

KOE TU'I KO E PULE, THE KING IS SOVEREIGN: AN ANALYSIS OF THE 2017 DISSOLUTION OF THE TONGAN PARLIAMENT

WILIAME IUPELI GUCAKE*†

Abstract

The Kingdom of Tonga is the only country in the Pacific never to have been colonised. Its constitutional development thus provides a unique model of customary Pacific governance in the modern world context. On 25 August 2017, the King of Tonga dissolved Parliament. The impetus was said to be due to issues with Prime Minister Akilisi Pohiva. Elections held three months later resulted in the re-election of Pohiva as Prime Minister. This article considers the constitutional relationship between the King and the Tongan people in two different spheres. Firstly, it will consider the dissolution of Parliament through a customary lens, using the Kavei Koula 'e Fa, the four golden pillars of Tongan society, as a framework. It will specifically look at faka'apa'apa (respect) and its application between King and people, considering its utility as a mechanism for accountability. Secondly, this article considers the decision with respect to the main accountability mechanism within the common law, that is, judicial review. This article will evaluate the legal strength of a judicial review proceeding brought against the decision of the King, exploring the growing indigenous and overseas case law and jurisprudence on the constraining of prerogative powers of a Sovereign. This article overall considers the constitutional relationship between the King and his people, in the intersection of customary law and Western notions of power.

In the time beyond memory, the god Tangaloa 'Eitumatupu'a climbed down from the sky on a great casuarina tree, (he) saw a woman, searching for shellfish in the sea. Time

* LLB, BCom, Barrister and Solicitor of the High Court of New Zealand. Wiliame is of Fijian and Samoan descent. He would like to acknowledge his parents, family and friends for their support and reaffirmation. He also thanks Professor Tony Angelo QC, for his feedback and support, and acknowledges the late Professor Guy C. Powles and the late Associate Professor Teresia Teaiwa, for their academic inspiration for this paper. He also acknowledges that these are his views alone as an outsider to Tongan culture and apologises for any errors in his understanding. *Vina'a va'alevu and Malo au'pito.*

† The author acknowledges the passing of Prime Minister Pohiva in 2019. *Tōka ā 'i he nonga 'a e 'Eiki*

went by and the God kept visiting the human woman named Va'epopua. After some time, Va'epopua became pregnant but Tangaloa 'Eitumatupu'a had to return to his home in the sky. Not long after that she gave birth to a boy named 'Aho'eitu.¹

The genealogy of the ruling family of Tonga, and its connection to divinity, is key for outsiders to begin to understand the importance and role of the Tongan royal family.² Tonga, like many other cultures, has a traditional association of the divine with their leaders. While the old traditional religions are no longer largely practised, this cognitive link would have influenced many of the customs and practices permeating the royal family and the interactions between the royal family and the people of Tonga. This is best illustrated by the constitutional provisions holding the person of the King as being *tapu* or sacred.³ The sacredness of ruler's personhood is a customary principle, which holds that as leader of Tonga, the King's *mana* is supreme and thus his personhood is *tapu*.

On 24 August 2017, the *ngātu* of Tonga's constitutional history added a new print to its folds; the dissolution of the Legislative Assembly ("Parliament") by King Tupou VI. This resulted from growing tensions between the Pohiva government and the traditional noble powerbase. The caretaker government still left Prime Minister Pohiva ("Pohiva") in power, and, ultimately, Pohiva emerged victorious from the ensuing re-election held on 16 November 2017. The decision had worldwide media attention, with many commentators concerned for democracy in Tonga.⁴ This, however, does not fully comprehend the constitutional relationships at play in Tonga and applies a Western view of politics to the situation, not necessarily one that is *anga-fakatonga* – the Tongan way.

This article considers the exercise of the King's prerogative to dissolve Parliament. Firstly, it considers the decision of the King by employing the customary lens of *Kavei Koula 'e Fa*, with particular reference to *faka'apa'apa*. This is an attempt to understand the decision from a Tongan point of view. The article then analyses the legal basis of the decision, with specific consideration of whether the decision is justiciable and able to be heard before a court.

1 Adrienne L Kaeppler "Rank in Tonga" (1971) 10(2) *Ethnology* 174 at 180.

2 For discussion of the social organisation in Tonga of Nobles and Commoners in Tim René Salomon "A Balancing Act: Modern Equality vs Traditional Nobility In Tonga" (2009) 40 *VUWLR* 369.

3 Constitution of Tonga 1875 (Cap 2), cl 41.

4 Barbara Dreaver "Fears of violence in Tonga after King Tupou VI dismisses PM Akilisi Pohiva and dissolves Parliament" ONE News Now <www.tvnz.co.nz>.

