)

[1930] *A matter which causes me much concern is the fact that a number of taxpayers are without allotments. It is your duty to induce these people to secure the land to which they are entitled and to develop it for themselves and the future of the country.* (Queen Sālote's speech at the Opening of the Legislative Assembly on 26 June 1930, TGG no. 12 (30 July 1930) p. 86)

[1931] *I would urge the Nobles who hold land and also the Government to proceed very slowly and carefully in regard to leasing lands, always keeping in mind that our population is increasing. I do not say that the law should be amended, but that careful attention should be given to the amount of land in hereditary tofias that has not yet been appropriated. With regard to Government land there are many lessees unable to pay their lease money on the due date, and these give the Government endless worry. Many of these leases are eventually transferred and often pass into the hands of one or two persons; and the consequence is that these persons acquire thousands of acres, a condition that is not desirable in a small country like this. Then, too, in another Report the fact is mentioned that there are from 700 to 1,200 taxpayers who are without tax allotments. The number of taxpayers who received tax allotments during the year was 127.* (Queen Sālote's speech at the Opening of the Legislative Assembly on 25 June 1931, TGG no. 10 (2 July 1931) p. 50)

[1948] *I further wish to call on you to cultivate the land throughout our group of islands for political freedom has no more secure foundation than personal freedom from want. References are often made to the Freedom of Men as outlined in the Constitution and the Law. But that freedom is only whole and complete when everybody has his own food crops and when each man lives unassisted. If we do not cultivate our land there are bound to be shortages and those who cultivate their land shall suffer because of those who do not.*²³

²² See TGG no. 23 (17 September 1920) pp. 131-2.

²³ In her speech at the Opening of the Legislative Assembly 1948 the Queen had spoken of an appeal by the United Nations for help because of the shortage of food, especially in Europe,

(Queen Sālote's speech at the Closing of the Legislative Assembly on 11 August 1948, TGG no. 12 (8 September 1948) p. 128)

[1956] . . . *pleasing for me to note the efforts made by the Government to facilitate and accelerate the sub-division and distribution of the land for town and tax allotments [by means of the projected Cadastral Survey]. It is my wish that the Nobles co-operate fully with the Government to achieve our obligation of providing land for the people. Tonga is more fortunate than other countries in the matter of land ownership [sic]. Our land system is unique. It is the sure foundation of our peaceful way of life. It is our rightful duty to see that that this inheritance is made secure for posterity, but we can only act in accordance with the provision of the Law.* (Queen Sālote's speech at the Opening of the Legislative Assembly, 14 June 1956, TGG no. 13 (19 October 1956) p. 169)

[1957] *I am confident that the land belonging to the Crown or Chiefs will be fully utilised for the purpose of providing allotments for the people in accordance with the Law of Tonga.* (Queen Sālote's speech at the Opening of the Legislative Assembly, 12 June 1957 (TGG no. 11 (24 September 1957) p. 189 – referring to the Cadastral Survey)

[1965] *I ask you to look to the land, which was one of the freedoms granted by the Emancipation [of 1862 and the Constitution] to provide for your families and to ease your burdens. This land was given to you that you may not have to work as slaves for others, for to do this would be contrary to the spirit of the Constitution . . . There are some who complain that they have no land . . . work your land and concentrate your efforts . . .* (Queen Sālote's speech at the Closing of the Legislative Assembly, 14 October 1965, TGG no. 13 (26 October 1965) pp. 214-15)

7. Recommendations

1. NEED FOR CHANGE

The very fact of the establishment of a Royal Land Commission indicates that the present situation in relation to land is not satisfactory, particularly given the increasing numbers of males who do not have land or any hope of inheriting any. The RLCT Interim Report has described many of the problems. There is also an obvious problem with the way leases are negotiated and lease money determined by the *tofi`a*-holders without any government regulation to curb their greed. The ideals of Tupou I and Queen Sālote relating to *tofi`a*-holders were that they should serve their country and look after the needs of the people. These ideals (you might even say requirements) appear to have been completely forgotten. A wise Government identifies the

following World War II. The Queen arranged for assistance to be sent by way of food and money. Prior to her visit to London in 1953, she ordered food to be sent from New Zealand to London for her to distribute to people she would encounter during her visit.

needs of the people and is pro-active in changing laws to suit contemporary conditions before dissatisfaction leads not just to petitions but to more overt difficulties. It is not right that a few should have a lot and many have nothing.

