A human rights - based approach to women's land rights in Tonga

Author:
Moa, Sela Teukisiafoou

Publication Date:
2017

DOI:
https://doi.org/10.26190/unsworks/20444

A Human Rights-Based Approach to Women's Land Rights in Tonga

Sela Teukisiafo'ou Moa

A thesis in fulfilment of the requirements for the degree of

Doctor of Philosophy

University of New South Wales

Faculty of Law

April 2017

PLEASE TYPE

THE UNIVERSITY OF NEW SOUTH WALES
Thesis/Dissertation Sheet

Surname or Family name: **Moa**

First name: **Sela** Other name/s: **Teukisiafo'ou**

Abbreviation for degree as given in the University calendar: PhD

School: **Faculty of Law** Faculty: **Faculty of Law**

Title: A human rights-based approach to women's land rights in Tonga

ABSTRACT

Tonga is one of the many countries in the world where women have fewer land rights than men. This thesis proposes a response to the problem of unequal land rights for women in Tonga. Discriminatory laws that prevent women from owning land, supported by cultural attitudes, operate to limit women's capacity to participate fully in social, political and economic life. In formulating solutions the thesis utilises feminist legal approaches to equality and non-discrimination, feminist interventions in the debate between universalism and cultural relativism in human rights discourse, and the human rights framework itself.

This thesis makes an original contribution to knowledge by providing a feminist legal analysis of the basic principles of land law in Tonga. The analysis of land law demonstrates that women in Tonga are discriminated against not just on the basis of their gender, but also on the basis of their class. It also illustrates that discrimination against women in land law breaches not only women's fundamental right to equality and non-discrimination, but also their social and economic rights.

The thesis utilises relevant international human rights law on gender equality and women's land rights, which sets out standards to which Tongan law and governance may work towards to achieve real equality for women in Tonga. A Royal Land Commission was established in 2008 to review land law practices and make recommendations. The findings and recommendations of the Commission provide an important starting point for this thesis's proposals which offer a way forward. In short this thesis recommends that the Declaration of Rights in the Constitution should be amended to guarantee gender equality and to prohibit sex and gender discrimination. It also recommends that the Constitution and Land Act should be amended to enable women to hold tax and town allotments, and to provide all children of a landholder with equal rights of inheritance. A critical pragmatic approach to reform is employed that recognises the complex social, political and cultural environment in Tonga while aiming at substantive equality for women and girls in the long term.

ORIGINALITY STATEMENT

'I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.'

Signed ……..

Date ……..

Abstract

Tonga is one of the many countries in the world where women have fewer land rights than men. This thesis proposes a response to the problem of unequal land rights for women in Tonga. Discriminatory laws that prevent women from owning land, supported by cultural attitudes, operate to limit women's capacity to participate fully in social, political and economic life. In formulating solutions, the thesis utilises feminist legal approaches to equality and non-discrimination, feminist interventions in the debate between universalism and cultural relativism in human rights discourse, and the human rights framework itself.

This thesis makes an original contribution to knowledge by providing a feminist legal analysis of the basic principles of land law in Tonga. The analysis of land law demonstrates that women in Tonga are discriminated against not just on the basis of their gender, but also on the basis of their class. It also illustrates that discrimination against women in land law breaches not only women's fundamental right to equality and non-discrimination, but also their social and economic rights.

The thesis utilises relevant international human rights law on gender equality and women's land rights, which sets out standards to which Tongan law and governance may work towards to achieve real equality for women in Tonga. A Royal Land Commission was established in 2008 to review land law practices and make recommendations. The findings and recommendations of the Commission provide an important starting point for this thesis's proposals which offer a way forward. In short, this thesis recommends that the Declaration of Rights in the Constitution should be amended to guarantee gender equality and to prohibit sex and gender discrimination. It also recommends that the Constitution and Land Act should be amended to enable women to hold tax and town allotments, and to provide all children of a landholder with equal rights of inheritance. A critical pragmatic approach to reform is employed that recognises the complex social, political and cultural environment in Tonga while aiming at substantive equality for women and girls in the long term.

Acknowledgments

I would like to express my most sincere thanks to the Australian Government for the great privilege of being awarded an Australia Awards Scholarship to undertake this research. In addition, the stepping stones to this degree, my Bachelor of Laws and Master of Laws degrees, were also undertaken with the support of Australian Government scholarships. I would also like to thank the University of New South Wales and its Faculty of Law for accepting me into this study program.

I am extremely grateful to my supervisors Associate Professor Christine Forster and Dr Janice Gray for their immense support and invaluable comments and suggestions. I would also like to thank my supervisory panel Professor Theunis Roux, Professor Sarah Williams and Mehera San Roque. A special thanks to Jenny Jarrett for her assistance and kindness since Year 1 of my study program.

I would like to thank Dr Halahingano Rohorua and Dr Sue Farran for their suggestions in regard to my research topic prior to undertaking my PhD.

I am indebted to countless people who helped me directly and through my family without whose assistance and support, whether big or small, I would not be where I am today. Lastly, I would like to thank my family and friends for everything.

Table of Contents

List of Figures

Chapter One – Introduction

Prior to the end of the 19th century, women in all parts of the world either had limited land rights or no land rights at all.[1] Indeed, direct discrimination against women in land rights in law still occurs in many countries mostly, although not exclusively, in the developing world.[2] This thesis examines women's land rights in the island kingdom of Tonga in the Pacific, where women face direct discrimination in land law.

The *Act of Constitution of Tonga* (Constitution) which came into force in 1875, together with the *Land Act* (Cap 132) which came into force in 1927, provide the legal framework for land in Tonga. Under that framework, hereditary life interests called estates and allotments are held only by men, with the exception of a female monarch, and are heritable through the eldest male line. Widows and daughters have some limited rights in the form of conditional life interests. Women can only lease land but due to certain obstacles, have less opportunity than men to obtain a lease. Although Tongan land tenure is often said to be unique, most of the principles in Tongan land law are derived from the English common law. In fact, the current land law was developed as late as the 1830s, when Wesleyan Methodist missionaries became directly involved in the modernisation of Tongan society.

There is also another dimension to women's land rights in Tonga emanating from a socio-political class hierarchy established by the Constitution. That socio-political hierarchy consists of the Monarch and the Royal Family at the top, followed by the nobility, and then the majority commoners at the bottom. The monarch and the nobles, descendants of traditional chiefly lines,[3] hold most land in Tonga as estate holders. Women face discrimination on the basis of their gender as well as their position in the class structure. To date, there is little feminist legal analysis of the discrimination in land rights faced by women and girls in Tonga, and the way in which such discrimination breaches their fundamental right to equality. Unequal rights to land

[1] Frances Raday, 'Culture, Religion and CEDAW's Article 5 (A)' in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination Against Women* (The Feminist Press at CUNY, 2007) 82. While some women did have control, over land by the end of the 19th century most did not.

[2] OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (United Nations, 2013), 3.

[3] These were not the only chiefly lines.

disempower women socially, economically and politically, subsequently influencing the development of the country as a whole. This thesis provides the first comprehensive analysis, from a feminist perspective, of women's rights and interests in land in Tonga. It concludes with a set of recommendations aimed at advancing gender equality in land rights.

Tonga has a unique historical, social and political context which poses particular challenges to achieving equal land rights for women. In order to understand the history and development of land law, women's position in Tongan society, and the relationship between women and land, the next sections provide a general background.

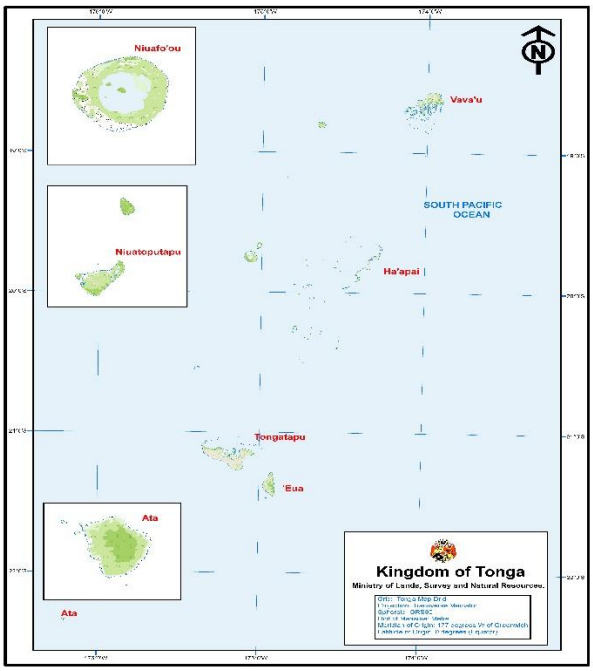

Figure 1.1: Map of Tonga (Ministry of Lands, Survey and Natural Resources)[4]

Geography

The kingdom of Tonga is an archipelago in the Pacific Ocean about 3577 km north-east of Australia and about 2,382 km north north-east of New Zealand. Tonga is constituted of approximately 170 islands although only 36 are inhabited.[5] There are five main island groups as shown on the above map – the northernmost islands are Niuafo'ou and

[4] Used with permission of the Ministry.
[5] Tonga Department of Statistics, *2011 Population Census* (Government of Tonga, 2012).

Niuatoputapu, followed by the Vava'u group, the Ha'apai group, the main island Tongatapu, where the capital Nuku'alofa is situated, and 'Eua (on the south-east of Tongatapu). Tonga has a total land area of about 748 km[6] and an Exclusive Economic Zone of about 640050 km².

In 2011 Tonga's total population was 103, 252.[7] Seventy-three per cent of the total population live in Tongatapu which has a land area of about 257 km². This is followed by 14% in Vava'u, 6% in Ha'apai, 4.9% in 'Eua and 1.2% in the two Niuas.[8] In terms of rural-urban population distribution, 73% of the population live in Nuku'alofa, whereas 23% live in the rural areas of all island groups. Just over 50% of the population is male and 49.3% is female. The majority of the population is of Tongan ethnicity (97.3%).

Economy

Unlike some of its Pacific neighbours, Tonga does not have any mineral resources.[9] Instead, the country's main source of revenue is remittances from Tongans living overseas.[10] The number of Tongans living overseas is estimated to be close to the total population in Tonga.[11] Tourism is the second source of revenue. Tonga's main natural resources are its fish resources but like the tourist industry, they do not yield as much revenue as in other Pacific countries.[12] Given its limited economic opportunities, Tonga must focus on developing its human resources. Nobel Prize winning economist Joseph Stiglitz stated that '[a] country's most important resource are (sic) its people'[13] and that

[6] Estimates of the total land area varies in a number of publications. For example, the Australian Government Department of Foreign Affairs and Trade states it is 748 km whereas the Royal Land Commission (2012). *Final Report* Part I Vol 1, 104, states it is 718km.
[7] Tonga Department of Statistics, above n 5.
[8] Ibid.
[9] The mineral resources position is as it is known to date, although there are deep-sea-bed mining prospects in Tongan waters. See Ministry of Lands, Survey and Natural Resources, *Sea-bed Exploration in Tonga*, <http://dsm.gsd.spc.int/public/files/meetings/TO_Deepsea%20Minerals%20Workshop%20in%20Nadi_RV.pdf>.
[10] Asian Development Bank, *Tonga – Economic Update and Outlook 2012* (Author, 2013) 2.
[11] Government of Tonga, *Tonga Strategic Development Framework 2015–25: A More Progressive Tonga, Enhancing Our Inheritance* (Ministry of Finance and National Planning, 2015) 37.
[12] Countries like PNG, Kiribati and FSM. See Food and Agricultural Organization of the United Nations (FAO), *Fisheries of the Pacific Islands Regional and National Information* (FAO Regional Office for Asia and the Pacific, 2011) 28.
[13] ABC, 'Invest in People, Infrastructure and Technology for Future Prosperity', *Lateline*, 30 June 2014, <http://www.abc.net.au/lateline/content/2014/s4036416.htm>.

inequality hampers economic growth and is not conducive to economic stability.[14] Land law which explicitly limits women's access to land not only discriminates against women, it is also an obstacle to economic growth and stability.

Historical background

The history that gave rise to the modern Tongan legal system provides an important context for understanding Tongan land law and the gender inequalities it represents. Tonga is the only country in the Pacific that was not colonised, a source of pride for Tongan people. However, Tonga was influenced by Pacific colonisation. The first Europeans to arrive in Tonga were the Dutch explorers Willem Schouten and Jacob le Maire in 1616 followed by Abel Tasman in 1643 and the English seafarer, Captain James Cook in 1773, 1774 and 1777. The explorers' visits were brief and the explorers did not involve themselves in local matters unlike the Wesleyan Methodist missionaries who started arriving in 1822.[15] Crucial to the success of their work, the missionaries taught the people how to read and write. They also created the first Tongan alphabet, brought a printing press to Tonga and published Christian booklets and schooling materials.[16] Most importantly, the Wesleyan Methodist missionaries drafted for the

[14] Ibid. See also Joseph Stiglitz, 'Macroeconomic Fluctuations, Inequality, and Human Development' (2012) 13(1) *Journal of Human Development and Capabilities* 31, 32. Stiglitz's analysis was set against the backdrop of the global financial crisis focusing mainly on the United States but he argues that it applies to both developed and developing countries. He argues that '[e]quality is both a cause and consequence of volatility', at p. 50 of his article. It is inequality being a cause of volatility, which he also links to political and economic power dynamics including landholding power, and negative social impacts. See World Economic Forum, *Stiglitz on Battling Economic Inequality* (20 November 2015) <https://agenda.weforum.org/podcast/podcast-stiglitz-on-battling-economic-inequality>.

[15] They were not the first Christian mission in Tonga. A mission from the London Missionary Society arrived in 1897 but their mission was abandoned in 1900. However, like the Europeans before them, their presence had a lasting impact on Tongan society. They exposed the Tongans, with whom they came in contact, to a foreign religion. In fact one of the missionaries, George Vason abandoned his role as a missionary and lived among the locals. He later wrote an account of this time in Tonga. Accordingly, he lived under one of the high chiefs in Tonga who gave George his own home and workers. His workers preferred to live with him rather than Tongan chiefs because George was kind to them and did not oblige them to carry out customary functions such as working and giving food to the chief. The inference here is that although George Vason's account has not been subjected to scholarly scrutiny, it has been cited by a number of scholars. The locals were exposed to a new way of living or exercising authority. Therefore, this seemingly unsuccessful mission must have left a lasting impression in the minds of Tongans and cautioned future missionaries on what to do to be successful. See George Vason (1840). *Narrative of the Late George Vason, of Nottingham, One of the First Missionaries Sent out by the London Missionary Society in the Ship Duff, Captain Wilson, 1796* [edited by James Orange] (Henry Mozley, 1840).

[16] A. W. Murray, *The Bible in the Pacific* (first published James Nisbet, 1888, 2013 Forgotten Books ed) 65, 70.

king, George Tupou I, Tonga's first written laws, the Constitution of 1875, and laws of the 1880s which collectively established the basic land law principles.[17]

The Constitution established a constitutional monarchy as the form of government with some of the features of the Westminster system – an executive, a parliament (the Legislative Assembly) which was and remains unicameral, and the judiciary.[18] The Constitution also created a landholding class, the royal family and the nobles (collectively),[19] who control most of the land in Tonga. When King George Tupou I established the modern governmental system, it was his vision that Tonga should remain perpetually independent from foreign powers, that peace and stability should prevail, and that each Tongan (male) should have land to live on with his family and to farm to support himself and to contribute to society. King George Tupou I's vision has been a reference point for conservative leaders whenever socio-political reform is debated, both to support and to oppose new measures, sometimes in contradictory ways. For example, mortgages were introduced as a legal institution resulting, in some circumstances, in the repossession by banks of people's land, despite appearing contrary to the vision of King George Tupou I. The same leaders refused, however, to change the law to guarantee equality for women, arguing it is contrary to the vision of Tupou I. Adaptation and change are marks of a responsive and mature society which is able to adjust to, and accommodate, the developing circumstances of its citizens and the world at large. Resistance to the advancement of gender equality, is not, however, a mark of a responsive and mature society and an important theme of this thesis is to understand the strong resistance to change in regard to women's rights.

Research approaches and key Tongan materials

This research adopts various approaches. First, it adopts a doctrinal approach using primary law materials including the Constitution of Tonga, legislation[20] and case-law.[21] It examines international human rights treaties and non-binding international human

[17] Sione Latukefu, 'The History of the Tongan Constitution' (Paper presented at the Convention on Tongan Constitution and Democracy, Nuku'alofa, 24-27 November 1992) 88-89.
[18] The three branches of government – the Executive, the Legislature and the Judiciary.
[19] The nature of their landholding is similar, namely, hereditary estates.
[20] Most of the primary law materials are publicly available online at the legislation website of the Crown Law Office (Tonga), http://crownlaw.gov.to/cms/en/#
[21] Available on the Paclii website. See http://www.paclii.org. Secondary materials were obtained from UNSW Law Library, UNSW Main Library and online.

rights instruments to identify international standards. It also utilises the legislation and case-law of other Pacific jurisdictions (by way of contrast). Second, a theoretical analysis is employed in which a range of primary and secondary resources are analysed from a feminist perspective and placed in a historical and cultural context. An analysis of the early laws of Tonga in the 19th century, for example, and the relevant history literature is important to trace the development of the current principles of land tenure. Historical sources are also assessed and contrasted with accepted cultural traditions and gender roles.

There is little published work on the land law of Tonga, particularly from a legal perspective, and little commentary from a feminist legal perspective. There are some historical accounts of land law. There are also several publications on land law in the form of books relating to Pacific Island countries more generally. These have mainly been authored by academics in the School of Law at the University of the South Pacific.[22] Such publications outline land law in the twelve Pacific member countries of the University.[23] As such they provide a useful comparative overview of land law in those jurisdictions but do not provide an in-depth study of the law in each jurisdiction from a feminist legal perspective.[24] The late Dr Guy Powles' extensive research on the Tongan Constitution also provides an important source for this thesis. Sione N Halatuituia, wrote his PhD thesis on the Tongan land tenure system titled *Tonga's Contemporary Land Tenure System: Reality and Rhetoric* which considers the impact of commercialisation on the Tongan land tenure.[25]

Sue Farran's brief article on women's land rights in the Pacific provides basic information on each jurisdiction.[26] Imrana Jalal's seminal work *Law for Pacific Women*

[22] Sue Farran and Don Paterson, *South Pacific Property Law* (Cavendish Publishing, 2004). See also Jennifer Corrin and Don Paterson, *Introduction to South Pacific Law* (Routledge Cavendish, 2007).

[23] Cook Islands, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu and Vanuatu. See University of the South Pacific, *Office of the Vice Chancellor* <http://www.usp.ac.fj/index.php?id=3765>.

[24] Sue Farran has however published extensively on land law in Vanuatu and wrote her PhD thesis in law on that subject. See Susan Elizabeth Farran, *Vanuatu: Lands in a Sea of Islands* (PhD thesis, Northumbria University, 2013). Farran's analysis of the land law in Vanuatu is a vital source of reference on how to approach land law in a Pacific jurisdiction. .

[25] (PhD thesis, University of Sydney, 2002).

[26] Sue Farran, 'Land Rights and Gender Equality in the Pacific Region' (2005) 11 *Australian Property Law Journal* 131. Sue Farran has carried out extensive research on property rights in general in Pacific.

– *A Legal Rights Handbook* contains a chapter on land rights.[27] Like other regional publications, Jalal provides a brief overview of land law in various Pacific jurisdictions (including Tonga) and how the laws discriminate against women. Jalal alludes to a number of themes discussed in this thesis including the relationship between culture and the law, the existence of outdated laws introduced during the colonial era, and the economic disadvantage of women because of their limited land rights.[28] However, these themes are not developed in her work because it is intended as a practical handbook for the community rather than an analysis of the themes considered in this thesis.[29] A chapter on women's land rights in Tonga appears in another Pacific-focused book, *Land Rights of Pacific Women*, published in 1986.[30] The author is not a lawyer but has, nevertheless, attempted to analyse women's land rights from a legal and sociological perspective.

Other literature relevant to the themes of this thesis includes work by scholars from non-law fields such as anthropology,[31] geography,[32] sociology[33] and history. The late historian Sione Latukefu's contribution to Tonga's modern history, *The Church and State in Tonga*, for example, provides an important general background to the development of the governmental system including the legal system and Tonga's first written laws.[34] Latukefu appended the pre-Constitution laws and the Constitution (as it was passed in 1875) to his book which this research has drawn on extensively. Those laws have been re-examined from a feminist legal perspective although it should be

[27] P Imrana Jalal, *Law for Pacific Women – A Legal Rights Handbook* (Fiji Women's Rights Movement, 1998).
[28] Ibid 57–60.
[29] This is because the book is intended to be used not just by lawyers but also by lay people.
[30] Mosikaka Moengangongo 'Tonga: Legal Constraint and Social Potentials' in Cema Bolabola, Dorothy Kenneth, Henlyn Silas, Mosikaka Moengangongo. Aiono Fana'afi and Margaret James (eds), *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, 1986) 86–101.
[31] Such as Urbanowicz. See for example Charles F Urbanowicz, 'Motives and Methods: Missionaries in Tonga in the Early 19th Century' (1977) 86(2) *The Journal of the Polynesian Society* 245.
[32] Such as Alaric Maude and Feleti Sevele. See, for example, Alaric Maude and Feleti Sevele, 'Tonga Equality Overtaking Privilege' in Selwyn Arutangai and Ron Crocombe (eds), *Land Tenure in the Pacific* (University of the South Pacific, 3rd ed, 1987) 114–142. Maude and Sevele's text remains one of the few informative works on the development of land law in Tonga since the 19th century, the limitations of the land law and future issues such women's land rights that had already been raised by some members of the public at that time.
[33] Such as Kerry James who has written several articles touching on gender and the land tenure in Tonga. See for example Kerry James, 'Right and Privilege in Tongan Land Tenure' in Gerard R Ward and Elizabeth Kingdon (eds), *Land, Custom and Practice in the South Pacific* (Cambridge University Press, 1995) 157–197.
[34] Sione Latukefu, *Church and state in Tonga: the Wesleyan Methodist missionaries and political development, 1822-1875* (Australian National University Press, 1974).

noted they, (except for the Constitution), contained few sections dealing with land law. Surveying the non-legal literature revealed misunderstandings by the authors of some aspects of the Tongan land law, how land law operates and what constitutes the basic principles of the land law.

Contribution to knowledge

The above overview of the literature focusing on land law in Tonga, and in particular, women's land rights, reveals a significant gap in the literature. Tonga's female lawyers make up about 50% of all lawyers but only a few have contributed to academic law journals or other scholarly sources and not on the topic of women's land rights in Tonga. Loupua Pahulu Kuli, a female lawyer has completed her Master of Laws thesis on women's land rights in Tonga titled 'Women's Rights to Land in Tonga: A Review of Policy and Legal Framework since 1983 Land Commission'.[35] Kuli also considers the issue of women's limited land rights in Tonga from a human rights perspective although she does not employ feminist legal approaches to equality and land rights. In sum, there is a dearth of academic debate on women's land rights in Tonga. Local feminist perspectives were given voice during the Royal Land Commission of Inquiry between 2008 and 2012, when parliament debated accession to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 2009 and when the government signed CEDAW in 2015. Additionally, there are a few vocal key women's rights advocates who have consistently taken a stance for gender equality and equal land rights for women in the media.

This research provides therefore, a major contribution to knowledge as it is the first academic research on women's land rights in Tonga from a feminist legal perspective. Additionally, this research contributes to the global literature on women's land rights, highlighted by the United Nations as a pervasive obstacle to equality for women and girls especially in the developing world.[36] This research also contributes to debates on a number of related themes including feminist legal approaches to equality and non-

[35] Loupua Pahulu Kuli, *Women's Rights to Land in Tonga: A Review of Policy and Legal Framework Since 1983 Land Commission* (Master of Laws thesis, University of the South Pacific, 2016) <http://digilib.library.usp.ac.fj/gsdl/collect/usplibr1/index/assoc/HASH01cd/215a668c.dir/doc.pdf>. Kuli carried out a survey to ascertain views on why the 1983 and 2008 Royal Land Commission's recommendations have not been implemented.

[36] OHCHR and UN Women, above n 2.

discrimination, the human rights debate on universalism versus cultural relativism, and the relationship between law and culture.

Outline of the thesis

The thesis has six chapters. Chapter Two provides the theoretical framework for the thesis. The chapter expands two main theoretical themes that are applicable to this thesis – (a) the principles of gender equality and non-discrimination, and (b) the debate between universality and cultural relativism in the field of human rights, with a particular exploration of feminist interventions into this debate. Part I of the chapter overviews different feminist approaches to understanding the principle of equality and non-discrimination, particularly the importance of achieving substantive equality rather than merely formal equality. In Tonga the law does not yet guarantee even formal equality between men and women. This part overviews different feminist approaches to achieving substantive equality including how to address structural inequalities through formulating and implementing policies that will achieve real equality for women. Importantly, this part overviews the theory of intersectionality, which acknowledges that other factors such as race, class, age or disability, intersect with gender to complicate solutions for achieving substantive equality for women and girls. Theories of intersectionality are utilised in this thesis to understand the impact of the socio-political class structure in Tonga on women's land rights.

Part II explains and overviews the debate on universalism versus cultural relativism. While universalism approaches women's human rights as existing beyond (and despite) any cultural context, a cultural relativist view focuses on the importance of culture. In Tonga a powerful counter-argument to giving equal land rights to women is that to do so would undermine or run counter to Tongan culture. Further, gender equality is a misunderstood concept. Cultural relativism therefore provides a strong basis for denying equality in land rights to Tongan women. Cultural relativism is evaluated based on a plethora of literature which focuses on the debate. Within that framework, a critical pragmatic approach proposed by a number of feminist legal scholars, such as Celestine Nyamu, has been identified as a workable method for achieving equal land rights for

women in Tonga.[37] It requires a careful examination of the historical, social, cultural and political dynamics of a society not only to be able to counter any argument against women's rights but also to identify a common ground which is acceptable for reform. This approach forms the backdrop of the analysis in the remaining chapters.

Chapter Three focuses on Tongan land law. Part I of this chapter begins with an overview of the background to the current land law by providing a synopsis of the traditional landholding in pre-19th century Tongan society. The chapter then examines Tonga's first written laws, drafted by the Wesleyan Methodist missionaries for Tupou I, in order to trace the origin of the introduction of a Western government model and the common law principles (modified for Tongan conditions) that remain in force today. Part II of the chapter overviews the basic principles of the current land law. This includes the Constitution providing the basic principles of Tongan land law and a Declaration of Rights that guarantees several fundamental rights except one key right, namely equality between men and women. Together with the *Land Act* (Cap 132) the Constitution provides the legal framework for land tenure. The discriminatory provisions in land law are identified and analysed. The failure of land law to accommodate the reality of people's lives and land law's impact on family relations are discussed. This part also documents the differential effect of unequal land rights on women depending on where they are situated in the socio-political class structure.

Chapter Four provides an overview of women's land rights in Tonga from the perspective of international law. Part I provides an overview of Tonga's relevant international human rights obligations under the only two core human rights treaties it has ratified or acceded to; the Convention on the Elimination of All Forms of Racial

[37] Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381.

Discrimination (CERD) and the Convention on the Rights of the Child (CRC),[38] highlighting specific articles on equality and women's land rights. Tonga, however, is one of the few countries which has not acceded to the most relevant international treaty on women's rights, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW). This part also documents Tonga's participation at the Universal Periodic Review, important because it is the first time it accounted for the state of human rights in Tonga at the United Nations. Part II examines CEDAW and its relevant articles on equality and women's land rights. Despite Tonga's failure to accede to CEDAW to date, it has come close to accession twice. In 2009, CEDAW was debated in Parliament but strongly opposed by the conservative government, and in 2015, the newly elected pro-democracy-led government signed CEDAW but opposition from certain church leaders and some women's groups, amongst others, halted progress on accession.

Chapter Five examines the relationship between the law and culture in Tonga. An examination of the interface between law and culture is relevant to this thesis because culture is advanced as justification for maintaining discriminatory laws. Part I of the chapter begins with an outline of the governmental structure of Tonga as established by the Constitution. The governmental structure places the King as the Head of State with a number of executive and prerogative powers meaning that he is directly involved in certain matters of government. The King also has absolute veto power, ensuring that no law can be made or changed without his assent. The nobles, who together with the monarch control most land in Tonga, hold nine out of the 26 seats in parliament. The Constitution is difficult to amend not because of the requirements in the Constitution as to how it may be amended, but because of the superficial importance attached to it by

[38] There are nine core international human rights treaties. For a complete list see United Nations, Office of the Commissioner for Human Rights, *International Human Rights Law* <http://www2.ohchr.org/english/law>. The CERD was adopted on 21 December 1965 and entered into force on 4 January 1969. It was ratified by Tonga on 17 March 1972. The CRC was adopted on 20 November 1989. It entered into force on 2 September 1990. Tonga acceded to the CRC on 6 November 1995 and it did not make any reservations to any of its provisions. Some women's rights activists in Tonga have referred to the CRC as relevant to the issue of women's land rights but citing no particular article and referring generally to it as a human rights instrument. See Tonga National Centre for Women and Children, 'Tongan Government Criticised Over Ignoring Women's Rights' (Press Release, 19 September 2009) <http://pacific.scoop.co.nz/2009/09/tongan-government-criticised-over-ignoring-womens-rights>.

the people, although it has been amended many times since 1875.[39] Part I therefore outlines this hierarchical system, linking it to the people's views of traditional leaders and their (people's) unwillingness to change the status quo.

Government and community leaders have utilised culture in the debate on women's land rights without explaining (or justifying) the link between culture, law and inequality. Part II of this chapter therefore, explores arguments that are based on the so-called traditional role of women and what is culturally appropriate, focusing on a particular custom – that of *fahu* –and its real meaning. The notion of the ideal Tongan woman is assessed against the involvement of women in political activism in the late-18th century to the early-20th century. The chapter closes with a discussion of contemporary Tongan women's views on gender roles and the reality of their lives.

Chapter Six focuses on the work and the findings of the 2008 Royal Land Commission and proposes recommendations drawing on the recommendations of the Commission and additionally from the people's views raised during the Commission's inquiry. This chapter applies feminist legal approaches and develops workable solutions that take into account the cultural context. While the work of the 2008 Royal Land Commission provides a starting point, the Commission did not ultimately recommend that women should have equal land rights and even made recommendations that ran counter to the historical development of the law in relation to women's land rights.

Chapter Six concludes with a series of law reform recommendations to advance women's equality in land rights and also highlights the challenges that remain. In particular Chapter Six recommends short term goals such as the phasing out of the current law on inheritance while allowing women to hold a tax allotment (farming plot) and town allotment (residential plot). This is intended to avoid strong opposition to the proposed reforms. Other immediate reforms are recommended, such as allowing the daughters of a landholder to inherit the landholder's land equally if there are no sons. Where a landholder has more than enough land to be subdivided among his children then he should do so.

[39] The Tongan Constitution can be amended like any other legislation – after being read and passed three times by the Legislative Assembly. See cl 79.

Chapter Seven concludes the thesis by identifying some suggested areas for future research.

Chapter Two – Theoretical Framework

Introduction

A 2013 UN Report on women's land rights and other productive resources throughout the world revealed that 'at least 115 countries specifically recognise women's property rights on equal terms with men',[1] whilst the remaining 80 countries do not. Additionally, and importantly, even in those countries which formally recognise equal property rights between men and women, most women do not enjoy equal land rights. The report identifies the two main barriers to equal land rights as inadequate laws and 'discriminatory cultural attitudes and practices at the institutional and community level.'[2] These two barriers form the basis for the theoretical framework of this thesis, which is the subject of this chapter.

This chapter establishes the theoretical framework for the research in this thesis. The theoretical framework has two parts. Part I examines theories of equality and non-discrimination which are utilised in subsequent chapters to demonstrate the ways in which the current land law in Tonga does not deliver equality to Tongan women and its discriminatory nature. There is no single, theoretical approach to equality and non-discrimination and indeed there is a diversity of approaches amongst feminist legal scholars. Part I begins with a discussion of direct discrimination against women in the law, followed by an overview of liberal feminist legal scholars' demands for formal equality. Formal equality is then critiqued, explaining how its failures led feminists to argue for additional measures to achieve substantive or real equality. However, achieving substantive equality is complex. This part considers the various strategies proposed by feminist theorists to address instances of multiple discrimination against women arising from the intersection of factors such as race, class, age and disability.

Part II discusses the human rights debate between universalism and cultural relativism. It considers how the cultural relativist approach, in contrast to the universalist approach, operates in Tonga as a barrier to women's equal land rights. In particular, this part

[1] OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (United Nations, 2013), 3.
[2] Ibid, 2.

explores feminist interventions in the debate and how to counter the use of culture to stifle the advancement of gender equality while still respecting the voices of local women.

Part I – Equality

2.1 Discrimination against women in the law

Feminist jurisprudence emerged as a body of legal thought examining the unequal treatment of women under the law in the first half of the 20th century by feminist legal scholars in the United States.[3] Feminist activists and scholars began questioning the role of the law in perpetuating inequality between men and women and demanded that women be treated equally with men.[4] Certain laws in the United States imposed restrictions on women but not on men in areas such as 'employment and families, obligations of citizenship, competency, and age, as well as crimes and sentences.'[5] Similar types of laws were (and still are) in force in Pacific island countries including Tonga. Direct discrimination against women in the law not only violates women's fundamental right to equality, it also 'has a serious effect on women's ability to access economic resources and empowerment.'[6]

The development of the current political and legal system in Tonga, which began in the first half of the 19th century excluded women (as well as the majority of Tongan men) from taking part in that process. This included the drafting and promulgation of the Constitution in 1875, which sets out certain fundamental human rights principles, the structure of government and the basic principles of the land law.[7] Women therefore are subjected to laws they had no part in formulating, as in most countries in the world.[8]

In Tonga, apart from discrimination in land law, there were a number of other provisions which directly discriminated against women. Women could not serve on

[3] Mary Becker, 'The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics' (1998) 40 *William and Mary Law Review* 209, 210.
[4] Martha A Fineman, 'Evolving Images of Gender and Equality: A Feminist Journey' (2009) 43 *New England Law Review* 437, 441; Catharine A MacKinnon, 'Reflections on Sex Equality Under the Law' (1991) 100 *Yale Law Journal* 1281, 1299.
[5] Becker, above n 3, 209, 211.
[6] Sandra Fredman and Beth Goldblatt, 'Gender Equality and Human Rights' (Discussion Paper No 4, UN Women, 4 July 2015) 4. See also Gregory R Day and Salvatore J Russo, 'Poverty and the Hidden Effects of Sex Discrimination: An Empirical Study of Inequality' (2014) 37(4) *University of Pennsylvania Journal of International Law.*
[7] As amended over the years.
[8] MacKinnon, above n 4.

juries until 1990[9] and could not vote until 1951, although government was constituted in 1875. Until 2007, a person born to a Tongan mother and a foreign father did not have automatic right to nationality in contrast to a person born to a Tongan father and a foreign mother.[10] In addition, until 2007, a foreign woman could become a Tongan national through marriage to a Tongan man by writing to the Minister of Foreign Affairs, whereas a foreign man married to a Tongan woman had to apply for naturalisation.[11] Other Pacific island countries either had or still have similar discriminatory laws.[12]

Access to political power for women in Tonga is severely limited by a socio-political system which is entrenched in the Constitution. Although women can run for parliament, they are precluded from contesting nine of the 26 elected seats of the unicameral parliament. Those nine seats are reserved for the nobles' representatives who are elected by about 33 nobles from among themselves.[13] Noble titles are held by men only and are heredited by the eldest son.[14] Women can therefore only be elected to 17 seats of the people's representatives. Only four women have been elected to parliament since 1875. Currently there is only one woman member of parliament and there is no woman in Cabinet, the judiciary and Privy Council.[15]

2.2 Formal equality

In response to direct discrimination during the so-called second wave of feminism in the 1960s, liberal feminist scholars advocated the equal treatment of women and men in the law, except in relation to women's biological differences, where they argued the law

[9] P Imrana Jalal, *Law for Pacific Women – A Legal Handbook* (Fiji's Women's Rights Movement, 1998) 32.
[10] *Nationality Act* s 2 (prior to amendment in 2007).
[11] Ibid.
[12] Countries such as Fiji, Kiribati, Nauru, Solomon Islands, Vanuatu and Western Samoa. Jalal, above n 9, 35–8.
[13] *Act of Constitution of Tonga* cl 60. There are 33 noble titles but a few nobles hold more than one title e.g. the titles of Kalaniuvalu and Fotofili.
[14] The rules of succession to a noble's title are set out in clause 111 of the Constitution and are discussed in detail in Chapter Three.
[15] The Privy Council is a body of advisors to the King which until 2010 was the highest Executive body in government.

must make special accommodation.[16] A formal equality approach merely requires that the law is worded in gender-neutral language. In practical terms, formal equality is achieved when written constitutions or human rights legislation expressly provides for equality between men and women and when other legislation is not discriminatory against women. Liberal feminists argue that as long as the law allows for equal opportunity, it is up to women to use that opportunity to better themselves.[17] The achievements of liberal feminists in many countries were considerable, attaining (gradually) the right to vote, the right to stand for parliament and equal education for women.[18]

Most of the Pacific island countries expressly guarantee formal equality, or equality between men and women, as a fundamental right in their constitutions. Fiji,[19] Samoa,[20] Vanuatu[21] and Solomon Islands[22] all have written constitutions guaranteeing equality before the law, interpreted in the courts as equating to formal equality. Any legislation which contravenes that constitutional right is (theoretically) void.[23] The Tuvaluan Constitution prohibits discrimination on the grounds of race, religion, place of origin, political opinion and colour but not sex and gender.[24]

While the preamble to the Constitution of Kiribati states that 'the principles of equality and justice shall be upheld', section 15 prohibits discrimination only on the grounds of 'race, place of origin, political opinions, colour or creed', but not sex and gender.[25] The same section provides exceptions including the law on the land tenure thus expressly

[16] Regina Graycar and Jenny Morgan, 'Thinking About Equality' (2004) 27(3) *UNSW Law Journal* 833, 834; Becker, above n 3, 210; Elizabeth Sheehy, 'Personal Autonomy and the Criminal Law: Emerging Issues for Women' (Background Paper, Canadian Advisory Council on the Status of Women, September 1987) 3.
[17] Sheehy, above n 16, 3.
[18] MacKinnon, above n 4, 1286; Graycar and Morgan, above n 16, 834–5; Sharon L R Anleu, 'Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory' (Winter 1992) 19(4) *Journal of Law and Society* 423, 424.
[19] *Constitution of the Republic of Fiji* s 26.
[20] *Constitution of the Independent State of* Samoa 1960 s 15.
[21] *Constitution of the Republic of Vanuatu* s 5(1)(k).
[22] *Constitution of Solomon Islands* 3(a).
[23] *Fiji Constitution* s 2(2); *Samoa Constitution* s 2(2); *Vanuatu Constitution* ss 2 and 16(4); *Solomon Islands Constitution* s 2.
[24] *Constitution of Tuvalu* s 27. Sex refers to biological differences while gender refers to socially constructed differences. Both lead to discrimination and strong non-discrimination provisions prohibit discrimination on the basis of both sex and gender. Discrimination in land law is based on gender. The term 'gender' will be used throughout this thesis. There are places where both 'sex' and 'gender' will be used in the thesis. For example when referring to equality provisions in the Constitution.
[25] *Constitution of Kiribati* s 15(3).

validating discrimination against women in Kiribati in land law.[26] The Tongan Constitution does not guarantee formal equality for women.[27] Indeed, the Constitution explicitly discriminates against women in land ownership and inheritance as discussed in detail in the next chapter.