I. Context

A. Tonga – *Si'i pe kae hām* – We are a Small Island, We are Still Great

Tonga remains the only Pacific nation not to have been fully colonised, having only been a British Protectorate from 1900–1970. Tonga is somewhat of a Wakanda in the Pacific,⁵ with a constitutional model that not only incorporates Western principles of governance but also contains a power system based on “*nga fakatonga*”.⁶

Tonga is the only Pacific nation not to have any explicit constitutional recognition of custom. However, as noted above, custom is interwoven throughout the Tongan Constitution.⁷ This is illustrated by provisions that uphold customary principles such as the sovereignty of the King and the sacredness of their person.⁸ The Constitution also codifies the customary hierarchical class structures, attempting to create clear divisions between royals, nobles and commoners.⁹ The drafters of the Constitution have sought to both incorporate custom and preserve the Tongan way of life, while attempting to include the benefits of Western culture, creating a system that is uniquely Tongan.¹⁰

Tonga's system of government is similar to many Western legal systems, with three branches of government overseen by the Monarch. In terms of the court structure, at the base are the Magistrates Courts, which hear civil actions that concern less than TOP \$1,000 and criminal matters that have a punishment that do not exceed a fine of TOP \$1,000 or a period of three years' imprisonment. The Supreme Court hears civil and criminal appeals from the Magistrates Court. Appeals from the Supreme Court are heard by the Court of Appeal. There is also the Land Court, which hears all questions of title affecting land or any interest in land. Appeals from the Land Court in relation to hereditary estates and titles are heard by the Privy Council, which consists of the King's legal advisors, the Law Lords. The superior courts are largely staffed by expatriate judges, with the first judge of

5 Wakanda is a small fictional nation in North East Africa, within the Marvel comic series. For centuries they have remained in isolation, free from colonisation but developed into a technologically advanced nation, while retaining their customs and indigenous culture.

6 See Mele Tupou “Constitutional and political reform in the kingdom of tonga: New wine in old bottles?” (2016) JSPL 19 for further discussion of Tonga's constitutional and political system.

7 Guy C Powles “Common law at bay? The scope and status of customary law regimes in the Pacific” (1997) 21 JSPL 61 at 66.

8 Constitution of Tonga 1875 (Cap 2), cl 41.

9 At cls 4, 44 and 63.

10 Campbell McLachlan “State Recognition of Customary Law in the South Pacific” (PhD Thesis, University of London, 1988) at 170.

Tongan descent in the Supreme Court in over 100 years being appointed in 2018.¹¹ Tonga has never had a Chief Justice of Tongan descent.

B. Dissolution of Tongan Parliament

The dissolution of Parliament by the King in 2017 was a sudden and unexpected event. The instrument of dissolution is detailed in the Gazette, declaring:¹²

WE, TUPOU VI, BY THE GRACE OF GOD, OF TONGA, KING:

HAVING CONSIDERED Advice from the Lord Speaker of the Legislative Assembly and

HAVING REGARD to Clauses 38 and 77(2) of The Act of Constitution of Tonga (Cap.2)

DO lawfully dissolve the Legislative Assembly with effect from Thursday 24 August 2017 at 1700 hours and

DO Command that new Representatives of the Nobles and People be elected to enter the Legislative Assembly at Elections to be held no later than 16 November 2017.

DONE by Us at Nuku'alofa this Twenty Fourth day of August in the Year of Our Lord Two Thousand and Seventeen and in this the Sixth Year of Our Reign.

Tupou VI

The Gazette notes that the exercise of the King's prerogative powers is based upon consideration of advice from the Speaker of the House, Lord Tu'ivakano.¹³ In a radio interview on 28 August 2017, Tu'ivakano stated that his advice to his Majesty was based on eight grievances:¹⁴

1. The submission of a Bill that would seek to amend the Constitution, so as to revoke the King's right of assent to legislation approved by the Legislative Assembly before it could become law.

11 Radio NZ "Local lawyer finally appointed to Tonga's Supreme Court bench" (29 June 2018) Radio New Zealand <www.radionz.co.nz>.

12 "Instrument of Dissolution" (25th August 2017) 4 *Tongan Government Gazette Supplement Extraordinary* 2017.

13 Radio NZ "Tonga speaker claims govt's thirst for power drove him to King" (29 August 2017) Radio New Zealand <<http://www.radionz.co.nz>>.