Recommendation 1: That the RLCT recognise the reforms of Tupou I and Queen Sālote Tupou III as the basis of land tenure in Tonga, including the need to cultivate the land.

Recommendation 2: That changes to the laws of land tenure in Tonga and to the administration of these laws be made in accordance with the principles identified by Tupou I and Queen Sālote Tupou III.

2. AN INDEPENDENT, STATUTORY BODY AS A PERMANENT LAND COMMISSION

An Independent Land Commission

The idea of a Lands Commission is not new, as it was mooted in 1913 and a draft ordinance prepared in 1915 and legislated for in 1917. Its main task was to determine boundaries.²⁴ It was ineffective because stalling tactics were used to prevent it functioning.

Having multiple authorities involved in decision-making is always problematic. Currently, as I understand it, not only the *tofi`a*-holder, the Minister for Lands, the Cabinet, but also on occasion the Monarch may be required to approve registration of an *`api `uta*.

Recommendation 3: That an independent, statutory Land Commission (ISLC) should be set up to develop the necessary legislation and supervise the implementation of the reforms proposed by the RLCT for approval by Parliament.

Membership of the ISLC

The ISLC should have the interests of the country as its first priority, it should show no fear or favour, and its decisions should be transparent and available to all. The Minister for Lands should be a member of the ISLC but not the chairperson. The chairperson should be a fully qualified lawyer. It is important that a number of proxies be appointed so that the work of the ISLC should not be delayed because members are not available when meetings are scheduled.

Recommendation 4: That the members of the ISLC should be selected because of their professional expertise in matters relating to land and as representatives of different districts of Tonga.

²⁴ I have made notes on the voluminous correspondence (1913-19) relating to this Lands Commission, including the original ordinance of 1915, Land Act no.2 of 1917, and a report of 1919 by A. B. Wallace (later Minister for Public Works) of a survey. It was in existence (it seems) for only 7 months and no recommendations were implemented.

Research and Advisory Unit for the ISLC

In view of the inadequacies of the data held by the Ministry, studies and surveys need to be carried out in order to determine how much land should be available for allocation and cultivation. Many of the following recommendations proceed on the assumption that answers will be found to key questions that are relevant to the implementation in this decade of the original thinking of the creator of the land system.

Recommendation 5: That as soon as possible a Research and Advisory Unit be established, associated with the ISLC and the Ministry of Lands, and with funding secured to cover research projects for at least four years. Appropriate skilled and expert people, in Tonga and from overseas, should be engaged in fact-finding and making assessments of needs for housing and cultivation throughout the kingdom.

Removal of Privilege in Legislative Assembly

ISLC recommendations must go to the Legislative Assembly to be made into law. Although at the present time *tofi`a*-holders are in a minority in the Legislative Assembly, the present law that gives them exclusive rights to discuss and vote on matters relating to estates and royal lands (which the Constitution calls a 'Privilege of Nobles') would be an obstacle to land reform and this law should be repealed.

Recommendation 6: That the law that gives *tofi`a*-holders exclusive rights to discuss and vote on matters relating to estates and royal lands should be repealed.