In family law, before feminists responded with a demand for formal equality, custody of children was mostly (and continues to be, in many countries) granted to women on the basis that it was women's natural role to take care of children. Financially, providing for the family was assumed to be the role of men. Liberal feminists argued that men and women should be treated the same in custody disputes and that the principle of the best interests of the child should be employed although this might result in many men winning custody of their children.[28] However, liberal feminists agreed that a different approach was appropriate in order to take into account women's biological differences especially in employment and family matters;[29] for example, by providing for maternity leave with pay, an employment benefit available only to women to accommodate the birthing process.[30]

Formal equality is easily introduced requiring merely a change in the law to guarantee equal treatment of men and women. It does not demand a radical change to the status quo or 'disruption in the current distribution of power.'[31] Some feminist scholars argue that formal equality remains the dominant approach even in developed countries.[32] The *Treaty of Amsterdam 1997*, the constitutive instrument of the EU, expressly provides for equal pay, but not pay equity, between men and women.[33] In Australia the prevalence of formal equality as the dominant approach is partly attributed to the absence of a Bill of

[26] Ibid s 15(4)(d). See also Secretariat of the Pacific Community, *Stocktake of the Gender Mainstreaming Capacity of Pacific Island Governments – Kiribati* (Secretariat of the Pacific Community, 2015) 8.
[27] Fredman and Goldblatt, above n 6, 3.
[28] Becker, above n 3, 238.
[29] Ibid, 213–4, 244.
[30] Graycar and Morgan, above n 16, 834.
[31] Ibid; Regina Graycar and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *Australian Feminist Law Journal* 23, 33; Beth Goldblatt, 'Intersectionality in International Anti-discrimination Law – Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights*, 3.
[32] Graycar and Morgan, 'Thinking About Equality', above n 16, 837.
[33] Mieke Verloo, 'Mainstreaming Gender Equality in Europe. A Critical Frame Analysis Approach' (2005) 117 *Greek Review of Social Research* 11, 12. The full title of the Amsterdam Treaty is *Treaty of Amsterdam Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts*, signed 2 October 1997 (entered into force 1 May 1999). See art 141 (formerly art 119) at http://treaties.fco.gov.uk/docs/pdf/1999/TS0052.pdf.

Rights or an equality provision in the Constitution, although there is a *Sex Discrimination Act 1984* (Cth).[34] However, in the United States where there is an equality provision in the Constitution, formal equality remains the dominant approach.[35] Canada, although it has developed jurisprudence on substantive equality under its *Charter of Rights and Freedoms* still takes a formal equality approach in many areas including women's socio-economic rights.[36] This global situation is discouraging for women in developing countries such as Tonga which have yet to guarantee formal equality. A further challenge arises for women in Tonga if formal equality is the only understanding of equality.

The major criticism of the formal equality approach to equality is that it has not led to real equality for women and girls. Feminists have argued that formal equality requires women to be treated the same as men. In order to achieve equality however this does not account for historical discrimination which has left women unequally positioned.[37] Further, maleness is the norm to which women have to conform.[38] The sameness approach, built on liberal ideals 'of individual rights, freedom, and reasonableness, while purporting to be value-neutral and objective, favour men's interests and actually reinforces male domination.'[39] Littleton argues that 'there is no logical, inherent link between *difference and inequality.*'[40] She argues that '[i]nequality is created; it is not natural.'[41]

[34] Graycar and Morgan, 'Thinking About Equality', above n 16, 833; Graycar and Morgan, 'Examining Understandings of Equality', above n 31, 33.
[35] Graycar and Morgan, 'Examining Understandings of Equality', above n 31, 33; Diana Majury, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 *Osgoode Hall Law Journal* 297, 307.
[36] Graycar and Morgan, 'Examining Understandings of Equality', above n 31, 41; Majury, above n 35, 305-6, 335.
[37] Christine A Littleton, 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburgh Law Review* 1043, 1048.
[38] Ibid.
[39] Anleu, above n 18, 423.
[40] Littleton, above n 37, 1050.
[41] Ibid, 1052.

2.3 Substantive equality

Formal equality however does not lead to substantive equality or real equality for women.[42] Feminist theorists have argued that treating men and women the same without correcting past and existing structural inequalities further entrenches inequality.[43] Substantive equality requires that the law not only expressly guarantees equality between men and women (formal equality) but also ensures 'equality of opportunity, or the removal of apparently neutral barriers to women's advancement.'[44] In addition to equality of opportunity, substantive equality requires equality of outcome.[45] If women are granted equal land rights in a regime that historically only allowed men to own land without taking further steps to ensure that women do in fact have equal opportunity without any hindrance to own land, including the removal of social and cultural barriers, real equality will not take place. Further,

> [s]ubstantive equality recognizes that in order to further equality, policies and practices need to respond to historically and socially based differences. Substantive equality looks to the effects of a practice or policy to determine its equality impact, recognizing that in order to be treated equally, dominant and subordinated groups may need to be treated differently.[46]

[42] Even in developed countries substantive equality for women has not yet been achieved in some areas. For example, there remains a salary gap between men and women in most countries and paid parental leave is not yet universal. Miranda McGowan, 'Stop the Fight for Equality', (2012) 28(1) *Constitutional Commentary* 139–146; Sandra Fredman, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) *International Journal of Law in Context*, 442, 444. In the latter article Fredman discusses the ongoing debate between sameness feminists and difference on equality and parenthood; Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1. The OECD published its 2013 figures for the gender wage gaps for the following countries – New Zealand – 5.6%, United States – 17.91%, Australia – 18%, Canada – 18.97% and the United Kingdom – 17.48%. See Organisation for Economic Co-operation and Development, *Gender Wage Gap* (2014) <https://www.oecd.org/gender/data/genderwagegap.htm>. In regards to paid leave available to mothers Australia has a total of 18 weeks, NZ – 16 weeks, UK – 39 weeks and the United States – 0. See Organisation for Economic Co-operation and Development, *PF2.1: Key Characteristics of Parental Leave Systems* (28 February 2016) <https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>.

[43] Sheehy, above 16, 4; Fredman and Goldblatt, above n 6, 5.

[44] Sandra Fredman, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Ineke Boerefijn, F Coomans, Jenny E Goldschmidt, R Holtmaat and R Wolleswinkel (eds), *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia, 2003) 111. See also Fineman, above n 4, 445.

[45] Fredman, 'Beyond the Dichotomy', above n 44, 111. See also Fineman, above n 4, 445.

[46] Majury, above n 35, 305.

This means that special measures may be necessary in order to close a gap created by men's historical, social and cultural advantage.[47] Indeed, international human rights law recognises the need for temporary special measures (TSMs) to bring women up to the same level as men, without which equality will take a long time to achieve.[48] CEDAW requires States parties to put in place 'temporary special measures aimed at accelerating de facto equality between men and women' and that TSMs 'shall not be considered discrimination as defined in the present Convention …'.[49] Once equality is achieved in the area in which the TSMs were employed, the TSMs must be discontinued.[50] Temporary special measures have been used by some countries to increase women's representation in parliament.[51] Employing TSMs to achieve equal land rights for women has not, however, been directly addressed in international human rights law. This can be attributed to the lack of an express right to land in international human rights law.[52] Nevertheless the CEDAW Committee has recommended that '[p]ursuit of the goal of substantive equality also calls for an effective strategy aimed at overcoming underrepresentation of women and a redistribution of resources and power between men and women.'[53] Pursuing such a goal is likely to be opposed by existing holders of resources and power.

Although there is no specific right to land in international human rights law, CEDAW has been used to enable the principle of equality to take precedence over discrimination at the national level in many jurisdictions. In Vanuatu for example, in the case of *Noel v Toto*,[54] there was a land dispute between the applicant (son of a sister of the defendant) and the defendant who belonged to the same clan, over land belonging to the clan

[47] Goldblatt, above n 31, 6; CEDAW Committee, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures* (2004) <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf>

[48] Goldblatt, above n 31, 6; CEDAW Committee, above n 47.

[49] United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979 (entered into force 3 September 1981) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>, art 4.

[50] Ibid.

[51] Lesley Clark and Charmaine Rodrigues, *Utilising Temporary Special Measures to Promote Gender Balance in Pacific Legislatures: A Guide to Options* (UNDP, 2008).

[52] Jeremie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 18 *SUR International Journal on Human Rights*, 115.

[53] CEDAW Committee, above n 47, para 8.

[54] *Noel v Toto* [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995) http://www.paclii.org/vu/cases/VUSC/1995/3.html>.

headed by the defendant.[55] Part of the land, Champagne Beach, was popular with tourists. The defendant was in control of the use of the land and was collecting proceeds from Champagne Beach which he did not distribute to other members of the family including his sisters and their children.

The applicant claimed equal entitlement to proceeds from the land through his mother who, he argued had an equal right to the land as a customary owner. The defendant claimed that as head of the clan, he had sole rights to income from the land and that it was up to him to decide whether or not to distribute the money. The Constitution of Vanuatu provides that all land in Vanuatu is customary land, owned by the indigenous people of Vanuatu[56] and that '[t]he rules of custom shall form the basis of ownership and use of land in the Republic of Vanuatu'.[57] The Supreme Court of Vanuatu accepted the applicant's claim and held that the Constitutional guarantee of equal protection of the law was fundamental and that any customary rule which discriminated against women was unconstitutional. The court held that all children male and female were entitled to the proceeds from the land.

Courts in other countries have taken a similar approach and upheld the constitutional right of equality in favour of women's customary practice and law.[58] There are many countries which have ratified or acceded to CEDAW and where formal equality is guaranteed by law but discrimination against women remains.[59] However, as the case of *Noel v Toto* shows, the courts can play an important role in the achievement of substantive equality. The Supreme Court in Tonga has been progressive in its interpretation of human rights principles and its application of international human rights principles in some cases, but, in the absence of an equality clause in the Constitution, it has not applied women's rights principles in cases where a woman's right was an issue but was not pleaded.

[55] The court referred to CEDAW as 'Human Rights Charters with respect to women's rights' perhaps due to an unfamiliarity with the Convention.
[56] *Constitution of the Republic of Vanuatu*, art 73.
[57] Ibid, art 74.
[58] See *Vishaka v. State of Rajasthan* (1997) 6 SCC 241 and *Ephraim v Pastory* (2001) AHRLR 236 (TzHC 1990).
[59] Sue Farran, 'Land Rights and Gender Equality in the Pacific Region' (2005) 11 *Australian Property Law Journal* 131.

2.3.1 Intersectionality

Substantive equality means equality for all, and any strategy to achieve it must account for the differences amongst women. In the Tongan context of land this is complicated by the socio-political class structure that is entrenched in the Constitution. Crenshaw's theory of intersectionality is helpful in exploring the ways in which class and gender are compounded in the Tongan context to complicate women's land rights.[60] Crenshaw argues that much feminist theory, anti-discrimination law and anti-racist politics, have been advanced on a 'single-axis framework' based on the experience of white women. Such an approach ignores the further discrimination of many women because they are not white, as well as their socio-economic background, disability, age and other factors.[61] Although her argument is based on the experiences of black women in the United States, who Crenshaw argues suffer heightened discrimination because of the compounding effect of their race and gender, it is applicable to the Tongan context.[62] Addressing intersectionality has been an important part of the development of substantive equality under international human rights law.[63] International human rights bodies have recognised that many women suffer multiple forms of discrimination.[64] The CEDAW Committee has made specific recommendations in areas such as age, disability and migrant women, where it has found that many women are further discriminated against.

Indeed, Crenshaw's framework is important to the analysis of women's land rights in Tonga because of the socio-political class structure that was entrenched in the Constitution when it was enacted. That socio-political class structure is also tied to the system of land tenure entrenched in the Constitution. The impact of that structure is that most women in Tonga, who are part of the commoner class, are disproportionately affected in terms of access to land and power. Crenshaw argues that '[b]ecause the

[60] Fredman and Goldblatt, above n 6, 18.
[61] Kimberley Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139, 140. See also Nitya Duclos, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 *Canadian Journal of Women & Law* 25, 44–5; Fredman and Goldblatt, above n 6, 21, 27, 31; Goldblatt, above n 31, 6.
[62] Crenshaw, above n 60, 139, 148.
[63] Fredman and Goldblatt, above n 6, 21, 27, 31. Human rights bodies such as the CERD and CEDAW committees have recognised the further discrimination suffered by Roma women in Europe and native women in Canada.
[64] Goldblatt, above n 31.

intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular in which Black women are subordinated.'[65] In the same way, an analysis of women's land rights in Tonga based on gender discrimination only, and not taking into account the further marginalisation of commoner women who make up the majority of the female population, distorts the reality of the women's situation in Tonga.

However, applying the theory of intersectionality in the Tongan context is a more difficult approach than the single intersection of gender, because of class privilege and the resistance of privileged (royal noble) women to reform which would dismantle their power base. Additionally, those men and women in the commoner class who support the existing class structure are also likely to oppose law reform, despite it offering them greater rights. Thus, if social class differences are perceived as cultural norms or the 'natural order of things', feminists will find it more difficult to challenge the status quo.

2.4 Multiple approaches to equality

Employing multiple approaches to achieving equality in Tonga in relation to land rights is necessary and strategic.[66] Categorical discourse which draws attention to predominant male and patriarchal values is of particular relevance in Tonga where there is no formal equality and women are almost non-existent in the highest decision-making roles at the national level. Both formal and substantive approaches to equality are necessary. Although substantive equality is the ultimate aim, women in Tonga do not have formal equality. The first and primary goal therefore is to achieve formal equality in the law while at the same time strategising for an approach that will ultimately lead to the enjoyment of substantive equality on the ground. The next part, exploring the debate between universalism and cultural relativism and feminist interventions into that debate, focuses on how particular definitions of culture have hindered equality reform initiatives, and the achievement of both formal and substantive equality for women.

[65] Crenshaw, above n 60, 140.
[66] Sheehy, above n 16, 8; Daniela Ikawa, 'The Construction of Identity and Rights: Race and Gender in Brazil' 2014 (10)4 *International Journal of Law in Context* 494, 502.

Part II – Universalism versus Cultural Relativism

This part focuses on the use of culture as a justification for maintaining laws and cultural practices that discriminate against women, posing a major challenge to achieving both formal and substantive equality in land rights. The debate between cultural relativists who argue that culture takes precedence over the human rights principles that are contained in the UN's human rights instruments, and universalists who argue that human rights are universal and cannot be modified by cultural norms is central to this part. After outlining that debate this part considers, evaluates and utilises feminist interventions into that debate.

2.5 Cultural relativism

The cultural relativist position is summed up in the American Anthropological Association's submission to the United Nations Commission on Human Rights which was tasked with drafting the Universal Declaration on Human Rights, that:

> standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole.[67]

Cultural relativists, in general, argue that human rights, including women's human rights, are representative of Western values not shared by non-Western societies[68] and claim that human rights are a modern-day form of Western imperialism.[69] Cultural relativists argue that human rights discourse is premised on liberal ideals such as individualism, autonomy and human dignity whereas non-Western societies value communal living, duties and responsibilities to family and society, the sharing of

[67] Radhika Coomaraswamy, 'Are Women's Rights Universal? Re-Engaging the Local' (2002) 3 *Meridians: Feminism, Race, Transnationalism* 1.

[68] Nancy Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1994) 25 *Columbia Human Rights Law Review* 49; Eva Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 *Human Rights Quarterly* 136, 142–3, 145.

[69] Jill Steans, 'Debating Women's Human Rights as a Universal Feminist Project: Defending Women's Human Rights as a Political Tool' (2007) 33 *Review of International Studies* 11, 12–13; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2003) 34 *George Washington International Law Review* 483, 484, 492; Brems, above n 68, 142–3, 145.

resources with a focus on collective rights rather than individual rights.[70] Further, cultural relativists argue that the concept of rights apply to an adversarial justice system, such as those that operate in common law systems where one party succeeds over the other, whereas non-Western societies value conflict resolution by peace-making and consensus.[71] However, most societies and communities have been influenced by Western culture[72] and have adopted some liberal values. For example, although opposing equal land rights Tonga has adopted many western and liberal values; for example, the adversarial system of justice has been in place in Tonga since the 19th century.

The cultural relativist perspective however incorporates a spectrum of views ranging from the rejection of human rights outright to those rejecting a particular right or how it has been interpreted.[73] Some cultural relativist theorists support a particular right but argue it is subject to certain cultural practices.[74] Other cultural relativist theorists approach culture as a unitary system and argue that disagreement with one aspect of culture amounts to rejection of culture in general.[75] Cultural relativism has been employed to argue against the recognition of women's rights. For example, a number of States parties to CEDAW have lodged reservations on article 16 on family relations on the basis of the incompatibility of the standards created by article 16 and standards adopted and utilised in the local culture. However, the reservations demonstrate that the reserving States accept equality between men and women in certain areas but not in others.

2.6 Universalism

Universalists argue, in contrast to the cultural relativists, that there are certain fundamental values all human beings share regardless of race, culture and ethnic

[70] Kim, above n 68, 58; Brems, above n 68, 145–6; Yash Ghai, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims' (2000) 21 *Cardozo Law Review* 1095, 1097.
[71] Brems, above n 68, 146.
[72] Jack Donnelly, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly* 400, 406.
[73] Brems, above n 68, 143–144. See also Ghai, above n 70, 1097–8.
[74] Brems, above n 68, 136, 144.
[75] Oonagh Reitman, 'Cultural Relativist and Feminist Critiques of International Human Rights – Friends or Foes?' (1997) 100(1) *Statsvetenskaplig Tidskrift* 106. Radical feminists see culture as male dominated and therefore should be disregarded. Kim, above n 68, 95, 100.

background.[76] Human rights represent fundamental values which are universal and possessed by every person.[77] Some universalists argue that human rights are based on natural law stemming either from a higher authority or the ability of human beings to reason.[78] Other universalists argue that human rights are created by, guaranteed and protected by international law. When a state ratifies or accedes to a treaty it undertakes to be bound by that treaty.[79] All members of the UN have ratified one or more core human rights treaty or convention and therefore all have endorsed the universality of human rights through becoming members of the UN and ratifying or acceding to a core human rights treaty.[80] Any government which argues against the universality of human rights is therefore taking a contradictory stance to its UN membership obligations.

Another argument based on positive law is that there are certain human rights principles that form customary international law because they are universally observed.[81] Customary international law is established by uniform State practice 'accompanied by the conviction that they as subjects of international law were bound by law to act that way and that such conduct was believed to be good and necessary.'[82] Principles such as the prohibition of torture and racial discrimination therefore, bind all states through customary international law even if they have not ratified or acceded to a treaty which deals with those principles specifically.[83] However, the international community has not recognised gender equality as a customary international norm.[84]

2.7 Feminist perspectives of cultural relativism and universalism

There is a range of feminist positions on cultural relativism and universalism. Some feminists critique both the notion of rights itself and the cultural relativist position. Feminist supporters of universalism employ similar arguments to liberal legal feminists

[76] Coomaraswamy, 'Are Women's Rights Universal?' above n 67, 1.
[77] Ghai, above n 70, 1096.
[78] Guyora Binder, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 211, 213–4.
[79] Kim, above n 68, 64.
[80] Coomaraswamy, 'Identity Within', above n 68, 483, 502.
[81] Kim, above n 68, 65.
[82] Vojin Dimitrijevic, 'Customary Law as an Instrument for the Protection of Human Rights' (Working Paper 7, Istituto per gli Studi di Politica Internazionale (ISPI), 2006) 4.
[83] Coomaraswamy, 'Identity Within', above n 69, 483, 497; Coomaraswamy, 'Are Women's Rights Universal?', above n 67, 5–6.
[84] Coomaraswamy argues that women's rights are still treated with scepticism and given less priority by the international community. See Coomaraswamy, 'Are Women's Rights Universal?', above n 67, 5–6.

arguing that women must be given the same rights as men within the human rights framework. Other feminists, many from developing countries,[85] have critiqued this version of human rights arguing that liberal feminists have replaced a male standard with one based on experiences of white women in Western countries ignoring cultural differences between women.[86] In addition, while some Western feminists argue that women from developing countries are oppressed by culture, they are ignoring their own cultural oppression.[87] This view essentialises women from developing countries, and while the literature on essentialism is mostly authored by feminists from African, Asian and Latin American countries, it is not representative of women in the Pacific because of social, cultural, political and historical differences, although similar themes are apparent.[88] A feminist critique of international human rights law from women in the Pacific would provide a clearer understanding of how equality can be achieved in the region.

2.8 Feminists on cultural relativism

Cultural relativism has been utilised, in large part, to deny women's rights.[89] Proponents of cultural relativism argue that the women's human rights system is a form of Western imperialism which should be resisted.[90] It is argued that international agreements on women's human rights, such as CEDAW and the Beijing Platform for Action, promote Western values of sexual freedom (by promoting the legalisation of abortion and sex-work), 'radical individualism' and the equalisation of men and women's role within the family, contrary to family values in non-Western societies.[91] Advancing culture, as a

[85] Karen Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 47, 59–60. For example, feminists from developing countries argue that Western feminists are overly concerned about women's sexual rights; women in developing countries are more concerned about issues such as poverty (at p 62).

[86] Tracy E Higgins, 'Anti-essentialism, Relativism and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89, 91; Kim, above n 67, 49, 63; Steans, above n 68, 11, 15. Other feminists have joined the debate siding with neither universalists nor relativists but proffering their own view of international human rights law in which their views also differ. See Engle, above n 85, 52. In critiquing Western feminists' views on non-Western women see Engle, above n 84.

[87] Engle, ibid, 61.

[88] Ibid, 61.

[89] Frances Raday, 'Culture, Religion and CEDAW's Article 5 (A)' in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination Against Women* (The Feminist Press at CUNY, 2007) 70; Fareda Banda, 'Global Standards: Local Values' (2003) 17 *International Journal of Law, Policy and the Family* 1, 6.

[90] Higgins, above n 86, 97.

[91] Ibid.

justification for maintaining laws or customary practices that are discriminatory against women, is well documented not just in scholarly literature but also in many of the CEDAW Committee's Concluding Comments.[92] Choudhury explains how culture is articulated as justification for maintaining inequality:

> From arguments based on tradition which demands respect for no other reason than past practice to those based on religion demanding adherence to divine commandments, those who wish to retain the status quo that subordinates women and sexual minorities give the impression that change is either undesirable, dangerous, or impossible.[93]

In response to cultural relativists, universalist feminists reject the argument that human rights is a Western value. They argue that women's rights violations occur in all societies[94] and both feminism and women's human rights allow women to challenge the status quo and the cultural constraints imposed on them.[95] According to Higgins, the main concern among feminists in this debate is that '[i]n the face of profound cultural differences among women, how can feminists maintain a global political movement yet avoid charges of cultural imperialism?'[96]

As Kim states, '[f]eminism shifts the focus of women from one of object to one of subject.'[97] Cultural relativism challenges women's right to question a discriminatory cultural norm or law.[98] A number of feminists have argued that only cultural practices which discriminate against and perpetuate the subordination of women should be abolished.[99] There are many cultural practices identified by feminists as harmful or perpetuating the subordination of women, many from within the countries where they are practiced. Raday identifies the cultural practices with which CEDAW is concerned:

---

[92] Hilary Charlesworth, 'Feminist Ambivalence About International Law' (2005) 11 *International Legal Theory* 5.
[93] Cyra Akila Choudhury, *Law, Gender and the Burden of Culture* (Florida International University Legal Studies Research Paper No. 13-34, October 2013) 2 <http://ssrn.com/abstract=2320040>.
[94] Coomaraswamy, 'Identity Within', above n 68, 489; Kim, above n 67, 49.
[95] Kim, above n 68, 50.
[96] Higgins, above n 86, 89.
[97] Kim, above n 68, 50.
[98] Ibid.
[99] Brems, above n 68, 136; Reitman, above n 74, 106–7; Choudhury, above n 93.

> CEDAW must be understood as referring to traditionalist cultural norms that are at variance with the human rights culture and to the maintenance of patriarchal norms that conflict with and resist gender equality.[100]

Harmful practices such as sati (widow immolation), female genital mutilation and honour killing are among the most extreme cultural practices.[101] Unequal pay and unequal representation of women in decision-making roles at the national level, sometimes conceptualised as cultural practices, based on a view of women as uniquely suited to domestic responsibilities, persist even in developed countries. Male preference for land ownership is still prevalent in many developing countries.[102] Underlying these cultural practices is the persistent stereotyping of women as mothers (even though not all women are or will become mothers) and primary caretakers of children, the elderly and the sick, and with domestic responsibilities, that impinge on their ability to participate in social, political and economic life.[103] The stereotype persists even where women are working in predominantly male jobs and women have become Heads of States and Heads of Governments.

Raday argues that some practices which were universally practised in the past have been abolished in certain parts of the world.[104] For example, the 'patriarchal control over land' was prevalent in Western countries before the 20th century but women now enjoy equal land rights.[105] This challenges the cultural relativist argument in societies such as Tonga that the male right to land is traditional and should not, and cannot, be modified. Indeed, the historical reality is that all societies once privileged a male right to land. Resnik comments:

> A pervasive assumption is that nation-states have bounded legal regimes. Yet the burdens imposed on women in the name of gender and sexuality have not been circumscribed by jurisdictional lines. Rather, gender hierarchies have travelled-by way of Roman law, civil law, the common law, and religious systems – to impose constraints on women living under autocracies, republican

[100] Raday, above n 89, 70.
[101] Coomaraswamy, 'Are Women's Rights Universal?', above n 67, 9–10.
[102] Choudhury, above n 93, 2. Other practices include a preference for sons and control of female sexuality, which link and underscore land law principles in Tonga, as will be demonstrated in Chapter Three. See Raday, above n 89, 70.
[103] Ibid, 71.
[104] Ibid, 82.
[105] Ibid.

> democracies, and other political forms. The many laws supporting gender inequalities make plain that legal rules internal to a nation-state are often not indigenous to a particular polity but, instead, are regularly shaped by cross-border influences.[106]

This supports the argument by universalists that cultural relativists are selective about the traditional and fixed origin of the cultural traditions they defend. As Coomaraswamy comments, '[t]here are no essential traditions, only essential memories that pick and choose from the anthology of the past.'[107]

2.9 Whose definition of culture?

The meaning of culture and who decides the meaning of culture, or what constitutes a cultural practice, is central to the debate between universalists and cultural relativists. Choudhury argues that 'whenever culture comes up as a rationale for legal decisions, it requires careful unpacking and scrutiny. Moreover, it requires scepticism.'[108] Raday argues that culture 'may be viewed from three different perspectives: ethnicity or religion; institutional subcultures varying at the levels of family, workplace, church, and state; and the developing international or global culture, which includes the human rights culture.'[109] Because a number of governments have used culture as a pretext for human rights violations, some scholars have tasked human rights advocates to ask certain questions of those cultural claims. Hilary Charlesworth has framed such questions as, 'whose culture is being invoked, what the status of the interpreter is, in whose name the argument is being advanced, and who the primary beneficiaries are.'[110] Celestine Nyamu agrees:

> [w]hen gender-biased social arrangements are defended in the name of culture, the purported cultural norms need to be challenged. Arguing on the basis of their inconsistency with human rights standards and ideals of gender equity in development does not go far enough. Scholars and practitioners must ask: Do the cultural norms reflect actual social practice? Are they representative of the

[106] Judith Resnik, 'Opening the Door: Ruth Bader Ginsburg, Law's Boundaries, and the Gender of Opportunities' (2013) 25 *Columbia Journal of Gender and Law* 81.
[107] Coomaraswamy, 'Are Women's Rights Universal?', above n 67, 1, 7.
[108] Choudhury, above n 93.
[109] Raday, above n 89, 70.
[110] Hilary Charlesworth, 'No Principled Reason' (November 1997) *Eureka Street* 24, 30.

> community, or are they simply a generalization of the narrow interests of a few? Whose power is preserved through the use of cultural norms? Is the label of culture being deployed to stifle a desirable and necessary political debate?[111]

Cultural relativists often disregard the voice of local feminists in their own communities who support the universality of human rights and demand social, cultural and legal reform. Women's rights groups have been able to use the international forum as a platform to voice their demands for a legal forum at the national level – knowing that without international pressure, or a certain measure of accountability to the international community, women's rights issues at the national level are not likely to be addressed. Cultural relativists view such women as being (inappropriately) influenced by Western values such as autonomy and rights.[112] Such an attitude reflects the perception that women cannot make decisions for themselves, are not able to think for themselves, are easily influenced by outside perspectives,[113] and have no respect for the local culture.[114] Universalists criticise cultural relativists for viewing culture as immutable and 'an unchanging set of social arrangements.'[115] Universalists see culture as 'adaptive, in a state of constant change, and rife with internal conflicts and inconsistencies.'[116]

Cultural relativists approach culture as inviolable even if it violates fundamental human rights[117] and assume that all people within a society or community view or practise culture in the same way.[118] They preserve an idealistic culture, although change and influence by other cultures is inevitable as a result of the adoption of technology and migration.[119] In response to who is making the cultural claim and what their motives are, universalists argue that cultural relativist claims are often made by government

[111] Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381, 404.
[112] Kim, above n 68, 95; Reitman, above n 75, 106–7.
[113] Kim, above n 68, 102–103.
[114] Reitman, above n 75, 107.
[115] Cyra Akila Choudhury, *Beyond Culture: Human Rights Universalisms Versus Religious and Cultural Relativism in the Activism for Gender Justice* (Florida International University Legal Studies Research Paper No. 14-29, November 2014) 16. Choudhury, however, argues that universalists also treat culture as static by attacking either religion or culture as contravening human rights (pp 16, 18).
[116] Raday, above n 89, 70; Banda, above n 89, 14; Nyamu, above n 112, 381, 386, 393.
[117] Raday, above n 89, 70; Choudhury, 'Law, Gender and the Burden of Culture', above n 9, 3–4.
[118] Steans, above n 69, 11, 13.
[119] Kim, above n 68, 94–95.

leaders who want to maintain the status quo and escape accountability to its citizens.[120] Steans observes:

> Cultural relativism can be evoked as part of the meta-narrative of governments who actively oppose the application of international human rights to their politics in order to protect their privilege and in such circumstances tolerance of relativism can result – unwittingly perhaps – in acquiescence in state repression.[121]

However, the government may not be holding the ultimate power but rather the ruling elite whose status and influence remain, even when there is a change in government.[122] Banda refers to the ruling elite within a society as the primary beneficiaries of maintaining culture.[123] Similarly, Nyamu argues that the relationship between law and culture is often ignored despite 'the active role that the state apparatus plays in defining culture'.[124] Nyamu explains:

> Formal laws and cultural norms are modes of social control that play an important role in constructing social arrangements. Formal law may operate to give a natural and immutable appearance to dominant articulations of custom, and custom may be invoked to legitimize formal law. Attributing gender hierarchy to a vague notion of culture masks the role played by formal legal institutions in creating those conditions. A vague notion of culture provides a convenient scapegoat for government institutions and obscures the state's responsibility in redressing inequalities. A government can easily avoid addressing inequalities by claiming that it is powerless to alter social structures within the cultural sphere.[125]

Nyamu's analysis is apt in the context of Tonga where discriminatory laws enacted in the 19th century are still in force and maintained by the ruling elite, who have positive power over law reform (such as the power to veto legislation passed by Parliament), by relying on culture.

---

[120] Reitman, above n 75, 106; Steans, above n 69, 13; Banda, above n 89, 4.
[121] Steans, above n 69, 13.
[122] Donnelly, above n 72, 411–2.
[123] Banda, above n 89, 9.
[124] Nyamu, above n 111, 401.
[125] Ibid, 404.

Universalist feminists argue that governments making cultural relativist claims often only advance such claims in relation to women's rights in a context of public attention on perceived 'negative impacts'. Governments rarely give the same attention to other international instruments they have ratified or acceded to, especially in the areas of trade and commerce, which may also be contrary to cultural traditions and may negatively influence local people, especially women.[126] There is a double standard in how governments have ratified or acceded to international agreements in other areas of international law, usually with little public consultation, yet when it comes to women's rights especially CEDAW, governments express strong oppositional views. Tonga has ratified a number of international treaties and yet when it comes to CEDAW, conservative elements in society have demanded thorough public consultations that were not demanded of other ratified treaties. Even after the Tongan government announced that it would accede to CEDAW in 2015, Tonga has ratified several treaties. No public outcry from conservative members of society against the recently ratified treaties.[127]

2.10 Change from within

Feminist scholars differ on strategies to counter cultural relativists at the local level although there is general agreement that the impetus for reform should come from local feminists.[128] Coomaraswamy states that avoiding 'the arrogant gaze of the outsider is essential if rights discourse is to win the ideological battle. The full participation and consultation of women and men living in these societies must be the ultimate goal.'[129] Further, the international community must refrain from overseeing reform in a patriarchal society. Many scholars caution that there is no single women's voice in any society:

> [t]he women's groups in these societies do not always speak with one voice. Some want intervention, some want to perpetuate the practice, some want to

[126] Reitman, above n 75, 105.
[127] Since the Tongan government announced in 2015 that it would accede to CEDAW in March 2015, Tonga acceded to the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing (entered into force on 5 June 2016) on 6 May 2016; ratified the Paris Agreement (entered into force on 4 November 2016) on 21 September 2016.
[128] Kim, above n 68, 91–92; Coomaraswamy, 'Identity Within', above n 69, 513; Coomaraswamy, 'Are Women's Rights Universal?, above n 67, 11.
[129] Coomaraswamy, 'Identity Within', above n 69, 494.

> fight it internally. There are as many groups as there are viewpoints and it is often confusing as to what approach one should take or which group has developed the best perspective.[130]

The theory of intersectionality is important when, in addition to laws and practices that discriminate on the ground of sex and gender, privileged and influential women in their society align with cultural relativists in order to maintain the status quo. The challenges to cultural relativists must also be made to those women who oppose reform because of their social and political status in society. It is a challenge however that local feminists must address because success in bringing about reform may rest on how convincing their arguments are to women with opposing views.

The debate highlights the importance of a contextual analysis in determining the most effective approach to addressing a particular women's rights issue in any society.[131] A contextual analysis is warranted in the case of Tonga because of its unique history in being the only Pacific island country that was not colonised. Tonga however was not exempt from Western influence during the colonial era, which resulted in its adoption of a Western form of government and a written constitution with a Bill of Rights.[132] Those human rights principles did not include equality between men and women. Other introduced laws particularly in the area of family law and property law were explicitly discriminatory against women.[133]

Conclusion

The first part of the chapter outlined the main feminist approaches towards equality. It considered, with examples from Pacific island countries, how a formal equality approach is insufficient in achieving substantive (or 'real') equality for women. However, as this chapter has illustrated, formal equality remains the dominant approach in most countries and substantive equality is yet to become a reality. This chapter argued that feminists in Tonga face the challenge of working towards substantive

[130] Coomaraswamy, 'Are Women's Rights Universal?', above n 67, 11.
[131] Choudhury, 'Beyond Culture', above n 115, 15–6.
[132] Indeed Tonga was a British protectorate from 1900 to 1970 whereby Britain handled Tonga's foreign affairs. The Bill of Rights in the Constitution is called 'The Declaration of Rights'.
[133] Such laws are still in force in many countries. See Coomaraswamy, 'Identity Within', above n 69, 499–500.

equality when formal equality has not yet been achieved and in a socio-political class structure that is mirrored in the land tenure system.

The second part of the chapter considered how culture is used as the justification for maintaining discriminatory laws and practices in some societies. In particular, it explored the theoretical debate between universalism and cultural relativism. Universalism sees human rights as inherent in every human being and these are therefore intrinsic values in all societies regardless of race, ethnicity and culture. Cultural relativists argue that human rights are Western values imposed on non-Western societies and are a form of Western imperialism. Feminists argue against the essentialisation of women because women's experiences within countries and between countries may be different. Feminists also argue that culture must not be used as a pretext for violating women's rights but it is only those cultural practices which are harmful to women that should be abolished. By taking a universalist position, feminists propose that one must engage in the politics of culture and ask who is defining culture, the position of the person relying on culture and what could be his or her motive? Feminists have also suggested practical approaches to dealing with cultural arguments in a local context.

The next chapter considers the basic principles of land law in Tonga and how those principles discriminate against women, beginning with mapping the adoption of a Western-style government, religion and culture, with the support of the Western Methodist missionaries and key Western individuals.

Chapter Three – The Land Law in Tonga

Introduction

This chapter focuses on the land law of Tonga and provides an analysis from a feminist legal perspective, arguing that the failure to achieve formal land equality for women is predicated on the cumulative impact of gender and class discrimination. A number of articles have been written about land law in Tonga and yet little scholarly analysis has been conducted on both the background to the law, and the content of the current land law, from a feminist perspective. This chapter has two parts – Part I provides a background to the current law beginning with a brief overview of the traditional landholding system. It then provides an overview of the development of Tonga's first written laws in the 19th century in order to determine the extent to which they informed current land law principles.

Part II analyses the basic land tenure principles established in the Constitution and elaborated in the *Land Act (Cap. 132)* (Land Act). Current Tongan land law is mandated by both the Constitution and the Land Act. Land tenure in Tonga does not yet offer women formal equality, except in relation to leases. The main types of landholdings in Tonga are – the estates held by the monarch, the nobles and certain ceremonial chiefs (*matapules*), unallocated Crown land administered by the Minister of Lands, tax allotments (a plot of land with a maximum area of 3.3387 hectares), town allotments (land for a residential home with a maximum area of 1618.7 m) and leaseholds.[1] Except for the estates of the monarch which can be held by a female monarch, the only other type of landholding which women can hold is leasehold. Such a system of tenure accords fewer and less significant rights to women. Provisions relevant to land law but contained in other legislation are, along with relevant case law, also discussed as appropriate. However, while case law establishes precedents, the majority of the land cases deal with the land rights of men under the Constitution and the Land Act.[2]

[1] There are many ceremonial chiefs or *matapule* (singular form for ceremonial chief in Tongan) but only six hold hereditary titles and estates. They are not nobles and thus are not eligible to be representatives of the nobles in parliament.

[2] There are a number of cases where one of the parties is a woman through whom the claim of a male relative was made as provided for by the law. The inability of women to claim an estate, or a tax or town allotment, did not change as a result of those cases.

Part I – Background to Tongan Land Law

3.1 Traditional Landholding

A discussion of traditional landholding is an important starting point to understanding the current land law framework because past land law patterns and practices inform the present. The literature on traditional landholding as a feature of traditional Tongan society (the socio-political order prior to European contact) is extensive and is mainly found in the writings of historians, anthropologists and scholars from non-law disciplines.[3] There are also writings of European explorers who visited Tonga in the 17th and 18th centuries.[4]

The first Europeans to arrive in Tonga were the Dutch explorers Schouten and Le Maire in 1616 followed by others later in the 17th century and in the 18th century.[5] These explorers visited Tonga for short periods of time and arguably their impact on the modernising of

[3] The only legal scholar who has written on the traditional landholding system is Dr Guy Powles, writing his PhD thesis on chiefly powers in Tonga and Samoa in which he covered the traditional landholding system in these two societies. See Charles Guy Powles, *The Persistence of Chiefly Power and Its Implications for Law and Political Organisation in Western éa* (PhD thesis, Australian National University, 1979). Non-lawauthors, include Sione N Halatuituia, *Tonga's Contemporary Land Tenure System: Reality and Rhetoric* (PhD thesis, University of Sydney, 2002). See also Edward W Gifford, *Tongan Society* (Bernice P Bishop Museum, 2002); Sione Latukefu, *Church and State in Tonga: the Wesleyan Methodist missionaries and political development, 1822-1875* (Australian National University Press, 1974); 'Ana Taufe'ulungaki, 'Women, Politics and Democracy in Tonga' (Paper presented at the Convention on the Constitution and Democracy in Tonga, Nuku'alofa, 24–27 November 1992), <http://planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml>; R R Nayacakalou, 'Land Tenure and Social Organisation in Tonga' (June 1959) 68(2) *Journal of Polynesian Study* 93; Viliami Fukofuka, 'New Directions in Land Development Policies in Tonga' in Ron Crocombe and Malama Meleisea (eds), *Land Issues in the Pacific* (Institute of Pacific Studies, University of the South Pacific, 1994), 147; Kerry James, 'Right and Privilege in Tongan Land Tenure' in Gerard R Ward and Elizabeth Kingdon (eds) *Land, Custom and Practice in the South Pacific* (Cambridge University Press, 1995), 157–197; T Savae Latu and Ronald I Grenfell, 'The Evolution of Land Tenure in the Kingdom of Tonga'(1994) 39(4) *Australian Surveyor* 241–251; Alaric Maude and Feleti Sevele, 'Tonga: Equality Overtaking Privilege' in R G Crocombe (ed) *Land Tenure in the Pacific* (University of the South Pacific, 1987, 3rd ed) 115–6; Ron Crocombe, 'The Pattern of Change in Pacific Land Tenures' in R G Crocombe (ed) *Land Tenure in the Pacific* (University of the South Pacific, 1987, 3rd ed), 1.