14 Steven Ratuva "Tonga" (2018) 30(1) *The Contemporary Pacific* 204 at 210.

2. The intended use of that Bill to align with Cabinet's earlier plans to bypass the King's prerogative to sign treaties and conventions as per the Constitution. This was seen in the attempt by Cabinet to ratify the Convention on the Elimination of All Forms of Discrimination Against Women without prior royal approval.
3. Cabinet entering into the PACER-Plus Agreement without prior royal approval.
4. The submission of another Bill seeking to amend the Constitution to remove the Privy Council's right to appoint crucial positions like the Police Commissioner and the Attorney-General.
5. The intervention of Prime Minister Pohiva into Parliament's investigation into the alleged abuse of office committed by a former Cabinet Minister. His intervention prevented the proper sanctioning of the former Minister by Parliament. This was accepted by Parliament on the understanding that Pohiva would punish the Minister instead. It later became apparent that he did not punish the member as promised.
6. Several petitions have been submitted to the Office of the Speaker that sought to impeach various Members of Parliament. These were considered by the Speaker as a waste of time and resources.
7. The deliberate misleading of Parliament by Cabinet regarding the hosting of the 2019 Pacific Games. The Government, through the special legislation authorising the collection of foreign exchange levy tax to fund the Games, continued to collect such taxes even though the Games were cancelled.
8. The approval by Cabinet of a five per cent salary increase for all Ministers in response to a recent increase in income tax, yet the tax increase applied to the whole country especially all the civil servants and people in private enterprises.

The validity of these claims has not been tested. However, what they do indicate is the growing tensions between the Pohiva Government and its opponents. Earlier that year, on 2 February 2017, the Speaker received notice of a no-confidence motion signed by ten members, who were largely noble members of Parliament.¹⁵ The vote resulted in Pohiva remaining in power, with 14 votes for him and ten votes against him.¹⁶ The motion was a response to allegations of “poor governance, nepotism and favouritism”, with criticism of the appointment of Pohiva’s son as an advisor and concerns that the Prime Minister’s strong stance on West Papua threatened diplomatic relations with Indonesia.¹⁷ In addition, the withdrawal of Tonga as host of the South Pacific Games further aggravated tensions. This was considered an unpopular decision to the detriment of Tonga’s public image and increased resentment against Pohiva.¹⁸

The events leading up to the dissolution in August reveal the tensions between nobles and commoners wanting democracy in Tonga.¹⁹ The next two sections of this article analyse the decision detailed above, firstly with the customary lens and then considering the legal grounds for review.

II. Custom – *Motu Ka na’e Navei*

Motu ka na’e navei –

The *navei* is a supporting strap of a Tongan basket. If the original handle breaks off the *navei* will remain and save the basket’s contents from falling away.²⁰

Consider Tongan society as a *kato alu* (basket), with *anga fakatonga* – the Tongan way – making up its woven strands, held together by the *navei* – *faka’apa’apa*. The disturbance of one part of the *kato alu* can harm the others, undoing the woven bonds. This section aims to consider the King’s decision to dissolve Parliament in relation to the custom of Tonga.

15 Ratuva, above n 14, at 204 and 205.

16 Radio NZ Pacific “Tonga’s Pohiva survives no confidence vote” Radio New Zealand <www.radionz.co.nz>.

17 Parliament of Tonga – Lastest News “Parliament Receives Motion for a Vote of No Confidence” Parliament of Tonga <www.parliament.govt.to>.

18 Steven Ratuva, above n 14, at 210.

19 At 206.

20 Translations by Mereana Taungapeau “*Ko e Kai ia ‘a e Tonga*” (September 2014) National Library <www.natlib.govt.nz>.

A. *Faa'i Kavei Koula 'e Fa* – The Four Golden Pillars

Tongan society is said to be built on the *Kavei Koula 'e Fa* – the four golden pillars. These are four values that make a Tongan a paragon of virtue. They are the “four values that underpin the relationship between the nobility and the people of the *foua* (land)”.²¹ These were articulated by Queen Salote in her speech at the opening of the Tonga Cultural and Heritage Society in 1964 as consisting of:²²

1. *Faka'apa'apa*: acknowledging and returning respect;
2. *Anga fakatokilalo/loto tō*: humility, open to learning;
3. *Tauhi vaha'a/vaā*: keeping the relationship ongoing, alive and well; and
4. *Mamahi'i me'a*: one's loyalty and passion.

The foundation for the four pillars is *'Ofa* (love, care and kindness). These are the core values a Tongan is expected to uphold in their daily life and particularly in traditional ceremonies.²³ They are ideals to which all Tongans should aspire in order to live successfully with God, land and people.²⁴ These values, as stated by Queen Salote, distinguish Tongans as a people and are reflected in: *teuteu* (dress), *lea* (speaking), *tō'onga* (behaviour), *ngāue* (action) and *tauhi vaha'a* (relationships).²⁵

This article focuses on the value of *faka'apa'apa* (acknowledgment and returning respect) and analyses the decision of dissolution with consideration of *faka'apa'apa*.

B. *Faka'apa'apa*

Faka'apa'apa is reverence for others. It nurtures relationships; thus, it must be observed at all times.²⁶ The absence of *faka'apa'apa* leads to chaos.²⁷ *Faka'apa'apa* is central to *'anga fakatonga*. *Faka'apa'apa* is total and unquestioning obedience,

21 T Tuinukuafe and others *Fofola e fala kae talanoa e kāinga: A Tongan Conceptual Framework for the prevention of and intervention in family violence in New Zealand – Fāmili lelei* (Pasefika Proud Tongan Framework, Ministry of Social Development, March 12) at 13.