3. RECORD-KEEPING BY THE MINISTRY OF LANDS

In 1981 I visited a number of government departments in Nuku`alofa at the request of UNESCO and the International Council of Archives, with the hope that the Government of Tonga would agree to the setting up – with assistance from UNESCO – of a National Archives and Record Office (NARO). UNESCO appointed me because I had previously been employed as an archivist in Cambridge, UK. I ended my time in Tonga with a formal meeting with the then members of the Tonga Traditions Committee (TTC), chaired by the late Tui`ipelehake (Fatafehi). The response of the members of the TTC was that Tonga had greater priorities than a NARO.

I am not wholly cognisant of the situation today, but it is essential that records held by the Ministry of Lands be catalogued and that this catalogue be easily available to Tongans as well as the proposed ISLC. Cataloguing is a special skill and should be undertaken by trained and dedicated personnel according to a system that is understood by others employed in the Ministry who have permission to access them. If properly catalogued, then registered landholders, for example, will be able to consult them at any time and many complaints resolved quickly and easily.

Recommendation 7: That the Ministry of Lands be authorised by the

Government to set up a Records Division where all records relating to landholding will be catalogued by personnel who will be trained as archivists and have a professional supervisor.

Recommendation 8: That the Government of Tonga seek funding from an appropriate international body to train personnel as professional archivists to undertake cataloguing of the records of the Ministry of Lands according to international standards. That this be undertaken as a matter of highest priority. Possible funding sources would include UNESCO and the World Bank.

4. TOFI`A-HOLDERS

Re-affirmation of Basic Principles

It seems from the motion moved in Parliament by the noble Fakafanua and referred to the RLCT that some of the *kau nōpele* do not fully understand their legal situation in connection with lands. They do not 'own' any land, not even their personal *tofi`a*. The King owned the all land until he assigned it to the government as Crown Land. Furthermore, Tupou I did tell them to assign land to some and not to others; he said that each male should be given a farm allotment so he could support himself and his family. The leases should be of reasonable length for the lessee. A short lease in order that the rent may be raised within a few years at the whim of the *tofi`a*-holder is not ethical practice and should not be condoned by law.

If there is resistance on the part of *tofi`a*-holders to honouring Tonga's original land tenure policy, perhaps certain measures should be considered. A policy should be adopted of restoring and implementing the original tenets of the land tenure system. This means that non-conforming land should be regarded as Crown/Government land, to which the basic principles of distribution and registration as *'api 'uta* and *'api kolo* are applied. This should be implemented as soon as reasonably practicable having regard to Tonga's land shortage and the desirability of Tongan-grown food.

Recommendation 9: That Government should re-affirm the basic principles of the survey, distribution and registration of *'api 'uta* and *'api kolo*.

Identifying personal tofi`a

Clearly much work needs to be done in order to identify non-conforming land. The nineteenth-century mechanism for distributing land (i.e. by the *tofi`a*-holders) has proved increasingly unsatisfactory with the increase of population. It is now administratively possible for land to be distributed systematically and effectively with some organisational and practical changes and improved record-keeping.

Recommendation 10. That boundaries of the personal *tofi`a* should be surveyed and published with their dimensions in the *Tonga Government Gazette* and other media.

Recommendation 11: That those *tofi`a*-holders who have pieces of land in different districts or islands of Tonga should choose from which piece of land their personal *tofi`a* should be surveyed and registered.

Trustees for absentee *tofi`a*-holders and minors

Recommendation 12: That a *tofi`a*-holder residing overseas must appoint someone to be the *trustee* of the *tofi`a* during his absence and the name of that trustee should be registered at the Ministry of Lands.

Recommendation 13: If the heir is a minor, that a trustee must be appointed to look after the inheritance until he comes of age and that trustee must be approved by the Chairperson of the ISLC or Minister for Lands and also by the Premier.

Time-frame for reforms

Recommendation 14: That after adequate notice has been given to allow all *tofi`a*-holders to have the necessary surveys carried out and land distributed and registered according to law, all land remaining unregistered outside the personal *tofi`a* should be considered to be Crown Land. All 'rents' for allotments to be paid to the government.

The issues of *tofi`a*-holders and leases are dealt with below in Section 7.