[4] Maude and Sevele, ibid, 115–6; Crocombe, 'The Pattern of Change', ibid, 1. There is one well-known contemporary account, William Mariner and John Martin, *Tonga Islands: William Mariner's Account: An Account of the Natives of the Tonga Islands in the South Pacific Ocean, with an Original Grammar and Vocabulary of Their Language* (John Murray, 1817).

[5] Other explorers included Abel Tasman (1643), Captain James Cook (1773, 1774 and 1777), La Perouse (1787) and Captain William Bligh (1781 and 1792). See Charles F Urbanowicz, 'Motives and Methods: Missionaries in Tonga in the Early 19th Century', (1977) 86(2) *Journal of the Polynesian Society* 245, 250.

Tongan society was minimal compared to that of the Wesleyan Methodist missionaries who arrived in the 19th century.[6]

It is difficult however, to ascertain an accurate picture of traditional landholding because many sources of the literature on traditional Tongan society are based on oral tradition. Tongan society was non-literate prior to the 1830s[7] and in Latu and Grenfell's words, '[s]ince Tonga had no written language prior to the coming of the missionaries in the early nineteenth century, examining their past runs immediately into myth.'[8] Ralston also commented that, '[p]recontact Tongans were not literate, and European males produced all writings of the early contact period. This 'evidence' must therefore be critically and openly assessed for Eurocentric and androcentric bias in terms of preconceptions, representation and interpretation.'[9] Further, the sources of much oral tradition were the chiefly leaders who focused mainly on the lives of their ruling ancestors.[10]

Most historians describe the traditional landholding as reflecting the hierarchical structure of traditional Tongan society. At the top of the hierarchy was the Tu'i Tonga who, from around

[6] Urbanowicz argued that Tongan society remained fundamentally unchanged until the missionaries' influence in the 19th century. See Urbanowicz, above n 5, 245, 249. However, to say that the only outsiders to have influenced Tongan society were the Europeans would be misleading. Latukefu argued that a few centuries prior to the arrival of the Europeans, frequent contact between Tonga and neighbouring Pacific island countries was common especially contact with Fiji. Fiji was a main provider of large canoes and sandalwood. Tonga adopted certain Fijian customs such as the *fahu* (from Fiji's *vasu*) which is still being practised in Tonga today. Latukefu, *Church and State in Tonga*, above n 3, 11 and 12. See also Paul Van der Grijp, 'The Making of a Modern Chiefdom State: The Case of Tonga', (1993) 149(4) *Bijdragen tot de Taal-, Land- en Volkenkunde* ('*Politics, Tradition and Change in the Pacific'*) 661–2. George E Marcus, 'Land Tenure and Elite Formation in the Neotraditional Monarchies of Tonga and Buganda', (1978) 5(3) *American Ethnologist* 509, 510.

[7] Oral tradition is defined as '…verbally transmitted testimony concerning the past, with or without a conscious intent to record history; the crucial distinction from other major types of oral testimony lying in the tradition's hearsay transmission from an original witness through a series of witnesses to the present narrator.' P M Mercer, 'Oral Tradition in the Pacific', (1979) 14(3) *Journal of Pacific History* 130. History that is largely based on an oral tradition has been criticised by some well-known historians and historiographers for its highly selective and subjective nature. See Bronislaw Maliknowski, 'Myth in Primitive Psychology' in Bronislaw Maliknowski, *Magic Science and Religion and Other Essays* (Doubleday, 1954); Bronislaw Maliknowski, *Argonauts of the Western Pacific; An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (George Routledge & Sons, 1922); Jan Vansina, *Oral Tradition as History* (University of Wisconsin Press, 1985).

[8] Latu and Grenfell, above n 3, 245.

[9] Caroline Ralston, 'Deceptive Dichotomies: Private/Public, and Nature/Culture. Gender Relations in Tonga in the Early Contact Period' (1990) 5(12) *Australian Feminist Studies* 65, 66.

[10] Mercer, above n 7, 137.

950 AD, was the ruler of all Tonga with a godly father and an earthly mother.[11] The Tu'i Tonga allocated land to the chiefs who each headed a large descent group (*ha'a*).[12] Each *ha'a* consisted of extended families (*kainga*) who lived in the same area and was headed by an *'ulumotu'a* (head of the extended family).[13] Within extended families were smaller units of *'api* (home) 'which generally consisted of a married couple, their unmarried children, any married sons with their families, and perhaps one or more other relatives.'[14] Although archaeological records date the first arrivals in Tonga between 1300–1200 BC,[15] the year 950 AD and the origin of the Tu'i Tonga chiefly line remain the starting point of analysis of the traditional land tenure, despite gaps and inconsistencies.

By the beginning of the 19th century, each of the main islands in Tonga had its own ruler.[16] According to Powles, 'authority to control rights and use of the archipelago of Tonga originated in kinship descent groups and larger *ha'a*, subject to rights of conquest.'[17] Land was held by families collectively and not individually, but details on how land was allocated are not clear from the existing literature.[18] Maude and Sevele contend that allocation of land was not the role of the chief but that of the *ha'a* as a whole.[19] Urbanowicz agrees, adding that the head of the *ha'a* whether male or female was chosen by the *ha'a* as a group and was not an hereditary right.[20] That women could be head of the *ha'a* at this time through selection rather than as an hereditary right illustrates that opposition to women's hereditary land rights is not grounded in a long-standing custom and tradition but rather is a product of a more

[11] Latukefu, *Church and State in Tonga*, above n 3, 1. In addition to the inconsistency of the descriptions of traditional Tongan society, the etymology of some of the key words used by historians to describe Tongan society seems to conflict with historical realities. The term 'commoners' appeared first in the Constitution yet it did not appear in the 1839, 1850 and 1862 Codes of Laws. The Tongan word for 'commoners' in its current usage is *tu'a* which means 'outsider'. The word *tu'a* as it was used in pre-modern Tonga seemed to refer to outsiders, to a clan or extended family, and most likely referred to prisoners of war.

[12] Urbanowicz defines a *ha'a* as a 'corporate land-holding and property-sharing descent group[s]'. Urbanowicz, above n 5, 245, 246.

[13] Even with the definition of the *ha'a* as the largest social unit headed by a chief, some inconsistencies are apparent. Tthe *ha'a* is said to be headed by a chief and within each *ha'a* are a number of extended families headed by 'a *'ulumotu'a*. Latukefu wrote about the Ha'a Havea chiefs as a group of chiefs who had a common ancestor but they ruled different villages. The selection of certain chiefs (and the exclusion of many) to be the only ones recognised by the Constitution distorted traditional social units.

[14] Maude and Sevele, above n 3, 115.

[15] However, there are different periods of settlement put forward by different scholars; see Latu and Grenfell, above n 2, 242; Noel Rutherford, *Friendly Islands: A History of Tonga* (Oxford University Press, 1977) 6–8; I C Campbell, I C Campbell, *Island Kingdom Tonga Ancient and Modern* (Canterbury University Press, 1992) 1.

[16] Martin Daly, *The Bible and the Sword John Thomas and the Tongan Civil War of 1837* (2010) <http://www.methodistheritage.org.uk/missionary-history-daly-tongan-civil-war-2010.pdf>, 1.

[17] Guy Powles, *Political Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (Comparative Law Journal of the Pacific – Monograph XV, 2012), 77.

[18] Crocombe, 'The Pattern of Change', above n 3, 4; Maude and Sevele, above n 3, 116.

[19] Maude and Sevele, above n 3, 116.

[20] Urbanowicz, above n 5, 247. There were female chiefs in traditional society as discussed in the Chapter 5.

contemporary Tonga. Investigating the origin of a law, policy or custom which has been advanced as a long-standing custom and tradition is thus illustrated as an important feminist strategy.

3.2 Women's land rights in traditional Tongan society

Historical materials do not accurately depict the traditional society and landholding. It is difficult therefore to determine what, if any, land rights women had in the pre-European contact period. Some scholars have argued that women in Tonga had more land rights in the pre-European contact period than they do today because of the custom of *fahu;* a concept which makes women superior in rank to their brothers' children (discussed further in Chapter Five).[21] Elevating the importance of *fahu* is problematic because the *fahu* custom is said to have been adopted from Fiji and it is uncertain when the custom began to have influence on traditional landholding.[22]

Nevertheless, Maude and Sevele argue that land distribution was not strictly patrilineal.[23] The evidence suggests that land was allocated to families to build dwelling houses and plantations. As land was held collectively or belonged to the extended family, women would have had no restrictions on access to land and land use. Indeed, many landholders today have obtained land which has derived from their grandmother's or great grandmother's family.[24]

3.3 The development of Tonga's written laws

The development of Tonga's written laws began in the 1830s drafted for King George Tupou I (known as Taufa'ahau at that time) by the Wesleyan Methodist missionaries from Australia,

[21] Ron Crocombe, 'Trends and Issues in the Pacific', in Ron Crocombe and Malama Meleisea (eds) *Land Issues in the Pacific* (University of the South Pacific, 1994), 9; Taufe'ulungaki, above n 3, 137–8; 'Atu Emberson-Bain, *Women in Tonga – A Country Briefing Paper* (Asian Development Bank, 1998) 38.

[22] Latukefu is one of the few Tongan historians to have alluded to the origin of the *fahu* custom from Fiji but he did not elaborate on it. See Latukefu, *Church and State in Tonga*, above n 3, 11, 12. In addition, according to Rutherford, *fahu* was adopted and practised by chiefly families that intermarried with Fijian chiefly families. Rutherford, above n 15, 6–8.

[23] Maude and Sevele, above n 3, 115.

[24] This is not the same as matrilineal inheritance because in this type of situation, land was given by a landholder to a female relative's son to be registered and then passed down in accordance with rules of succession.

who began arriving in Tonga in 1822.[25] The role of the Wesleyan Methodist missionaries in modernising Tongan society between 1822 and 1875 was researched by one of Tonga's leading historians, Sione Latukefu.[26] Latukefu recorded the missionaries' participation in the development of Tonga's early laws but as he was not a legal historian, he did not provide a legal analysis of those laws or how they affected women.[27] Other scholars have written on the development of land law in this same period but most of them focused on the Constitution as it came into force in 1875.[28] Most did not discuss women's rights (nor the lack of them) under these laws and some only identified those rights when the current provisions on widows and daughters' conditional life interests became part of the law.[29]

The missionaries' primary aim was to bring Christianity to the Tongans but they became involved in other areas, including social, political and economic areas, in response to the needs of the local people and their leaders.[30] Latukefu wrote that the missionaries 'were from the lower middle and working classes of the British [I]sles…'[31] and that the majority of them:

> 'received only a very meagre education of the kind available to their social and economic classes at home at the time … most of whom received their only formal education from the Methodist Sunday School, where pupils were instructed in reading, spelling and writing.'[32]

[25] This was not the first group of Christian missionaries to arrive in Tonga. The first group, from the London Missionaries Society, arrived in 1797. As with the latter groups, their mission was to convert and *civilise* the Tongans. The mission did not succeed because they were caught up in a power struggle between the most powerful chiefs in Tonga at the time. A civil war broke out in which some of the missionaries were killed. One of the missionaries, George Vason, lived with the chief Mulikiha'amea and adopted the Tongan way of life, abandoning his missionary duties. He wrote an account of his time in Tonga which has been cited by a number of scholars such as Sione Latukefu, Gifford, Rutherford and Campbell. See James Orange, *The Narrative of the Late George Vason* (Henry Mozley, 1840).

[26] Latukefu, *Church and State in Tonga,* above n 3.

[27] He alluded to the role of a few missionaries' wives as teachers. The wife of Rev Charles Tucker (in the island of Ha'apai) and the wife of Rev Wilson in Vava'u. Their names were not mentioned. See Latukefu *Church and State in Tonga,* above n 3, 79.

[28] Guy Powles, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia' (1988) 10 *University of Hawaii Law Review* 105.

[29] Maude and Sevele, above n 3, 140.

[30] H G Cummins, 'Missionary Politicians – Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development 1822–1875 by Sione Lātūkefu' (1975) 10(2) *The Journal of Pacific History* 105.

[31] Latukefu, *Church and State in Tonga,* above n 3, 42.

[32] Sione Latukefu, 'The Case of the Wesleyan Mission in Tonga' (1969) 25 *Journal de la Société des Océanistes* 95.

The missionaries introduced 'schools, [and] the people were taught the value of money and of articles of trade among civilised countries.'[33] The missionaries, Nathaniel Turner and William Cross opened the first school in Nukuʻalofa 'to teach both children and adults to read and write in the Tongan language.'[34] The missionaries also created the Tongan alphabet from Roman letters.[35] In April 1831, William Woon of the missionaries, set up the first printing press in Tonga and began printing school books.[36] In the same year, Taufa'ahau expressed to the missionary Peter Turner, his wish to have written laws in place.[37]

3.3.1 Code of Vavaʻu, 1839

Tonga's first written law the *Code of Vavaʻu*, came into effect on 20 November 1839.[38] It was enacted on the outer island of Vavaʻu[39] and initially enforced only in Vavaʻu and the island of Haʻapai. In the 1840s, it was extended to certain parts of the main island, Tongatapu.[40] The law was made official by a declaration to the people at a *fono* (public meeting) in Vavaʻu by Taufaʻahau, who was at the time the ruler of the islands of Vavaʻu and Haʻapai.[41]

The Code *of Vavaʻu* provided that chiefs must divide the land amongst all people who lived on land under their control 'for their own use, that each one may have means of living, of supporting his family procuring necessaries, and of contributing to the cause of God.'[42] Men were expected to cultivate the land, plant yams and to farm pigs.[43] If a man left his wife, his wife could claim his plantations and any other property he left behind, but there were no provisions as to succession when the wife died.[44] This Code created individual land-

[33] Latukefu, *Church and State in Tonga*, above n 3, 39.
[34] Ibid, 55.
[35] Latukefu, 'The Case of the Wesleyan Mission', above n 32, 102.
[36] Latukefu, *Church and State in Tonga*, above n 3, 57.
[37] Ibid, 121.
[38] Ibid.
[39] Hence the title *1839 Code of Vavaʻu*.
[40] Although Latukefu wrote that the 1839 Code was eventually enforced in Tongatapu in the 1940s it contradicts his own account that the Haʻa Havea chiefs in Tongatapu were against Taufaʻahau's rule and they were not subdued by Taufaʻahau until the civil war of 1952; Latukefu, *Church and State in Tonga*, above n 3, 133.
[41] A *fono* is 'a compulsory assemblage of people to be informed of what their chief wanted them to do'. Latukefu, *Church and State in Tonga*, above n 3, xv. For background on how Taufaʻahau came to be the ruler of all Tonga, see Latukefu, *Church and State in Tonga*, chapters 3–5.
[42] Section 3, as reproduced in Latukefu, *Church and State in Tonga*, above n 3.
[43] This was also reflected in section 5 of the *Code of Vavaʻu 1839*, which stated, '[a]nd it is my mind that the land should be brought into cultivation and planted'.
[44] *Code of Vavaʻu 1839*, s 8: 'In case a man leaves his wife and escapes, she shall claim his plantations and whatever other property he may have left."

holdings[45] and gave a woman some rights to her husband's land, the latter being a principle of land law which became established in Tonga, 43 years later when the *Act to Regulate Hereditary Lands* (Hereditary Lands Act 1882) was enacted.

3.3.2 The 1850 Code of Laws

The second written law was the 1850 Code of Laws, in part adopted from the 1822 Code of Laws of Huahine in Tahiti.[46] According to Latukefu, the missionaries advised the King to seek assistance in drafting a better code of laws from the 'highest English legal authority in New Zealand'[47] who advised the King to enact a code of laws similar to the laws of Huahine.[48] The laws of Huahine did not contain any land provisions and the final version of the 1850 Code contained only a few.[49] Those provisions were likely to have been the sole input of the missionaries, King George and those chiefs who were close to him.[50] Two provisions contained well-defined gender roles in relation to land.[51] First, a man was required to seek a piece of land and cultivate that land to feed himself and his family.[52] Secondly,

[45] Some argue that individual landholding was established by the Constitution but it appears to have begun with this law in 1839. See Marcus, above n 6, 509, 516, 526. The Constitution itself did not provide for the hereditary individual landholding that is in force today. It was not until the Hereditary Lands Act 1882, which under a later consolidation of all the laws of Tonga, was incorporated into the Constitution.

[46] Latukefu, *Church and State in Tonga*, above n 3, 127.

[47] Ibid.

[48] Latukefu wrote that the Code of Laws of Huahine was drafted in 1823, but it seems that this law came into force in 1822 and was published in 1823. Latukefu, *Church and State in Tonga*, above n 3, 127; William Ellis, *Polynesian Researches, During a Residence of Nearly Six Years in the South Sea Islands; including Descriptions of the Natural History and Scenery of the Islands – with Remarks on the History, Mythology, Traditions, Government, Arts, Manners, and Customs of the Inhabitants*, Vol II (Fisher, Son & Jackson, 1829), 426. According to Latukefu, King George, who was now the king of the whole of Tonga after the death of the ruling paramount chief Aleamotu'a [at p 127] sought the assistance of the missionaries in drafting 'a more comprehensive code of laws with which to govern his country more efficiently'. [Latukefu at p 127]. The missionaries advised the King that he 'should seek the advice and opinion of 'the highest English legal authority in New Zealand' on the matter.' [Latukefu at p 127]. The advice that the King received from New Zealand was to draft a law similar to the 1822 *Code of Laws of Huahine*, Tahiti. The missionaries translated a copy of the laws of Huahine for the King and the chiefs. The King and the chief made a number of changes to it and so did the missionaries. The final draft included only a few provisions similar to those of the Huahine laws specifically those dealing with marriage, bigamy, divorce, fornication, false accusation, conspiracy to commit and crime, and voyaging. [William Ellis at p 427].

[49] The King appointed certain chiefs 'to govern portions of the land, and their people' (s V (1.)) and the sale of land to foreigners was prohibited (s XXIX).

[50] Latukefu, *Church and State in Tonga*, above n 3, 128.

[51] 1850 Code, Sections 36 and 37.

[52] 1850 Code, s XXXVI. Men who did not work were 'useless to the land and its inhabitants, and unprofitable to their friend' and were 'not to be fed or assisted'.

married women were required to work in order to clothe their husbands and children.[53] The two provisions mirror a gendered division of labour where men are responsible for generating income, while women are caretakers and mothers in the family. That division of labour has been used as justification for limiting women's land rights in many countries on the basis that the woman does not need the financial security of land and inheritance as she is reliant and dependent on a man, either her husband or her father. [54]

3.3.3 The 1862 Code of Laws

The 1862 Code amended the 1850 Code but only three sections pertained to land. [55] Chiefs were required to distribute land to men 16 years of age and above for farming and other purposes.[56] In return, landholders were to pay a tax of three dollars per person to the government and a rent of two shillings to their chief.[57] If a landholder paid his tax and rent, no chief could expel him from the land under his control.[58] The King could recommend that the size of the land be increased according to the size of the family.[59] The King's oversight together with payment of tax and rent provided a security of tenure for the landholder. If any man did not make use of a part of the land allocated to him (or did not appoint a successor to take over his land in the event of his death) the government would reclaim it.[60] Patrilineal and hereditary succession rules were the only ways in which land was passed down when those rules were codified in the Hereditary Lands Act of 1882.

[53] 1850 Code, s XXXVII. In addition single women were required to help their parents and relatives but this section did not state the type of work they were expected to do nor did it make any reference to land. Women who did not work were also not to be fed or assisted for 'assisting the indolent, is supporting that which is an evil.'

[54] 'Historically, Islamic jurists and scholars have given two main justifications for the inequalities in inheritance laws. The first is that within the family men are burdened with all financial responsibility, while women are not required to generate any income because women are seen as caretakers and mothers in their primary roles within the family … Therefore, men have the necessity for a greater inheritance. This justification is also influenced by the social and religious ideal that women are to be looked after by a man, regardless of whether or not she can economically support herself.' Sam Brotman, Emma Katz, Jessie Karnes, Winter West, Anne Irvine and Diana Daibes, *Implementing CEDAW in North Africa and the Middle East – Roadblocks and Victories* (Middle East and North Africa (MENA) Report) (CEDAW, 2008), 10.

[55] The missionaries still made their input into this law but by this time Shirley Baker, a missionary and who later became Premier did the actual drafting. See Latukefu, *Church and State in Tonga,* above n 3.

[56] *The 1862 Code of Laws*, ss XXXIV, 6 and XL.

[57] Ibid, s XXXIV, 4, 5.

[58] Ibid, s XXXIV, 6.

[59] Ibid, s XXXIV, 7.

[60] Ibid, s XL.

3.3.4 Constitution of Tonga, 1875

This section focuses on the Constitution of Tonga when it was enacted in 1875. A number of clauses (sections) have since been repealed and new provisions on land tenure have been added, many of which remain in force to this day. The Constitution was drafted by the King's personal advisor, Wesleyan missionary Reverend Shirley Baker.[61] According to Latukefu, Reverend Baker and King George Tupou I used a number of sources to draft the Constitution.[62] The Constitution established a constitutional monarchy under King George Tupou I and his heirs which was modelled on the British monarchy.[63] It contained three main parts, all of which remain in the current version of the Constitution – the Declaration of Rights, Form of Government and Land.[64] The Constitution was drafted with ambiguous provisions and still reflects a lack of clarity in some areas pertaining to land. It followed the structure of the previous Codes of laws providing substantive and procedural detail, particularly on land matters typically provided for in legislation.

The Constitution created hereditary royal lands, hereditary nobles' and chiefs' estates, and government land.[65] Under the Constitution, royal lands are inherited by successors to the

[61] Sione Latukefu, 'The History of the Tongan Constitution' in *Report of the Convention on the Tongan Constitution and Democracy in Tonga (1992)* pp. 88-103, 92; Latukefu, *Church and State in Tonga*, above n 3, 201–203.

[62] Those sources were – Baker's consultation with Edward Reeve (St Julian's successor as Hawaiian Consul-General, in Sydney from late 1872 to early 1873), Baker's consultation with the Premier of New South Wales, Sir Henry Parkes who gave Baker a copy of the laws of New South Wales since its inception, the existing laws of Tonga at the time, and the 1852 Constitution of Hawaii. Latukefu, 'The Case of the Wesleyan Mission', above n 32, 110. Edward Reeve was also a reporter for the Sydney Morning Herald. 'He compiled a "Gazetteer of Central Polynesia" for Charles St Julian's *Official Report on Central Polynesia* (Fairfax, 1857), became his secretary and succeeded him as Hawaiian consul-general in 1872.' See Rosilyn Baxter, 'Reeve, Edward (1822–1889)' in *Australian Dictionary of Biography* (Melbourne University Press, 1976), <http://adb.anu.edu.au/biography/reeve-edward-4462>.

[63] Latukefu stated that it was the 1852 Constitution that was used, given to King George by Charles St Julian. Powles suggested that all three Constitutions of Hawaii – 1840, 1852 and 1864 – were used as a guide; the structure of the 1852 and 1864 Constitutions of Hawaiian bear a striking resemblance to the Tongan Constitution. Powles, 'The Common Law', above n 28, 105, 119. Under the first two Constitutions of Hawaii, the legislature was bicameral consisting of the House of Nobles and the House of Representatives (s 60, 1852 Constitution of Hawaii). The 1864 Hawaiian Constitution changed that structure giving nobles a certain number of seats in a unicameral parliament which is similar to that established under the Tongan Constitution in 1875 (s 45, 1864). It appears from the 1840 Hawaiian Constitution that the members of the House of Nobles held lands which they were allowed by the Constitution to keep. They were not established as a privileged landholding class with hereditary estates and titles. No such reference to landholding was made in respect of them in the 1852 and 1864 Constitutions. The conclusion that can be drawn from the usage of the Hawaiian Constitutions as models for the drafting of the Tongan Constitution is that the establishment of the nobility in Tonga was an adaptation of the corresponding Hawaiian constitutional provisions.

[64] The Declaration of Rights purported to be a Bill of Rights, but only some provisions are human rights provisions. Clauses 17 – 32 of Part I are not rights provisions and seem to have been a drafting oversight.

[65] *Constitution of Tonga, 1875*, cl 48, 52, 110, 119, 124 and 126 (1875 version). Clause 126 provided that the government had a reversionary interest in the hereditary land of a chief who died without an heir.

throne.[66] Succession to the throne is through sons, beginning from the eldest and if there are no sons, then daughters beginning from eldest.[67] The rules of succession have remained unchanged and are discussed below in Part II under the section, 'Royal estates'.

Twenty chiefs were chosen to be 'nobles' and also members of parliament.[68] The noble title, land[69] and parliamentary membership were hereditary through the line of the noble's heir, in accordance with the rule of succession provided by clause 125.[70] Other chiefs were not selected to be nobles but still retained their title and land which were also to be hereditary.[71] Succession to the title and land of a noble or chief was similar to the succession to the throne however, an arguably ambiguous proviso provided that if a woman was next in line to a noble's title, it was lawful for her to appoint the next male heir in line (her eldest son if any or her father's brother), if he was 21 years of age or older, to represent her in parliament. The proviso did not state who would have use of her father's title, whether it was her or her representative in parliament. It also did not state what would happen if she did not choose a representative to be in parliament. However, it did state that if the person she chose was unfit, the King and parliament could require her to choose another person.[72] However, no woman has held a noble or chief's title since the Constitution came into force, although several of the current nobles acquired their title and estate through a female relative.[73] The right of a noble's daughter to appoint her representative in parliament is no longer in force.

[66] Ibid, cl 52.
[67] Ibid, cl 35.
[68] Ibid, cl 63 (2). The rank of nobles was adopted from the *Hawaiian Constitution 1852*.
[69] The term 'estate' was not used until the Hereditary Lands Act 1882.
[70] *Constitution of Tonga*, cl 63 (2) (1875 version). Both the rules of succession to the throne and to a noble's title provided that the successor could not succeed to the title if he was found guilty of a crime, was insane or 'an idiot' (clauses 38 and 65). This rule is based on the common law doctrine of escheat. In relation to the Tongan Constitution, the word 'clause' is used rather than 'section' because it is the common usage. All other laws of Tonga refer to sections of the Constitution as 'clauses'.
[71] *Constitution of Tonga*, cl 124. The names of the twenty nobles and chiefs not chosen to be nobles were published in the Government Gazette and the newspaper 'Boobooi' after the Constitution came into force. (cl 124).
[72] The proviso also stated that the same was to apply to the title and land of a chief who was not chosen to be a noble, but did not clarify how. To add to the ambiguity, clause 124 stated that hereditary titles and lands of nobles and chiefs were to pass from father to son. However, Powles interpreted this proviso to mean that a noble's daughter could not succeed to her father's title at all and that it automatically went to the next male heir. The next male heir could be her son if he is 21 years of age or older, and if not, the next male heir until her son turns 21. See Guy Powles, *The Persistence of Chiefly Power*, above n 3, 253. Powles' interpretation reflects the current version of the provision as it is stated in the *Constitution of Tonga, 1875*, cl 111 (current version).
[73] For example, the nobles Vaea and Tu'ilakepa. If a noble had no successor his land would revert to the government but the King could appoint any other person as successor. *Constitution of Tonga*, 1875, s 127 (1875 version)

The Constitution established a leasehold system for commoner men.[74] It provided that those who lived on land held by chiefs prior to the coming into force of the Constitution, were required to enter into a formal lease agreement with their chief for either 21, 50 or 99 years.[75] A leaseholder could devise his land under a will in accordance with the law of inheritance relevant to a noble or chief's title and land. Such a provision was particularly contradictory in nature.[76] It is unclear whether or not a leaseholder could leave his land to his daughter if she were his only child.

3.3.5 Developments between 1882 and 1927

The Hereditary Lands Act 1882 changed the leasehold system under the Constitution, and created an hereditary tax allotment and an hereditary town allotment (defined below) for male commoners who paid tax. Provisions permitting the creation of such allotments are still in force today.[77] The Act provided that every male taxpayer was to be entitled to a tax allotment (farming plot of 8.25 acres) and could also acquire a town allotment (residential plot).[78] In both cases, rights to land were to be hereditary through the male line.[79] Little information is available on the background to the adoption into Tongan law of allotments although they appear to have a heritage in English land law.

There were statutes on allotments in the UK between 1819 and 1850.[80] An 1819 statute in the UK allowed 'parish wardens to let up to eight hectares (20 acres) of parish land to individuals at a reasonable rent' for the purpose of helping the poor.[81] By 1850, allotments were also

[74] According to Latukefu, King George learnt of the leasehold tenure whilst he was in Sydney, Australia in 1853. See Latukefu, *Church and State in Tonga*, above n 3, 162. The Constitution referred to leases which existed prior to 1875 (cl 115). The three Codes did not create leases therefore such leases must have been created between 1862 and 1875.

[75] *Constitution of Tonga, 1875*, cl 128 (1875 version). If anyone refused to enter into a formal lease agreement, Cabinet would direct a person to pay a certain amount to the chief. If after two years a landholder refused to accept the new leasehold system and pay the lease to his chief, the chief had the right to take the land from him and give it to another who would be willing to pay the lease.

[76] Ibid, cl 135 (1875 version). Not all chiefs were made nobles.

[77] Hereditary Lands Act 1882, ss 5–11 and17. See also Powles, *The Persistence of Chiefly Power*, above n 3; Maude and Sevele, above n 3, 120.

[78] Powles, *The Persistence of Chiefly Power*, above n 3, 259. The 1882 Act did not make the holding of a tax and town allotment a right.

[79] Ibid.

[80] Canterbury City Council, *The Law and Allotments* at <https://www.canterbury.gov.uk/media/892659/The-Law-and-allotments-summary-Appendix-28.pdf>.

[81] Ibid, 1.

provided by individuals and public bodies to the poor for subsistence farming.[82] The use aspect of allotments under UK law and tax allotments (as introduced by the missionaries) under Tongan law Tonga reveals some similarities between them.[83] However, Tongan law makers went further than UK law makers by creating allotments for residential purposes (town allotments). Additionally an allotment holder under Tongan law pays rental to the estate holder. Yet there is a major difference between an allotment under UK law and an allotment under Tongan law as described in Part II below. The latter is an hereditary life interest on the allotment holder and his heirs in perpetuity rather than a type of leasehold property as discussed below under the heading 'Tax and town allotments'.

Under the Hereditary Lands Act 1882, widows have a life interest in their husband's land conditional on remaining unmarried and not 'committing adultery'.[84] Such a condition on women (known as a *dum casta* clause) appeared in Tongan law for the first time and was adopted from the common law principle of free bench, whereby a widow could inherit her husband's estate as long as she remained unmarried and chaste.[85] Similar conditions were later imposed on a daughter's life interest discussed more fully below.

In the *Laws of Tonga 1891*, further amendments to land law were made by Basil Thomson, who was assistant premier in Tonga, from 1890 to 1891.[86] The principle of Crown ownership of all land was explicitly defined and the role of the Minister of Lands in administering all land matters, as representative of the Crown, was mandated.[87] The right of every 16 year old Tongan male to a tax and a town allotment was also explicitly provided for.[88]

---

[82] Ibid, 2. A noteworthy aspect of allotments under UK law in the 19th century was that commercial farming on allotments was prohibited, but tenants were allowed to sell surplus produce (at page 2).

[83] Another provision in the UK law which seems to have been incorporated into the Land Act is the requirement for allotment holders to maintain their plots under the UK *Smallholding and Allotment Act, 1926.* An allotment holder who neglects his plot would be liable to pay compensation. The corresponding provision in the Land Act is section 74 which requires every tax allotment holder to grow 200 coconut trees and to keep the tax allotment clean and free from weeds. The penalty for violation is a fine of not more than $50 pa'anga. Section 74 however has not been enforced.

[84] Hereditary Lands Act, 1882, s 6.

[85] The provision is known as a *dum casta* clause, short for *dum sola et casta fuerit* – a Latin phrase meaning 'while she will have been alone and chaste'. See Harold G Wren, 'The Widow's Election in Community Property States' (1965) 7(1) *Arizona Law Review* 1.

[86] Basil Thomson, *The Diversions of a Prime Minister* (Blackwood, 1894).

[87] The Crown had the right to collect rent from allotment holders rather than allotment holders paying directly to estate holders. The Crown alone also retained the right to grant allotments and evict tenants. Thomson, ibid. Fukofuka, above n 3, 146.

[88] *Land Laws of 1903*, s 563. Sections 2 and 3 of this law provided that the laws that were passed by parliament in 1891 and 1903 were to be the only laws enforced in Tonga. All other laws were repealed.

In 1927 the *Land Act*, the main land legislation in force today, was enacted. A number of significant amendments have taken place between 1927 and the present day and these have been covered by other scholars.[89] The *Land Act*, as it was passed in 1927, consolidated land provisions from previous laws.[90]

3.4 Summary of the early laws

The three Codes of laws departed from the traditional landholding by providing for individual landholding so as to ensure that each family had their own farming plot. This objective was captured more clearly later in the creation of tax and town allotments.

There are three main principles present in the current land law that were established under the Codes. First, there is the power to distribute land by chiefs, which was a precursor to the allocation of hereditary estates to the nobles under the Constitution, who then allocate land to the people. Secondly, there is the individual landholding by men who have reached the age of 16 years. This requirement was not included in the Constitution but was revived in 1882 by the Hereditary Lands Act 1882. Thirdly, there is the exclusion of women from holding land, although subsequent reforms enabled a woman to acquire a conditional life interest if either her husband died or there were no male heirs. Reforms also enabled women to lease land.

The current system of land tenure began in the 1880s. The King relied on Wesleyan missionaries for the drafting of all laws, including those relating to land. Two reasons could explain why missionaries did not introduce the concept of land ownership for women.[91] First, until 1882, property owned by unmarried women in England became that of their husband upon marriage.[92] Equal property rights between men and women in England did not occur

[89] For amendments to the Land Act (Cap 132) between 1927 and present day see Fukofuka, above n 3, 146; Ron Crocombe, *Land Tenure in Tonga, The Process of Change: Past, Present and Future* (Discussion paper for the Tonga Council of Churches Seminar on Land Tenure and Migration, 21–26 September 1975, Nuku'alofa) (South Pacific Social Sciences Association, 1975); James, above n 3.

[90] Latukefu, 'The History of the Tongan Constitution', above n 61, 93. The consolidation was carried out by the chief justice at the time, Kenneth Horne. Elizabeth Wood-Ellem, 'Chief Justices of Tonga 1905–40' (1989) 24(1) *The Journal of Pacific History* 21, 32.

[91] John Simkin, *1882 Married Women's Property Act* (August 2014) <http://spartacus-educational.com/Wproperty.htm>.

[92] Mary Lyndon Shanley, *Feminism, Marriage, and the Law in Victorian England* (Princeton University Press, 1989) 103–4; Simkin, above n 92. Although it is ironic that the year married women could own property in their own right, the Hereditary Lands Act 1882 in Tonga restricted women's rights and did not allow for single women to own land.

until 1935.[93] Thus the social and legal environment from which the drafters of Tonga's early laws came, did not recognise equal land rights between men and women.[94] In addition, both English and Tongan societies at the time were strongly patriarchal. Secondly, as Latukefu argued, the creation of the landed nobility under the Constitution was most likely a compromise between the King and the chiefs in order to maintain the chiefs' support, and the focus was on the solidification of political power through the creation of a class hierarchy rather than the rights of women.[95]

[93] Ben Griffin, 'Class, Gender, and Liberalism in Parliament, 1868–1882: The Case of the Married Women's Property Acts', (March 2003) 46(1) *The Historical Journal* 59, 81.
[94] Noting that the Wesleyan Methodist missionaries were sent from Australia.
[95] Latukefu, 'The History of the Tongan Constitution', above n 61, 88–89.

Part II – The Current Law

This part overviews current land law focusing on the provisions that are relevant to this thesis particularly those limiting women's land rights. The land law is set out in both the *Act of Constitution of Tonga* (the Constitution), which provides the general principles and the *Land Act (Cap. 132)*, enacted in 1927, which consolidated land provisions from previous laws[96] and provided the substantive and procedural detail. A number of significant amendments took place between 1927 and the present day, and these have been covered by other scholars.[97]

The Constitution contains three parts. Part I – The Declaration of Rights, guarantees certain fundamental rights and freedoms such as the prohibition of, slavery, freedom of religion, right to free speech, and a right to due process. Part II sets out the 'Form of Government' which contains the following key land provisions. Clause 44 gives the King the prerogative power to confer honorary titles and hereditary titles. Clause 48 provides that the King shall have lands which are his personal property, distinct from the Crown ownership of all land. Clauses 84 and 90 establish the Land Court under the jurisdiction of the Supreme Court to hear cases on land titles except for hereditary estates and titles.[98] Part III is specifically focused on land. It provides that all land is the property of the Crown and the sale of land is prohibited.[99] It also sets out the rules of succession to hereditary titles and estates[100] and provides that every Tongan male over 16 years of age is entitled to a tax and a town allotment.[101]

The Land Act restates and elaborates the principles in the Constitution. They include: (a) all land belongs to the Crown; (b) the King has the power to grant estates; and (c) it is prohibited to sell land.[102] Section 12 of the Land Act, provides that if a landholder is found guilty of selling or attempting to sell land, he is liable to imprisonment for up to ten years. The

[96] Latukefu, 'The History of the Tongan Constitution', above n 61, 93. The consolidation was carried out by the chief justice at the time, Kenneth Horne. Ellem, above n 92, 21, 32.
[97] For amendments to the *Land Act* (Cap 132) between 1927 and present day see Fukofuka, above n 3, 146; Crocombe, *Land Tenure in Tonga*, above n 90; James, above n 3.
[98] Further powers of the Land Court are provided for in the *Land Act* (s 149). An appeal from the Land Court lies to the Court of Appeal (s 90).
[99] *Act of Constitution of Tonga*, cl 104.
[100] Ibid, cls 111, 112.
[101] Ibid, cl 113. The 2008 Royal Land Commission, whose role and findings are discussed in Chapter 6, recommended, based on public feedback, that the legal age should be increased from 16 to 21 years of age. The reason given by those who favoured 21 years of age is that boys were still at school at age 16 'but at 21 years a male Tongan would be mature enough to use the land if he was not pursuing an academic career.' Royal Land Commission, *Final Report* (Royal Land Commission, 2012), 49. 'Further studies' rather than 'academic career' would have been more appropriate wording.
[102] Part I of the Act.

Minister of Lands is given the power to administer the Act including the power to grant allotments and define boundaries.[103] Part III of the Act deals with hereditary estates, the rights and powers of hereditary estate holders, limitation of their powers and the rules of succession. Part IV deals with tax and town allotments, who may apply for such lands, the responsibilities of an allotment holder and other relevant matters. Part V deals with leases to which both men and women can apply although it is not expressly stated, and Part VI deals with mortgages, allowing allotment holders, leaseholders and estate holders to mortgage their land. Part X establishes the Land Court, its members and jurisdiction.[104]

3.5 Crown land – a definition of 'land ownership'

In accordance with the English common law principle, the Constitution and the Land Act vest absolute ownership of all land in Tonga in the Crown.[105] However, unlike other Pacific island jurisdictions there is no freehold land or customary land in Tonga[106] and no right to buy and sell land. Section 4 of the Land Act states that the 'interest of a holder in any hereditary estate, tax allotment or town allotment is a life interest subject to the prescribed conditions' and both the Constitution and the Land Act explicitly prohibit the sale of land.[107]

Figure 3.1 illustrates the types of landholdings which exist on Crown land. In the Tongan context, the term 'ownership' refers to the holding of land by estate holders and allotment holders but not leaseholders. Such ownership does not entail the right to sell or devise land. Even the Crown, which the Constitution states owns all land in Tonga, is prohibited from selling land.