22 At 13.

23 Hon Frederica Tuita “Princess Diaries VII: Faka'apa'apa (Respect)” The Whatitdo.com – Urban Island Review <www.thewhatitdo.com>.

24 ‘Alaimalulua Toetu'u-Tamihere “Ki He Lelei Taha Talanoa: Mei He Kaliloo of Successful Tongan Graduates” (PhD Thesis, University of Auckland, 2015) at 41, citing Queen Sālote Tupou III, *Ko e Faka'apa'apa. Tala-e-Foua Tonga Book I* (Palace Office Papers, Nuku'alofa).

25 ‘Alaimalulua Toetu'u-Tamihere, above n 24, at 41.

26 At 41.

27 At 41.

respect for higher rank and is the essence of social order in Tonga.²⁸ Taumoeofolau explains that *faka'apa'apa* underpins the hierarchical structure within Tongan society, governing the interactions between different classes.²⁹ He considers that *faka'apa'apa* is expressed through ways of behaving (wearing of *ta'ovala*, or wearing of black during funerals). Taufē'ulungaki and others also described *faka'apa'apa* as an unwritten social contract that is the foundation that Tongans live by, encompassing a shared understanding of a relational social contract between classes, people and communities.³⁰

Importantly, *faka'apa'apa* should not be limited to its Western understanding as “respect”, for the concept is broader than this.³¹ Tongan society is determined by relations of *faka'apa'apa* between those whom are *'eiki* (superior) and *tu'a* (inferior), characterising the social relationships within families, communities and classes.³² Member of the Tongan Royal family, Hon Frederica Tuita, explains *faka'apa'apa*, as the respect which the general public give their Sovereign and the respect the King and/or Queen gives their people.³³ It applies to all Tongans regardless of a person's rank or status – nationally or within the family.³⁴

C. The Decision

The decision by the King to exercise his powers to dissolve Parliament was done under his absolute right as Sovereign. However, a key question is whether his decision aligned with the value of *faka'apa'apa*. Consideration of this question is not intended to pass judgement on the King, as that in itself undermines the customary basis this article attempts to apply. However, it is intended to consider the decision to dissolve Parliament against Tongan values. If *faka'apa'apa* is foundational to all

28 Guy Powles “Testing Tradition in Tonga: Approaches to Constitutional Change” (2007) 12 CLJP/ JDCP 111 at 121, citing Laki Niu “The Constitution and Traditional Political System in Tonga” in Yash Ghai (ed) *Law, Government and Politics in the Pacific Islands States* (University of the South Pacific, Institute of Pacific Studies, Suva, 1988) 304.

29 M Taumoeofolau “Respect, solidarity and resilience in Pacific worldviews: A counselling perspective” in M Agee, T McIntosh, C Culbertson and C Makasiale *Pacific Identities and well-being: Cross-cultural perspectives* (Routledge, New York, 2013) 115 at 120. See also Edmond Fehoko “Pupepuka Fonua : an exploratory study on the faikava as an identity marker for New Zealand-born Tongan males in Auckland, New Zealand” (Masters Thesis, Auckland University of Technology, 2014) at 12.

30 A Taufē'ulungaki, S Johansson-fua, S Manu and T Takapautolo *Sustainable livelihood and education in the Pacific Project – Tonga Pilot report* (Institute of Education Report, University of South Pacific, 2007) cited in Edmond Fehoko, above 29, at 12.

31 The concept has also been considered in criminal sentencing decisions like *R v Santos* [2019] NZHC 2670 at [14], where the court considers how *faka'apa'apa* operates at the family level.

32 Tracie Mafile'o “Tongan Social Work Practice” in John Coates Michael Yellowbird and Mel Gray *Indigenous Social Work around the World: Towards Culturally Relevant Education and Practice* (Routledge, New York, 2016) 117 at 121.

33 Hon Frederica Tuita “Princess Diaries VII: Faka'apa'apa (Respect)” The Whatitdo.com – Urban Island Review <www.thewhatitdo.com>.

34 Tuita, above n 33.

Tongan lives and applies in the relationships between classes, as considered by Queen Salote and Hon Frederica Tuita, then *faka'apa'apa* arguably applies also to decisions of the King.

The King, in exercise of his prerogative powers, should have consideration of such fundamental principles. In support of the King's decision, the basis upon which the decision was made stemmed from complaints about poor governance and corruption within the Pohiva Government. In consideration of those issues, the dissolving of Parliament, was arguably done out of recognition of *faka'apa'apa* by the King concerned for his people. His actions can thus be seen as a justifiable response to the lack of *faka'apa'apa* shown by the Pohiva government towards the people of Tonga. As King, it was his constitutional right to intervene where peace and justice are threatened.