5. `API `UTA AND `API KOLO

Importance of registration

It was recognised by the architects of the land tenure system that its principles could not be established and maintained without a strict registration regime. There has been a tendency in the statistics to recognise as 'distributed' or 'allocated' *`api* that have not been registered.

Recommendation 15: That only registered *`api `uta* or *`api kolo* should be recognised as having been allocated and held legally.

Recommendation 16: That after adequate notice has been given to allow every person holding an unregistered *`api* to take the necessary steps to register it according to law, land that is not registered should be considered to be Crown Land and be available for re-distribution to those who do not already have registered *`api `uta* and *`api kolo*.

Age eligibility for *`api*

Most boys and girls are still at school when aged 16. A more reasonable age would be 20 years, but that should be determined by the proposed ISLC.

Recommendation 17: That the age at which a person is eligible to apply for or inherit an *`api `uta* or *`api kolo* should be raised.

Size of *`api*

Complaints are heard that it is unfair that some registered *`api `uta* and *`api kolo* exceed the stipulated size. Further, it seems that in some cases the legal

maximum is itself too large for the particular geographic, topographical, or economic circumstances. It is suggested that actual sizes be reviewed systematically with the intention of subdividing those large *'api 'uta* and *'api kolo* that are capable of sustaining two or more viable farms or two or more residences (house and small garden), as the case may be.

Recommendation 18: That the legal size of an *'api 'uta* or *api kolo* should be regarded as a maximum. In the interests of meeting demand for land, greater productivity or fairness between parties, the permitted size may be reduced or the *'api* may be subdivided. Those with registered holdings from which land is removed under this proposal should be able to nominate the brother, sister, son, or daughter who will be able to register such excess land in their own name. Applications to vary the size of, or subdivide, an *'api* must be made to the ISLC. The ISLC might set different areas in different parts of Tonga. Land holdings created in this way should not be leased to non-family without the approval of the ISLC.

Recommendation 19: That after adequate notice having been given to allow all *'api*-holders to have the necessary surveys carried out and newly created holdings distributed and registered according to this proposal, all land remaining unregistered outside the original retained *'api* should be considered to be Crown Land for the Government to deal with.

Use of *'api*

Recommendation 20: That any land not used for cultivation or a legitimate business should revert to the Crown.

Land tax

Recommendation 21: That anyone who does not have a registered *'api 'uta* or *'api kolo* should not be obliged to pay a land tax or 'rent', although s/he will still be required to pay other taxes.

Recommendation 22: That the land tax due should be determined according to the acreage of land held.

Recommendation 23: That all land taxes and 'rents' should be payable to the government and released only for social capital (e.g. improvement of church and government or schools).

Trustees for absentee *'api*-holders

It is understandable that Tongans living overseas should regard land they have registered in Tonga as being insurance for themselves and/or their children. However, overseas Tongans, in addition to *tofi'a*-holders (for whom see Recommendations 12 and 13 above) have obligations in relation to their land. That is, that the land should be used productively, not lie idle.

Recommendation 24: That registered landholders resident overseas for extended periods or moving from one part of Tongan to another part of Tonga for a defined period (e.g. 3 months in any one year) should register the name of

the *trustee* who will be responsible for the productive use of the land during his/her absence and who will pay the land tax, cultivate the *`api `uta* and be responsible for the upkeep of the *`api kolo* during their absence. The preferred *trustee* should be a close family member, such as a parent, brother, sister, son, or daughter.

Priority of claim of Tongans

Recommendation 25: That no land may be leased to a Foreigner if required by a Tongan citizen as an *`api `uta* or *`api kolo*.

Removal of restrictions on applications

Recommendation 26: That any Tongan may apply for an *`api `uta* or *`api kolo* anywhere in Tonga, and should not to be restricted to any particular district.

Recommendation 27: That an applicant who refuses an offer of an *`api `uta* or *`api kolo* should not be prevented from applying for another, unless the refusal is based on no rational ground.