[103] Part II of the Act.
[104] Parts VII, VIII and IX deal with the foreshore, registration of title and land reserved or reclaimed for public purposes respectively.
[105] Sue Farran and Don Paterson, *South Pacific Property Law* (Cavendish Publishing, 2004) 33–43. The Constitution was amended in 1891 by Basil Thomson, Assistant Premier of Tonga from 1890–1891 to incorporate the express provision of Crown ownership of all land. See Thomson, above n 86.
[106] Farran and Paterson, ibid, 33–43. The other Pacific countries where the principle was introduced were Fiji, Kiribati, Tokelau, Cook Islands, Niue, Papua New Guinea, Samoa and Tuvalu. These countries are former British colonies and their laws under colonial rule were introduced by the colonial government. See also Janice Gray, *Property Law in New South Wales* (LexisNexis Butterworths, 2007), 21.
[107] *Constitution*, cl 104 and *Land Act* (Cap 132), s 12. In comparison, life estates under English law can be sold.

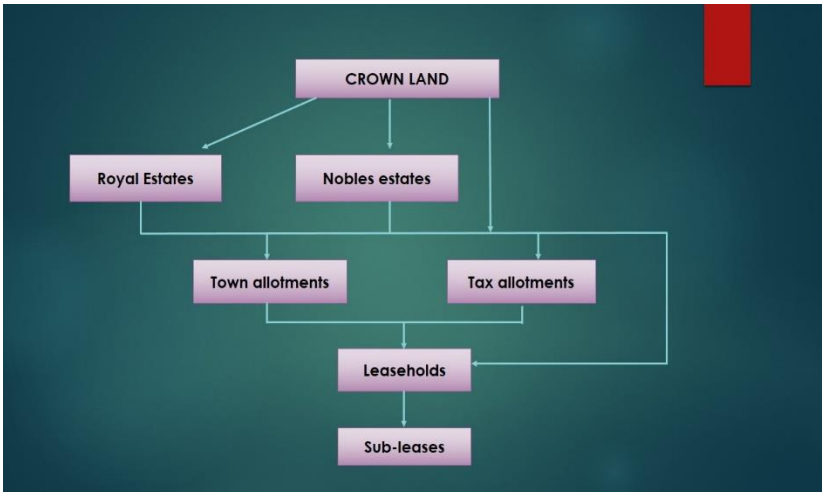

Figure 3.1: Types of landholding

Land that has not been allocated as royal estates, royal family estates and nobles' estates remains with the Crown and in practice, is referred to interchangeably as 'Government land', 'Crown land' or 'Government estate'.[108] The Minister of Lands holds Crown Land on trust for the Crown.[109]

Although the sale of land is prohibited, a de facto land market emerged in the 1970s especially in the main island of Tongatapu, due to increasing monetisation and urban migration from rural areas and the outer islands.[110] Landholders 'surrendered' part of their land so it could be granted to another person in exchange for money.[111] Although this appears

[108] 'Government estate' is typically used in the Tongan translation. Government land is widely misconceived to be a separate interest held by the government which exists over Crown Land. Such misconception is based on a misunderstanding of the operation of the principle of Crown ownership of all land and is often associated with the perception that the monarch personally owns all land. George E Marcus, above n 6, 518.

[109] *Land Act* (Cap 132), s 2.

[110] James, above n 3, 159. Internal migrants have sought land in the capital, Nuku'alofa, to be close to work and schools.

[111] Although the exchange of money is effected privately and not part of the formal process, only Cabinet has the power to grant land to another. Grant here refers to the forfeiting of part of one's land in order to be granted by the Minister of Lands to another person who has come to an agreement with the landholder. It is usually in return for money if the grantee is not a close relative. It is the only way a landholder can have his land transferred to another by the Minister of Lands. Another way of understanding this provision is to look at its historical roots. The 1850 Code prohibited the sale of land by any person including chiefs and the King to a foreigner. The word 'foreigner' did not appear in subsequent laws but the effect of the whole law made it clear that no land could be sold to any non-Tongan.

to amount to a sale of land, no action to prevent the practice has occurred to date. The 2008 Royal Land Commission stated the practice did not amount to an outright sale of land. However, the Commission did not explain its view. Since the landholder who surrenders his land relinquishes his right to the land, despite the law requiring that an allotment holder can only surrender his land or part of it with the consent of Cabinet, it appears a sale has taken place.[112]

3.6 Hereditary estates

Most habitable land in Tonga has been allocated as estates to the monarch, 33 nobles and six ceremonial attendants.[113] The term 'estate' is not defined in the Constitution or the *Land Act* but has two distinct meanings under Tongan law. First there is the technical meaning of an estate under the common law. An estate under common law is defined as:

> the bundle of rights which a tenant is able to exercise at successive times in respect of land. It has been described as 'an abstract entity' which is 'interpose[d] … between the tenant and the land'. Further, the term 'estate' has been said to indicate 'an interest in land of some particular duration'.[114]

The *Land Act* refers to a widow's life estate and a daughter's life estate, referring to a widow or a daughter's life interest.[115]

The second meaning of an estate under Tongan law is more concretised. This meaning is more common and refers to refers to the 'districts of land' or large tracts of land which had previously been allocated to the King, a noble or a ceremonial attendant.[116] However, the common law aspect of an estate that it is not owned by estate holder outright (an estate holder only holds tenure from the Crown) also applies. This is clearly provided for in section 4 of the *Land Act* which states – '[t]he interest of a holder in any hereditary estate, tax allotment or town allotment is a life interest subject to the prescribed conditions.' Lists of estate holders

[112] *Land Act*, s 54.
[113] The number of nobles was increased from 20 to 30 by the Hereditary Lands Act 1882, together with the appointment of six estate holding ceremonial attendants (matapule). Three other nobles were added in 1894, 1903 and 1924. Powles, *The Persistence of Chiefly Power*, above n 3, 253.
[114] Gray, above n 106, 24.
[115] Sections 58, 66, 80, 81 and 82.
[116] The Tongan word for the term 'estate' is '*tofi'a*'.

and their respective estates are provided in Schedules I, II and III to the *Land Act*. Most estates cover the land area of entire villages or parts of villages.[117] Below is a map of the main island of Tongatapu with a rough sketch of estate boundaries which have not been officially demarcated.

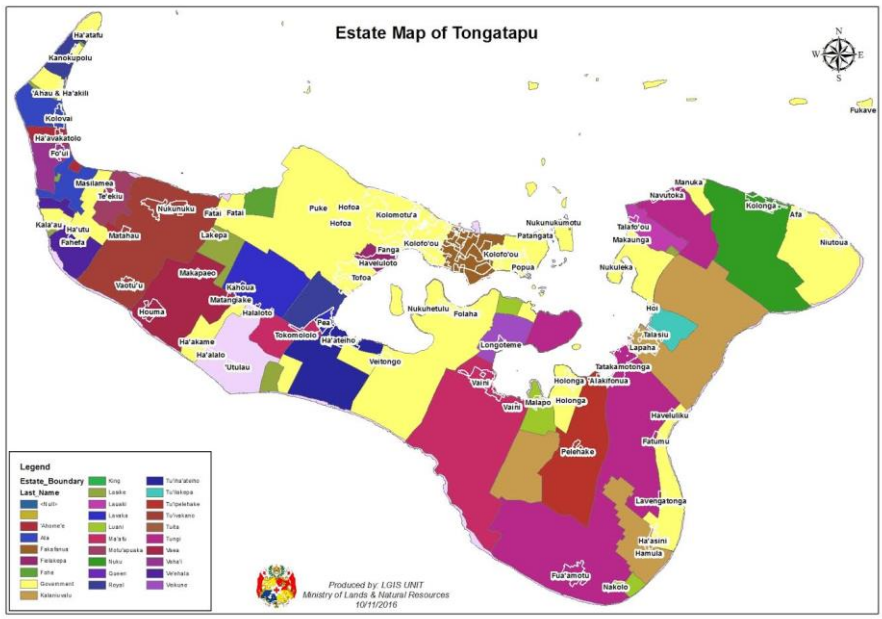

Figure 3.2: Estate Map of Tongatapu (Ministry of Lands, Survey and Natural Resources)[118]

The legend shows the estate boundaries and corresponding estate holder.[119] Areas in yellow are Government land.

Estate holders cannot sell land unlike holders of estates in fee simple in other jurisdictions.[120] An estate will revert to the Crown if there is no heir.[121] This basic land tenure discriminates against women by preventing them from holding vast areas of land (except in the case of a female monarch) and, as a direct consequence precludes women from possessing many social,

[117] Some estates are specified smaller boundaries within a village. Schedule I to the *Land Act* lists all the villages which are the hereditary estates of nobles. Schedule II and III list all the areas and villages which are the hereditary estates of the monarch. The lists show that some nobles and the monarch have more than one hereditary estate. There are about 27 royal estates and 22 royal family estates.
[118] This is an unofficial map provided by the Ministry.
[119] This is an unofficial map of the estate boundaries. The boundaries are not accurate but are shown here just for illustration.
[120] Farran and Paterson, above n 105, 40.
[121] *Act of Constitution of Tonga*, cl 112.

political and economic power. Feminist scholars oppose the unequal distribution of resources because it underlies and perpetuates inequality in many areas of women's lives.[122]

3.6.1 Royal estates

The Constitution states that '[t]he lands of the King and the property of the King are his to dispose of as he pleases. The Government shall not touch them nor shall they be liable for any Government debt.'[123] The *Land Act* provides that lands are to be set aside as royal estates and royal family estates from Crown land. The former is defined as 'for the use of the Sovereign for the time being' (royal residences). The latter is for the royal family but the monarch is the holder of both types of estates.[124] The monarch can grant a tax and/or town allotment to any male from royal estates.[125] Once a grant of an allotment by the monarch is registered in accordance with the *Land Act*, the monarch cannot take it back without the consent of the allotment holder.[126] The rights and interests of the monarch as the holder of royal estates in respect of registered allotments are governed by the same rules that apply to the estates of nobles discussed below.[127] The monarch may also lease out a royal estate or part of a royal estate 'for projects of general public interest and benefit.'[128]

3.6.2 Rules for succession to the throne

The rules for succession to the throne are similar to the former rules of succession to the British throne before the latter were changed in 2013 to provide for the eldest child

[122] See, for example, Martha A Fineman, 'Evolving Images of Gender and Equality: A Feminist Journey' (2009) 43 *New England Law Review* 437, 449, 450, 456.
[123] *Act of Constitution of Tonga*, cl 48.
[124] *Land Act (Cap 132)*, s 10. The male members of the royal family are nobles with hereditary titles and estates such as the titles and estates of Ata and Lavaka; see Schedule II to the Land Act (Cap 132). The Crown Prince is an estate holder in addition to his hereditary noble title and estates. Thus in total, the royal family holds a vast area of land personally.
[125] Ibid, ss 10 (1) and 56. Section 56 does not explicitly state that allotments can be granted out of royal estates, but the Court of Appeal in *Tukuafu v Latu* held that the law does not restrict the monarch from granting allotments from his or her land, in addition to the fact that there are a number of registered allotments within royal estates. It was clear from that decision that royal estates are to be treated the same as for nobles' estates as far as the rights of allotment holders are concerned. In this case the Court of Appeal read together section 10 of the *Land Act (Cap 132)* which does not expressly provide that royal estates are land available for allocation (for example to be granted as a tax or town allotment), and section 48 of the Constitution which allows the monarch to dispose of his or her property (including land) as he or she pleases.
[126] *Tukuafu v Latu* (unreported) Tonga Court of Appeal, CA 5/2005 (15 August 2005), <http://www.paclii.org/to/cases/TOCA/2005/12.html>.
[127] Even though the Constitution and the *Land Act (Cap 132)* do not expressly state so.
[128] *Land Act (Cap 132)*, s 10 (2).

succeeding to the throne regardless of gender.[129] The rules of succession to the Tongan throne, correspond to the right to hold royal estates which are set out in the Constitution.[130] First preference is given to sons beginning with the eldest (if he has reached the age of 18 years).[131] If the monarch has no son, the eldest daughter will succeed followed by her children (eldest male first).[132] A female monarch would be the holder of royal estates and royal family estates.

Tonga was ruled by a female monarch, Queen Salote Tupou III from 1918 to 1965. Latukefu wrote that,

> '[s]he was concerned about discrimination against women in the legal system, and was determined to remedy it. In 1920 she brought before Parliament the question of legislating for women to inherit land from their fathers and in 1922 an Act was passed to that effect.'[133]

There is no indication that the 1922 Act was enforced. In 1930, three years after the *Land Act* was enacted, a group of approximately 27 women petitioned parliament to give women the right to inherit land if there were no male heirs, but the petition was denied. It is the only petition to Parliament on women's land rights that has ever been made.[134]

3.6.3 Nobles and ceremonial attendants' estates ("nobles' estates")

The Constitution provides that the King 'may at pleasure grant to the nobles and titular chiefs or matabules one or more estates to become their hereditary estates.'[135] There are 33 nobles and six ceremonial attendants whose estates are listed in Schedule I to the Land Act.[136] In

[129] The old rules of succession to the British throne passed to the eldest son even if a daughter was the eldest of the monarch's children. The rules were changed by the *Succession to the Crown Act 2013* (c. 20) in which the eldest child will succeed to the throne regardless of gender.
[130] *Act of Constitution of Tonga*, cl 32.
[131] Ibid, cl 27 and 32.
[132] Ibid, cl 32. Only legitimate children can succeed to the throne.
[133] Latukefu, above n 61, 12.
[134] Clare Bleakley, 'Women of the New Millennium: Tongan Women Determine Their Development Direction' (2002) (14)1 *The Contemporary Pacific* 134. No petition has been made since then.
[135] *Constitution*, cl 104. Matabules or matapules are ceremonial attendants. They are not nobles but they hold hereditary titles and estates.
[136] The increase from 20 estate holders provided by the Constitution in 1875 to 39 was made in 1882.

total the nobles and the ceremonial attendants hold 119 estates.[137] Some nobles and ceremonial attendants hold more than one estate. The Land Act provides that estate holders should grant town and tax allotments to residents who lawfully reside on their estates or the Minister of Lands in the case of residents residing on Crown Land.[138]

The rules of succession to a noble's title and estate are the same as the rules of succession to the throne.[139] However, unlike daughters of a monarch, if a noble only has daughters, the eldest daughter will not inherit the title and estate.[140] Instead, the title and estate will go to the noble's eldest daughter's eldest son if he has attained the age of 21 years. If the noble's eldest daughter's son has not attained the age of 21 years, the title and estate will be held by the noble's next eldest brother on trust for the former until he turns 21.[141] This is illustrated in Figure 3.3.

[137] Savae Latu and Simon Dacey, 'LIS and Customary Land Tenure: The Tongan Approach' (Paper presented at the 19th Annual Conference of the National Advisory Committee on Computing Qualifications (NACCQ 2006), Wellington, New Zealand, 146.

[138] *Land Act (Cap 132)*, s 8. However, s 8 it does not define what 'lawfully residing' means. Indeed, the wording of s 8 is ambiguous as it does not oblige estate holders to grant land to all applicants who are lawful residents. The use of the word 'grant' is also misleading and inconsistent with other sections of the Act because only the Minister of Lands has the power to grant an allotment to an individual even without the consent of the estate holder. (Constitution, s 113 as amended by s. 3 of the *Act of Constitution of Tonga (Amendment) Act 1997* and the Land Act, ss 19 (2), 32 and 34.) Estate holders are entitled to rent payment from tax and town allotment holders and lessees and in their estates. Land Act, s 31. The rate of rentals to be paid by registered holders and lease holders of tax allotments are to be determined by an order of the Privy Council. (s. 57(1)) Rentals in respect of a town allotment must be be agreed to by the parties. (s.57(2)) The Minister of Lands is responsible for collecting rentals to be paid to the Treasury and distributing the moneys to hereditary estates holders less ten per cent. (s.57(3)) In practice, payment of rentals for tax and town allotments are rarely enforced because the estate holders obtain much more in gifts ranging from cash, traditional mats and tapa and other goods. See Christopher G Crawford, 'Tongan Land Management: Putting the Brakes on the Global Economy' (June 2001) 6(1) *Journal of Pacific History* 93, 96.

[139] Land Act, s 41 (f). The rules of succession in the Constitution can only be discussed and voted on in parliament by the nobles' representatives and if passed will be subject to the King's veto power.

[140] An estate holder will cease to hold his title and estate if convicted of treason (Constitution, cl 44) or an indictable offence or has been certified as insane or imbecile by a medical officer (Land Act, *s 37*). His estate and title will devolve to the next lawful successor (Land Act, s 38 (1)). On 25th January, 2006 a noble, Veikune, was found guilty of two indictable offences of bribing a Government Officer and attempting to evade customs laws. He automatically lost his title and estates. See *Veikune v Kingdom of Tonga* [2007] Tonga LR 284, <http://www.paclii.org/to/cases/TongaLawRp/2007/53.html>. His title and estates were later bestowed on his son Fatafehi Veikune in accordance with s 38 (1) of the Land Act.

[141] Constitution, cl 111.

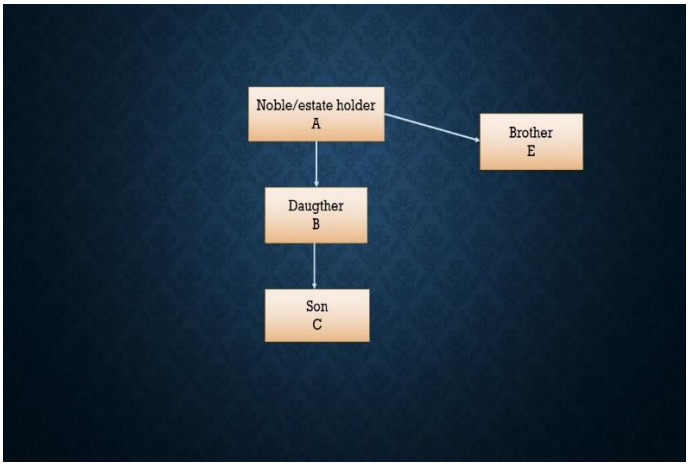

Figure 3.3: Succession to a noble's title and estate

Figure 3.3 illustrates the situation where the noble/estate holder, here called A, only has a daughter B. B will not succeed to A's title and estate upon his death. However, if B's son C is 21 years of age or older at the time of A's death, C will succeed.[142] Otherwise the title and estate will go to A's brother E[143] (or E's eldest son if E's brother has died) to hold on trust for C until C attains 21 years. Although an estate holder's daughter will not hold the title and estate herself, her heirs (if any) would still be the successors of her father's titular estate.[144] The eldest daughter of a noble has the right to occupy the town allotment and plantation lands of her father while the rest of the estate is held by the successor.[145] If there is no lawful successor, the estate will revert to the Crown.[146] At this level, women's rights diminish even further as women have no right to inherit their father's title and land nor can they be conferred as having hereditary title to land. Hence, unlike a female monarch who is not limited by the strictures of gender that govern the lives of lesser ranked women, class intersects sharply with gender in the Tongan context.

Neither the Constitution nor the Land Act provides for a noble's widow to have a life interest in her deceased husband's residential home and plantation. In *Tu'iha'ateiho v Tu'iha'ateiho (1973)* it was held there is no presumption that a deceased noble's widow will have an undisputed life interest to such a land.[147] In that case the plaintiff, who was the brother of a deceased noble and the heir to noble's title and estate, brought an action against his brother's

[142] The age of majority for a successor to a noble, Constitution, cl 27.
[143] If more than one, the older one first.
[144] Constitution, cl 27.
[145] Ibid, cl 111.
[146] Ibid, cl 112.
[147] *Tu'iha'ateiho v Tu'iha'ateiho* [1962-73] TLR 22.

widow to remove her from a 33 acre plot of land on which not only her residential house was situated but also a coconut plantation that she and her husband had developed. The Land Court (erroneously) applied Tongan custom and held that the plaintiff was obliged to provide for his brother's wife and denied the plaintiff's application.[148] The plaintiff appealed to the Privy Council.[149] However, before the case was heard, the parties settled and agreed that the widow would have a life interest to three acres of land while the plaintiff would have a life interest to the remaining 30 acres. Although the law is silent on the life interest of the widow of a noble, both the Land Court and the Privy Council had the matter come before it, should have found that the widow had a life interest to the entire 33 acres because it was developed by the widow and her husband as part of their home and farm land. If the case came before the Land Court today, it is likely that the Court would declare that the widow held a life interest over the entire 33 acres[150] on the basis of the noble's widow demonstrating that she and her husband had developed the land. The Court's ability to make such an order could be inferred from reading the land provisions of the Constitution and the Land Act.

3.7 Tax and town allotments

As observed above, the Constitution provides that every Tongan male over 16 years of age may be granted a tax and a town allotment by the Minister of Lands.[151] A tax allotment is a plot of land with a maximum area of 3.3387 hectares (approximately 8.25 acres) for farming

[148] Although the Land Court ruled in favour of the widow, it erred in law by taking into consideration Tongan custom which is not part of the laws of Tonga. However, it does not seem that it was relied on as a ground of appeal by the plaintiff.

[149] Clause 50 (2) of the Constitution provides that any appeal from the decision of the Land Court in a case related to the hereditary estate and title of a noble lies with the Privy Council. This refers only to a right to a title and hereditary estate and not in relation to an allotment situated in a hereditary estate, in which case an appeal from the Land Court lies with the Court of Appeal; see *Tukuafu v Latu* note (unreported) Tonga Court of Appeal, CA 5/2005 (15 August 2005), <http://www.paclii.org/to/cases/TOCA/2005/12.html>. At the time all appeals were made to the Privy Council because the Court of Appeal was not established until 1990.

[150] In addition, the Land Court, in the most recent cases before it, has upheld principles of natural justice over any statutory claim. See *Folau v Taione* [2016] TOLC 2; LA6 of 2015 (18 April 2016) <http://www.paclii.org/to/cases/TOLC/2016/2.html>.

[151] Clause 113, as amended by s. 3 of the *Act of Constitution of Tonga (Amendment) Act 1997.* Prior to the 1997 amendment, clause 113 guaranteed a right to an allotment for every male aged 16 and above. The 1997 amendment seems to have removed that entitlement and making it conditional perhaps on availability of land. The effect of the 1997 amendment has not been made known because the general public still hold the view that the old clause 113 prevails. Section 43 of the *Land Act*, corresponding to the old clause 113, guarantees a right to an allotment and has not been amended. The 2008 Royal Land Commission still referred to men's constitutional entitlement to an allotment discussed in Chapter Six under the heading "Basic Land Tenure". The Court of Appeal referred to clause 113 in two separate cases after the 1997 amendment. In the earlier of the two cases, the Court cited the old clause 113 and in the latter case it cited the new clause 113. It may be because the Court was not aware of the 1997 amendment. See *Tafa v Viau* [2006] TOCA 6, Court of Appeal of Tonga, 16 August 2006 and *Taufa v Tahaafe* [2015] TOCA 7, Court of Appeal of Tonga, 31 March 2015.

purposes.[152] A town allotment is land for a residential home with a maximum area of 1618.7 m².[153] An allotment can be allocated from Crown land or a noble's estate. The Minister of Lands,[154] upon receiving an application for an allotment, and in deciding the location of the allotment to be allocated, must first consider whether there is available land at the estate (or Crown land) where the applicant lawfully resides.[155] The availability of land is an important factor as emphasised by the Court of Appeal in *Tafa v Viau*.[156] It has not been the case that every 16 year old or every man has applied for an allotment. It is important to emphasise this point because one of the issues which was raised during the 2008 Royal Land Commission's public inquiry, as discussed in Chapter Six, is the shortage of land.[157]

A tax allotment holder must pay an annual rent of 80 *seniti* (cents) to the estate holder (or the Minister of Lands if the allotment is on Crown Land) on which their land is situated.[158] No person is allowed to hold more than one tax allotment and more than one town allotment.[159] Once a tax and or town allotment is registered, it becomes hereditary in favour of the holder's eldest son and his heirs.[160] With the consent of Cabinet, an allotment holder can surrender or give up part or all of his allotment(s) if he so wishes, and his land will automatically pass to

[152] In *Manu v Tauheluhelu* (2002), a grant by the Minister of Lands was set aside, as contrary to the Act, the landholder had not reached the age of 16 years.

[153] In practice, many landholders have inherited land that exceeds the prescribed size (Maude and Sevele, above n 3, 129). Such lands were allocated to the original holders before the current prescribed size of tax allotments came into effect. The minimum area is 30 perches (758.8 m²). The terms are not defined in the Constitution or the *Land Act (Cap 132)*. See Maude and Sevele, at 114; Royal Land Commission, see above 103, 1.

[154] *Land Act (Cap 132),* s 56. Section 56 does not explicitly state that allotments can be granted out of royal estates, but the Court of Appeal in *Tukuafu v Latu* held that the law does not restrict the monarch from granting allotments from his or her land, in addition to the fact that there are a number of registered allotments within royal estates. It was clear from that decision that royal estates are to be treated the same as nobles' estates as far as the rights of allotment holders under it.

[155] *Land Act (Cap 132),* ss 8 and 50. Section 8 sets out the rules for determining the allocation of allotments by the Minister of Lands. 'Available land' has been interpreted to include land not already allocated to, promised to be allocated to, or lawfully occupied by, another person. See *Tafa v Viau* (unreported) Tonga Land Court, LA 15/2005 (24 April 2006) < http://www.paclii.org/to/cases/TOLC/2006/2.html>; *Falepaini v Tukufuka* (2006); *Vai v 'Uliafu* [1989] Tonga LR 56.

[156] The residential aspect is not strictly applied. An applicant who is not a resident of an estate can still apply for an allotment provided he does not misrepresent his situation and that the estate holder is aware of it and that he has ties to the land in question. See *Finau v Maamakalafi* (2003). Land occupied by other people has to be land not available for grant. It is possible for a tax allotment to be situated partly on a hereditary estate and partly on government land as contemplated in section 64 of the *Land Act (Cap 132)*.

[157] The Court in that case dealt with a legal question of whether land granted to the appellant was available to be granted meaning that there was no other claim to it.

[158] *Land Act (Cap 132),* s 64. Section 67 gives an estate holder the right to sue to recover unpaid rent but this provision is rarely enforced. Commentators have rightly pointed out that allotment holders in hereditary estates in particular, and especially in traditional ceremonies during weddings, birthdays and funerals, present to the estate holder gifts and money with values which far exceed the amount stated in the law. See Royal Land Commission, Final Report, 1.

[159] Ibid, s 48.

[160] Ibid, s 5.

his heir in accordance with the rules of succession.[161] The *Land Act* allows an allotment holder, with the consent of the heir, to surrender part of the land to be granted to another person outside the family if the land is more than the prescribed minimum size.[162] A surrender is usually for money or other payment in kind. The right to surrender is subject to the wife's interest or consent as discussed in the next section.[163]

3.8 Widow's life interest

When an allotment holder dies, his widow has a life interest in his land[164] but she cannot mortgage or lease out that land or part of it.[165] Case law reveals that some landholders have surrendered their allotment (with the heir's consent) without consideration of the wife's life interest.[166] In *Fonohema v Piukala,*[167] the Land Court held that the wife's life interest is a constitutional right which must be respected by an allotment holder who cannot surrender the land while the wife is alive, without her consent.[168] However, the court's view has not been followed by other Land Court judges in subsequent cases. There is also no evidence that the court's decision has had any impact on the practice, perhaps because there is no express requirement for a wife to give her written consent if her husband decides to surrender his land or part of it. Another explanation could be, as the land solely belongs to the husband, and not jointly with the wife, an express requirement cannot be prescribed by law.

The life interest is subject to the widow remaining unmarried and without convictions for adultery or fornication (a relic of 19th century law) proven in proceedings in the Land

[161] Ibid, s 54. If he has no heir he can recommend someone, in most cases a relative, to succeed to his land but such a recommendation is subject to the approval of Cabinet. Such a case would occur when the (allotment holder) father migrated overseas leaving his children behind and has no intention of returning to Tonga. He would then want his son to have title to the land.

[162] Ibid. See *Fonohema v Piukala [2001] TOLC 8* (http://www.paclii.org/to/cases/TOLC/2001/8.html>.

[163] *Land Act*, s 54. See *Fonohema v Piukala [2001] TOLC 8* <http://www.paclii.org/to/cases/TOLC/2001/8.html>.

[164] *Constitution*, cl 111. A widow must also register her claim to her husband's land within 12 months of his death otherwise the land will revert to the Crown or the estate holder., *Land Act (Cap 132)*, s 87.

[165] *Land Act (Cap 132)*, ss. 52 (ii) and 89. The wife's inability to lease out land precludes her from using that land for her economic benefit. However, she and her children can still use the land for farming and other purposes. Despite that the Bankers' Association in Tonga have argued that women's limited land rights have a negative impact on the country's social and economic development. This is discussed in more detail in Chapter Six.

[166] *Fonohema v Piukala [2001] TOLC 8,* <http://www.paclii.org/to/cases/TOLC/2001/8.html>.

[167] [2001] TOLC 8.

[168] *Fonohema v Piukala [2001] TOLC 8; Fatafehi v Kuea [2011] TOLC 1*; <http://www.paclii.org/to/cases/TOLC/2001/8.html>.

Court.[169] There have been several cases where a widow's life interest has been challenged by a claimant on the basis of adultery or fornication.[170] In *Kama v Kama*[171] the court noted that the rule was anachronistic but considered itself bound to apply it. The plaintiff was the brother of a deceased town allotment holder who sought to recover his brother's land from his widow on the ground that she had committed fornication. The Land Court stated:

> The continued presence of a *dum casta* provision in Tonga's laws might be considered anachronistic but the job of the Court is to apply the law, not to reform it. The removal of a person's right to land is clearly a very serious step and one which should not be to taken lightly.[172]

Despite the court's statement the law has not been reformed and the 'anachronistic' rule remains. The defendant did not contest the allegations and the court allowed the plaintiff's application and ordered that the land previously belonging to the defendant's deceased husband be transferred to the plaintiff.[173] The Royal Land Commission was of the view that this provision is outdated and clearly discriminates against women noting that no such conditions are imposed on men. It recommended that the conditions be repealed.

3.9 Daughter's life interest

If a holder dies without any son or a male child of a son, an unmarried daughter (or unmarried daughters jointly) will inherit a life interest. If any of the daughters marry or is found guilty in the Land Court of adultery or fornication, her life interest is forfeited.[174] No study has been carried out to assess the social implications of these provisions. Tongan society during the 20th century was strongly conservative and disapproved of extra-marital relations, and women

[169] Ibid, ss. 80 and 81. The contender is a person who is entitled to inherit the allotment such as the next eldest brother (or his son) of the deceased allotment holder. Some cases have been brought by the estate holder against a widow of an allotment holder. See *Lavaka v Pahulu* (1923-1962) Vol.2 Tonga LR 109. The plaintiff's case failed because he could not prove adultery. As it is worded in cl 113 of the Constitution and s 80 of the *Land Act (Cap 132)* any undertaking by a widow in relation to her land after remarriage, such as giving exclusive authority to another person to take care and cultivate her land, will be null and void. See *Tu'itavake v Masila* (2002) Tonga Land Court, No. L. 13/02.

[170] Maude and Sevele, above n 3, 122.

[171] *[2012] TOLC 4*, <http://www.paclii.org/to/cases/TOLC/2012/4.html>.

[172] per Scott CJ.

[173] As per Court Order dated 28 September 2012 (*Kama v Kama* LA 3 of 2010).

[174] *Land Act (Cap 132)*, s 82 (d).

giving birth to children out of wedlock.[175] However, such topics are not openly discussed in the presence of brothers and sisters or male and female cousins.[176] Such social norms would prevent a potential claimant from bringing claims against a woman on the basis of adultery or fornication because it would be shameful for him and his female relatives to be exposed to the discussion of such issues. Consequently, there are few cases of relatives reclaiming land from the widow on that grounds that the widow is in a new relationship. Although such social norms continue,[177] Tongan society is rapidly changing due to globalisation, modernisation and westernisation. Tongan society is increasingly becoming less conservative and claims against a widow on the basis of adultery or fornication are likely to become even more uncommon.

The next successor in line after the determination of a daughter's life interest is the landholder's next eldest brother, followed by his eldest son, provided that neither of them already holds a registered allotment.[178] In the absence of an heir, lineally and laterally, the land will revert to the estate holder or to the Crown.[179] A married daughter and her children, both male and female, are not entitled to succeed even if there is no male heir.[180] However, a daughter's life interest is more acceptable than a widow's life interest because she is the genetically connected child of the land holder. A wife or widow is regarded as an outsider to the family especially if the land in question has been hereditary on the landholder's family for generations, rather than land acquired by the landholder on his own, before or during

[175] Melenaite Taumoefolau, 'Women Issues in Tonga' (Paper presented at the Panel of the NZ Federation of Graduate Women, Auckland, 3 October 2009) 2.
[176] Ibid.
[177] See for example Taumoefolau, above n 175, 2.
[178] *Land Act (Cap 132)*, s 82 (e).
[179] *Land Act (Cap 132)*, s 83. A complaint was made to the Ministry of Lands by the brother of a deceased landholder who had no male heirs that the two daughters of the deceased landholder who lived in the family home had given birth and had thus forfeited their life interest. The uncle made the complaint on the basis that he was the rightful successor to the land. The Minister of Lands rejected his claims because he already held land. The Minister of Lands also leased the land to one of the daughters as the other was already residing in New Zealand. The uncle's claim was not brought before the Land Court; personal communication with a Ministry of Lands official (18 October 2016).
[180] There have been cases where the Minister of Lands granted land to the sons of women whose fathers died without any male heir.

marriage.[181] Potential claimants would be reluctant to bring a claim against a daughter on the basis of fornication or adultery and indeed there is no case law on the point.

3.10 Leases

Any person (male or female) including a religious, charitable or social organisation or an incorporated body, can apply for a lease of land which is granted only with the approval of Cabinet.[182] A person can hold up to 10 leases of tax allotments[183] and five leases of town allotments at the one time. A lease may be granted from an estate by an estate holder, or by the Minister of Lands in respect of Crown land, or a tax or town allotment holder. A lease of a town allotment may be granted for a period of up to 50 years with the approval of Cabinet, and 99 years with the approval of the Privy Council.[184] Leases granted to individuals are typically for a maximum of 50 years.[185] The maximum period for leasing a tax allotment is 20 years.[186] A lease is transferable *inter vivos* or can be disposed of in a will.[187] If a lessee dies intestate, the lease remains effective and will become part of estate of the deceased and will be distributed in accordance with the *Probate Act* (1915).[188] A lessee can sub-let his or her leasehold by applying to the Minister of Lands; however the sub-lease must approved by Cabinet.[189]

---

[181] The 2008 Royal Land Commission's findings revealed that some members of the public differentiated between land acquired by the husband just before or during marriage and land that was inherited by the husband. Those members of the public were more in favour of allowing widows to lease out or mortgage her deceased husband's land if it was acquired by the husband himself and not hereditary. The view that wives or widows are outsiders to the family is common in many societies. Wives' contributions to the family are not valued. See for example, Rachel Rebouche ,'Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' (2006)19 *Harvard Human Rights Journal* 235, 245–6; Mechthild Runger, *Governance, Land Rights and Access to Land in Ghana – A Development Perspective on Gender Equity* (Good Governance Programme Ghana 2006), 6; Bina Agarwal, 'Gender, Resistance and Land: Interlinked Struggles over Resources and Meanings in South Asia' (1994) 22(1) *Journal of Peasant Studies* 86.

[182] Land Act, s 89. A 'person' is defined in s. 2 of the *Interpretation Act* as 'any body of persons corporate, or unincorporate'. (Land Act, s 17). A religious, charitable or social organisation which holds a lease must not use the leasehold for any purpose other than that of the organisation declared at the time of the application for the lease. Such organisations also must not transfer or sub-let the lease without the prior consent of Cabinet.

[183] Ibid, s 61.

[184] Ibid, s 19 (3).

[185] Royal Land Commission, above n 103, 76.

[186] Land Act, s 56 (iv).

[187] Ibid, s124 and Schedule IX, Form No. 8. *Leger v Niu* (1989); *OG Sanft and Sons v Tonga Tourist and Development Co Ltd* [1981] TOLC 1 <http://www.paclii.org/to/cases/TOLC/1981/1.html>. If a lessor dies, his widow, successor or estate holder, is bound by the terms of the lease including entitlement to rentals (s 58).

[188] See *Fakafanua v Fakafanua* (unreported) Tonga Land Court, LA 7/2008 (7 May 2008).

[189] *Land Act (Cap 132)*, s 19 (3) as amended by s.2 of the *Land (Amendment) Act 1999* and Schedule IX, Form No. 8.

Leasing is the only land right in Tonga in which women have formal equality. Although some argue that, in practice, this elevates women's land rights to that of men, the differences between a lease and a hereditary allotment are significant.[190] First, a lease expires at the end of the term of the lease and the land returns to the landholder.[191] A woman and her family may outlive the term of the lease, typically 50 years or less, and there is no guarantee that the lessor or his successor will extend the lease. If she develops the land, over the years, with her earnings, she could lose that investment at the end of the lease. Secondly, women are competing with other legal entities, such as companies which can better afford to lease large areas of the already limited available land.

Thirdly, women face several challenges in obtaining a lease. A woman can lease land from a close male relative such as her father or brother, free of charge.[192] Leasing from a non-relative might entail the payment of a high yearly rental, depending on the location of the land, because of the increasing value of land.[193] Only women with good financial standing can afford to lease land from a non-relative. Landholders would typically surrender part of their tax allotment in order for it to be leased for a longer period as a town allotment by a relative or someone else.[194] The process takes longer than leasing a town allotment directly from the landholder. It also requires the consent of the heir and the approval of Cabinet. Thus, although a lease maybe acquired by anyone, the opportunity for women to actually obtain a lease varies between women. There is still no real substantive equality for women in respect of leaseholds as women face significantly more barriers than men in obtaining a lease. Indirect discrimination continues.

3.11 Mortgaging of land

The Land Act allows the granting of mortgages over land held by an estate holder, an allotment holder or a lessee. A mortgage is 'a transfer of land as security for a debt' and is

[190] 'Tonga not ready for CEDAW', *Matangitonga* (online) 1 October 2009 <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=9&num=5388>.

[191] It is not that the land returns to the landholder. It is more that the land returning to the landholder is the effect of the landholder getting back their full bundle of rights unburdened by the lease.

[192] The Royal Land Commission emphasised that an allotment holder can subdivide his land equally among his children by allocating (through the normal process) parts to his sons to be registered and leasing some parts to his daughters. Payment of a rental is required by the Land Act, s 54. The annual rental for the lease of a tax allotment is currently at 80 seniti per acre. The rental lease of a town allotment is as agreed to between the parties (Land Act, s 57 (2)).

[193] Personal communication with a Ministry of Lands official. See also Vijaya Nagarajan, 'Obstacles to Growth: Gender, Discrimination and Development in Tonga' (2009) 24(3) *Pacific Economic Bulletin* 132, 134.

[194] Longer than the 20 year maximum period of leasing a tax allotment.

created by a mortgage lease.[195] Every mortgage must be effected in accordance with the Act and must be approved by the Minister of Lands.[196] A mortgage granted by an allotment holder must not exceed 30 years and the loan must be used for the 'purposes of the improvement of the allotment'.[197] The Minister has the discretion to decide whether the purpose of a loan constitutes an improvement of the allotment.[198] A mortgage granted by a lessee is created by assigning the lease and must not exceed the unexpired period of the lease.[199] A female lessee can grant a mortgage over her land. However, a widow who holds a life interest over her deceased husband's land cannot mortgage that land.[200] To mortgage land a person must have a registered title to land, whether the land be classified as an allotment or a leasehold. A life interest is an insufficient title to form the subject of a mortgage.