Alternatively, it is also arguable that the decision undermined *faka'apa'apa*. The dissolution of Parliament is usually considered as a last resort, only exercised where the circumstances desperately require it. The decision was based upon the Speaker's complaints presented to the King. There was no opportunity given for Pohiva to explain his side of the story, which does not necessarily show *faka'apa'apa* for Pohiva. These canons of justice are important to ensure that *faka'apa'apa* is given to Pohiva and the Government, and that the decision overall complies with *faka'apa'apa*.

Furthermore, Parliament is a direct expression of the will of the Tongan people; both commoner and noble. Pohiva's Government was the product of the people's collective democratic intention, thus the King's decision to override it could be said to lack *faka'apa'apa* for his people. As Pohiva's Government was re-elected a few months later, it reinforced the fact that the people's will was for Pohiva to remain in power, and *faka'apa'apa* should have been accorded to that. This somewhat undermines the decision of the King on a customary basis, and threatens to dim the dignity of his title and mana. A dissolution of Parliament by the King is arguably equivalent to a total disregard of the people's collective will, especially without proper exploration of other options that would better align with *faka'apa'apa*.

For an exercise of royal powers to be harmonious with custom, it should consider whether the decision upholds *faka'apa'apa*. If *faka'apa'apa* is foundational and universal in its application, it is even more pertinent that *faka'apa'apa* is upheld in the social relationships between nobility and commoners. Many of the issues that led to the dissolution arose from the tensions between nobles and commoners.³⁵ When *faka'apa'apa* is lost, chaos arises, as seen from the public uproar after the dissolution of Parliament. But *faka'apa'apa* can also be rejuvenating and unifying,

35 Steven Ratuva, above n 14, at 206.

as the *navei* for the *kato alu* that is Tongan society. A greater showing of it between nobles and commoners, between King and Parliament and King and people, can only lead to a stronger Tonga.

III. The Justiciability of Royal Prerogatives - *Fangota kihe kato 'ava*

Fai'aki e 'ilo 'oua 'e fai'akie fanongo – Do it by knowing, not by hearing³⁶

This section considers the legal basis by which a review of the decision to dissolve Parliament may be brought before a court of law, ie the justiciability of the decision to dissolve Parliament. The question is really whether these exercises of prerogative power are able to be heard before a court of law. The proverb is used to caution against acting hastily without knowing a situation fully. Whether caution was heeded or not is considered in this section.

A. Royal Prerogative

The dissolution of Parliament was an exercise of the King's powers under cl 38 of the Constitution which states that:³⁷

The King may convoke the Legislative Assembly at any time and may dissolve it at his pleasure and command that new representatives of the nobles and people be elected to enter the Assembly. But it shall not be lawful for the Kingdom to remain without a meeting of the Assembly for a longer period than one year ...

This clause recognises the the prerogative powers of the Monarch. Dicey articulates these powers as “the discretionary power left at any moment in the hands of the Crown, whether such power be in fact exercised by the King himself or by his Ministers”.³⁸ The Supreme Court of Tonga, as per Ward CJ, defined prerogative power as:³⁹

36 Translations by Taungapeau, above n 20.

37 Constitution of Tonga 1875 (Cap 2), cl 38.

38 A V Dicey *Introduction to the Study of the Law of the Constitution*, (10th ed, Macmillan & Co, London, 1959) at 424.

39 *Lali Media v Lavaka Ata* [2003] TOSC 27, [2003] Tonga LR 114, at 8.

... power which is possessed by the Crown but not its subjects. It was based on the supreme sovereignty of the Monarch and the concept that the King can do no wrong and derives from the common law.

The power to dissolve Parliament is well-recognised both in common law and by Tongan Courts. In *Lali Media v Lavaka Ata*, Ward CJ in the Supreme Court held that:⁴⁰

... [t]he modern position of the prerogative is that it is limited by the common law and the Monarch can claim no prerogative that the law does not allow. When the prerogative is defined by statute, as occurs in our Constitution, it is thereafter subject to that law.

The Chief Justice held that prerogative powers fall into two groups:⁴¹

... those which are clearly stated to be the prerogative of the King alone – *personal prerogatives*, and those which are executive acts of the Crown (with or without personal involvement of the King), exercised by the Privy Council, Cabinet or other government departments, – *executive prerogatives*. (emphasis added)

Ward CJ held that personal prerogatives are not justiciable (that is, a court cannot consider the manner in which personal prerogatives are exercised), but executive prerogatives are justiciable before a court to consider the extent of it and the manner in which it is used.⁴²

While there is persuasive case law from the Pacific and other common law jurisdictions,⁴³ *Lali* is the leading indigenous precedent, in consideration of Tonga's unique amalgam of custom and Constitution. Firstly, *Lali* is authority for the point that the Monarch's powers are not absolute and can be reviewable in certain circumstances. As the Court explains, when the Monarch became subject to the Constitution, this was an acknowledgement that the prerogatives used in government would be justiciable.⁴⁴ This is consistent with common law doctrine.⁴⁵

40 *Lali Media v Lavaka Ata*, above n 39, at 9.