Recommendation 28: That if a person inherits an allotment and has already registered another piece of land, s/he should be able to choose which will be his/her registered allotment.

6. INHERITANCE

Formerly the chiefs of a *ha`a* would have a say in the succession to a major title,²⁵ and ideally the heir to an allotment would be determined by consensus of the relatives that one of themselves can be trusted to make the best use of the land. Unfortunately such practices can lead to disputes and bad feeling, even to bribery. The justifications for inheritance by primogeniture are (a) it avoids family dissension, and (b) it keeps the estate or allotment more or less intact (e.g. if an allotment-holder has 10 children, one-tenth of the allotment is unlikely to be enough for a viable farm). Nevertheless one who is fortunate enough to be born first in a family should be mindful of the well-being of his/her siblings.

Recommendation 29: That land should continue to be inherited on the basis of primogeniture, with the proviso that s/he is mindful of the welfare of siblings.

Recommendation 30: That daughters should have rights, and the eldest daughter should be the heir in the event that there is no son to inherit or the eldest son is deceased and has no living son.

Recommendation 31: That if an eldest child inherits land and then leases it, then the lease money should be equally divided among the siblings who are resident in Tonga.

²⁵ 'Discussions', vol. 1, p. 65.

Recommendation 32: That an inheritance is forfeited by anyone living permanently overseas, and guidelines should be drawn up to assist in applying this principle.

7. ALES AND LEASES

No sale of land

Recommendation 33: That no land shall be sold. Tupou I forbade the *sale* of Tongan land to Foreigners or Tongans. This prohibition should be applied to any *indirect* as well as direct sale of land by *tofi`a*-holders or *`api*-holders, or anyone else resident in Tonga.

Extortion a criminal offence

Recommendation 34: That demands for money up front in order to facilitate a registration or to make or renew a lease should be illegal, and the perpetrator of such a demand should be charged with a felony.

Role of the ISLC

Recommendation 35: That the ISLC should determine what is a fair rent for leased land. The terms of the lease, including the rent, will be recorded by the Ministry of Lands.

Recommendation 36: That the ISLC should approve the length of a lease and the annual rent for schools and other community organisations should be given preferential treatment, including leases of 99 years for schools if requested.

Renewals of leases

Recommendation 37: That only the ISLC can approve the renewal of a lease. Approval of the Government (in the case of Crown Land) or estate-holder will not be a requirement, although they may be consulted at the discretion of ISLC members.

Recommendation 38: That a lease may be automatically renewed if the land is still used for its original purpose, e.g. a school, a legally recognised and active church, a community centre, or for legally recognised charitable purposes. The lessee is accountable for the fulfilment of conditions, such as ensuring production or provision of adequate food for school students.

Termination of leases

Recommendation 39: That leases may be terminated if the leased land is no longer used for the purpose set down in the lease.

8. FOOD SUPPLY

It should be remembered that the prime motives for Tupou I's land reforms were not only the security of tenure but also to ensure an adequate supply of food for his people in normal times as well as times of natural (or unnatural) disasters. An adequate food supply, as we know well in the twenty-first

century, is essential for health, and inadequate food can lead to disease. This means a variety of food crops to supply proper nutrition. Imported food is not necessarily good for nutrition. Cash crops should be grown only as an addition to crops grown for the home market. This is something that the ISLC should study in co-operation with the ministries of Agriculture and Health, although the ISLC is not necessarily responsible to the drawing up and implementation of such policies. It is also not just that when cash crops are exported, that only certain growers are included in the quota, while other growers may not be able to dispose of their crops and may be unable to re-pay money borrowed for that purpose.

Recommendation 41: That, although such regulations would *not* necessarily be the responsibility of the ISLC, the ISLC should be mindful that one of the basic tenets of Tupou I's land reform was the provision of an adequate food supply for the Tongan people

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