A mortgage can enable a woman to obtain funds to build a house or to be used for other purposes such as purchasing a vehicle, developing a small business or financing her children's tertiary education.[201] Mortgages may, in turn, help facilitate women's engagement with the wider world. The difficulties faced by women in obtaining leases, women's inability to own allotments, and the limitations of a life interest which deny such estates the ability to operate as security interests, amount to inequality and discrimination. The impact of these inequalities is considerable. International studies have shown that women are more vulnerable to poverty because of the impact of limited land rights on their economic opportunity.[202]

[195] Land Act, ss 96 and 100 (1) (v). Mortgages in Tonga are more akin to the old system title mortgages of England and Australia. In Australia, old system title gradually fell away in favour of a system of land titling whereby the act of registration gave rise to a title. The latter system is known as the Torrens system and it exists in conjunction with what remains of the old system title. Under the Torrens system mortgages operate as statutory charges over the land. They do not transfer the fee simple estate to the mortgagee, leaving the mortgagor with a reversionary interest only.

[196] Ibid, ss 96, 99-101.

[197] Ibid, s 100 (1).

[198] Ibid, s 100 (2).

[199] Ibid, s 99 (ii) (iii). The term of a mortgage granted by an estate holder must not exceed 30 years. The loan must be used for the 'purposes of the improvement of the hereditary estate' The Minister has the discretion to decide whether or not the purpose of a loan constitutes an improvement of the hereditary estate. The mortgage is created by a mortgage lease. The mortgaged land does not exceed five per cent of the estate (Land Act, s101).

[200] Ibid, s 100 (1).

[201] Jozefina Cutura and Christine Van Hooft, *Women in Business in Tonga – Key Findings from the February 2008 Scoping Mission* (AusAID, 2008) 6.

[202] Valentine M Moghadam, *The 'Feminization of Poverty' and Women's Human Rights* (SHS Papers in Women's Studies/Gender Research No 2) (UNESCO, 2005), 8–9; OHCHR and UN Women, *Realizing Women's Rights to Land and other Productive Resources* (United Nations, 2013) 2; Susanna Lastarria-Cornhiel and Zoraida García-Frías, 'Gender and Land Rights: Findings and Lessons from Country Studies' in *Gender and Land Compendium of Country Studies* (Food and Agricultural Organisation of the United Nations, 2005) <http://www.fao.org/docrep/008/a0297e/a0297e08.htm>, 3.

3.12 Matrimonial property

Matrimonial property division is contained in the *Divorce Act (1927)* and the *Maintenance of Deserted Wives Act (1916)*. The *Maintenance of Deserted Wives Act* provides that a woman whose husband has deserted her and has refused or failed to provide for her and their children, can apply to the Magistrates Court to 'order the husband to provide accommodation for his wife or his wife and children in accordance with his means'.[203] Section 5 (1) provides that:

> (1) If the Magistrate makes an order under section 2 and the husband refuses or neglects to obey the order or is absent from the Kingdom, the Magistrate may, in addition to or as an alternative to any other order, order that the possession for the time being of the tax and town allotment of the husband be given to the wife and the produce of tax and town allotment shall be used in support of the wife and the children, if any.

This provision does not confer title on the wife but gives her and her children a right to live in the family home. Section 3, however provides that an order will not be granted if the wife is found guilty of adultery unless the adultery was 'condoned'. This discriminatory provision goes further than the *dum casta* clause because it requires the deserted wife remain chaste but does not require the same of the deserting husband. This provision directly discriminates against women by imposing different moral standards of behaviour on women and men. Like the conditions on a widow's life interest, the provision provides a legal ground for relatives of the husband to remove a woman from their husband's home where there are no children in the marriage.[204] Although this provision is still in force, there is an expectation that it will be repealed once the 2008 Royal Land Commission's recommendations are implemented. Those recommendations includes repeal of the *dum casta* clauses in the Land Act.

Division of matrimonial property upon divorce is provided for by the *Divorce Act (Cap 29)* which provides that '[w]henever a decree for divorce is pronounced, each of the parties to the marriage so dissolved shall retain his own property.' Section 15 has been interpreted to refer to property owned by each party prior to the marriage and not that acquired during the

[203] *Maintenance of Deserted Wives Act*, s 2 (b).
[204] If there are children of the marriage they will inherit the land.

marriage.[205] The Divorce Act is silent on how property acquired during marriage is to be divided but the Court in *Nakao v Afeaki* held that it may be reasonable to conclude from s15 that 'any joint matrimonial property should be divided in proportion to each party's contribution.'[206] This is problematic if the wife's contribution for taking care of her family is not recognised by the court. Buildings and other fixtures attached to the land are not regarded as immoveable property, so in the event of a dispute, and a party is held to be entitled to the building but not the land, that party has to decide whether he or she wants to remove the building, or if in agreement with the other party, obtain some compensation for it.

However, because a landholder's siblings both male and female have no right to the family land,[207] it would not be fair on the siblings to have the family land equally divided between the landholder and his wife. A system which gives all children equal rights to those of their parents' land is one that is just and fair. Further, by allowing women to own an allotment women would be more secure in a marriage and would not have to rely on their husband for a place to live in the event of a divorce.

As women are precluded from holding a tax and town allotment, division of matrimonial property, in respect of land, only applies if the matrimonial property is a lease acquired by the couple during marriage. However, because of the reversionary right of an allotment or an estate holder,[208] leaseholders do not have the freedom to transfer property to another without the agreement of the landholder. It is more likely that parties to matrimonial proceedings will agree on who will continue to live on the land. If the leasehold belonged to the wife and was registered under her name prior to the marriage, her sole right to the land is secure.[209]

[205] *Nakao v Afeaki* [2002] TOSC 37 FD 086 2002 (17 December 2002) <http://www.paclii.org//cgi-bin/disp.pl/to/cases/TOSC/2002/37.html?query=matrimonial%20property>.
[206] This was applied in *Vance v Guerra* [2008] TOLawRp 32.
[207] In the case of inherited land as opposed to land obtained by the landholder on his own or land subdivided from his father's land.
[208] Such 'holder' would also include the Minister of Lands in respect of land situated on Crown Land.
[209] *Nakao v Afeaki* [2002] TOSC 37 FD 086 2002 (17 December 2002) <http://www.paclii.org//cgi-bin/disp.pl/to/cases/TOSC/2002/37.html?query=matrimonial%20property>. In that case the Supreme Court rejected an application by the respondent (husband) for a division of the matrimonial property as it was established that the property belonged to the petitioner before the marriage. Consideration of what constitutes matrimonial property begins from when the couple married. Any contribution prior to marriage does not apply in the absence of a contract between the parties. The court also held that contribution must be sufficient to establish any right to the property.

3.13 Applying the theory of intersectionality

Women's land rights diminish along the socio-political class structure. Women in all classes – the royal family, nobility and commoners – are discriminated against in varying degrees. A monarch's daughter is an heir to the throne but unlikely to succeed to the throne and to hold royal estates, as sons are first in line to succeed. However, women in the royal family enjoy equal access to royal family estates and have their own royal residence. Additionally, women in the royal family can acquire a leasehold from their estate holding family member.[210]

Daughters of nobles are not entitled to succeed to a noble's hereditary title and estate even if they have no brothers. Inheritance will bypass them in favour of their sons (if any) when those sons attain 21 years of age, or in favour of their father's brothers. The gendered assumption underscoring that rule is that daughters of nobles will marry and be supported by their husbands and eventually have sons. There is no provision for unmarried nobles' daughters who are precluded from holding an estate and can only hold a lease. Women of the nobility, however, hold a certain measure of influence in society (although not as much as women in the royal family) and can have access to land from their father's estate to be used during their lifetime, illustrating the significant impact of class on women's land rights.

Commoner women, who make up the majority of the female population, are the most disadvantaged under Tongan land law. A commoner woman can obtain a life interest in her father's land only if she has no brothers. She has a right to remain at her family home together with her brother (the heir) and his family until she marries or for her lifetime if she does not marry. Commoner women, without the privileges of women in the royal family and nobility, will have few opportunities to access land through a lease unless they obtain a high educational qualification, a high position in government or run a successful business venture. Class and gender intersect starkly for commoner women, and proposals for land rights reform must respond to this. A failure to analyse women's land rights in Tonga through the lens of class will not capture the reality of commoner women's lives.

The public debate on women's land rights focuses only on the rights of commoner women. There have been no public discussions of the rights of women in the royal family or in the

[210] As in the case of younger Royal Family members who do not live in Royal Family estates.

nobility. Indeed, it is a topic many avoid because discussion may offend social norms. Discussion is also unlikely to be supported by women in the royal family and the nobility who prefer the status quo to continue. Any relevant reform (although highly unlikely in the near future) for the monarchy and the nobility must be driven by them.[211] Calls for the reform of royal and noble women's land rights are likely to be considered subversive by conservatives, and no doubt strongly resisted, leading to any progressive reform being hampered. For that reason, the main reform recommendations of this thesis focus on the right of all women in Tonga to hold and inherit a tax and town allotment.

3.14 Same law for all classes

The Constitution contains a 'Bill of Rights' but there is no guarantee of equality between men and women and non-discrimination on the grounds of gender. Clause 4 of the Constitution provides that '[t]here shall be but one law in Tonga for chiefs and commoners for non-Tongans and Tongans. No laws shall be enacted for one class and not for another class but the law shall be the same for all the people of this land', but this provision has not been interpreted to include gender equality.[212] Women cannot utilise the Bill of Rights to challenge the present land law on the basis of discrimination.[213] Clause 4 is paradoxical because it recognises socio-political 'classes' with varying degrees of rights and privileges which the Constitution itself established.[214] This clause purports to guarantee equality to all 'classes', but the power and control of the country's only key natural resource remain with the royal family and the nobles as privileged landholding classes. The Constitution protects those powers as will be discussed in Chapter Five under 'Law and Culture'. Thus, the law is not the same for all classes despite clause 4.[215]

[211] This is in addition to the Constitutional requirement that changes to the hereditary titles and estates of the nobility can only be voted upon by the representatives of the nobles in parliament (Constitution, cl 67).
[212] Constitution, cl 4.
[213] And if they do, it is likely to fail.
[214] Powles, *The Persistence of Chiefly Power*, above n 3, 253.
[215] The Supreme Court has not been asked to rule whether clause 4 covers gender equality. Arguably, women constitute a 'class' and could challenge any discriminatory law on the basis of clause 4. However, the problem for Tongan women is compounded because it is the Constitution itself which sets out the basic principles of land law.

Conclusion

This chapter focused on land law in Tonga. Part II of the chapter began with a discussion of traditional landholding prior to Western influence. The chapter suggested that, while the term traditional land holding is commonly used, there is no consensus as to its meaning. In fact, the vast literature on traditional land holding is based on oral tradition. Although oral tradition is valuable, it also has limitations and may not accurately depict women's relationship to land and its use. That discussion contributes to one of the main themes of this thesis which is the use of culture and tradition as a justification for inequality between men and women.

Part I also considered the development of the current land law from the 1830s onwards noting that the Wesleyan missionaries (including Shirley Baker) drafted the laws from the 1839 Code of Vava'u to the Hereditary Lands Act 1882. The 1839, 1850 and 1862 Codes did not contain a comprehensive land tenure system but did establish individual landholdings and perpetuated gender stereotyped roles in relation to land, with men as responsible for providing a financial income and women as responsible for domestic 'private sphere' tasks. The Constitution and subsequent laws adopted and modified certain English property law principles which form the basis of current land law. However, although English common law principles were transplanted into the Tongan legal system, it excluded the increasing recognition of women's rights, including property rights, that was taking place in the British legal system. The right of men 16 years of age and above, to a tax and town allotment, was created in the Hereditary Lands Act 1882 while for only a conditional life interest was granted to widows and daughters.

Although the Tongan land tenure system is unique in its current form, this chapter has revealed that a number of common law principles such as hereditary estates and related principles, leases, mortgages and registered titles[216] were adopted and modified to suit the purpose of the lawmakers at the time. King George Tupou I's thinking which informed the Constitution was that the Constitution, including the land tenure, would remain static 'forever'.[217] An adherence to that kind of thinking has militated against the achievement of land equality for women in Tonga and the introduction of positive reforms.

[216] Sue Farran, 'Land as a Fundamental Right: A Cautionary Tale' (2010) 40 *Victoria University Wellington Law Review*, 387, 389.
[217] As quoted in Latukefu, *Church and State in Tonga*, above n 3, 204.

Part II of the chapter provided an overview of the current land law, describing the basic principles and the various types of landholdings, particularly emphasising that women have not yet attained even formal equality in relation to land rights with the exception of leaseholds. Yet even in this context women have had their rights challenged, reduced or taken away in court proceedings indicating that the achievement of formal equality has not led to substantive equality.

Indeed, this chapter has argued that the cumulative effect of class and gender has resulted in discrimination against all women in Tonga, yet becomes progressively heightened through the social classes from the monarch to the commoner. It is the 'commoner' women who are the most disadvantaged and the greatest in number. Commoner women are then faced with two major challenges in land reform – the challenge of gender discrimination and class discrimination whereby women in the royal family and nobility are more likely to support the status quo and the preservation of their favoured landholding status.

Discrimination against women in relation to land rights is not unique to Tonga however. Local feminists and other advocates for women's equality in many other countries throughout the world, have utilised international human rights as a tool to pursue reform. The next chapter therefore focuses on international human rights and the use of these systems to advance gender equality with regard to land rights.

Chapter Four –
International Human Rights Law and Women's Land Rights

Introduction

This chapter provides an overview of the international human rights law pertaining to gender equality and women's rights to land. It focuses on the international human rights treaties that Tonga has ratified and acceded to, non-binding instruments that Tonga has committed to, and CEDAW, because CEDAW is the only comprehensive treaty on women's rights. International human rights law, in particular CEDAW, is central to this thesis. Although land reform in favour of women can occur without ratification of or accession to a human rights treaty, CEDAW provides a standard to which women's groups may aspire and work towards. Without such standards to guide women at the national level, land reform may not result in real equality. Indeed, women's rights groups, not only in countries which have ratified or acceded to CEDAW but also in countries which have not, have used CEDAW and other international human rights instruments to challenge local laws which discriminate against women.[1] Additionally, although Tonga has not acceded to CEDAW, an analysis of its relevant provisions is important because the government announced in 2015 that it would accede to it, but after strong opposition from conservative groups and individuals, work towards accession has ceased. In part the opposition has focused on the obligation to amend the land law to give women equal rights that acceding to CEDAW would require, despite the support for accession by local women's groups and many who participated in the 2008 Royal Land Commission's public consultations.

This chapter has two main parts. Part I discusses Tonga's international human rights obligations and commitments and the extent to which it has fulfilled those obligations and commitments. It also evaluates Tonga's participation in the Universal Periodic Review, a newly established international human rights mechanism which reviews the human rights records of all members of the United Nations (UN). On 14th May 2008,

[1] See Vedna Jivan and Christine Forster, 'What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism Through Women's Use of CEDAW' (2005) 9 *Singapore Yearbook of International Law* 103. In most cases however, the international instruments relied upon, especially the United Nations Convention on the Elimination of All of Forms of Discrimination Against Women (CEDAW), are binding on the country in question.

Tonga participated for the first time in a UN human rights forum to account for the state of human rights in Tonga.[2] Part II examines CEDAW and the particular articles which focus on gender equality and women's land rights. Examples of the implementation of CEDAW at the national level are drawn from the experiences of other Pacific island countries which have ratified or acceded to CEDAW. Part II also identifies the changes which are required to Tonga's laws in order to comply with CEDAW.

Part I – Tonga's Relevant International Human Rights Obligations

4.1 Ratified human rights conventions

Tonga has ratified only two core international human rights conventions, namely the Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Rights of the Child (CRC).[3] Although the object and purpose of the CERD is the elimination of all forms of racial discrimination, its preamble notes that all member states of the United Nations have pledged to, amongst other things, promote human rights on the basis of equality of all human beings. Additionally, Article 7 of the CERD requires States parties to promote the 'purposes and principles' of other instruments such as the United Nations Charter and the Universal Declaration of Human Rights (UDHR).[4]

[2] This does not refer to international human rights meetings and conferences which Tonga attended, such as the UN's Fourth World Conference on Women, Beijing 1995.

[3] There are nine core international human rights treaties. For a complete list see United Nations, Office of the Commissioner for Human Rights, *International Human Rights Law* <http://www2.ohchr.org/english/law>. The CERD was adopted on 21 December, 1965 and entered into force on 4 January, 1969. It was ratified by Tonga on 17 March 1972. The CRC was adopted on 20 November 1989. It entered into force on 2 September 1990. Tonga acceded to the CRC on 6 November 1995 and it did not make any reservations to any of its provisions.

[4] The preamble to the UN Charter and articles 1, 8 and 13 emphatically guarantee the equality of the sexes. Article 4 of the UN Charter provides that, upon becoming a member of the UN, a state undertakes to be bound by the Charter. Tonga therefore is bound to promote and protect gender equality at the local level. Additionally, article 2 of the UDHR states 'that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status' (*Charter of the United Nations*, 1945 at <http://www.un.org/en/charter-united-nations/>).Article 17 of the UDHR declares that every person has the right to own property alone or in association with others.

Tonga has placed a reservation on article 5(d)(v) of the CERD. Reservations are permitted only if they do not undermine the objects and purpose of the convention.[5] Article 5(d)(v) requires States parties to guarantee that no person is discriminated against with regard to their right to own property based on his or her race, nationality or ethnicity.[6] The Tonga government declared that it would not alienate land to non-indigenous Tongans, because it is prohibited under its national law.[7] This is important (as will be explained in Chapter Six), because as observed in Chapter Three, land shortage is a critical issue in Tonga which must be addressed in any land reform proposal. It should be emphasised that this reservation was made in 1972 when Tonga ratified CERD, but a Royal Land Commission established in 2008 (discussed more fully in Chapter Six) considered a proposal to introduce freehold land tenure in order to facilitate foreign investment by allowing foreign companies to buy freehold title to land.[8] Such a proposal would reduce women's chances of having access to land as foreign companies can afford to buy large tracts of land. The Commission recommended that the proposal should be accepted but its report has not been endorsed by the government.

Article 2 of the CRC obliges States parties to guarantee, amongst other rights, the equality of all children regardless of sex. States parties to the CRC recognise the

[5] A reservation is "a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State". *Vienna Convention on the Law of Treaties*, art 19(c), adopted 22 May 1969 (entered into force 27 January 1980).

[6] Tonga has submitted 14 periodic reports to the CERD Committee, the treaty-monitoring body, but it has not on any occasion sent a delegation to present those reports. The latest periodic report was submitted on 17 March 1999, indicating that its commitment may be lacking. See Government of Tonga, *Committee on the Elimination of Racial Discrimination: State Party Report, Tonga*, CERD/C/362/Add.3 (23 April 1999). The government submitted in its 1999 report that racial discrimination was not an issue in Tonga. The government also stated that Tonga's laws are sufficient to protect non-Tongans from racial discrimination (p 2). Non-Tongans make up less than three per cent of the total population (in 1999 and as of 2011 according to the 2011 population census). Despite that, Tonga is still required to ensure that discrimination against non-Tongans is explicitly guaranteed in policy and law (CERD/C/362/Add.3, 3). The Chinese business community have been targeted by violent robbers. Although there is no systematic discrimination against the Chinese community or any other racial or ethnic group in Tonga, the government is still obliged to address the situation. See Prime Minister's Office, 'Police Look to Reduce Crimes Against the Asian Community' (Media release, 3 February 2017) <http://www.pmo.gov.to/operation-great-wall>. The Committee expressed concern that the Convention has not been made part of Tongan law (p 5). Indeed, the CERD Committee noted that Tonga has not provided sufficient information in order for the Committee to be able to fully assess Tonga's implementation of the Convention (CERD/C/362/Add.3, 2).

[7] United Nations, 'Tonga's Reservation to the CERD', *Treaty Series* 660 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&clang=_en#EndDec>

[8] The proposed freehold land is to be applied to a specified reclaimed zone.

principle of gender equality guaranteed in other international human rights instruments such as the UN Charter and the UDHR.[9] This means that, in addition to its obligation under the UN Charter as a UN member to respect human rights and equality between men and women,[10] Tonga recognises equality as stipulated in other human rights instruments. Gender inequality affects girls' rights because if women cannot own or inherit land, their opportunities for future economic stability and wellbeing are severely reduced.[11] In countries where women cannot own land nor access credit, there are higher rates of malnutrition amongst children.[12] Studies have shown that women spend their income on their family whereas men spend on themselves.[13] Meanwhile article 24 (2)(c) of the CRC provides that 'States Parties … shall take appropriate measures … [t]o combat disease and malnutrition'. Therefore, in order to realise children's right (under the CRC) to healthy nutrition, women must be able to own land and have access to credit in order to generate income or grow food that will in turn provide adequate nutrition for children.[14] Tonga has not submitted its initial report to the Committee on the Rights of the Child, the Convention's monitoring body. The CRC has also not been made part of Tongan laws.

Although Tonga has not ratified or acceded to most key UN human rights conventions, the Tongan government has made several international and regional commitments in relation to gender equality and women's land rights. These include commitments made to the *Beijing Declaration and Platform for Action* and the *Commonwealth Plan of Action for Gender Equality 2005 – 2015*. These instruments do not have the legal force

[9] The UN Charter, the UDHR, the *International Covenant on Civil and Political Rights* adopted 16 December (entered into force 23 March 1976) and the *International Covenant on Social, Economic and Cultural Rights* 16 December 1966 (entered into force 3 January 1976).

[10] *Charter of the United Nations*, Preamble and arts 1(3), 55(c).

[11] 'General recommendations made by the Committee on the Elimination of Discrimination against Women' General Recommendation No. 21 (13th Session, 1994), paragraph 7, at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

[12] Studies have shown that women spend more on their families whereas men spend more on themselves. See Landesa Rural Development Institute, Women's Secure Rights to Land: Benefits, Barriers, and Best Practices (Landesa Rural Development Institute, 2012) 1; OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (UN, 2013) 2; Organisation for Economic Co-operation and Development (OECD) Development Centre, *Gender Equality and the MDGs: What are the Missing Dimensions?* (2010) <https://www.oecd.org/dev/development-gender/45987065.pdf>.

[13] Ibid, Landesa Rural Development Institute, 1.

[14] In 2004, anaemia in children in Tonga was found to be high at 11% although no study has been conducted that expressly links malnutrition in children and women's limited land rights. Viliami T Manu, 'Tonga National Nutrition Statement' (Paper presented at the Second International Conference on Nutrition, Rome, 20 November 2014) 2.

of treaties,[15] however they do generate 'reasonable expectations of complying behaviour'.[16] These instruments were widely adopted and they refer to binding human rights conventions which highlight the fundamental importance of gender equality. They also highlight the importance of securing women's land rights.[17] The CEDAW treaty-monitoring body, the CEDAW Committee, requests States parties 'fully utilize the Beijing Declaration and Platform for Action, which reinforce the provisions of CEDAW, and requests the State party to include information thereon in its next periodic report.'[18] The importance of the comprehensive provisions of the Beijing instruments is affirmed. However, a more effective non-binding human rights mechanism, the Universal Periodic Review (UPR), requires all member states of the United Nations to account for their national human rights records. Tonga's participation in the UPR provides an opportunity to analyse its performance at the international level.

4.2 The Universal Periodic Review

The Universal Periodic Review (UPR) is a compulsory mechanism of the UN, whereby the human rights records of every UN member country is reviewed every four years.[19] Tonga has undergone two reviews under the UPR in which a number of UN member states made specific recommendations regarding women's land rights. The first review took place on 14 May 2008 and the second on 21 January 2013.[20] This section discusses and analyses the second review in depth because it is the first and only time when the Tongan government has reported to a UN body on the state of human rights in Tonga.

---

[15] *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2.

[16] Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International Comparative Law Quarterly* 957, 960.

[17] *Beijing Declaration*, art 35. UN Women, *Beijing Declaration and Platform for Action* (Author, 1995), paras 51, 55, 58 (m) (n), 60 (f) and 61 (b), 165 (e), 166 (c) and 247. See also Commonwealth Secretariat, *Commonwealth Plan of Action for Gender Equality* (Author, 2005) paras 3.23, 3.24, 3.25 (viii), 3.27 and 3.37.

[18] CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women* – Sri Lanka, 48th sess, UN Doc CEDAW/C/LKA/CO/7 (8 April 2011).

[19] The UPR is one of the three mechanisms of the UN for promoting and protecting human rights. The other two are the UN Special Procedures and the UN Human Rights Treaty mechanism. See OHCHR, *Human Rights Mechanisms* <http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/8_Human_ rights_mechanisms.pdf>.

[20] For the first review, see Human Rights Council, *Report of the Working Group on the Universal Periodic Review (Tonga)*, UN GAOR, 8th sess, Agenda Item 6, UN Doc A/HRC/8/48 (5 June 2008) and for the second, see Human Rights Council, *Report of the Working Group on the Universal Periodic Review (Tonga)*, UN GAOR, 23rd sess, Agenda Item 6, UN Doc A/HRC/23/4 (21 March 2013).

The UPR is overseen by the Human Rights Council (HRC) which was established by the UN General Assembly (UNGA) Resolution 60/251 on 15 March 2006, to replace the Commission on Human Rights.[21] The HRC is 'responsible for the promotion and protection of all human rights around the globe'.[22] The HRC consists of 47 member states, elected by a majority of the members of the General Assembly with a certain number of seats allocated to five different regional groups.[23] The mandate of the HRC in respect of the UPR is to carry out a periodic review of the human rights obligations and commitments of all UN member states.[24] Countries are assessed against the UN Charter, the UDHR, the State's human rights treaty obligations, voluntary pledges and commitments made by States and applicable international humanitarian law.[25] Three types of documents are considered for the review which is submitted to the Working Group of the HRC six weeks prior to the review.[26] These are: a national report by the State under review, a compilation prepared by the Office of the High Commissioner for Human Rights (OHCHR) 'of the information contained in the reports of treaty bodies, special procedures, including observations and comments by the State concerned, and other relevant official United Nations documents', and another compilation by the OHCHR of information provided by other relevant stakeholders which includes reports by local NGOs.[27]

The review has two parts – the first is a presentation by the State under review, and the second is the interactive dialogue between all state members and responses by the State under review.[28] An outcome report is prepared by the Working Group which contains all the deliberations during the review which includes recommendations by other States to the State under review.[29] States are expected to implement the recommendations

[21] *Human Rights Council*, GA Res 60/251, UN GAOR, 60th sess, UN Doc A/RES/60/251 (3 April 2006).
[22] OHCHR, *United Nations Human Rights Council*, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/HRCIndex.aspx>.
[23] Members are not eligible for immediate re-election after serving two consecutive terms. United Nations General Assembly, above n 21, para 7.
[24] Ibid, para 5(e). The procedures for the UPR are set out in Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 5th sess., 9th mtg, UN Doc A/HRC/RES/5/1 (18 June 2007). Paragraphs 1 and 2 set out the basis of the review.
[25] Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 5th sess., 9th mtg, UN Doc A/HRC/RES/5/1, paras 1 and 2.
[26] Ibid, paras 15-17.
[27] Ibid, Annex para 15(b).
[28] Ibid, Annex Part I. D 1 and 2.
[29] Ibid, Annex para 32.

made at the review and to report to the HRC Working Group at the next cycle.[30] If requested, capacity-building and technical assistance will be provided by the international community to implement a state's obligation under the UPR.[31]

Tonga has undergone two reviews but before discussing Tonga's participation in the second review, two of the key features of the first review are relevant. First, a number of countries recommended that Tongan accede to the core conventions it has yet to accede to, including CEDAW.[32] Secondly, eight countries commented on Tonga's land law. Switzerland expressly recommended that Tonga should repeal its discriminatory land law.[33] Israel's comment focused on women's land rights, recommending that Tonga should accede to CEDAW.[34] Israel particularly referred to articles 15 and 16 of CEDAW which provide for the capacity to conclude contracts and to administer property and the equal rights of spouses to ownership, acquisition and management of property respectively. The first report noted however, that the Tongan government did not agree with the recommendations to repeal the discriminatory provisions in its land law against women.[35] Importantly however the government at the time was of the conservative political order,[36] in contrast to the pro-democracy majority-led government which was elected in November 2014 and remains in power (as at 2017).[37] The latter has been supportive of women's rights and has supported the rights of women to hold and inherit tax and town allotments.

[30] Ibid, Annex paras 33 and 34.
[31] Ibid, Annex para 36.
[32] A/HRC/8/48, above n 20. Countries included Mexico, Italy, Switzerland, Bhutan, The Vatican, Australia, New Zealand, Japan, Egypt and Senegal.
[33] Ibid, para 38.
[34] Ibid, para 51.
[35] Ibid, para 64.
[36] The conservative political order continues to hold the ultimate power despite the narrative (expounded by the conservatives themselves) that Tonga is undergoing reform towards a more democratically-elected government.
[37] Pro-democracy here refers to the local political organisation, the Human Rights and Democracy Movement (HRDM) whose members including the current Prime Minister, together with some independent members of parliament (People's Representatives), and were elected into government in 2014. See Radio New Zealand, 'Tonga to Vote on Polarising UN Convention for Women's Rights' *Dateline Pacific*, 8 July 2015 <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201761434/tonga-to-vote-on-polarising-un-convention-for-women's-rights>.

Tonga's national report for the second review addressed actions taken by the government in relation to the recommendations that resulted from the first review.[38] Several local NGOs submitted a report to the second UPR. They uniformly argued that little progress had been made since the first UPR towards acceding to the core conventions including CEDAW.[39] The NGOs also noted the absence of equality and non-discrimination provisions in the Tongan Constitution.[40] However, while the views of local NGOs may be significant at the UN human rights level, they are not regarded seriously at the national level in Tonga.

At the beginning of the second review, the head of the Tongan delegation stated that:

> the introduction of new human rights would involve a delicate balancing exercise of important factors, including limited resources, core Tongan cultural values, fundamental Christian beliefs and liberal ideologies. These unique circumstances should be recognised as the reason why Tonga has been slow to ratify the core human rights conventions.[41]

This statement implies that gender equality and equal land rights for women are new rights that require introduction. It reflects the cultural relativist stance which views human rights as introduced concepts rather than the inherent rights of every person. It is also the first time reference was made to liberal ideologies as having some influence in the Tongan polity. The Head of Delegation did not elaborate on what he meant by

[38] Human Rights Council – Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 – Tonga*, 15th sess, UN Doc A/HRC/WG.6/15/TON/1 (9 January 2013).

[39] UN Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 5 of the Annex to the Human Rights Council Resolution 16/1: Tonga*, UN GAOR, 15th sess, UN Doc A/HRC/WG.6/15/TON/3 (29 October 2012) para 3. Only one local NGO, the Legal Literacy Project (LLP) submitted a report for the first review in which it commented that the Tongan government had been slow to accede to CEDAW and called on the government to take steps in that regard 'as a matter of urgent priority'. The LLP also specifically stated that the land law discriminated against women and called on the government to amend the law to provide for equal land rights as between men and women. (Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to the Human Rights Council Resolution 5/1: Tonga*, UN GAOR, 2nd sess, UN Doc A/HRC/WG.6/2/TON/3 (11 April 2008) A 2.) The LLP was a project under the local Catholic Women's League (CWL). The LLP ended in early 2008 and its staff members formed a new NGO, the Ma'a Fafine mo e Famili (For Women and Children). Conservative members of the CWL no longer supported the women's rights objectives of the LLP. The CWL was instrumental in staging a protest march against Tonga's ratification of CEDAW on 19 May 2015.

[40] A/HRC/WG.6/15/TON/3, above n 39, para 8.

[41] A/HRC/23/4, above n 20, para 7. The Head of Delegation, Lord Vaea, is a noble and the government at the time was of old established order as opposed to the current pro-democracy majority government.

liberal ideologies but accordingly such ideologies could be utilised to qualify *new* human rights standards that may be implemented at the local level.[42] Indeed, liberal values were introduced with the adoption of a Western-style government and legal system, however this did not include formal gender equality. While other western liberal democracies did not initially introduce formal gender equality, eventually Western societies came to recognise the equality of men and women under the law.

The notion that core cultural values may be used to limit fundamental human rights referred to in the statement is contrary to Tonga's legal tradition as there is no customary law in Tonga. In *Taione v Kingdom of Tonga*,[43] a landmark case in which human rights advocates challenged an amendment to clause 7 of the Constitution (which protects the right to free speech),[44] attempted to limit free speech by 'cultural traditions'. The Supreme Court held that cultural traditions could not be used to qualify the right to free speech and the amendment was, therefore, invalid. The court's ruling has not, however, prevented conservative leaders from asserting cultural values as contrary and superior to human rights, taking in effect a cultural relativist stance against human rights advocates.[45] Such a stance is contrary to the development of Tonga's legal system and not supported by the Constitution.

Appeal to religious principles by opponents of women's rights in Tonga is another factor that must be addressed by local women's rights advocates. Vague references to rules regarding women's land rights as contained in the Bible was made by the conservative government, discussed below, which opposed accession to CEDAW in 2009. A number of church leaders petitioned against accession to CEDAW on the basis that some of its articles are contrary to Christian beliefs.[46] Some church leaders however supported accession to CEDAW and disagreed with arguments used by opponents that were based on religious principles.[47]

---

[42] By including the word 'new' the government was careful not to ignore that some fundamental rights are already contained in the Constitution.
[43] 374/2004 SC.
[44] Clause 7 of the Constitution.
[45] Governments prior to the pro-democracy led government which was elected into government in November 2014.
[46] 'Church Leaders Take Petition to Palace', *Matangitonga* (online) 22 May 2015 <http://matangitonga.to/2015/05/22/church-leaders-take-petition-palace>.
[47] 'Tongans March Against Women's Equality', *Cook Islands News* (online) 26 May 2015 <http://www.cookislandsnews.com/regional/item/51956-tongans-march-against-women-s-equality/51956-tongans-march-against-women-s-equality>.

In the first part of the second review, Norway and Slovenia asked what steps Tonga had taken to achieve gender equality. The United Kingdom (UK) challenged Tonga's failure to accede to CEDAW and asked what steps it had taken towards accession.[48] In response to the question from the UK, the head of the Tongan delegation stated that Tonga decided in 2011 to accede to CEDAW (with reservations) in response to a nation-wide consultation.[49] Spain asked what reservations Tonga would make in the event of acceding to CEDAW.[50] The head of the Tongan delegation replied that reservations would be in relation to succession rights and land ownership, among others.[51] The head of the delegation also requested assistance in advancing human rights especially in relation to gender equality.[52]

During the interactive dialogue, 40 state representatives made statements. More than half of them specifically commented on Tonga's failure to accede to CEDAW and the need to achieve gender equality and equal land rights, with some states expressing a stronger view than others. Italy called on Tonga to 'remove all obstacles' to accession to the rest of the core human rights conventions.[53] Norway, Uruguay and Costa Rica expressed concern about the unequal land rights between men and women. The UK asked Tonga how it intended to respond to discriminatory rules against women,[54] a question which it had previously raised in Tonga's first review. The United States expressed concern about Tonga's apparent lack of commitment to gender equality.[55] France was more direct, noting that no progress had been made since the first review towards acceding to the core conventions.[56] In response, Tonga accepted all recommendations including those which suggested that Tonga should accede to CEDAW, but rejected calls for immediate accession to CEDAW or accession without reservations.[57]

[48] A/HRC/23/4, above n 20, para 21.
[49] Ibid.
[50] Ibid, para 22.
[51] Ibid.
[52] Ibid, para 29.
[53] Ibid, para 32.
[54] Ibid, para 51.
[55] Ibid, para 52.
[56] Ibid, para 68.
[57] Ibid, para 82.

Tonga's participation in the two UPR reviews has had little impact on gender equality at the national level. This is a significant weakness of the UPR as a non-binding mechanism. However, the UPR is important for several reasons.[58] First, the UPR is mandatory on all UN member states. Tonga, has expended little effort in advancing women's rights at the local level and complying with its reporting obligations, and must account to the UN regularly and within a short period of time.[59] Although the UPR is intended to be a non-confrontational approach,[60] the experience of the first two UPRs to date[61] has shown that non-cooperation is taken seriously by the HRC. The HRC will take immediate action when a country refuses to take part in the review.[62] However, as the UPR is still in its infancy, it remains to be seen whether not acting on the most urgent recommendations over a period of years will be deemed persistent non-cooperation with the UPR mechanism.

A second indication of the potential impact of the UPR in advancing human rights is its capacity to highlight and identify the challenges a state faces in implementing human rights standards. One of the most common reasons for non-compliance put forward by states under review, especially by developing countries, is the need for technical assistance and capacity-building.[63] The Tongan government stated in its first UPR report that it had difficulties in meeting its reporting requirements to treaty bodies due to 'financial, technical and capacity constraints'.[64] However, appearing before a treaty body and reporting should be a secondary focus premised on the actual implementation

[58] Allehone M Abebe, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law Review* 1, 3.

[59] How long the UPR will be able to continue with the four-yearly cycle remains to be seen. Some have suggested that a prolonged period of this requirement might be excessive, tiring states out and leading to the ultimate failure of the UPR. See Elvira D Redondo, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) *Chinese Journal of International Law* 721. Perhaps every seven years is a reasonable time to allow states to meet expected targets.

[60] Felice D Gaer, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) *Human Rights Law Review* 109, 130.

[61] The second cycle of the UPR was still under way in 2016.

[62] Human Rights Council, *Report of the Human Rights Council on its Seventh Organizational Meeting*, UN GAOR, UN Doc A/HRC/OM/7/1 (4 April 2013) on 'Non-cooperation of a State under review with the universal periodic review mechanism'. The decision was specifically in relation to Israel which refused to be reviewed in the second cycle. Israel is the only country to have done so. On the same day Israel was scheduled to be reviewed and did not attend, the Council and met and adopted this decision. For Israel's view on the matter see BBC, *Israel Boycotts UN Rights Council in Unprecedented Move* (29 January 2013) <http://www.bbc.com/news/world-middle-east-21249431>; 'UN Avoids Israel Showdown, Delays Rights Review', *The Jerusalem Post* (online) 29 January 2013, <http://www.jpost.com/Diplomacy-and-Politics/UN-avoids-Israel-showdown-delays-rights-review>.

[63] A/HRC/RES/5/1, above n 25, para 27(d).

[64] A/HRC/8/48, above n 20, 4.

of the treaty. Tonga's next review is in January to February 2018 and it has until then to take steps towards obtaining such assistance in order to implement at least some of the UPR recommendations.[65] Whether lack of resources will be accepted by the UPR as a reason for refusing to ratify or accede to human rights conventions is yet to be determined.[66] Tonga has ratified and acceded to many non-human rights treaties without appealing to a lack of financial and technical capacity to implement them. If the degree of assistance required from the international community to facilitate the implementation of non-human rights treaties far exceeds that of human rights treaties, then some commentators are right in criticising the international legal system for giving less weight to human rights, especially women's rights.[67]

The final justification for not acceding to or ratifying the core conventions provided by the Tongan government is the country's unique cultural traditions. The utilisation of cultural traditions as superior to human rights is one of the main criticisms of cultural relativism. During Tonga's second review Switzerland noted Tonga's explanations for non-compliance but it was of the view that, as with all countries, Tonga should still ratify or accede to the core conventions.[68] Other states have not questioned Tonga directly on its unique cultural traditions claim. One of the criticisms of the UPR is that states are reluctant to strongly criticise other states in order not to attract the same criticism when it is their turn to be reviewed.[69] Despite that, it is unlikely the UPR will accept such a claim as justification for continuously failing to ratify or accede to core conventions and the maintenance of gender inequality and discriminatory land laws. It is evident from Tonga's participation in the UPR that the UN is concerned about Tonga's minimal commitment to women's rights and expects Tonga to accede to CEDAW in the immediate future. It is relevant therefore to examine CEDAW and provide an overview of the articles on equality and land rights.

---

[65] OHCHR, *Universal Periodic Review – Calendar of Reviews for the 3rd Cycle (2017–2021)* <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>.

[66] Gaer, above n 60, 109, 133-4; Sally Engle Merry, 'Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women' (2011) 9 *Journal of Women of the Middle East and the Islamic World* 49, 61.