41 At 9.

42 At 9.

43 See *Qarase v Bainimarama* [2009] FJCA 9, ABU0077.2008S, 9 April 2009.

44 Guy Powles *Political and Constitutional Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (2nd ed, University of South Pacific Press, Suva, 2013) at 66.

45 *Council of Civil Service Unions v Minister for Civil Service* [1984] 3 All ER 935 (HL).

Secondly, for the decision made by the King to dissolve Parliament to be subject to judicial review, it would need to be considered as an executive prerogative power and not a personal prerogative. Decisions subsequent to *Lali* have upheld the notion that the Monarch's prerogative powers are limited to those provided by the Constitution and statute, and cannot be inferred.⁴⁶ Additionally, in *Aleamotu'a*, the Land Court held that:⁴⁷

... the Court retains the right and duty to analyse the actions taken and, when it is of the view that the parameters within which the royal prerogative must be exercised have been exceeded it may, in its discretion, declare that to be the case.

However, the courts have not had the opportunity to consider in depth the scope of when a decision is a personal prerogative and when a decision is an executive prerogative, and so there remains no conclusive standpoint from the Tongan courts. The next section will go on to consider whether the dissolution falls within the parameters of a 'personal prerogative' under Ward CJ's distinction of the types of prerogative powers.⁴⁸

B. Dissolution – A Personal Prerogative?

Prima facie, as per the wording of the constitutional provision, the Monarch's power to dissolve Parliament is a personal prerogative and therefore is not likely to be subject to review by the courts. In an "uncustomary" press release, the Acting Attorney-General ("Attorney-General") contended that any legal action undertaken in response to the August 2017 dissolution of Parliament would be dismissed in summary judgment by the Court.⁴⁹ He stated that, as the decision was an exercise of a personal royal prerogative with no prescribed "parameters", it therefore could not be subject to review.⁵⁰ In support of this, he cited cls 38 and 77(2) of the Constitution, which allow for the dissolution of Parliament by the Monarch, containing the phrase "at his pleasure". This, he argued, indicated that the King was exercising his personal prerogative.⁵¹

46 *Veikune v Kingdom of Tonga* [2007] TOLC LA 9/2007, [2007] 14 Tonga LR 60 at [12].

47 *Aleamotu'a v Fielakepa* [2015] TOLC 13, LA 15/2015, 4 December 2015 at [26].

48 *Lali*, above n 39, at 9.

49 Acting Attorney-General "Dissolution of Parliament is His Majesty's Unfettered Personal Royal Prerogative 31st August 2017" (press release, 31 August 2017) ("Attorney-General's press release").

50 Attorney-General's press release, above n 49.

51 Constitution of Tonga 1875 (Cap 2), cls 38 and 77(2); Attorney-General's press release, above n 49.

Support for the Attorney-General's position can be found in common law. In *Council of Civil Service Unions v Minister for the Civil Service*, the leading English precedent on prerogative power, Roskill LJ held that prerogative powers, like the dissolution of Parliament and the appointment of Ministers as well as others, are not susceptible to judicial review because their "nature and subject matter is such as not to be amenable to judicial process".⁵² This is authority for the position that powers of the Monarch to dissolve Parliament are personal and political, and therefore not justiciable.

A similar line of authority is found in the Tongan Supreme Court decision, *Flyniu v Ata*.⁵³ In that decision, Webster CJ held that in relation to prerogative powers, their justiciability is dependent on:⁵⁴

... the nature and subject matter of the decision which is being challenged, and that certain matters of high policy involving political judgement – as distinct from administrative decisions – are inherently unsuitable for review by the courts because practically, the courts are not competent to do so as they would be in a judicial no man's land with no judicial or manageable standards by which to judge the issues.

The 24 August 2017 decision to dissolve Parliament was made on the advice of the Speaker and was reportedly based on political issues. This would indicate the decision itself was an exercise of political judgement, where the King made a decision based on his concern for his people. Thus, can a court really question a decision made on these grounds?

Further support comes from Professor Guy C Powles' categorisation of the Monarch's powers. Powles lists the power to dissolve Parliament within "Category 1, where the Monarch is exercising his discretion without necessarily receiving advice".⁵⁵ He considered that "these are areas where the Monarch retains full executive authority and may act with or without advice, as they wish".⁵⁶ In contrast, Category 2 powers are those where the Monarch's executive authority is not absolute but guided by the Executive who provide advice,⁵⁷ and Category 3 powers are decisions that are already made to which the Monarch lends their authority to give validation.⁵⁸ This categorisation indicates that the power to dissolve Parliament lies

52 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 (HL) at 956.