[67] Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 614-5; Joel R Paul, 'Cultural Resistance to Global Governance' (2000-2001) 22 *Michigan Journal of International Law* 1, 10, 30-73; Radhika Coomaraswamy, 'Are Women's Rights Universal? Re-Engaging the Local' (2002) 3(1) *Meridians: Feminism, Race, Transnationalism* 1, 6.

[68] A/HRC/23/4, above n 20, para 46.

[69] Redondo, above n 59, 731.

Part II – CEDAW, Gender Equality and Land Rights

4.3 Background to CEDAW

In 1946 the UN Commission on the Status of Women (CSW) was established, 'to monitor the situation of women and to promote women's rights.'[70] Between 1949 and 1965 the CSW drafted instruments on specific women's rights issues that needed urgent attention.[71] The CSW also drafted the Declaration on the Elimination of Discrimination against Women which was adopted by the General Assembly on 7 November 1967.[72] However, by the 1960s discrimination against women worldwide became a serious concern for the CSW[73] and it was clear the existing instruments 'failed to deal with discrimination against women in a comprehensive way.'[74] The Declaration was non-binding and was merely a 'statement of moral and political intent'.[75] These concerns led the CSW to propose that the UN consider the creation of a binding treaty.[76] The proposal was accepted and the CSW began drafting CEDAW in 1976.[77] It was adopted by the UN General Assembly in 1979 and entered into force on 3 September 1981.[78]

To date there are 189 States parties including 11 Pacific island countries.[79] Tonga and Palau are two of only seven countries globally that have not ratified or acceded to

[70] United Nations, *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979 (entered into force 3 September 1981) <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>.

[71] These specific areas were the political rights of women, the nationality of married women, and consent to marriage, minimum age for marriage and registration of marriages. Ibid.

[72] CEDAW, *Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women – Report by the Committee on the Elimination of Discrimination against Women*, UN Doc A/CONF.177/7 (4 September 1995), paras 9-10 <http://www.un.org/documents/ga/conf177/aconf177-7en.htm>. The other four instruments are: the *Convention on the Political Rights of Women* , opened for signature 31 March 1953 (entered into force 7 July 1954); the *Convention on the Nationality of Married Women*, opened for signatured 29 January 1957 (entered into force 11 August 1958); the *Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* opened for signature 7 November 1962 (entered into force 9 December 1964); and the *Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages* (adopted 1 November 1965).

[73] A/CONF.177/7, above n 72, para 10.

[74] Ibid.

[75] Ibid, para 11.

[76] Ibid.

[77] Ibid.

[78] United Nations, above n 70.

[79] The 11 Pacific Island countries are Cook Islands, Federated States of Micronesia, Nauru, Fiji, Kiribati, Marshall Islands, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu.

CEDAW. The others are the United States (despite being one of the 60 first countries to sign CEDAW in 1980), Sudan, Somalia and Iran. The fact that the US has not acceded to CEDAW has been utilised by some local opponents to justify Tonga's failure to accede to the Convention. According to these opponents, if the US, which embodies democracy, has not ratified or acceded to CEDAW there must a good reason for not doing so.[80]

Unlike previous instruments, CEDAW comprehensively covers all areas of women's lives and obliges States parties to guarantee both formal and substantive equality for women and girls.[81] Accordingly, CEDAW has been referred to as a Magna Carta and an International Bill of Rights for women.[82] Although other human rights instruments provide for the promotion and protection of gender equality and non-discrimination, '[i]t is in CEDAW that the international human rights system's philosophy of gender equality is expressed.'[83] Moreover, there are fundamental differences between CEDAW and other international human rights conventions. CEDAW prohibits (amongst other things) all forms of discrimination, both direct and indirect, by both public and private actors, requires the use of temporary special measures to achieve substantive equality, and requires the elimination of cultural practices that discriminate against women.[84]

The CEDAW Committee on the Elimination of Discrimination against Women (the Committee), established under article 17, is responsible for monitoring progress of the implementation of the Convention. The Committee consists of 'twenty-three experts of

[80] Legislative Assembly of Tonga, *Minutes of the Parliamentary Session*, 17 September 2009. It was this parliamentary session that debated a proposal for accession of CEDAW and was rejected. One of the MPs who opposed accession referred to the fact that the USA had not ratified CEDAW.

[81] A/CONF.177/7, above n 72, para 1; Marsha Freeman, 'The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance' (1997) 91 *American Society of International Law* 378, 382.

[82] Frances Raday, 'Culture, Religion, and CEDAW's Article 5 (A)', in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-five Years of the UN Committee on the Elimination of Discrimination Against Women* (The Feminist Press at CUNY, 2007) 68, 74; Alda Facio, 'A Magna Carta for All Women' (2011) 1(1) *feminists@law* 1; Freeman, above n 81, 378, 382; United Nations, above n 70.

[83] United Nations Development Fund for Women (UNIFEM), *CEDAW and the Human Rights Based Approach to Programming: A UNIFEM Guide* (2007) <http://unwomen-asiapacific.org/docs/cedaw /archive/cedaw_hrba2007.pdf>, 52. For other instruments that recognise gender equality and women's equal land rights see Susana Lastarria-Cornhiel, *Women's Access and Rights to Land: Gender Relations in Tenure* (University of Wisconsin-Madison, 2006); Elisabeth Wickeri and Anil Kalhan, 'Land Rights Issues in International Human Rights Law' (2010) 4(10) *Malaysian Journal on Human Rights* 1, 16.

[84] Lisa R Pruitt, 'Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference' (2011) 17(2) *William & Mary Journal of Women and the Law* 346, 349.

high moral standing and competence in the field covered by the Convention.'[85] A State Party is obliged to submit periodic reports to the Committee one year after the Convention becomes effective in that State[86] and then every four years thereafter or at any time if requested by the Committee.[87] The reports must contain:

> the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect

and

> may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.[88]

States parties which fail to submit reports on time may be requested by the Committee to do so.[89] The Committee will, 'as a measure of last resort', consider a State party's implementation in its absence if the State party fails to submit its report after the request has been made.[90] After considering a State party's report, the Committee makes concluding observations on the report to that State party on areas the Committee considers necessary for the full implementation of the Convention.[91] Despite the strong language of the Convention on the reporting obligation, the reality is that many States

---

[85] United Nations, above n 70, art 17(1). The experts are nominated by States parties from their own country and are elected to serve in their capacity as experts and not representatives of their government. Each geographical region and 'different forms of civilization as well as the principal legal systems' are represented. They serve for a term of four years (art 17(4)). The Committee adopts its own procedures in accordance with article 19(1).

[86] Ibid, art 27(2).

[87] Ibid, art 18 1.(b).

[88] Ibid, art 18.

[89] Committee on the Elimination of Discrimination against Women, *Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination Against Women*, 41st sess, Agenda Item 2, UN Doc CEDAW/C/2008/II/4 (16 May 2008) 5-6.

[90] Ibid. In February 2007, the initial reports of 12 States parties were more than 10 years overdue. The Committee requested those States to submit their report by a specified date. The initial report of four States parties namely Haiti, Liberia, Dominica and Guinea-Bissau were more than 20 years overdue. All four countries were requested to submit their initial and combined due reports by March 2008. All except for Dominica submitted their report. In January 2009 the Committee adopted Concluding Observations on Dominica based on available information and dialogue with Dominican representatives at its forty-third session. The main concern raised by the Committee was Dominica's non-compliance with its reporting obligation under article 18 which 'creates serious obstacles to the effective monitoring of the implementation of the Convention at the national level.' See CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women – Dominica*, 43rd sess, UN Doc CEDAW/ C/DMA/CO/AR (26 January 2009).

[91] CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, 56th sess, UN Doc A/56/384 (20 September 2001), Annex 1, Rule 53(1).

parties do not submit their reports on time and many have several reports overdue.[92] The lack of an effective enforcement mechanism is a major weakness of CEDAW.[93]

The Committee makes general recommendations to all States parties based on its consideration of State party reports and other information.[94] The general recommendations refer to 'specific provisions of the Convention and on the relationship between the Convention Articles and what the Committee described as 'cross-cutting themes'.[95] The Committee draws insights from NGOs[96] and other actors such as the UN Economic and Social Council, adding legitimacy to its interpretations.[97] The Committee has proclaimed that CEDAW is a living document because its interpretation is continuously being expanded to accommodate development in international law.[98]

Articles 1–5 of the Convention provide for the general obligations of States parties to eliminate all forms of discrimination against women, to explicitly guarantee equality between men and women and to ensure that women do in fact enjoy and exercise full equality with men.[99] Articles 6–16 focus on the particular areas of women's lives such as trafficking in women, political and public life, education and employment. Articles 17–24 identify monitoring mechanisms. Articles 1–5 will be examined in depth in section 2.2 and articles 13, 14, 15 and 16 in section 2.3.

---

[92] CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women*, 13th sess – UN Doc A/49/38, para 16.

[93] Linda M Keller, 'The Impact of States Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (2014) *Michigan State Law Review* 309, 317.

[94] CEDAW, above n 70, arts 21 and 22.

[95] United Nations, above n 70.

[96] Ibid.

[97] Article 22, 'actors' also include specialised agencies whose functions fall within the ambit of CEDAW. General Recommendation 21, para 34. The Committee's interpretative role has attracted criticisms as imposing on State parties new obligations to which they did not agree to be bound; see Luisa Blanchfield, *CEDAW: Issues in the U.S. Ratification Debate* (Congressional Research Service, 2011) 6.

[98] CEDAW, General Recommendation No. 28 (47th sess, 2010), para 2. The Committee stated – 'The Convention is a dynamic instrument that accommodates the development of international law. Since its first session in 1982, the Committee on the Elimination of Discrimination against Women and other actors at the national and international levels have contributed to the clarification and understanding of the substantive content of the Convention's articles, the specific nature of discrimination against women and the various instruments required for combating such discrimination.'

[99] Article 4 requires States parties to put in place temporary special measures (TSMs) to expedite the achievement of equality between men and women, where inequalities are identified. Article 4 is not discussed here because TSMs will not be proposed as a mechanism that should be employed in relation to women's land rights in Tonga. To do so would be highly controversial and may hinder the achievement of equal land rights for women.

4.4 General obligations of CEDAW (Articles 1–5)

Article 1 defines 'discrimination against women' as:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

The application of this definition to land rights requires that the law not only guarantees equality between men and women, but also prohibits discrimination against women in land law. Further, women must not only have the opportunity to acquire or inherit land on an equal basis with men but must actually do so and have recourse to take legal action if their land rights are violated. Article 1 encompasses not just discrimination based on 'sex', which is 'the biological differences between men and women', but also discrimination based on gender.[100] The Committee has defined 'gender' to mean:

> socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences resulting in hierarchical relationships between women and men and in the distribution of power and rights favouring men and disadvantaging women. This social positioning of women and men is affected by political, economic, cultural, social, religious, ideological and environmental factors and can be changed by culture, society and community.[101]

[100] CEDAW, General Recommendation 28, para. 5. See also Facio, above n 82, 7.
[101] CEDAW, General Recommendation 28, para 5.

In the Committee's view, countries that have not guaranteed equality and prohibited discrimination in accordance with article 1 of the Convention are in serious violation of women's rights and of CEDAW.[102]

Article 2 establishes the framework for the subsequent substantive articles 6 to 16 of the Convention.[103] The CEDAW Committee stated that it 'considers article 2 to be the very essence of the obligations of States parties under the Convention.'[104] The Committee highlighted the crucial elements of article 2, these being that States parties must:

- condemn discrimination against women
- in all its forms
- to pursue by all appropriate means, and
- without delay
- a policy of eliminating discrimination against women.[105]

The Committee has explained that the phrase 'in all its forms' covers all discrimination even if not specifically identified in the Convention.[106] This is important because there is no specific article dealing with land rights for women generally, although there are indirect references in articles 13 and 15, and specific references to the land rights of rural women in article 14, and the rights of women to matrimonial property under article 16.[107] States must also take action immediately, and no justification for delay is permissible, including lack of financial and technical resources.[108] State parties must

[102] CEDAW, General Recommendation 21, para 12. UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Singapore, 49th sess, UN Doc CEDAW/C/SGP/CO/4 (10 August 2011) paras 11–2; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Tuvalu, 44th sess, UN Doc CEDAW/C/TUV/CO/2 (7 August 2009) paras 13–14; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Liberia, 62nd sess, UN Doc CEDAW/C/LBR/CO/6 (7 August 2009) para 13; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Mauritania, 38th sess, UN Doc CEDAW/C/ MRT/CO/1 (11 June 2007) paras 13–4; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Sri Lanka, 48th sess, UN Doc CEDAW/C/LKA/CO/7 (8 April 2011) paras 14–5; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Cook Islands, 39th sess, UN Doc CEDAW/C/ COK/CO/1 (10 August 2007) paras 10–1.

[103] General Recommendation 28, para 30.

[104] General Recommendation 28, para 41.

[105] Article 2.

[106] General Recommendation 28, para 15.

[107] General Recommendation 28, paras 8 and 24.

[108] General Recommendation 28, para 29.

seek international assistance to meet such needs if they do not have the resources to implement reforms.[109] Article 2(a) also requires States parties to guarantee in their constitution, as the supreme law, the fundamental right to equality between men and women and to prohibit any form of discrimination on the grounds of sex and gender.

None of the Pacific island countries which have ratified or acceded to CEDAW has amended its Constitution to fully reflect the definition of discrimination in article 1 and to prohibit both direct and indirect discrimination by both public and private actors.[110] Fiji has the most comprehensive equality and non-discrimination provisions (Article 26 of the *Constitution of the Republic of Fiji* 2013). It prohibits direct and indirect discrimination by public actors and some (but not all) private actors including business owners. Fiji's Constitution also prohibits discrimination on the grounds of race, culture, ethnic or social origin, colour, place of origin, sex, gender, sexual orientation, gender identity and expression, birth, primary language, economic or social or health status, disability, age, religion, conscience, marital status or pregnancy.[111]

If Tonga acceded to CEDAW, the Tongan Government would be required to amend the Constitution to include in the Declaration of Rights an explicit guarantee of substantive equality between men and women, in order to meet the requirements under articles 1 and 2. The Constitution would also be required to prohibit explicitly all forms of discrimination, both direct and indirect, against women in accordance with article 1. The Constitution would also be required to guarantee equal land rights for women by giving women the right to apply for a tax and town allotment and to inherit land on an equal basis with men rather than after preference has been given to sons.

However, a constitutional guarantee of gender equality and non-discrimination is insufficient because it does not ensure equal outcomes. To achieve substantive equality in land rights, a State party must ensure that the law not only provides for equal land rights between men and women, but that women do in fact hold land on an equal basis with men. States parties are obliged to remove all social, cultural and legislative barriers

[109] General Recommendation 28, para 29.
[110] See for example the Committee's Concluding Observations on Cook Islands, Samoa, CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Vanuatu, 38th sess, UN Doc CEDAW /C/VUT/CO/3 (11 June 2007) and Tuvalu.
[111] *Constitution of the Republic of Fiji* (2013), art 26 (3)(a).

that prevent women from claiming their rights to own land and from having such lands registered in their names. States parties must ensure, for example, that women are not pressured by men or any other person to forfeit their right, or that their decision-making power and benefits from their own land, are limited.[112] There must also be no discriminatory conditions imposed on women's landholding rights such as that they must remain unmarried, chaste, and not found guilty of fornication or adultery.[113] The Land Act and all other legislation must be amended accordingly. The government must also put in place policies that ensure that women are not hindered in their efforts to acquire land including eliminating stereotypes against women holding land. Lack of financial and technical resources cannot be used as a reason to avoid obligations created by accession to CEDAW, as States parties are responsible for seeking assistance as required. However, it is notable that the Tongan government has stated it will make reservations to article 2 in the event Tonga acceded to CEDAW.

Article 5 requires States parties to:

> take all appropriate measures
>
> (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.[114]

[112] Golam Sarwar, Rezaul Islam and Monzoor Shahorin, *Women's Rights to Land in Bangladesh: Roles, Limitations and Transformation* (Unnayan Onneshan – The Innovators, Centre for Research and Action on Development, 2007) 6.

[113] The 2008 Royal Land Commission, discussed in Chapter 6, recommended that conditions imposed on widows and daughters be repealed.

[114] Article 5(b) is specific to the stereotypical role of women in the family.

Article 5 addresses the social and cultural behaviours which underlie all forms of discrimination against women, a problem which persists in all states regardless of socio-economic development.[115]

CEDAW stands out from other human rights conventions because 'it goes further by recognising the importance of culture and tradition in shaping the thinking and behaviour of men and women and the significant part they play in restricting the exercise of basic rights by women.'[116] States parties' implementation of this article has shown that changing social and cultural behaviour is an enormous challenge.[117] The prevalence of unequal land rights, for example, between men and women in many societies, is based on social and cultural views of the roles of women. In Vanuatu, although the Supreme Court held in 1995 in the case of *Noel v Toto* that any customary rule which discriminated against women was unconstitutional, the CEDAW Committee expressed its concerns that customary law is still being used to deny women access to land and inheritance.[118] In its concluding observations to Tuvalu, Vanuatu and Cook Islands, the Committee advanced the universalist position on culture – that culture is dynamic rather than static.[119] The Committee invited those countries 'to view culture and tradition as dynamic aspects of the country's life and social fabric and therefore subject to change.'[120] The Committee made such a statement in respect of those countries because it noted the persistence of strong adverse cultural traditions which prevent the advancement of women's rights in those countries.

In 2009, when the Tongan parliament debated whether Tonga should accede to CEDAW, article 5 was heavily criticised because it requires States parties to abolish certain cultural traditions. Although the current government announced in 2015 that it

[115] General Recommendations 3 (6th sess, 1987) and 19, para 23 (11th session, 1992). CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination against Women* - Botswana, 45th sess, UN Doc CEDAW/C/ BOT/CO/3 (26 March 2010) para 23; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Timor Leste, 54th sess, UN Doc CEDAW/C/ TLS/CO/1 (7 August 2009) paras 27–8; UN CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Fiji, 46th sess, UN Doc CEDAW/C/ FJI/CO/4 (16 September 2010) para 20. See also Raday, above n 82, 69; Lastarria-Cornhiel, above n 83, 6.

[116] General Recommendation 21 (13th sess, 1994).

[117] General Recommendation 3 (6th sess, 1987).

[118] CEDAW /C/VUT/CO/3, above n 110.

[119] CEDAW /C/VUT/CO/3, above n 110, CEDAW/C/ COK/CO/1, above n 102, CEDAW/C/TUV/CO/2, above n 102.

[120] CEDAW/C/ COK/CO/1, above n 102.

would take steps towards accession to CEDAW, sparking heated public debate between supporters and opponents of accession to CEDAW, no written material captures the cultural relativist views of opponents as well as the minutes of the parliamentary debate in 2009. The Prime Minister at the time explained that the government fully supported women's rights where they are in accordance with the law and the Constitution, Tongan traditions, culture and family life.[121] He went on to explain (to parliamentarians with little knowledge on CEDAW) that the purpose of the Convention is to abolish all provisions in the Constitution, the law and all cultural traditions that *differentiate* between men and women.[122] He concluded that such would be the result if Tonga accedes to CEDAW.

The former Prime Minister asserted that if the people of Tonga understood the potential impact of CEDAW on the Tongan Constitution, the laws and the culture, the unity of the family and the Christian faith, they would not accept it.[123] He emphasised the perceived ramifications of accession on local law and culture and omitted to explain that the Convention only applied to those aspects that discriminate against women. He specifically commented on the potential impact of accession on Tongan land law. The land law, he noted, is more than a century old and has existed unchanged during that time. Less than a hundred people, he claimed, were in favour of changes to the then existing land law.

> This is what will happen if we ratify the Convention, the land law must be changed to give equal rights of inheritance to daughters and sons. The same will happen to hereditary estates. The same will happen to the succession to the throne. We believe, in accordance with our culture and the Bible, that the head of the family is the man. That too must be removed.[124]

[121] Legislative Assembly of Tonga, *Minutes of the Parliamentary Session*, above n 80. Parliamentary sessions. These are conducted in the Tongan language. The Prime Minister at the time was Dr Feleti Sevele.

[122] The Prime Minister mistakenly referred to article 1 rather than article 2..

[123] The government (Cabinet) had not carried out any nation-wide consultation but proceeded on the basis of an assumption that the people would think the same as those in Cabinet.

[124] The Prime Minister repeatedly used the word 'tukufakaholo' which means 'tradition' rather than 'the law' when he referred to inheritance by daughters and sons, inheritance of hereditary estates and succession to the throne.

This was a subtle way of explaining the impact of article 5 on land law so as to give the impression that repealing laws that are discriminatory against women would have a devastating effect on Tongan society. The reference to the Bible and the impact ofarticle 5 on Christian values was certain to appeal to religious conservatives. Feminists have argued that when culture and religion are infused, both must be examined individually before scrutinising any link between the two. Women in predominantly Christian societies such as Tonga, where religion has been used together with culture by cultural relativists, cannot ignore the religious arguments.[125] As Hilary Charlesworth has pointed out, 'we need to understand that religious traditions reflect an historically conditioned interpretation of scripture, influenced by social, economic and political circumstances.'[126] Women must scrutinise the claims by re-examining the sources of those claims.[127]

The former Prime Minister's statement that no previous attempt had been made to change land law in relation to women's rights is inaccurate. Remarkably, and unknown to many, a petition by a group of women was made to parliament in 1930 to allow women to inherit their father's land if they had no brothers.[128] This occurred just three years after the Land Act came into effect. In 1983 a Royal Land Commission was established to review the land laws.[129] The Commission received feedback from citizens proposing that women should have equal land rights with men.[130] While parliament was debating whether Tonga should accede to CEDAW, another Royal Land Commission established in 2008 was conducting its inquiry on land practices. The 2008 Commission later reported that the majority of the people who participated in its public inquiry wanted more land rights for women.[131] The government at the time either had no knowledge of the issues raised in the past regarding land, or was deliberately ignoring past concerns.

[125] Hilary Charlesworth, 'No Principled Reason' (November 1997) *Eureka Street* 24.
[126] Ibid, 24, 29. See also Raday, above n 82, 72–3; Nancy Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1994) 25 *Columbia Human Rights Law Review* 49, 92.
[127] Charlesworth, above n 125, 24, 29–30.
[128] Clare Bleakley, 'Women of the New Millennium: Tongan Women Determine Their Development Direction' (2002) (14)1 *The Contemporary Pacific* 134.
[129] As discussed in Chapter 6 under "Mandate of the Commission".
[130] As discussed in Chapter 6 under "Mandate of the Commission".
[131] Royal Land Commission, *Final Report*, vol 1 part 1 (Royal Land Commission, 2012) 10–11.

4.5 Specific provisions on land rights under CEDAW

There is no specific article on land rights in international human rights conventions including CEDAW.[132] Although CEDAW does not explicitly provide for equal land rights for all women, it does so indirectly in articles 13, 14, 15 and 16, each one containing provisions which are related to property rights including land rights.[133] Articles 13 to 16 are typically addressed by the Committee in its concluding observations to States parties under a targeted heading named 'Economic Empowerment of Women' linking women's land rights directly to their economic rights.[134] However, in its concluding observations to Tuvalu in 2009, the Committee commented on discrimination against women in land ownership under the Constitution in a general section on discriminatory laws in Tuvalu.[135]

Articles 13 to 16 guarantee equal social and economic rights, particularly in relation to property including land, credit and finance, and income-generating activities and business opportunities. As Nitya commented, '[w]omen's access to and control over land can potentially lead to gender equality alongside addressing material deprivation. Land is not just a productive asset and a source of material wealth, but equally a source of security, status and recognition.'[136] Women must have the financial means and the autonomy to provide for themselves and their family. In order to achieve that they must have equal access to resources especially land. One of the strongest statements that has been made by the Committee in relation to discriminatory land law is that:

> [t]here are many countries where the law and practice concerning inheritance and property result in serious discrimination against women. As a result of this uneven treatment, women may receive a smaller share of the husband's or father's property at his death than would widowers and sons. In some instances,

[132] Jeremie Gilbert, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 18 *SUR International Journal on Human Rights* 115; Wickeri and Kalhan, above n 83, 16, 18, 19.
[133] Sam Brotman, Emma Katz, Jessie Karnes, Winter West, Anne Irvine and Diana Daibes, *Implementing CEDAW in North Africa and the Middle East – Roadblocks and Victories* (Middle East and North Africa (MENA) Report) (CEDAW, 2008), 9.
[134] Asli Demirguc-Kunt, Leora Klapper and Dorothe Singer, 'Financial Inclusion and Legal Discrimination Against Women Evidence from Developing Countries' (Policy Research Working Paper 6416, The World Bank, April 2013), 9, 23–4.
[135] CEDAW/C/TUV/CO/2, above n 102, 3. The Committee expressed concerned that the Tuvaluan Constitution (s 27 (3) (e)) allows for discrimination against women in land law.
[136] Nitya Rao, *Women's Access to Land: An Asian Perspective* (UN Women, 2011) 1.

> women are granted limited and controlled rights and receive income only from the deceased's property. Often inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.[137]

The Committee's comment confirms that Tonga's land law contravenes CEDAW.

4.5.1 Social and economic rights

Article 13 requires the guarantee of equal social and economic rights between men and women including the right to family benefits and 'to bank loans, mortgages and other forms of financial credit'.[138] Family benefits include inheritance and the equal distribution of property among family members on death. Additionally, land is the primary collateral for mortgages, bank loans and financial credit of a high amount. In order to use land as collateral, a person must be the registered title holder of that land.[139] All countries in the Pacific which have ratified or acceded to CEDAW have limited women's land rights thus the ability of women to access credit loans is impaired. Those countries are not fulfilling their obligation to guarantee women's social and economic rights. Likewise, women in Tonga cannot hold tax and town allotments, and therefore they cannot access bank loans and mortgages through that avenue. Women can lease land, but unless it is leased to them by a close relative for a small rental as prescribed by the Land Act, they will have to pay a high price for a piece of land. They can be a co-borrower with a male relative who holds either a tax or town allotment, or a leasehold, but this co-joining of women with men in accessing finance is discriminatory reflecting stereotypes that women cannot manage land and finance.[140]

4.5.2 Rural women

Article 14 addresses discrimination against rural women highlighting their less advantageous position compared to urban women and 'the significant roles which rural

[137] CEDAW Committee General Recommendation 21, para 35.
[138] Article 13(b).
[139] Demirguc-Kunt, Klapper and Singer, above n 134, 7, 23.
[140] Ibid, 6. Women in Pakistan cannot obtain a loan without two male guarantors who are not relatives and they themselves cannot be guarantors. This is a bit of a random example – ie Pakistan I would just delete and leave it at ibid

women play in the economic survival of their families.'[141] States parties must, among other things, ensure that women in rural areas are able, on a basis of equality with men, to have access to employment opportunities;[142] are able to access credit and loan facilities;[143] are treated equally in land and agrarian reform;[144] and have adequate housing with water, electricity and sanitation and access to transport and communications.[145] Rural women in Tonga make up 37.9% of the total population.[146]

Rural women face discrimination on two fronts. First, they face spatial discrimination, or urban/rural discrimination, due to the 'the physical geography that separates them from centres of power'.[147] Their isolation and inability to access central planning facilities mean they often do not participate in development planning that affects them. Living in a rural location compounds with their gender to heighten the discrimination they face.[148] Secondly, patriarchal norms and gender stereotypes are often strongest in rural areas which lead to a greater denial of their rights.[149] This was noted by the CEDAW Committee in the case of Tuvalu, Samoa and Fiji[150] but is also very relevant to Tonga, particularly on the outer islands where gender stereotypes persist.

In addition, as found in a study on Vanuatu, negative cultural practices and stereotypes that are harmful to women persist in rural areas because enforcement of the law and legal literacy are weak.[151] Rural women live in poor living conditions, lacking basic

[141] CEDAW, art 14(1). See also Naela Gabr, *General Recommendation on Article 14 of CEDAW* (CEDAW) <http://www.ohchr.org/Documents/HRBodies/CEDAW/30thAnniversaryCEDAW/GeneralRecommendationOnArticleNaelaGabr.pdf>; WomenWatch, *Facts & Figures: Rural Women and the Millennium Development Goals* <http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>; Pruitt, above n 84, 346.
[142] Art 14 2(e).
[143] Art 14 2(g).
[144] Art 14 2(g).
[145] Art 14 2(h).
[146] Tonga Department of Statistics, *2011 Population Census* (Government of Tonga, 2012).
[147] Pruitt, above n 84, 346, 390.
[148] Ibid, 346, 350.
[149] Ibid, 346, 351, 378.
[150] See CEDAW/C/TUV/CO/2, above n 102 (para 47); CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Samoa, 52nd sess, UN Doc CEDAW /C/WSM/CO/4 -5 (9-27 July 2009); CEDAW/C/ FJI/CO/4, above n 115 (para 26).
[151] Concluding Observations on Vanuatu, paras 24, 25, 38 and 39. See also General Recommendation 19, para 21; CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Sierra Leone, 38th sess, UN Doc CEDAW/ C/SLE/CO/5 (11 June 2007) para 36; CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women – Egypt*, 45th sess, UN Doc CEDAW/ C/EGY/CO/7 (5 February 2010) para 17. Lastarria-Cornhiel, above n 83, 6.

amenities such as sanitation, electricity and water supply, leading to poor health.[152] They also lack access to transport and communications;[153] '[r]ural women in developing countries comprise the poorest and least favoured group.'[154] Rural women's lack of access to health care is a problem in all Pacific island countries which have submitted reports to the CEDAW Committee.[155] The World Health Organization's 2011 report on Tonga, although not providing any sex-disaggregated data, stated that '[p]eople who live on the outer islands, where access to education and health care is poor, transport costs are high and income opportunities few, have higher rates of hardship.'[156]

Rural women constitute the majority of the workforce in the agricultural sector in a number of countries.[157] Most women in the agricultural sector however do not own the land that they use[158] and are compensated less, if any, for their work.[159] This is also the case for rural women in Tonga.[160] Women in Tonga do participate in agricultural activities but there is no data as they are considered 'part of the informal economy'.[161] Economic globalisation which has led to changing socio-economic patterns has

[152] General Recommendation 24, para 28.
[153] General Recommendation 24, para 28. General Recommendation 27, paras 12 and 24. CEDAW/ C/SLE/CO/5, above n 152, paras 34–5.
[154] Food and Agricultural Organization, *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) – Guidelines for Reporting on Article 14* (FAO, 2005) <http://www.fao.org/ docrep/008/y5951e/y5951e00.htm>.
[155] See the CEDAW Committee's Concluding Observations on Fiji (paras 32–33); Tuvalu (paras 47–48); Papua New Guinea (para 45); Samoa (para 34); Cook Islands but not specific to rural women (paras 34–35) and Vanuatu (paras 36-37).
[156] World Health Organization, *Western Pacific Country Health Information Profiles – Tonga* (Author, 2011) 422-37, 423. See also Japan International Cooperation Agency, *Country Gender Profile – The Kingdom of Tonga* (Author, 2010), 18, 21 and 23. The latter report noted that in rural areas the economic survival of families depends on women's 'contribution to the household income' (at page 23). Thus, the concern of article 14 in that regard is true in the Tongan context.
[157] UN CEDAW Committee, *Concluding observations of the Committee on the Elimination of Discrimination against Women - Fiji*, 16 September 2010, CEDAW/C/ FJI/CO/4, para 34. There is no gender, sector and rural/urban disaggregated data available on the participation of rural women in agriculture in Tonga but reports have pointed out that women do participate in agriculture. See Government of the Kingdom of Tonga, 'Tonga National Statement to the Commission on the Status of Women on its Fifty Sixth Session', delivered on 27 February 2012, 1; Government of Tonga, *Tonga. A Situation Analysis of Children, Women and Youth* (United Nations' Children's Fund, 2006), 32-34. Papua New Guinea also lacks such data and has been requested by the CEDAW Committee to provide such information, see Concluding Observations on PNG, paras 30-40.
[158] CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Tanzania, 11 July 2008, UN Doc CEDAW/ C/TZA/6 (11 July 2008), para 131.
[159] CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Yemen, 41st sess, UN Doc CEDAW/C/ YEM/6 (1 July 2008) para 375.
[160] Japan International Cooperation Agency, *Country Gender Profile – The Kingdom of Tonga* (Author, 2010), 18.
[161] Ibid.

compounded rural women's disadvantaged situation.[162] Given Tonga's level of development, its small land size and the unique aspect of its land law which gives only men the right to hold residential and agricultural land, article 14 is relevant to all women in Tonga regardless of whether they live in the rural or urban area.[163]

4.5.3 Rights of women in the family

Article 15, together with articles 9 and 16, are aimed at protecting the rights of women in the family.[164] Article 15(1) provides that women must be treated equally with men before the law. Article 15(2) provides that men and women must have 'equal rights to … administer property'. In relation to this provision, the Committee stated that:

> When a woman cannot … have access to financial credit, or can do so only with her husband's or a male relative's concurrence or guarantee, she is denied legal autonomy. Any such restriction prevents her from holding property as the sole owner and precludes her from the legal management of her own business or from entering into any other form of contract. Such restrictions seriously limit the woman's ability to provide for herself and her dependents.[165]

Women's lack of right to own land limits their opportunity to participate in income-generating activities.[166] First, it hinders access to credit facilities because financial institutions prefer (and sometimes require) registered title to land as collateral.[167] Second, it impedes their ability to take part in decision-making in their household, in their community and at the national level because they may have to defer to the legal owner of the land.[168] Additionally, as well as infringing on women's autonomy the studies have shown that economic empowerment of women ultimately leads to the

---

[162] Food and Agriculture Organization of the United Nations, *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) – Guidelines for Reporting on Article 14* (FAO, 2005) <http://www.fao.org/docrep/008/y5951e/y5951e00.htm>11.

[163] In fact, in the travaux preparatoires to article 14, it was suggested that article 14 should apply to all women in the developing world but some viewed that it would be 'politically unpalatable'. See Pruitt, above n 84, 353-4.

[164] General Recommendation 21.

[165] 'General recommendations', above n 12

[166] CEDAW/C/ TLS/CO/1, above n 115, para 42.

[167] Demirguc-Kunt, Klapper and Singer, above n 134, 7.

[168] Sarwar, Islam and Shahorin, above n 112, 12; Legal Literacy Project – Tuvalu National Council of Women, *Tuvalu NGO Submission to the United Nations Universal Periodic Review*, 3rd sess, July 2008, para 6; Rao, above n 137, 8–9.

overall economic development of the country.[169] Although the main concern of CEDAW is gender equality on the basis that women should have the same rights as men[170] economic studies on the effects of women's land rights show that it is in the economic development interests of a country to guarantee equal land rights to women.[171]

Article 16(1)(h) provides that States parties must give '[t]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.' All women, including married women in Tonga, can acquire and dispose of leaseholds without consent from a husband or father. A person can lease up to 10 tax allotments and up to five town allotments.[172] In the event of the dissolution of a marriage, CEDAW requires that the law provides for equal division of matrimonial property between spouses.[173] In Tonga, matrimonial property is defined as property acquired during marriage.[174] The Divorce Act provides that each spouse keeps the property that he or she brings to the marriage.[175] Since women cannot own or inherit land, a wife is upon divorce, limited to claiming improvements to the land during marriage. A woman enters marriage therefore on an unequal footing with her husband. If the marriage is dissolved, she has no right to the land despite her contributions to the maintenance and development of the family home.

Division of matrimonial which, as observed in Chapter Three, is based on each party's contribution would contravene CEDAW. However, one would argue that equal ownership may not always yield a fair result as demonstrated in the case of *Afeaki and Nakao* (2002). The applicant wife invested substantially in improving her home during the marriage which lasted only a few years. The court ruled that the husband was not entitled to an equal share of the property (the improvement to the house only as the land was the wife's leasehold acquired before marriage) because the applicant used her own

[169] Demirguc-Kunt, Klapper and Singer, above n 134, 3. See also Joseph Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W W Norton, 2012).
[170] Pruitt, above n 84, 358-9.
[171] This is especially the case in Tonga where women make up 49.7% of the population. Demirguc-Kunt, Klapper and Singer, above n 134, 2. FAO, above n 162, 12.
[172] Land Act, s 61.
[173] General recommendation 21, para 28.
[174] General Recommendation 21, paras 30-3.
[175] Divorce Act, s 15.

money to improve her home. If the court held otherwise it would have been an unjust result for the applicant.

Division of land after divorce would also be unworkable under Tongan land tenure because of the law of inheritance. The sole inheritance system through the eldest son precludes the rest of the landholder's children from any right to the family land. This thesis argues that the rights of all children to the family home should be provided for in the law. Thus, a spouse should only have equal right to the matrimonial home if it was acquired during marriage as is the current law. Together with article 2, the CEDAW Committee considers article 16 to be paramount to the objects and purpose of the Convention.[176] The Committee stated that '[r]eservations to articles 2 and 16 perpetuate the myth of women's inferiority and reinforce the inequalities in the lives of millions of women throughout the world.'[177]

Conclusion

Tonga has ratified just two of the ten core international human rights instruments, the CERD and the CRC. Neither has been incorporated into domestic law which is reflective of the absence of a strong human rights culture, despite there being a Declaration of Rights in the Constitution since adoption in 1875. Tonga's participation in two Universal Periodic Review cycles was an opportunity to test its commitment to human rights. It is evident from the two reviews that Tonga's record of guaranteeing and promoting human rights and especially women's rights is inadequate. A number of State representatives specifically commented on women's land rights in Tonga and recommended that Tonga accede to CEDAW and guarantees equal land rights for women. However, this is not as easy task because Tongan society is polarised politically with the recent success of the pro-democracy movement in the last General Election in November 2014 which is seen by conservatives as a challenge to the rule of the monarchy and the nobility. The differing views on accession to CEDAW, advancing gender equality and achieving women's land rights in Tonga, highlights a complex

[176] UN Women, Convention on the Elimination of All Forms of Discrimination Against Women, *Reservations to CEDAW* <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>.
[177] United Nations, *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)*, UN GAOR, 53rd sess, Supp No 38, UN Doc A/53/38/Rev.1. (14 May 1998) 49.

matrix of political conservatism and patriarchal attitudes. Although CEDAW does not expressly provide for women's land rights generally, the Committee has explained that the Convention does cover all forms of discrimination including land rights of all women, not just rural women. Because of the persistence of cultural norms and attitudes which negatively affect women, the next chapter explores the interplay of law and culture in Tonga and analyses how it operates to maintain discrimination against women in land rights.

Chapter Five – Law and Culture

Introduction

Tonga's legal system, together with the cultural traditions and beliefs prevalent in the community, pose considerable challenges to the realisation of equal land rights for women. This chapter examines the interplay between law and culture and illustrates how the cultural relativist arguments, explored in Chapter Two, operate to fix land law in its current form and frustrate the recognition of women's land rights. When the Constitution came into force in 1875, it secured the place of the traditional leaders in the highest positions in government, in particular, in the executive and the legislature. The Constitution coupled with the Hereditary Lands Act 1882 also gave traditional leaders, and their direct descendants, personal control over most of the habitable land in the country.

Consequently, although Tongan customs and traditions are not recognised by the Constitution as forming part of the laws of Tonga, traditional leaders have exceeded their legislative authority and exercised their traditional authority over matters of government. The place of traditional leaders in government and their powers in relation to land (formalised by the Constitution), make land reform untenable without their consent. Although the reform proposed in this thesis does not affect the ruling class' political position or the rights of its members as estate holders,[1] the ruling class nevertheless relies on cultural traditions to maintain the status quo.[2] The current framework of land tenure is equated (inaccurately) with traditional land tenure so that law and culture mutually reinforce each other thus posing a challenge to reform.

This chapter has three parts. Part I provides an overview of the structure of government and illustrates how that structure poses challenges to legislative reform. Within that structure, traditional leaders, the monarch and the nobility, are given special powers and privileges by the Constitution. Part II examines the custom of *fahu* which has been relied on by opponents of women's land rights and women's rights in general to argue

[1] 'Ruling class' here refers to both the royal family and the nobility.
[2] The concept of 'class' did not exist prior to the 20th century. Political and social class formation was a natural consequence of the political order established under the Constitution.

that women in Tonga already have superior status to men. Finally, Part III examines the notion of the 'ideal' Tongan woman in which Tongan women are presented as 'more virtuous' than other women. This part seeks to demonstrate how women's rights, framed as being contrary to the 'ideal' Tongan woman, are opposed to tradition. Accordingly, Part III examines those claims and illustrates how they operate to perpetuate discrimination against women, frustrating reform particularly in relation to land.

Part I – Constitutional, Legislative and Governmental Barriers

5.1 Governmental structure

The government structure established by the *Act of Constitution of Tonga* ('Constitution') poses challenges to land reform measures in favour of women because ultimately power continues to reside in the monarch. The modern state was founded when the Constitution came into force on 4 November 1875.[3] The Constitution created a constitutional monarchy under the reign of King George Tupou I and his heirs. The Constitution established the three 'distinct' branches of government:

- the Executive consisting of the King, Privy Council and Cabinet
- the Legislature called the Legislative Assembly (Parliament) and
- the Judiciary.[4]

That structure was amended in 2010 to accommodate political reforms which began in 2004[5] whereby the King purportedly devolved part of his executive authority to Cabinet and removed himself and the Privy Council from the Executive.[6] The 2010 constitutional reforms marked a first step in the political reform of Tonga's government

[3] The enactment of the Constitution was effected by a parliament consisting of chiefs (who were not the only members of the new parliament established by the Constitution itself – the new parliament, called the Legislative Assembly, was to have an equal number of People's Representatives) although the prevailing view is that the Constitution was granted by King George Tupou I to the people. See Sione Latukefu, 'The History of the Tongan Constitution' (Paper presented at the Convention on Tongan Constitution and Democracy, Nuku'alofa, 24-27 November 1992) 88-89.

[4] One of the amendments was the removal of the word 'distinct' from the original clause (clause 33, now clause 30), which clearly reflected the doctrine of separation of powers. Despite that the Supreme Court has held that clause 30 of the Constitution does reflect that doctrine. See *Lali Media Group Ltd v 'Utoikamanu* [2003] TOSC 14.

[5] These reforms were in response to calls for reform since the 1960s.

[6] Guy Powles, *The Tongan Monarchy and the Constitution: Political Reform in a Traditional Context* (State, Society & Governance in Melanesia Discussion Paper 2014/9) (Australian National University, 2014) 3. This so-called reform, although in accordance with constitutional amendments in 2010, is misleading because the King has retained all of his powers including his executive powers although he no longer takes part in 'active decision-making'. The pre-2010 Privy Council was headed by the King and consisted of all Cabinet ministers, two governors of the islands of Vava'u and Ha'apai 'and any others whom the King shall see fit to call to his Council.' After the 2010 constitutional amendment, Privy Council is 'composed of such people whom the King shall see fit to call to his Council.' (cl 50(1) as amended by s 12, *Act of Constitution of Tonga (Amendment) (No. 2) Act 2010*.

structure towards a more democratic model. However, the monarch still holds considerable political powers.[7]

The King is no longer directly involved in the running of government but he has retained all his powers, prerogative and other express powers, under the Constitution. One of his prerogative powers is the appointment of the Prime Minister and Cabinet Ministers.[8] The King's other express powers include the power to:

- convene and dissolve parliament at any time (cl 38)[9]
- enter into treaties with other countries as long as such treaties are in accordance with Tongan laws (cl 39)
- assent to Bills passed by parliament (cl 41)
- appoint, with the consent of the Privy Council, members of the judiciary (cl 85 and 86) who hold office 'during good behaviour' (cl 87)
- grant to the nobles and *matapules* (ceremonial attendants of the King and nobles), at pleasure, one or more estates to become their hereditary estates (cl 104).[10]

The King's power to assent to Bills is absolute so that if he does not assent to a Bill there is no other procedure whereby that Bill can become law.[11] This means that the King can veto any legislation which would guarantee equality. The Constitution also provides that only the members of the nobility in parliament can discuss and vote upon any matter relating to the King and royal family or the titles and estates of the nobles.[12] Consequently, any change to the titles and estates of the King and nobles must be initiated and resolved by them.

[7] Alisi Taumoepeau and Guy Powles, 'Constitutional Change in Tonga' (Paper presented at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu, 10-12 September 2008) 3-4.
[8] *Act of Constitution of Tonga*, cls 50A and 51(2). Another prerogative power is conferring titles of honour on any person (cl 44).
[9] The King also appoints the Speaker of parliament, *Act of Constitution of Tonga*, cl 61.
[10] This power was not in the original version of the Constitution. It was added to the clause which dealt only with the prohibition of the sale of land by the King, the chiefs and the people (cl 109 of the original version of the Constitution in 1875).
[11] *Act of Constitution of Tonga*, cl 79. If the King withholds his assent to a Bill, parliament cannot discuss that Bill until the following session (cl 68).
[12] Ibid, cl 68.

The Legislative Assembly is unicameral with a total of 30 members.[13] Nine members are nobles who are elected by and from amongst themselves.[14] Seventeen members are the People's Representatives elected by the rest of the voting population.[15] The 26 elected members of parliament, both nobles and peoples' representatives, elect the Prime Minister from among them. The Prime Minister is then appointed by the King.[16] Following his appointment the Prime Minister chooses his Cabinet ministers from the members of parliament, who are then appointed by the King.[17] Before 2005, all Cabinet Ministers were appointed by the monarch at pleasure, from outside parliament.

Prior to the 2010 reforms, the Executive was headed by the Privy Council which was composed of the King, Cabinet and the two governors of the islands of Vavaʻu and Haʻapai.[18] Except for the King, all members of the Privy Council sat as members in Parliament. They would then, together with the nobles' representatives, greatly outnumber the nine people's representatives. The 2010 reforms removed the Privy Council from the Executive but the Privy Council still remains a constitutional body with an advisory role to the King.[19] Its members are appointed by the King and 'composed of such people whom the King shall see fit to call to his Council.'[20] The constitutional amendments of 2010 did not address potential conflicts which may arise when the King in Privy Council exercises his executive powers. Such a conflict arose on

[13] Ibid, cl 59 (as amended by s 18 of the *Act of Constitution of Tonga (Amendment) (No.2) Act 2010*).

[14] There are about 36 hereditary noble titles but there are only 28 nobles. Some hold more than one title. See Taumoepeau and Powles, above n 7, 2. A report prepared by the Ministry of Education in Tonga asserted that nobles in parliament represent the people in estates. It was critical of how people viewed People's Representatives in Parliament (rather than the nobles) as representing the voice of the people. This was an unqualified view although it reflects the political outlook of former conservative governments. See Seuʻula Johansson Fua, Tuʻilokamana Tuita, Siosiua Lotaki Kanongataʻa, and Koliniasi Fuko, *Cultural Mapping, Planning and Policy: Tonga* (Secretariat of the Pacific Community on behalf of the Ministry of Education, Women's Affairs and Culture, Government of Tonga, 2011) 13-4.

[15] The four unelected Cabinet ministers are appointed by the King upon the recommendation of the Prime Minister (*Act of Constitution of Tonga*, cl 51(2)(a)).

[16] Ibid, cl 50A.

[17] Ibid, cl 51(a). The Prime Minister can select his ministers from both the People's Representatives and the Nobles' Representatives. The Prime Minister can also nominate four ministers who were not elected into parliament to be appointed by the King (*Act of Constitution of Tonga* (as amended), cl 51(2)(a)).

[18] Ibid, cls 50 and 54. In pre-2010 constitutional amendments, the governors were chosen from among the nobles.

[19] Ibid, cl 50(1).

[20] Ibid, cl 50(1). The Privy Council retained the power to appoint the Attorney General and the judges of the Court of Appeal and the Supreme Court (cls 31A, 85 and 86 respectively as amended by ss 8, 26 and 27 respectively of the *Act of Constitution of Tonga (Amendment) (No.2) Act 2010)*. This is an unconstitutional move because Privy Council, which is no longer part of the Executive, is given a key Executive role: in particular, appointing the government's principal legal advisor. Peter Pursglove, *Review of the Constitutional Provisions Relating to the Judicial Structure of the Kingdom of Tonga*, (Ministry of Justice, Tonga, 2014).

25 June 2015 when the Privy Council overrode a decision by the Prime Minister that the government will accede to CEDAW. Entering into treaties is one of the constitutional powers of the King, but is an Executive function.[21]

After the 2010 amendment to the Constitution, Cabinet must consult with the King on any decision to ratify or accede to a treaty, a step which Cabinet did not follow prior to announcing that Tonga would accede to CEDAW.[22] However, instead of suggesting to Cabinet that it should consult the King before taking any further action, the Privy Council directed Cabinet to revoke its decision to take steps towards accession. The authoritarian tone of the Privy Council decision reflects a total disregard for the authority of the government. The Privy Council's approach to this issue reflects a similar approach to that taken when the Constitution was amended in year 2010 to give the appearance of a political reform towards democratisation but simultaneously ensured that a democratically elected government would remain powerless.[23] It seems unlikely that the constitutionality of the Privy Council decision will be challenged by the government in court alongside a political refusal to accept equal rights for women through accession to CEDAW.

5.2 Role of ruling class in defining culture

Until November 2014 Cabinet ministerial positions were held by members of the ruling class and their affiliates. This same group also made up the majority of the members of parliament. Previous governments reinforced the view that women are held with high regard.[24] The traditionalist leaders, some of whom were elected into parliament and others who gained their positions through their nobility status, assumed the authority to speak not only on behalf of the country but also on behalf on women on a matter that is important to women. This was stated in a press release by the Press Secretary and

[21] It is an executive function because the King cannot personally enter into an international agreement with another state except through the government.
[22] Privy Council Decision 42/2015 of 25 June 2015.
[23] Commenting on the current state of the Constitution, Pursglove stated:
'The present Constitution of Tonga can lay claim to being the most poorly structured and drafted Constitution of any Country (sic) in the Commonwealth. When one considers the justifiable pride felt by Tongans everywhere in the First Constitution handed down by King George Tupou I in 1875 this is truly a very sad state of affairs in a Kingdom that has one of the world's oldest surviving written constitutions.' Pursglove, above n 20, 3.
[24] Legislative Assembly of Tonga, *Minutes of the Parliamentary Session*, 17 September 2009. Parliamentary sessions are conducted in the Tongan language.

Political Adviser to the Prime Minister, informing the public of why the government decided against accession to CEDAW in September 2009.[25] He stated the accession of CEDAW would lead to:

> the overthrow of our unique land tenure system … The Legislative Assembly and Government are looking after the interests of Tonga as a sovereign nation with a unique culture and way of life, the basic components of which should be maintained.[26]

It is a common feature of patriarchal societies that the men see it as their natural responsibility to decide what is in the best interests of women.[27]

5.3 Role of the Minister of Lands

The Minister of Lands ('Minister') has an important political role in women's land rights. Although needing to operate within the legislative framework he has oversight over all land matters.[28] The Minister has the authority to grant land with the consent of Cabinet, but the Land Act *(Cap 132)* provides that if the land that is to be granted is on a hereditary estate,[29] the Minister must first consult the estate holder.[30] Most of the habitable lands in Tonga are hereditary estates of the King and the nobility on which smaller tenures such as allotments and leases exist. The Land Act also provides that an estate holder cannot refuse to allow a person to occupy land already granted by the Minister.[31] Despite the legislative limitation on the rights of an estate holder, the cultural view is that estate holders have unfettered rights over their estates and, in practice, estate holders act accordingly.[32]

---

[25] 'Tonga not ready for CEDAW', *Matangitonga* (online) 1 October 2009 <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=9&num=5388>.
[26] Ibid.
[27] Janet Rifkin, 'Toward a Theory of Law and Patriarchy' (1980) 3 *Harvard Women's Law Journal* 83; Faustin Kalabamu, 'Patriarchy and Women's Land Rights in Botswana' (2006) 23 *Land Use Policy* 237, 238.
[28] There has never been a female Minister of Lands.
[29] As opposed to government land, in which case the Minister of Lands has sole authority subject to approval by Cabinet, *Land Act* (1927) ss 2(a) and 19(3).
[30] Ibid, s 19 (1).
[31] Ibid, s 34.
[32] This will be discussed further in the next chapter.

Although a person can apply directly to the Minister of Lands for an allotment or a leasehold of land, if the land in question is on a hereditary estate, she (only in relation to a lease) or he (in relation to all other kinds of land tenures) is obliged by custom to approach the estate holder first as a matter of courtesy and respect. In accordance with custom also, a person is expected to give gifts in various forms such as money, goods or both to the noble in exchange for a portion of land.[33] Although there is no customary law in Tonga as observed in Chapter Four, people are expected to show respect to the estate holder by approaching him with gifts in exchange for a section of land.[34]

Although not prescribed by law, the Minister 'is the representative of the Crown in all matters concerning the land of the Kingdom'.[35] The position of Minister has historically been, and is currently, held by a noble. Despite the apparent conflict of interest (since nobles have greater rights to land) no-one has, to date, challenged the impartiality of the role they play. In part, this may be because of cultural beliefs that only members of the royal family and the nobility possess inherent leadership qualities. Therefore, the position of the Minister only befits a noble or a member of the royal family.[36] Such beliefs are however contested and some people have challenged the nobles' refusal to distribute land or agree to the registration of land already occupied and developed by residents who have lived on their estates for some time.[37]

Moreover, the belief that only members of the ruling class are fit to hold the position of Minister of Lands has primarily emanated from the ruling class themselves and thus cannot be detached from political considerations. In 2010, in addition to the constitutional reforms, an amendment was made to the *Government Act (1903)* to mandate that the position of the Minister of Lands must be held by a noble during the period between the 2010 general elections and the end of the parliamentary session in November 2014.[38] This was an unusual amendment because land was not one of the

[33] However this would depend on the relationship between the applicant and the estate holder. An estate holder could give land to close friends and relatives or even non-relatives who live on his estate.
[34] The monetary value of such gifts depends on what they are, size and/or quantity.
[35] Land Act, s 19(1).
[36] Sione Latukefu, 'The Definition of Authentic Oceanic Cultures with Particular Reference to Tongan Culture' (1980) 4(1) *Pacific Studies*, 65; Powles *The Tongan Monarchy*, above n 6, 16.
[37] Ron Crocombe, *Land Tenure in Tonga, The Process of Change: Past, Present and Future* (Discussion paper for the Tonga Council of Churches Seminar on Land Tenure and Migration, 21–266 September 1975, Nuku'alofa) (South Pacific Social Sciences Association, 1975).
[38] *Government Act (Cap 3)*, s 22 as amended by the *Government (Amendment) (No. 2) Act 2010*, s 2.

areas marked for coverage by the constitutional reform of 2010.[39] The government at the time gave no explanation as to why the amendment was made but an answer may be inferred from the comments of the 2008 Royal Land Commission in relation to a draft Bill proposed by the nobles to transfer the power to grant allotments from the Minister of Lands to the nobles themselves:

> The Bill now proposed would appear to complete the process started in 1915 in removing the Minister and Cabinet from the decision-making power over the grant and leasing of allotments. What appears to have brought this move from the Nobles was the change in the political system to be effective from the November 2010 General Elections onward … The perceived concern from the Nobles is that the land tenure will be politicized and Nobles may lose control over their estates. There is a possibility under the new political system that Cabinet would not have any Nobles to look after the interests of hereditary estate holders and the Minister of Lands may not be a Noble as has been the tradition in the past.[40]

This view reflects the perception among the ruling class that when its members hold influential government positions their decisions are not affected by their political outlook, whereas if such positions were to be held by commoners, commoners will use those positions for their own political ends. In the same way, the purported democratic constitutional reforms of 2010 sought to safeguard certain offices from being *politicised*,[41] by making them accountable only to the Privy Council. Instead, the reforms have created a State which is more absolute than in the pre-reform period.[42] Interestingly, the government elected in November 2014 (led by a Prime Minister who was the leading pro-democracy advocate) has chosen a noble to be the Minister of Lands despite the expiration (prior to the November 2014 general elections) of the requirement to choose a noble for that position. The new Prime Minister may have

[39] Guy Powles, *Political Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (Comparative Law Journal of the Pacific – Monograph XV, 2012) 1, 16.
[40] Royal Land Commission, *Final Report* (Royal Land Commission, 2012) 237-8.
[41] This term is often used to imply possible influence by opponents to the status quo.
[42] Pursglove, above n 20, 3.

decided it was necessary to maintain this long-standing tradition as a compromise although the pro-democracy movement has broken with tradition on other matters.[43]

5.3.1 Problems with acquiring land on hereditary estates

Over the years, many commoners have complained about the problems involved in acquiring land on some nobles' hereditary estates.[44] Such complaints were ignored by the 1983 Royal Land Commission but were acknowledged and reported on by the 2008 Royal Land Commission.[45] The latter reported on the difficulties faced by people when asking a noble for land on his estate. The difficulties included a long waiting period for the estate holder to reach a decision.[46] In some cases an unregistered occupant was living on the land with the approval of the noble. Although the noble had promised to register the land in the occupant's name it was never completed.[47] In other cases the noble had granted the same allotment to two or more different applicants and then revoked one or other of the grants.[48] Some people complained of the demand or expectation to give money before they could be granted an allotment.[49] The

[43] Not every long-standing tradition was ceded by the new government. It chose a commoner to be the governor of the island of Ha'apai which is another position traditionally held by a noble.

[44] Crocombe, 'Land Tenure in Tonga', above n 37, 15. No particular noble has been named and it is important to emphasise that not every noble may have been the subject of such complaints. It is worth pointing out that King George Tupou I was concerned about the estate holders' powers when he stated to the Legislative Assembly 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 their tax lands to foreigners, and Tongans will become strangers in this land; but this is my mind concerning the same. (Elizabeth Wood-Ellem, Submission to the Royal Land Commission (2011) in Royal Land Commission, above n 40, Appendix 4, 9)

[45] Discussion of the mandates of the two Land Commissions are made in Chapter Six. The report of the first Royal Land Commission is appended to the final report of the second Royal Land Commission, see Royal Land Commission, *Report of the Royal Land Commission 1983 on its Review of all Practices, Usages and Laws Relating to Land* (Royal Land Commission, 1985), 29.

[46] Royal Land Commission, above n 40, 61-2.

[47] Ibid, 62.

[48] Ibid, 63.

[49] Ibid, 64 and 81.

Commission recommended that receiving or demanding money by a noble become an offence.[50]

The 2008 Commission recommended that an estate holder or the Minister of Lands (in regard to Crown land) must give his decision to an applicant within 12 months and in default will be presumed to have consented to the application.[51] The Commission also recommended that where a person (man) has lived on an allotment for more than one year, with the approval of the noble, that person should have that land registered in his name.[52] Further, the Commission recommended that where a noble had made a second grant of the same land to two different applicants, the first grant must prevail over any subsequent grant.[53] During the 2008 Commission inquiry, the nobles proposed a Bill to give them power to grant leases and allotments on estates instead of the Minister of Lands but this was rejected by the 2008 Commission.[54] Some of the nobles have also opposed Tonga's proposed accession to CEDAW.[55] They have argued that maintaining the status quo is in the best interests of the country, but they have demonstrated they are not able to make just and fair decisions regarding land distribution.

5.4 Constitution as an iconic document

The constitutional powers of the King and the nobles in government are supported by community perceptions of the Constitution as 'iconic', and, therefore, cannot or should

[50] However, there are other times when the Commission provides a misleading view of estate holders' rights contrary to Land Act. For example, in response to public concerns about the need for estate holders to distribute more land from their estates, the Commission stated that it did not want to remove estate holders' discretion as to accept or reject an application for an allotment from his estate. The Land Act on the other hand does not give such discretion to estate holders. As pointed out in Chapter Three, the power to grant an allotment lies only with the Minister of Lands. Even if an estate holder does not approve an application for an allotment from his estate the Minister can still make the grant to the applicant. The reasons why the Commission may take contradictory stances on the powers of estate holders have been explained in Chapter Five. It tried to soften its position on estate holders in some parts of its report but was tough in others. Even the Commission could not free itself from cultural taboos regarding criticising the nobility.

[51] Royal Land Commission *Final Report*, 62.

[52] Ibid.

[53] Ibid, 63.

[54] Ibid, 6-7.

[55] When the proposal came before the Legislative Assembly (Parliament) in 2009 and when the current government announced in 2015 that it would accede to the Convention.

not, be changed.[56] Tongans are proud that their Constitution is one of the oldest in the world and applaud the role of the Constitution in ensuring Tonga's independence from Western colonisation.[57] The Constitutional Electoral Commission (CEC) described community perceptions of the Constitution as follows:

> Many know that it is one of the world's oldest surviving written constitutions. Almost all will add that it protects traditional Tongan society and most will also profess to an almost instinctive distrust of any substantial changes on the ground that they will erode that very protection.[58]

The CEC however did not qualify this statement. The significance that is attached to the Constitution by the people is also inconsistent with the reality that it can and has been amended a number of times since it came into force in 1875, although until 2010 the governmental structure had remained the same.[59] A significant amendment, for example, from both a human rights and constitutional law perspective, was the 2003

[56] Such perceptions cannot be said to be universal since a certain segment of society are pro-democracy, activists and supporters. It also cannot be said that such perceptions have declined because according to some history scholarship, there was opposition to the Constitution right from the beginning when it was promulgated. Notwithstanding those two factors, reverence for the Constitution has been maintained by the ruling classes since the beginning of the 20th century when the position of the monarchy was no longer challenged by former rival chiefly families.

[57] Latukefu, 'The History of the Tongan Constitution', above n 3, 89; Guy Powles, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynesiénne* 111, 114; Constitutional and Electoral Commission, *Final Report* (Constitutional and Electoral Commission, 2010), 2. What many Tongans are not aware of is that Hawaii's Constitution, on which part of the Tongan Constitution was modelled, did not prevent Hawaii from being annexed by the United States of America, which suggests that other factors, as determined by the imperial powers, were at play. The particular Hawaiian Constitution was the *Kingdom of Hawaii Constitution of 1852* (Latukefu, at p 89). Latukefu also wrote that the ultimate fate of the country in the 19th century was determined in Europe, with the Tongan people having little role in it.

[58] A Commission established by the *Constitutional and Electoral Commission Act 2008* to 'examine, enquire into and report on such proposals or matters relating to constitutional or electoral reform', and to the Privy Council and the Legislative Assembly, s 4. The recommendations made by CEC were meant to be implemented in the 2010 reforms but many of its recommendations were disregarded by the Sevele government. Constitutional and Electoral Commission, above n 57, 2; Powles, 'Political Reform Opens the Door', above n 39, 5 and 8.

[59] I C Campbell, 'The Quest for Constitutional Reform' (2005) 40(1) *Journal of Pacific History* 91-104; I C Campbell, 'Progress and Populism in Tongan Politics' (2006) 41(1) *Journal of Pacific History* 49, 93; Powles, 'Political Reform Opens the Door', above n 39, 84; Powles, 'Testing Tradition in Tonga', above n 57, 111, 122-123. Further, unlike the written constitutions of other Pacific island states, which require a special procedure for amendment, the Tongan constitution can be amended like any other legislation – that is, after it has been passed three times by parliament and assented to by the King (cl 79). Vanuatu's Constitution, for example, can only be amended if 'it is supported by the votes of no less than two-thirds of all the members of Parliament at a special sitting of Parliament at which three-quarters of the members are present.' (*Constitution of the Republic of Vanuatu*, s 85) Similarly Samoa's Constitution requires a two-thirds majority of all members of Parliament at the third reading of the amending Bill and provided that a period of 90 days had lapsed between the second and third reading of the Bill (*Constitution of the Independent State of Samoa 1960*, s 109).

amendment by the legislature of clause 7 which guarantees the right to free speech and of the press.[60] The amendment added 'cultural traditions', as one of several new limitations to the right to free speech.[61] Prior to the 2003 amendment, clause 7 read:

> It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press forever but nothing in this clause shall be held to outweigh the law of slander or the laws for the protection of the King and the Royal Family.

The *Act of Constitution of Tonga (Amendment) Act 2003* added the following new sub-clause to clause 7:

> (2) It shall be lawful, in addition to the exceptions set out in sub-clause (1), to enact such laws as are considered necessary or expedient in the public interest, national security, public order, morality, cultural traditions of the Kingdom, privileges of the Legislative Assembly and to provide for contempt of Court and the commission of any offence.

The amendment Act was challenged in the Supreme Court of Tonga in the landmark case of *Taione v Kingdom of Tonga*[62] on the basis that rights could not be lawfully constrained by 'cultural traditions'. The plaintiffs were editors of newspapers that had been critical of government. The Supreme Court held that the rights guaranteed under the Constitution were adopted from the English common law and outlined the leading case law on the right to free speech and its limitations. It held that because 'cultural traditions' are not a common law restriction on the right to free speech and of the press, the phrase could not be added to clause 7. In addition, the Court did not accept evidence

[60] The *Act of Constitution of Tonga (Amendment) Act 2003*. The amendment was also made in conjunction with two new pieces of legislation, the *Media Operators Act 2003* and the *Newspaper Act 2003*.

[61] The amendment came as a result of government's growing dissatisfaction with two newspapers the *Kele'a* and the *Taimi 'o Tonga*, which were affiliated with the pro-democracy movement and were publishing articles that were critical of government. See John Maloney and Jason Reed Struble, 'A New Day in Tonga: The Judiciary, the Reformers and the Future' (2007) 11(2) *Journal of South Pacific Law* 151.

[62] 374/2004 SC Tonga <http://www.paclii.org/to/cases/TOSC/2004/47.html>. The amendment was also made in conjunction with the enactment of two new pieces of legislation, the *Media Operators Act 2003* and the *Newspaper Act 2003*.

submitted by the government that 'in 1875 the Constitution was adopted on the basis that it was underpinned by the fundamental values of the Tongan people.'[63] The Court was right in reaching that conclusion because the Constitution does not recognise cultural traditions as part of the laws of Tonga.[64]

The Constitution entrenches the position of the monarch and of the nobles (as estate holders and as members of parliament), although the Constitution does not provide for the observance of the traditional authority of either the King or the nobles. They must rule in accordance with the Constitution. If the court had accepted cultural traditions as a new limitation on the right to free speech, the implications of such a decision would have reached beyond the operation of clause 7. Such a limitation would have paved the way for traditionalists (who strongly favour maintaining the *status quo*) to push for the formal recognition of cultural traditions as part of the laws of Tonga.

Some people misconstrue the principle of crown ownership of all land to mean that all land personally belongs to the monarch. A case in point is *Tukuafu v Latu*[65] which emphasises the limitations of the powers of an estate holder, and in that case the King, over his own estate.[66] In *Tukuafu v Latu*, the court held that once an allotment is granted and registered by the grantee, the monarch (and nobles in the case of nobles' estates) cannot evict that person or take that land and give it to someone else. In addition, in the case of *Tuita v Minister of Lands,*[67] it was held that the King could not grant land personally without the consent of the Privy Council as required by clause 116 of the

[63] As per Webster CJ.

[64] This is in contrast to the constitutions of other Pacific island countries such as Fiji, Tuvalu and Vanuatu, which explicitly recognise cultural values, customary law, or customs and traditions as either forming the principles of the Constitution or part of the laws of the country. See, for example, the Preamble to the *Constitution of the Republic of Fiji*; the *Constitution of Tuvalu*, 'Principles of the Constitution' sections 3 and 6; and the Preamble to the Constitution of the Republic of *Vanuatu* and sections 7(h) and 30.

[65] *Tukuafu v Latu* (unreported) Tonga Court of Appeal, CA 5/2005 (15 August 2005) <http://www.paclii.org/to/cases/TOCA/2005/12.html>.

[66] Although there is no definition of the two terms in the Constitution or the *Land Act*, it can be inferred from the Court's analysis in *Tukuafu v Latu* that a life interest is not an allotment because it is only intended for the use of the grantee for his lifetime and that the land would return to the estate holder upon the grantee's death. A hereditary life interest refers to an allotment because it has to be registered and would become hereditary in accordance with the law on succession to an allotment.

[67] [1926] TLR 1.

Constitution[68] clarifying the principle that all land is vested in the Crown 'for and on behalf of the government.'

Many Tongans value the Constitution because it maintains traditional social order.[69] However, such a view is idealistic and does not reflect the reality and complexity of the social order. The traditional social order was drastically changed by the influence of the Wesleyan Methodist missionaries beginning in the 1830s and culminating in the new governmental system that was established in 1875 to accommodate the leaders' vision. Powles argued that what is now considered Tongan as codified in the Constitution is a combination of (modified) traditional, Western and Christian values.[70] Despite the major constitutional changes of 2010, the Constitution still retains its 'iconic' status in the community. For example, in the public debate over accession to CEDAW in the first half of 2015, opponents to accession argued it would require a change to Tongan culture and traditions, an argument favouring those who wish to maintain the status quo.

[68] This clause has been repealed but is provided for in s 11 of the *Land Act*. Perhaps it would not have made any difference if the King took the matter to the Privy Council since the members of the Privy Council were appointed by the King. It remains to be seen though as the Privy Council is no longer the highest Executive body, whether s 11 of the *Land Act* will be amended to reflect other amendments to the Constitution in 2010 whereby the King's Executive powers purportedly devolved on the Prime Minister and Cabinet.

[69] Powles, 'Testing Tradition in Tonga', above n 57, 129.

[70] Ibid, 120-122.

Part II – Cultural Barriers to Land Law Reform

5.5 Superior customary status of women

Critics of women's land rights and women's rights in general have asserted that women in Tonga are cherished and are held in high regard.[71] Consequently, it is argued, increasing women's rights has no substantive benefit or value because women in Tonga are *in fact* considered superior to men already. The special status of women is viewed by many as compensating for women's inequality in land rights.[72] This position rests on the superior status acknowledged by the concept known as *fahu.* In traditional ceremonies *fahu* attached to a woman who is the eldest paternal aunt (*mehikitanga*) over her brother's children. A number of scholars from different fields have written about the custom but few refer to its origin although Latukefu, identifies *fahu* as a custom adopted from Fiji.[73] Gifford suggests that the custom was probably adopted during the 15th century through the marriage of a Fijian chief to the sister of the highest Tongan chief the *Tu'i Tonga*.[74] Regardless of its origins it is an important part of Tongan tradition. The strength of this argument and its links to women's land rights is discussed below.

5.6 Overview of the custom

In Tongan traditional custom, the eldest paternal aunt (*mehikitanga*) and her children are superior in status to her brother's children both male and female.[75] If there are younger paternal aunts, they are accorded the same status but priority begins from eldest to youngest. The brother's children are taught at an early age of their inferiority to their

[71] 'Leading Women Divided Over CEDAW' *Taimi Online* (online), 20 October 2010, <http://www.taimionline.com/articles/178>.

[72] Melenaite Taumoefolau, 'Women Issues in Tonga' (Paper presented at the Panel of the NZ Federation of Graduate Women, Auckland, 3 October 2009) 1; Clare Bleakley, 'Women of the New Millennium: Tongan Women Determine Their Development Direction' (2002) (14)1 *The Contemporary Pacific* 134, 134.

[73] See Chapter Three, fn 23.

[74] Edward W Gifford, *Tongan Society* (Bernice P Bishop Museum, 2002), 80-81. The Fijian equivalent is *vasu* and is still being practised in some parts of Fiji.

[75] Primarily, as for example, if she is still alive when her brother's child is the subject of the main event, such as a wedding or birthday, she exercises her ceremonial status and is acknowledged with the highest honour. Secondarily, her children can be fahu if she has passed away, or cannot attend an event for some reason. Scholars have used the term 'mehekitanga' instead of 'mehikitanga' for paternal aunt. The former appears to be an old pronunciation of the term but the latter is currently the most widely used term.

paternal aunt.[76] The latter has the privilege of naming her brother's eldest male and female child. She can call on her brother's children to help with household chores or run errands for her. In family events, such as weddings, birthday celebrations or funerals of any of the brother's children, she is referred to as the *fahu* and her status is marked by traditional gifts such as *ngatu* and mats prepared by her brother's wife.[77]

At the funeral of a brother's child, the *fahu* performs a particular role and is also honoured with traditional gifts. She wears a different type of mat around the waist to show that she is superior to the deceased and that she is the *fahu*. Any of her children both female and male can represent her as the *fahu*.[78] If she or any of her children cannot be present at a family celebration, she can be represented by any of her younger sisters.[79] When the *mehikitanga* dies her role passes down to the children beginning from eldest female child. At her own funeral, her brother's children have certain roles and wear a certain type of mat to denote their inferior status. In some extended families the *fahu's* authority extends not merely to her brother's children but also to her brother's grandchildren depending on that extended family's tradition.

The paternal aunt is not just a recipient of gifts and honour. She herself is expected to give traditional gifts such as fine mats and tapa to her brother's child. A woman who does not give back to her brother's children is likely to become the subject of gossip for taking and not giving back.[80] Today families choose other forms of gifts, in addition to or in replacement of traditional gifts. These include cash or other Western goods depending on the family's financial state.[81] The value of the goods exchanged ranges from inexpensive to very expensive.[82] Some of the most noteworthy modifications in the custom today are captured on the internet and in the social media where the most creative gifts and order of ceremonies are shared with a wider audience. This is an example of the influence of changing socio-economic patterns on the *fahu* custom.

[76] Taumoefolau, above n 72, 3.
[77] Ibid, 3, 10; Kerry James, 'Gender Relations in Tonga 1780 to 1984' (1983) 92(2) *Journal of the Polynesian Society* 233, 236.
[78] Emeline Faaumu-Niutei, *Tonga Custom "Fahu"... A Perspective* (24 September 2013) <http://prosperity-link.com/tongancustomfahuaperspective-en>.
[79] Ibid. The representation is only for that particular family event and not permanent.
[80] Ibid.
[81] Kerry James, 'Cutting the Ground from Under Them? Commercialization, Cultivation, and Conservation in Tonga' (1993) 5(2) *The Contemporary Pacific* 215, 217.
[82] Ibid.

The paternal aunt is believed to possess mystical powers which she can use to curse a brother's child if she is angered either by that child, her brother or her sister-in-law.[83] It is believed that the curse will one day manifest in some serious misfortune to the child and will remain with the child unless he or she is forgiven by the paternal aunt.[84] The wife of the brother avoids crossing her sister-in-law (her children's *mehikitanga*) in case the latter puts a curse on any of her children. The mystical power of the *mehikitanga* is however no longer as central to Tongan belief systems and some families bypass the actual *fahu* in favour of another person. The introduction of Christianity has also had an impact on the custom by reclassifying the woman's mystical power as superstition.[85] While it is difficult to ascertain the strength of the custom of *fahu* it does remain and is utilised as a reason to maintain women's unequal land rights.

5.7 Limitations of the superior status argument

Because the *fahu* custom (or being a *mehikitanga*) is relational, its practice depends on the existence of two factors – first that a woman has a brother and second that her brother (or brothers) has a child. Therefore, a woman who does not have a brother, or has a brother who does not have any children, cannot enjoy the status of a *fahu*. The argument that Tongan women as a whole enjoy a superior status ignores this reality. A woman or girl might not be a *mehikitanga* but she herself may have one. She is inferior to her paternal aunt but may not have anyone over whom to exercise that traditional honorific status. Other personal and individual situations complicate the reality of the custom. For example, a woman may not allow her paternal aunt to exercise customary authority over her but exercises such authority over her own brother's children:

> A strong woman can manipulate the ideologies and relationships so that she repudiates the claims of her husband's sisters while at the same time successfully claiming from her own brothers perhaps even against the wishes or interests of their wives. She is, therefore, using traditional ideologies of proper behaviour

[83] Taumoefolau, above n 72, 3.
[84] Ibid.
[85] James, 'Gender Relations', above n 77, 233, 239.

due to her while in other contexts rejecting the same pattern of behaviour required of her.[86]

A woman may also exercise such autonomy from her own *mehikitanga.* These situations may be due to factors such as the woman's wealth, education or career.

Further, a brother and his family can choose whether or not to honour his eldest sister with the customary rites due to her. In some instances a younger sister is chosen over the eldest if the younger sister has been able to exercise influence in the family due to a successful career, is better educated or has acquired wealth.[87] Sometimes a brother may choose his own *mehikitanga* to have customary authority over his children. This may or may not occur with the sister's agreement. This also means that it is the paternal grand-aunt of the child and not the paternal aunt who holds the honorific status at major family events.[88] Some families have invited members of the royal family or nobility to be the guest of honour in a celebration (who would then be honoured instead of the *mehikitanga* or *fahu)* in a funeral wake.[89] Such instances may occur even with the concurrence of the real *fahu* depending on the relationship between that family with the royal family or nobility.[90]

The observance of the custom within a family also depends on the good relations between the sister and her brother and his family. Disagreement over the *fahu* at funerals, in particular, has been a common cause of family disputes.[91] This may occur when the real *mehikitanga* is overlooked in favour of another. The dispute is typically between the *mehikitanga* and her children on one side and her brother and his family on the other. Other disputes occur between contenders to the *fahu,* that is, between sisters (and their children) themselves or between the immediate paternal aunt of a child and the paternal grand-aunt. It is not possible to contain the disputes within families because they occur at events with a number of attendants such as weddings, birthday celebrations and funerals. The contenders to the *fahu* may publicly state that they are the

[86] Ibid, 233, 238.
[87] Ibid, 233, 236.
[88] The paternal grand-aunt being the *fahu* is a recognised part of the custom (called *lohuloa*) and is practiced by many families.
[89] James, 'Gender Relations', above n 77, 233, 237; Faaumu-Niutei, above n 78.
[90] Faaumu-Niutei, above n 78.
[91] Fua, Tuita, Kanongata'a and Fuko, above n 14, 18.

real *fahu* who have been rejected in favour of someone else. Thus, although the custom is proudly observed by many Tongans, it is also the cause of much dissatisfaction at the family level.[92]

The custom of *fahu* has caused division in many families and no family is immune from such disputes often over material goods. However, there is little academic discussion on the usefulness of *fahu* in contemporary society. The custom is not criticised directly by most women perpetuating its practise.[93] However, members of the younger generation share their views on the *fahu* custom in the social media, in a myriad of ways not captured in scholarly publications.[94] Yet even the younger generations embrace Tongan culture in its contemporary form. Although many complain about the custom of *fahu* there is no evidence that its practice is declining.[95]

The above discussion of the *fahu* custom reveals its limitations as compensation for unequal land status and as a genuine cultural argument for women's inequality in law. Women are perceived to be superior to men in certain situations, however, they are simultaneously inferior to other woman in different situations. Additionally, both male and female children of the brother are considered inferior to their paternal aunt. The brother's wife is also bound in the subservient role of her children because she prepares the traditional gifts for her sister-in-law. The custom places women in positions where they are the cause of family disputes and subject to criticism by others and therefore at an even more disadvantageous position in their private life. The *fahu* custom is only observed at the family level. Only a woman's brother's children respect her because she

[92] Ibid; Faaumu-Niutei, above n 78.
[93] 'Leading Women', above n 71.
[94] One social medium posted a picture of a celebrity sitting up inside a coffin with the caption 'when you have the wrong fahu', depicting how a deceased person would not agree with his chosen *fahu*. The post attracted a number of comments mostly finding it humorous and agreeing with it. However, the forum also promotes Tongan culture.
[95] Other factors such as external migration have impacted the custom. Some families who live overseas and have adopted a Western lifestyle place more emphasis on the person on whose day it is rather than honouring someone else (Taumoefolau, above n 72, 3). On birthdays, for example, the family may spend money on the birthday child and invite only that child's friends as guests. In addition, in Western societies Tongans learn that the idea that a person is considered inherently superior over another is unacceptable. On the other hand, external migration has not stopped families from ensuring that the *mehikitanga* or the *fahu* (in case of funerals) must be present in family celebrations. It is common for women to travel out of country whether overseas from Tonga or vice versa to fulfil their traditional responsibility at the request of their brother's family. Travel expenses, especially if the *fahu* is travelling overseas from Tonga, would be paid for by her brother and his family. The preservation of custom by the Tongan community overseas may relate to marking their cultural identity and not just the belief in the mystical power of the *mehikitanga*.

is their *fahu*. No woman is honoured outside of her family because she is the *fahu* and therefore she is still susceptible to harassment and abuse by men.