53 *Flyniu v Ata* [2004] TOSC 49; [2006] Tonga LR 10.

54 At 11–12.

55 Powles, above n 44, at 67.

56 At 67.

57 At 68.

58 At 69.

more squarely within “personal” prerogative powers than “executive” prerogative powers.

C. Dissolution – An Executive Prerogative?

Alternatively, there is some strength in the argument that, in these circumstances, the dissolution of Parliament was not done as an exercise of personal prerogative powers but as an executive prerogative. The dissolution was based upon advice of the Speaker of the Assembly, and then upon advice of the Privy Council. Therefore, it could be argued that the decision was done as an executive act of the Crown, as per the definition outlined by Ward CJ in *Lali*.

The role of the Speaker traditionally in Westminster systems is as “the embodiment of the House”.⁵⁹ The Speaker is responsible for speaking on behalf of Parliament as a national institution.⁶⁰ Therefore, if the Speaker is representative of Parliament, does this mean that the recommendations for dissolution are equivalent to the Parliament making these recommendations? Also, would this form an additional category of powers from Ward CJ’s categories in *Lali*, empowering Parliament to exercise powers beyond its traditional role of law-making?⁶¹ Another question raised is whether this is simply an extension of Parliament’s role, or is it something already inherent, as part of having an effective Parliament? This issue however, would still not be an exercise by the Monarch of their full executive authority and becomes a Category 2 power, as per Powles.

There are several issues with this proposition. Prerogative powers are powers of the Crown and the Executive, not Parliament. Thus, where Parliament recommends dissolution, this might be viewed as an expression of the democratic will of the people of Tonga. Alternatively, this may also be viewed as an undermining of the separation of powers, as Parliament would be encroaching into the traditional powers of the Executive. For Parliament to exercise prerogative powers of the executive would undermine its foundational democratic principles and allow it to go beyond its constitutional purpose of making law.

The appointment of the Speaker by the Monarch is itself an exercise of prerogative power, though this falls into Powles’ third category, where the Monarch is exercising their authority to validate decisions made with those with lesser authority (here Parliament).⁶² The Monarch lends the dignity of their title, the highest in the land, to validate the noble recommended by Parliament to be Speaker.⁶³

59 Pita Roycroft “The Ayes Have It: The Development of the Roles of the Speaker of the House, 1854–2015” (2017) 15 NZJPIL 353 at 355.

60 At 356.

61 *Lali*, above n 39, at 9.

62 Guy Powles, above n 44, at 69; Constitution of Tonga 1875, cl 61.

63 Guy Powles, above n 44, at 69.

The dissolution of Parliament has traditionally been made on the advice of the Prime Minister. To have the Speaker giving such advice is a constitutional twist. While exercise of such powers may be on the advice of the Executive, powers to dissolve still lie at the pleasure of the Monarch, who exercises full executive authority. However, the current scenario shows the fine line between personal and executive prerogative powers.

While cases such as *Council of Civil Service Unions* uphold traditional notions of prerogative powers, there have been significant inroads made into the justiciability of prerogative powers. This was illustrated in the decision of *R (Miller) v Secretary of State for Exiting the European Union*, where the United Kingdom Supreme Court ruled that the Government could not initiate withdrawal from the European Union by formal notification to the Council of the European Union as prescribed by art 50 of the Treaty on European Union without an Act of the United Kingdom Parliament permitting the Government to do so.⁶⁴ The decision is authority for the justiciability of powers that lie within Category 1 of Powles's trichotomy, powers of the King concerning international affairs, that are traditionally considered personal prerogatives.⁶⁵ The restriction of powers largely and solely vested in the executive, strengthens arguments that if such decisions have been held to be reviewable, then so can decisions to dissolve Parliament.

D. Conclusion

There are valid arguments that lie either way as to whether the dissolution power was the exercise of a personal prerogative or an executive prerogative. While prima facie, one would understand these powers as a personal prerogatives, the unique circumstances that led to the dissolution, combined with the developing jurisprudence allowing for review of decisions that would usually be considered the personal domain of the Monarch, are a strong basis on which to argue that the King's dissolution of Parliament is theoretically amenable to review. It is unclear here how much has been done by knowing, and how much has been done by hearing, that is, the legal grounds by which the dissolution was made on are not infallible.

IV. *Faka'apa'apa* as a Ground of Review

In bridging the two sections of this article, the idea was advanced that, if the dissolution were litigated, this could provide the opportunity for an imaginative

64 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2016] EWHC 2768 (Admin), [2016] NIQB 19.

65 Guy Powles, above n 44, at 67; Constitution of Tonga 1875, cl 39.

bench to consider a novel ground of review: custom. This would examine whether an executive decision was consistent with customary principles like *faka'apa'apa*. Such mechanisms are already alive in Pacific nations like Vanuatu and the Solomon Islands, which give explicit constitutional recognition of customary law.

By considering a decision's consistency with custom, a court may be able to strengthen the relationship between state decisions and the Tongan people, particularly their culture and customs. This would produce a legal system more consistent with *'anga fakatonga* and result in a system which does not simply impose Western ideas of law and power onto Tonga.

For a court to undertake judicial review on the basis of custom, more indigenous academic commentary on Tongan customs and culture is needed. Also having more indigenous judges would support a court to have a better grounding in *'anga fakatonga* and Tongan customary principles. However, sadly, like many Pacific nations, Tonga's judiciary is largely made up of foreign judges,⁶⁶ who do not always have the indigenous perspective required to be able to properly apply customary principles.⁶⁷

This paper does not fully deliberate the possibility of such a ground being used. That is left for future indigenous Pacific legal scholars.

V. Conclusion

This article has considered the constitutional relationship between the King and the people in two different spheres. Firstly, it evaluated the dissolution of Parliament through a customary lens, using the *Kavei Koula 'e Fa*, the four golden pillars of Tongan society, as a framework. This was focused specifically on *faka'apa'apa* (respect) and its application between King and people, considering its utility as a mechanism for accountability. Secondly, the article examined the decision with respect to the main accountability mechanism within the common law, that is, judicial review. This article then evaluated the legal strength of a judicial review proceeding brought against the decision of the King, and explored the growing indigenous and overseas jurisprudence on the constraining of prerogative powers of a Sovereign. This article overall considers the constitutional relationship between the King and his people, in the intersection of customary law and Western notions of power.

66 At the writing of this paper, no judges of Tongan descent had ever been appointed to the Supreme Court of Tonga. The author recognises that since then there has been the appointment of Justice Laki Niu and Justice 'Elisapeti Lavakei'aho Makoni Langi.

67 For further discussion of this see Natalie Baird "Judges as Cultural Outsiders: Exploring the Expatriate Model of Judging in the Pacific" (2013) 19 *Canta LR* 80.

This article provides a wedge which might in future be used to open the door to judicial review on the grounds of custom. A court would need to find any potential issue to fit within one of the criteria of judicial review and be satisfied it would have standing to review the extent of and manner of the exercise of the Monarch's prerogative power. This article has suggested that the Attorney-General's basis for deciding that the King's decision was not justiciable was not fully tenable.

The circumstances of the August 2017 dissolution suggest a difficult blurring of the lines between personal and executive prerogative. It would be useful in the future for a court to decide where the balance best lies. If found to be an executive prerogative power, then a court may find a similar dissolution to be a breach of natural justice, as Pohiva did not have the ability to respond to the Speaker's allegations. Other grounds may also be relevant, but this article does not fully consider the applicable grounds.

There are also cultural factors of respecting the mana of the King (a showing of *faka'apa'apa*), that would likely inhibit successful litigation. These reasons possibly underlie the fact that a claim was not brought by Pohiva or another interested party arising from the events of August 2017 in Tonga. However, what the dissolution did show was the effectiveness of the Tongan Constitution in holding power to account, as the dissolution still left Pohiva in charge as head of the caretaker government, and elections held a few months later showed that Pohiva in fact remained the people's choice for Prime Minister.

Faka'apa'apa forms the basis of the relationships between people in Tongan society. It is the silken threads that form the web of how different classes co-exist. The decision to dissolve Parliament can be seen as both a showing of *faka'apa'apa* and a lack of *faka'apa'apa*. However, what is required for greater constitutional harmony in the future is greater *faka'apa'apa* being shown within Tonga's constitutional relationships.

When 'Aho'eitu was old enough he went to the sky to visit his father, and returned with several celestial inhabitants who became his *mātāpule*. 'Aho'eitu, half-man and half-god, lived over a thousand years ago (about A.D. 950), and from him have the present king descends from a collateral line. The succeeding Tu'i Tonga who descended from 'Aho'eitu were born of the daughters of the highest chiefs in the land. Several Tu'i Tonga were assassinated, and in about the fifteenth century the incumbent Tu'i Tonga appointed a subsidiary ruler, the Tu'i Ha'a Takalaua. The first Tu'i Ha'a Takalaua was a younger brother of the twenty-fourth Tu'i Tonga. The Tu'i

Ha'a Takalaua was given only Temporal power, while the Tu'i Tonga retained for himself high rank and spiritual status.⁶⁸

68 Adrienne L Kaeppler "Rank in Tonga" (1971) 10(2) *Ethnology* 174 at 180.