Although *all* women are said to have this superior customary status, that status does not translate into an enjoyment of human rights in general nor land rights in particular. Some landholding men have given land to their sisters' sons out of respect for their sisters. However, this does not amount to a *right* to land and not all women have had or will enjoy this benefit. For example, some women may not have good relations with their brothers or the family land in question may be a small area only. Many women suffer under the *fahu* custom and suggesting that it delivers equality to women perpetuates discrimination against women. As observed above, not all women can be a *fahu*, and, even for those who can, the benefits of being a *fahu* do not extend beyond the family into the other areas of women's lives. Women are not superior to men in law and many other customary traditions also treat women as inferior to men.

Part III – The 'Ideal' Tongan Woman

5.8 Defining the ideal Tongan woman

The 'ideal' Tongan woman is represented as virtuous, dignified and dutiful. She knows her place in the family and knows she has no right to the family home, which will be inherited by her eldest brother. This section will examine whether this 'ideal' Tongan woman stereotype accords with either the historical reality or the rapidly changing role of women in Tongan society in the current era. Feminist scholars have written about the 'ideal' woman and gender roles in many societies.[96] Girls and young women are inculcated with model behaviour while having little say in the socialisation process until they themselves become agents or otherwise in perpetuating those norms.[97] Implicit in the representation of the ideal woman in developing countries is the stereotyping of women in other societies especially Western women. Women in developing countries, as idealised in their respective societies, are represented as more chaste, dutiful and with more self-respect than Western women:

> Some third world thinkers believe that their societies offer a different version of "woman" than that of so-called Western societies … These so-called traditional women, reinscribed in the annals of the nation, are usually chaste, self-sacrificing, and long-suffering. We are told ad nauseam that they have no concern for rights, only for duties, and these duties involve taking care of a husband and children.[98]

The above passage is strikingly similar to the following description of the ideal Tongan woman:

> But as far as the attitude of the mother towards her, she is extremely strict. One of the most important duties of the Tongan fa`ē (mother) is to keep her daughters chaste and pure for their wedding day. If they turn out not to be, she is the one who is largely blamed and disgraced by society. So she instils in her

[96] Radhika Coomaraswamy, 'Are Women's Rights Universal? Re-Engaging the Local' (2002) 3 *Meridians: Feminism, Race, Transnationalism* 1, 6-7; Taumoefolau, above n 72.
[97] Taumoefolau, above n 72, 1.
[98] Coomaraswamy, 'Are Women's Rights Universal?', above n 95, 6-7.

> daughter the values of *anganofo*, a word used of women only to mean habitually staying at home, submissive, dutiful, and not inclined to rebel. She soon learns that women, as opposed to men, should be more *mamalu* or *molumalu*. These words are defined in the dictionary as solemn, impressive, majestic, imposing, stately, and dignified.[99]

The emphasis is placed on the roles of women and their responsibilities to the family. Each multi-dimensional role of a woman or girl either as mother, sister, sister-in-law, daughter in the home, has its own duties, responsibilities and taboos in relation to other members of the family.[100] The ideal Tongan woman, as it is described above, is promoted in cultural institutions such as in the home, in schools and it is reinforced in the media, and in the public sphere including at the government level as discussed above.[101] The model of the ideal woman suggests Tongan women have a monopoly on propriety which sets them apart from women in other societies. Women in all societies including women in the Western world have been (or are) still being subjected to similar model behaviour.[102]

The ideal Tongan woman is home-bound, dedicated to the family and does not participate in decision-making at the community and national level.[103] This restricts the roles of women to a static description that reflects the realities of women in a particular (past) period. Its known origin can be traced to the influence of the Wesleyan Methodist missionaries in the first half of the 19th century and the *Code of Vava'u 1839*, which explicitly stated that the woman is the homemaker and she is 'to clothe her husband' while the husband is to 'work the land' and is the provider.[104] The literature is sparse on the roles of the missionaries' wives in Tonga who undoubtedly, as they did in Fiji,

---

[99] Taumoefolau, above n 72, 2.
[100] Ibid.
[101] See also Fua, Tuita, Kanongataʻa and Fuko, above n 14.
[102] Joanne Meyerowitz, 'Introduction' in Joanne Meyerowitz (ed) *Not June Cleaver: Women and Gender in Postwar America, 1945–1960* (Critical Perspectives on the Past) (Temple University Press, 1994)', 1–2.
[103] See for example the views of 'Ainise Sevele, wife of a former Prime Minister Dr Feleti Sevele. 'Ainise Sevele is also the deputy president of the Catholic Women's League. She stated, '[w]e know our place in society … Women have a big voice in the running of the family, but the man has to make the final decision. In any other country they will challenge that, but in Tonga we don't. We were born into it and we know the benefits of just having one master in the household.' Peter Munro, 'The Friendly Islands are No Friend to Women', *Sydney Morning Herald* (Sydney) 11 July 2015 <http://www.smh.com.au/nsw/the-friendly-islands-are-no-friend-to-women-20150709-gi8ora.html>.
[104] However some might argue that this provision codified traditional gender roles at the time.

introduced Western values of housekeeping.[105] Indeed, a brief history of the first formal school for girls established by the Wesleyan missionaries reveals the influence of missionary families on gender roles in Tonga.[106]

The first group of women to attend formal school joined the Wesleyan Church's boys' school, Tupou College.[107] A brief history provided by the school states that the main purpose of allowing female students to attend Tupou College 'was to prepare educated and trained good mothers and wives'.[108] In 1873 the girls were prevented from attending school because the Reverend Shirley Baker had concerns about the behaviour of the pupils.[109] Girls were re-admitted in 1881 by Reverend James Moulton where they:

> continued with their formal education, and gained extra insight into the lifestyles of the papalangi as they were seconded, as part of their training, to assist in the housekeeping and arrangements of the papalangi residences. In this regard, the Moulton sisters (children of the chair, Mr. Moulton) were willing assistants and trainers.[110]

The Church eventually established its first all girls' school, Queen Salote College in 1926. When other churches later established their own schools, girls undertook similar housekeeping activities.

5.9 Women in 18th and 19th century Tonga

Pre-missionary Tonga did not conform to a gender division of labour where the men fished and grew food for their families while women focused on child-rearing:

> [i]t is a truism that in tradition the past is reformulated to conform with (sic) the present reality. One example of the present's effect upon the past is the

[105] Nancy J Pollock, 'The Early Development of Housekeeping and Imports in Fiji' (1989) 12(2) *Pacific Studies* 53. It is worth noting that two of the missionaries discussed in Pollock's paper, William Cross and David Cargill and their wives had lived in Tonga for eight and two years respectively before moving to Fiji; see p 56.
[106] Queen Salote College <http://www.tongatapu.net.to/tonga/convictions/schools/tbu/qsc/default.htm>.
[107] Ibid.
[108] Ibid.
[109] Ibid.
[110] Ibid. The word 'papalangi' means European.

> manipulation of incidents in tradition to conform with (sic) introduced European, and especially Christian, morality.[111]

When the first missionaries arrived in Tonga in the 1890s, there were power struggles between powerful families. Women were equally involved with men in that struggle. The historical, anthropological and legal-history literature has no focus on the active historical participation of women in politics. However, the literature on Tonga's history since the 18th century provides glimpses of powerful and empowered women despite the lack of focus on their lives by scholars.[112] Some women held high chiefly titles, such as Tupoumoheofo, who held the title of Tu'i Kanokupolu, and Toe'umu ,who was a high chief of the island of Vava'u.[113] In the late 18th century, Tupoumoheofo fought with her father's half-brother and his son over the title of Tu'i Kanokupolu, the ruling chiefly line, but she was defeated and deposed.[114] Shortly afterwards Toe'umu after being appointed the highest chief in the island of Vava'u by her nephew Finau 'Ulukalala II, the high chief of the island of Ha'apai and the most feared of all the chiefs in Tonga at the time led a revolt against him.[115] When she revealed her proposed insurrection to the other chiefs of Vava'u the chiefs were hesitant but Toe'umu's sister, an elderly woman, armed with a club and spear beckoned them to fight against 'Ulukalala II.[116] Toe'umu was a strong and remarkable woman and she set out to build the largest fortress in all of Tonga although it did not materialise.[117]

A religious conflict in the 1880s between King George Tupou I and Shirley Baker (the missionary) on one side and Reverend Moulton and the Wesleyan Methodist Church (the Wesleyans) on the other, paints a different picture of Tongan women from the 'ideal' woman promoted by opponents of reform. The conflict reveals the wilful participation and defiance of a number of women. The conflict was the culmination of

---

[111] P M Mercer, 'Oral Tradition in the Pacific', (1979) 14(3) *The Journal of Pacific History* 130, 143.
[112] Phyllis Herda, 'Gender, Rank and Power in 18th Century Tonga: The Case of Tupoumoheofo' (1987) 22(4) *The Journal of Pacific History* 195, 200-203.
[113] Ibid, 195, 199; William Mariner and John D Martin, *Tonga Islands: William Mariner's Account: An Account of the Natives of the Tonga Islands in the South Pacific Ocean with an Original Grammar and Vocabulary of Their Language* (John Murray, 1817, 197.
[114] Herda, above n 112, 195. The exact dates of Tupoumoheofo's political manoeuvres are not stated in the history literature.
[115] The events involving Toe'umu and her nephew Finau 'Ulukalala II occurred in the first decade of the 19th century, as it was witnessed by William Mariner and later transcribed by John D Martin.
[116] Mariner and Martin, above n 113, 137.
[117] Ibid.

more than three decades of growing discontent between the King and Shirley Baker, and the Wesleyan missionaries. The Wesleyan church in Tonga, of which the King was a member, was under the authority of the Wesleyan church in Sydney, Australia.[118] The King and Baker (the Premier) wanted independence from the authority of the church in Australia and in 1885, established the Free Church of Tonga.[119] Wesleyans under the leadership of Reverend Moulton refused to join the new church. This led to the relentless use of governmental powers by both the King and Baker to force all Wesleyans to abandon the authority of the church in Australia and to join the Free Church of Tonga. Women were not spared the government brutality.[120] An old woman was whipped in public and died soon afterwards,[121] and a young woman from a village whose chief did permit the return of people who refused to turn to the new church, lingered on the beach and made a dying declaration that if her chief would not allow her body to be buried in the village, that she should be buried at sea.[122]

In 1888 about 300 men, women and children, loyal to Moulton, were put on a boat and exiled to Fiji.[123] Most of them were Wesleyan ministers and their families but there were also notable individuals from chiefly families.[124] Among them was the King's own daughter Princess Salote Pilolevu.[125] She did not hold a position in the church and at the time of the exile was married to the noble of Kolovai.[126] Many of the church ministers travelled with their wives and children.[127] Another woman of high chiefly rank by the name of Hingano Aleamotu'a travelled on her own and was 75 years old at the time.[128] No violence was perpetrated against women from chiefly families and families of church ministers. Others who were not exiled met violence by the King and Baker's men.[129] The defiance of these women against the King, which led to the death of some,

[118] The Australasian Wesleyan Conference oversaw the Pacific region since 1855. See Australian Postal History and Social Philately, *John Thomas, Wesleyan Methodist Missionary Society, Tonga* <http://www.auspostalhistory.com/articles/371.php>.
[119] Noel Rutherford, *Shirley Baker and the King of Tonga* (Oxford University Press, 1971).
[120] Siupeli Taliai, 'Ko e Kau Fakaongo' in Elizabeth Wood-Ellem (ed), *Tonga and the Tongans: Heritage and Identity* (Tongan Research Association, 2007) 154.
[121] Rutherford, *Shirley Baker*, above n 119, 133.
[122] Greg Grainger, 'The Fakaongo Exiles from Tonga to Fiji 1887–1890' in Elizabeth Wood-Ellem (ed), *Tonga and the Tongans: Heritage and Identity* (Tongan Research Association, 2007).
[123] Ibid.
[124] Ibid.
[125] Ibid.
[126] Ibid. There is no evidence as to whether Salote's husband accompanied her to Fiji.
[127] Ibid.
[128] Ibid.
[129] Ibid.

strongly contradicts the perception of the 'ideal' passive and submissive Tongan woman.

Furthermore, an important example is a group of women who petitioned parliament in 1930 for equal land rights with men. All these examples of women in the formative years of modern Tongan society suggest that women had more freedom to participate (and did in fact participate) in politics to a greater extent than the literature suggests. These women lived and asserted their power from the last three decades of the 18th century until 1930. The emphasis on gender roles in the current era does not fit the realities of the women described above. Instead, the current emphasis on gender roles may have emerged from western and Methodist conceptions of gender roles.[130] Herda argued that the western authors who wrote about the involvement of women in politics at the time did not comprehend that women's roles in Tonga were dissimilar to what they were accustomed to in their home countries.[131] Critics of the role and influence of powerful women in the past should be re-evaluated because some of them were written after Western values on gender roles had already been transplanted into Tongan society.

The literature on Tongan history and culture demonstrates a heavy reliance on oral traditions particularly the accounts and views of those in power.[132] Such views have been questioned by human rights scholars as potentially one-sided and serving a particular purpose. Learning about a society's culture is as important as knowing who is describing it and whether there may be motives for describing or perpetuating particular customs. James noted that the nobility in Tonga claim a monopoly on defining culture to the exclusion of the perspective of commoners.[133] The vast literature on Tongan history highlights rank and power, the genealogies of chiefs and the power struggles between families. Although studies on women in Tonga from the 18th to 19th centuries from a feminist perspective are absent, a close examination of the available literature reveals a remarkable feature of traditional Tongan society. Women historically actively participated in political strife and contended for the most powerful chiefly titles.

[130] Herda, above n 112, 195, 207.
[131] Ibid. One of the writers about the female chief Tupoumoheofo was John Thomas, who led the first Wesleyan Methodist missionaries to arrive in Tonga in 1826. His *History of Tonga* where he wrote about Tupoumoheofo, whose political manoeuvres obviously occurred a few decades before his arrival in Tonga, was written in 1850. See John Thomas, *History of Tonga*, MS (National Library of Australia, MS 4070).
[132] Mercer, above n 111,144-5.
[133] James, 'Gender Relations', above n 77, 233, 237-8.

The ideal woman promoted by those who oppose women's rights on the ground of cultural traditions and beliefs is supported by various institutions in society and is upheld by many in the community. Gender roles are taught in school at both primary and secondary levels. The Ministry of Education commissioned 'the development of a national cultural policy for Tonga'.[134] The policy aims to protect, amongst others, the 'traditional social structure by encouraging events/festivals for *Ha'a* to come together. Documentation and archive genealogies, and *Ha'a* relations. Publish *Ha'a* relations and genealogies.'[135] From a universalist perspective, an attempt to define culture is problematic because culture is not static. It is possible to describe a particular custom as it was practised at a particular point in time but it cannot be claimed such a custom has always been practised in that way. One of the women's organisations, the Catholic Women's League, has described women's role in Tongan society as follows:

> Traditionally the place of women is 'in the house' where they perform their roles. The first priority is to remain dignified in addition to preparation of food, nourishing and teaching Tongan values and other feminine values to the children, making tapa, weaving mats, making Tongan oil, and making dancing costume.[136]

Various institutions collectively operate to define women's role. However, the 'ideal' woman – virtuous, dignified and dutiful – who minds children and keeps house is inaccurate historically and may not accord with the role many women play or want to play in contemporary Tongan society.

5.10 Women's views

Public response to parliament's decision in 2009 was not as strong as the reaction to the announcement, by the current government, in March 2015 that Tonga will accede to CEDAW. After parliament rejected accession in 2009, only a few prominent women publicly voiced their opinion. One woman, a former parliamentary candidate, stated that

[134] Fua, Tuita, Kanongataʻa Fuko, above n 14, 9.
[135] Ibid, 24.
[136] Catholic Women's League, *Gender: Women in Tonga* <http://www.mercyworld.org/_uploads/_ckpg/files/mirc/brief/SenolitaVakata.pdf>.

land rights constitute a fundamental issue that should be addressed immediately.[137] She also stated that the social landscape had changed and that the so-called traditional culture was unsupported by then current realities.[138] As a women and children's rights advocate she linked violence against women to women's limited land rights.[139] She explained that some women have no land and no income and are thus forced to remain with abusive husbands.[140] Another advocate, opposing accession to CEDAW, argued that there are more important issues than land rights such as poverty, unemployment, violence against women and child abuse.[141] CEDAW, she claimed opposes traditional Tongan culture and accession would require changes to the land law which should not be supported.[142] The commentator also asserted that 'Tongan women are already born into a society with a highly dignified status'.[143] This view indicates a lack of knowledge of CEDAW and the inter-linkages between all forms of discrimination against women. For example, women's inability to own land underlies and contributes to those other social problems she identified such as poverty, unemployment and violence against women. Although some highly educated women oppose accession to CEDAW, some of them are affiliated with the ruling class, thus potentially influencing their outlook.

Women who have spoken out publicly are divided on the issue of accession to CEDAW and women's land rights. Reform however requires the support of women from all socio-economic and political backgrounds including women in the ruling classes. However, as Bleakley states, 'women of high rank can exercise wide social influence, but, equally, may be pressured by the members of their extended families to act solely in their interests.'[144] Of course some women may act on their own volition without any pressure from family members. Women in the royal family and nobility have more opportunity to access land through their estate-holding male relatives, although they are

[137] 'Leading Women', above n 71.
[138] Ibid; 'Tongan Parliament Blatantly Ignores Women's Rights' *Matangitonga* (online) 19 September 2009 <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=9&num=5362>.
[139] Ibid.
[140] Ibid. The link between women's limited land and violence committed against them by their husband, in other countries, is documented in some reports. See OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (United Nations, 2013), 10; Habitat for Humanity International, *Shelter Report 2016 – Level the Field: Ending Gender Inequality in Land Rights* (Habitat for Humanity International, 2016) 16; Norwegian Refugee Council, *Violence Against Women and Housing, Land and Property in Monrovia* <http://womenshlp.nrc.no/wp-content/uploads/2014/02/Violence-against-women-and-HLP-Liberia.pdf>, 16.
[141] 'Leading Women', above n 71.
[142] Ibid.
[143] Ibid.
[144] Bleakley, above n 72, 136.

discriminated against by the preference for male children in the law of succession. They are, therefore, unlikely to support any reform for equal land rights. It is the majority of 'commoner' women who are the most disadvantaged under the current land law. Commoner women have a life interest in land if there are no male heirs and they remain unmarried but they do not have the right to hold land or pass it down to their children, male or female. Thus, commoner women must obtain support from (a) male-dominated decision makers and (b) women of the nobility, who may have a stake in maintaining the *status quo*. Commoner women are thus faced with this additional challenge which is rarely, if at all, discussed in public.[145]

The issue is complicated further because many commoner women are closely tied to the nobility either through blood relationships or other factors. Some women with high academic or, business achievements, or with family backgrounds and social circles in some ways not unlike the nobility share similar outlooks.[146] James noted that highly educated persons were opposed to the advancement of democratic ideals by pro-democracy advocates in the early 1990s.[147] The pro-democracy movement has been supportive of women's rights although they have not stated any official view on women's land rights.[148]

There are also commoner women, not necessarily of privileged background, who view land law as an important and a central part of the traditional culture. There is therefore no single woman's voice and women's views on any issue may vary according to factors including their social and economic background, education, occupation and religion.[149] Even within these groupings women's views may differ depending on, amongst others 'their skills, interests, goals and priorities, modes of operating and

[145] Coomaraswamy, 'Are Women's Rights Universal?', above n 96, 5.
[146] Kerry James, 'Is There a Tongan Middle Class? Hierarchy and Protest in Contemporary Tonga' (2003) 15(2) *The Contemporary Pacific* 309, 327.
[147] Ibid, 317.
[148] The current pro-democracy led government stated in 2015 that ifit accedes to CEDAW, it will make reservations in relation to succession to the throne and nobles' titles. This means that it would not make reservations to women's right to apply for and to hold a town and or tax allotment. Government of Tonga – Prime Minister's Office, 'Government Agrees to Ratify CEDAW' (Media release, 9 March 2015) <pmo.gov.to>. The proposed reservations made by previous governments in regard to land, differ from those of the current government. Previous governments included inheritance and land allocations – an obvious influence by the nobles who would want to have more say in the allocation of land from their estates.
[149] Fatma Alloo and Wendy Harcourt, 'From the South to the North: Evolving Perspectives on Gender and Poverty' (1997) 5(3) *Gender and Development – Poverty*, 9.

thinking, ways of strategizing, and global outlooks'.[150] Although there are differing views on whether there should be reform, and were there to be reform, the shape of that reform, as Coomaraswamy has argued, women from all backgrounds within any society must debate and discuss any traditional views which maintain women's subordination.[151]

5.11 Contemporary Tongan women

The notion of the ideal woman is contradicted by the realities of women in contemporary Tonga. As society changes with outside influence, the younger generations do not hold such conservative views. In addition, Tongan women are participating in social, economic and political areas although few women have reached the top political decision-making level. Since the last quarter of the 20th century, the number of women who worked outside of the home in the civil service and in the private sector, increased. The 2011 population census revealed that 41% of the labour force (15 years and over) are women,[152] 56% of the public service are women, and approximately 45 women are in the top three level positions of the public service compared to 61 men.[153] More women are entering predominantly male domains such as the defence force, technical institutes which offer training programs for seamen, apprentices and technical trades[154] and architecture.[155] Similarly men are entering predominantly female jobs such as nursing and technical schools which offers courses such as 'commercial cookery; accommodation services; fashion and design; and art, design and culture.'[156] The clear demarcation of gender roles, as in developed countries, is diminishing.

[150] Bleakley, above n 72, 135.
[151] Coomaraswamy, 'Are Women's Rights Universal?', above n 95, 15.
[152] Tonga Department of Statistics, *2011 Population Census* <http://www.spc.int/prism/tonga/index.php?option=com_content&view=article&id=98&Itemid=310>.
[153] Office of the Public Service Commission (Tonga), information obtained via email on 7 October 2014. The top three levels exclude the ministerial level in which there is no female minister.
[154] Tonga Maritime Polytechnical Institute. See New Zealand Agency for International Development and the Government of Tonga, *Tonga Education Sector Study: Final Report* (Authors, 2003), 46.
[155] Tupou Tertiary Institute <http://www.tti.to>.
[156] 'Ahopanilolo Technical Institute, see <http://www.atitonga.com>.

Conclusion

This chapter has demonstrated that the structure of government, established by the Constitution, and giving significant authority to the King and the nobility, creates major challenges for women's equal land rights. Reform cannot take place without the consent of the King because he has a power of veto over Bills passed by parliament in addition to his other constitutional powers. Although the structure of government underwent significant changes in 2010, there remain significant structural barriers to the recognition of equal land rights for women.

Cultural traditions and beliefs, including the claim that women already have superior status, and the view that the 'ideal' Tongan woman does not desire or require equal land rights, are shared by traditionalists and many members of the community. The ideal Tongan woman, however, does not accord historically with the role of women in traditional Tongan society. This chapter has illustrated that these views, which accord with the arguments used by cultural relativists elsewhere to maintain customary practices that discriminate against women, have little veracity. Instead the *fahu* custom does not provide women with a superior status equating with equal land rights. Many women do not enjoy *fahu* status and when they do, the limited sphere in which its benefits operate (the family) do not provide rights or equality for women.

Finally, the cultural stereotypes of women utilised by cultural relativists to deny women equal land rights do not align with the historical and current realities of women. Despite the opposition to accession to CEDAW and giving women equal land rights on the basis of culture, closer examination illustrates that the traditional culture supports, or at least does not oppose, women's rights. The next chapter, utilising the theoretical framework overviewed in Chapter Two, the women's human rights framework developed in Chapter Four and navigating the unjustified use of culture and stereotypes of the 'ideal' Tongan woman, will consider the Royal Land Commission's recommendations in relation to women's land rights and set out a series of recommendations.

Chapter Six – A Way Forward

Introduction

This chapter proposes an approach to equal land rights for women in Tonga. The approach takes heed of the complex historical, social, political, legal and cultural landscape in Tonga and the range of barriers that beset the achievement of equal land rights for women, as identified in the preceding chapters. This chapter has two parts. Part I discusses and analyses the specific findings of the 2008 Royal Land Commission on women's land rights.

The 2008 Commission carried out nationwide consultations as well as consultations with Tongan communities in Australia, New Zealand and the United States of America. Although considering and making recommendations on women's land rights was not within the Commission's mandate, it did include recommendations based on feedback from the public as well as the opinion of the Commission itself. The Commission's recommendations provide an important starting point for proposing a way forward. The feedback from the public showed that, contrary to views expressed by government leaders and some notable figures in the recent past, many people were in favour of giving women equal land rights.

The Commission's inquiry and findings are important for a number of reasons. Although it has been seven years since the release of its findings, the report provides the most recent comprehensive information on land use and public concerns about the impact of land law on everyday lives, including the impact of women's limited land rights on families, business and the wider community. The Commission's report, therefore, contains the most recent findings available on women's land rights. Additionally, an analysis of the relevant findings of the Commission is a critical starting point since no other in-depth study on women's land rights in Tonga has been carried out. Utilising the work and findings of the Commission is to make use of proposals which have already been formally discussed by a wide range of stakeholders 'while simultaneously working toward changing the larger social matrix of national legislation,

constitutions, and administrative institutions.'[1] The government has not, to date, acted on the recommendations of the 2008 Commission, leaving the issues the Commission highlighted unaddressed.

Part II of this chapter identifies practical responses and approaches to achieving equal land rights for women both in the short term and in the long term. In accord with Nyamu's critical pragmatic approach, this thesis argues that a non-confrontational approach that takes into account the rights of all landholders, including estate holders and allotment holders, provides an appropriate way forward. Part II sets out a series of recommended land law reforms focusing on the basic principles of allotment holding and inheritance. It proposes that the present law of succession be phased out quickly and new provisions enacted which enable a woman or girl to inherit land immediately if the woman does not have a brother(s) at the point the relevant amending legislation to provide for equal land rights comes into force.

The thesis also proposes that both men and women should be able to apply to the Minister of Lands for an allotment (subject to its availability) if the man or woman have made previous arrangements with an estate or allotment holder to be granted a vacant piece of land. As reform involves compromise, the balancing of competing demands, and an acceptance of political, cultural and legal realities, it is acknowledged that the proposed reforms do not provide Tongan women and girls with substantive equality. Nevertheless, the proposed reforms offer a path towards substantive equality for future generations of girls. Part III concludes the chapter with arguments for maintaining the prohibition of the sale of land.

[1] Celestine Nyamu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal*, 381, 416-7.

Part I – 2008 Royal Land Commission (the Commission)

6.1 Mandate of the Commission

The 2008 Commission was established on 10 October 2008 pursuant to section 2(1) of the *Royal Commissions Act (Cap 41)* with a mandate 'to inquire into (without changing the basic land tenure of our Kingdom) all matters whatsoever concerning the land laws and practices of our Kingdom with a view to providing more effective and efficient services.'[2] The Commission began its work on 10 October 2008 and completed it on 30 March 2012 when its final report was released.[3] Three commissioners (all male) were appointed.[4] The first was a former Attorney General who was also a member of the 1983 Commission.[5] The second was a noble and former Minister of Lands[6] and the third was a New Zealand lawyer of Tongan heritage.[7] Unfortunately, the Commission's recommendations did not provide a satisfactory result for women as discussed below. At the same time, its mandate and composition showed a clear intention that the current land tenure system, which favours men, would not be fundamentally changed.

The 2008 Commission was the second Royal Land Commission of inquiry established for the purpose of reviewing the land law since both the Constitution and the Land Act came into force. The first Royal Land Commission was established in 1983 and its views, findings and recommendations are referred to in this chapter where appropriate. The final report of the 1983 Commission, which was completed in 1985, was only made public in 2012 for the first time; that is, some 17 years later when it was appended by the 2008 Commission to its final report. The 2008 Commission stated that some of the land use figures relied on by the 1983 Commission were based on the nobles' own records and not that of the land registry at the Ministry of Lands and Survey.

[2] The 2008 Commission's final report was released in March 2012. Royal Land Commission, *Final Report* vol 1 part 1 (Royal Land Commission, 2012) 19.
[3] Ibid, 20.
[4] Initially there were four commissioners but the fourth and only female commissioner resigned in 2009. The secretary was also a woman. Ibid, 19. The number of members of 2008 Commission was less than half of that of the 1983 Commission.
[5] Lord Tevita Tupou who is currently a member of the Privy Council.
[6] The late Lord Fielakepa.
[7] Kahu Baron Afeaki.

6.2 The Commission's methodology

The work of the Commission was carried out in three phases. In the first phase, the Commission reviewed the work of the Ministry of Lands' core functions and service delivery, among other matters.[8] In the second phase the Commission inquired into allegations of unlawful land dealings in the two outer islands of Vava'u and Ha'apai.[9] Phase three, which is the focus of this chapter, consisted of 79 public consultations in Tonga and in overseas Tongan communities to ascertain the views of the people on the land law and current practices.[10] The Commission noted that at all times there were many more male attendees than female and that not many young people attended.[11] Twenty-four written submissions were made by both Tongans and non-Tongans.[12] The Commission also met with special interest groups such as women's groups, the Tonga Law Society, churches, banks, members of parliament and estate holders.[13]

Estate holders submitted a Bill that proposed they (estate holders) rather than the Minister of Lands, be given the power to grant leases and allotments from nobles' estates.[14] However, this proposal was rejected by the Commission because it did not have popular support. The Ministry of Lands compiled statistics for the Commission on all registered landholdings in order to ascertain how much land remained available for distribution, although the Ministry's records were outdated and incomplete.[15] The Commission stated that all written and oral submissions it received were considered when formulating its recommendations to 'amend the Land Act and change land practices to ensure they are in line with the land needs of Tongans.'[16]

[8] The Commission also visited the land registry offices in five countries – Australia (Sydney), New Zealand (Wellington), Samoa, Singapore and Cook Islands – to gain new ideas that could be introduced to the land registry in Tonga. See Royal Land Commission, above n 2, 3-4, 30.
[9] Ibid, 4-5.
[10] Ibid, 5-6, 28.
[11] Ibid, 23, 28.
[12] Ibid, 6. The non-Tongans included scholars such as Guy Powles and Elizabeth Wood-Ellem who have published books or papers on the Tongan land tenure.
[13] Ibid, 28.
[14] Ibid, 6-7.
[15] Ibid, 7.
[16] Ibid, 6.

6.3 Basic land tenure

In referring to its mandate, the Commission stated that the 'part of the basic land tenure that it is not allowed to change is the free distribution of land through the grant of a town and a tax allotment to a male Tongan subject, the prohibition on the sale of land and the estate holder's right to lease only 5 percent of his total estate.'[17] The Commission also added that 'ownership of land is not absolute.'[18] The Commission was inaccurate when it stated that land was freely distributed because allotment holders are required to pay a prescribed (albeit very small) annual rent to the estate holder or the Crown.[19] The Commission also did not comment on the 1997 amendment to the Constitution which appeared to have removed the right to an allotment instead making the grant of an allotment at the discretion of the Minister of Lands.[20] The Commission also erred when it stated that an estate holder's right to lease up to five per cent of his estate forms part of the basic tenure framework.[21] However, the Commission made clear that apart from land set aside for an estate holder's residence and plantations, an estate holder is obliged to distribute the remainder of his estate to eligible men.[22] An estate holder's obligation to distribute the majority of his estate is not expressly stated in the Constitution and the *Land Act*, leaving estate holders with the discretion to distribute his estate or not.[23]

Given the importance of its mandate the Commission, this thesis argues, should have clearly outlined the basic principles of land law in Tonga including the absolute ownership right of the Crown on which all other types of landholdings exist. The Commission also erroneously referred to government land as an estate rather than Crown land indicating that the two are separate.[24] Land not allocated to any noble

[17] Ibid, 21. It is interesting to note that the Commission chose to focus only on a 'part' of the basic land tenure when it was clear from its mandate that it was the whole basic land tenure that it was not allowed to change.
[18] Ibid, 47.
[19] Act of Constitution of Tonga, cl 113; Land Act, s 43(2)(c).
[20] Act of Constitution of Tonga, cl 113 as amended by the Act of Constitution of Tonga (Amendment) Act 1997, s 3.
[21] Land Act, s 33 (2).
[22] Ibid, s 34 (1). Except for his own personal residential and plantation land. The Land Act however does not specify the size of the land to be set aside by a noble for his own personal use.
[23] Royal Land Commission, above n 2, 47.
[24] Ibid, 47. The Commission stated that tax or town allotments are granted out of an estate. It should have made it clear, as the Land Act does, that tax and town allotments are granted out of either an estate or Crown land. See for example Land Act, ss 8 and 58.

remains with the Crown and is often referred to as government land which is administered by the Minister of Lands.[25] As described in Chapter Three, tax allotments and town allotments (which are hereditary life interests)[26] are granted from either a hereditary estate or Crown land. Leaseholds and other proprietary interests exist on an allotment, a hereditary estate or Crown land. The prohibition of the sale of land is also a key feature of the basic land tenure with the implication that all lands remain with 'native' Tongans to the exclusion of foreigners.[27]

Although the Commission did not have a specific mandate to consider the late King George Tupou V's original proposal to introduce freehold tenure in relation to land that might be reclaimed from the sea, it did go ahead and consider such a proposal. If freehold tenure were to be introduced, it would be a significant departure from the basic land tenure system that presently exists and which strictly prohibits the sale of land.[28] However, in contrast the granting of equal rights to women would not represent a significant departure from the basic land tenure system because women do already have some land rights, despite being limited. Indeed, it is argued that the steps towards redressing women's land inequality could be achieved *within* the existing land tenure system.

Although the Commission had a specific mandate, the Commission stated that:

> 'it was conscious of the changes over time and the different needs of today in contrast to the basic land tenure when it was first created. These important public concerns would be taken into account to provide "more effective and efficient practices" as required by the terms of reference.'[29]

In line with the 1983 Commission, the 2008 Commission proposed a number of amendments to the *Land Act* to replace redundant sections and to make the Act consistent with current practices and institutional changes which had occurred as a result of the ongoing political reform in Tonga beginning in 2010.[30] The 2008

[25] See Land Act, s 10 (1).
[26] *Tukuafu v Latu* [2005] TOCA 12 <http://www.paclii.org/to/cases/TOCA/2005/12.html>.
[27] See also Kerry James 'Cutting the Ground from under Them? Commercialization, Cultivation, and Conservation in Tonga' (1993) 5(2) *The Contemporary Pacific* 215, 218.
[28] Although, as was pointed out in Chapter Three, there is a real estate market and landholders are able to surrender land to be granted to another person for a valuable consideration.
[29] Royal Land Commission, above n 2, 22.
[30] Ibid, 25.

Commission referred to the importance of upholding King George Tupou I's vision stating that:

> '[t]here was an expectation by the people that the Commission would take their views into consideration and make such reasonable recommendations that would realize and meet today's needs while at the same time maintaining the visions of King George Tupou I which are the cornerstone of our land tenure system.'[31]

The Commission cited the historian Elizabeth Wood-Ellem, who described the King's vision of 'peace and stability in the kingdom, which he would unite under a central government, but also of equality and equity for all Tongans', conditional on the maintenance of the existing land tenure system.[32] Wood-Ellem did not comment on women's limited rights under the land tenure.[33]

6.4 The views of the people

The Commission identified nine main issues from the public consultations, three of which are relevant to this thesis. They are:

1. changing the law of succession to allotments to allow daughters, adopted and illegitimate children to succeed after sons;[34]
2. establishing equal rights to land for men and women, including the right to apply for an allotment;[35]
3. establishing a family trust whereby all members of the family have equal rights to the family land instead of a sole heir.[36]

[31] Ibid, 32.
[32] Ibid, 3. The views expressed by scholars such as Elizabeth Wood Ellem are somewhat more sentimental than factual because the current land tenure system was not in place until the Hereditary Lands Act 1882 was enacted.
[33] Wood-Ellem's statement is not surprising because she developed a close relationship with the royal family and wrote a number of publications about the royal family. See ABC Radio Australia, 'Tongan Royal Historian Dr Elizabeth Wood-Ellem Dies' *Pacific Beat*, 11 September 2012 <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/tongan-royal-historian-dr-elizabeth-woodellem-dies/1014098>.
[34] Royal Land Commission, above n 2, 7. Both the Constitution and the *Land Act* give no right of inheritance or succession to sons born outside of marriages. From a feminist perspective, discrimination against children born outside of marriage is outdated and discriminatory as it marks and punishes children for something over which they had no control.
[35] Ibid, 7.
[36] Ibid, 8.

The Commission considered women's limited land rights and remarked that '[t]here was strong public opinion expressed that women should be freed from the current limitations under the laws, to have equal rights with men under the Land Act. These proposals came from both men and women.'[37] The work of the Commission on women's land rights is remarkable because it was not within its mandate and yet due to public feedback, the Commission chose to undertake consideration of that subject.[38] The relevant issues discussed during the Commission's public inquiry are outlined below.

6.4.1 The right to an allotment

As observed in Chapter 3, the Constitution provides that every Tongan male subject 16 years of age and above may apply for a tax and town allotment. The Commission reported that many members of the public supported equal land rights for men and women and, therefore, supported the revision of this provision. Some, on the other hand, argued that women should not be allowed to hold tax allotments because in the words of the Commission 'it has never been the traditional role of Tongan women to do heavy and hard labour work which was associated with farming.'[39] The Commission recommended that women should not be allowed to apply for, and hold, a tax allotment. It stated that:

> [t]here are clear gender roles within Tongan society that are valued and reflect much of Tonga's basic cultural values and aspirations. Despite the increase in female income earners this has been predominantly in sectors that do not involve heavy or soiled kinds of work such as farming. These gender roles remain very important in Tongan society and should be protected and maintained. For now, the Commission feels that the present law giving men only the right to register these allotments works well for Tonga.
>
> … Tonga's well established gender roles in society appear to conflict with a range of gender equality measures sought by international pressure groups that Tonga is associated with. However, it is also important to reflect and maintain what is important to Tongan culture and what sets Tonga apart as unique and

[37] Ibid, 34,
[38] Ibid, 7-8, 22.
[39] Ibid, 50.

> special within the global context. To this end, it is suggested that more 'equitable' measures be adopted when considering what is fairer to women, within Tongan society values and not those of other societies.[40]

The Commission's view that gender roles are entrenched as part of a cultural heritage does not accord with the reality of women's lives as previously discussed in Chapter Five. The Commission provided no evidence to support its claim that women do not participate in farming. Indeed, it is inaccurate to characterise agricultural activities as consisting of driving heavy machinery and wielding heavy tools. Although, there is a lack of recent sex-disaggregated data on women's participation in agriculture there is evidence that women participate in both subsistence and commercial farming.[41]

The Commission's presumption that women do not take part in agricultural activities ignores the fast changing socio-economic patterns where no work category is viewed as predominantly that of a particular gender.[42] Additionally, tax allotments which are greater in size than town allotments, can be (and have been) subdivided by the landholder amongst his family and relatives for uses other than agriculture.[43] To deny women the right to hold tax allotments on the basis that 'culture' prevents them from participating in agricultural activities masks the complexity, diversity and reality of landholding practices and prevents landholders from exercising an autonomous decision to subdivide tax allotments to be granted to family members or others in return for money.

The Commission explicitly took a cultural relativist position on women's land rights in relation to tax allotments. It warned that complying with 'international standards' on gender equality should not come at the expense of culture.[44] The Commission further claimed that it had developed and recommended a solution that is 'fairer' to women.[45] It concluded that holding a town allotment befits the modern Tongan woman's role and

[40] Ibid, 50-1.
[41] Japan International Cooperation Agency, *Country Gender Profile: The Kingdom of Tonga* (Author, 2010), 19; 'Atu Emberson-Bain, *Women in Tonga – A Country Briefing Paper* (Asian Development Bank, 1998) 52.
[42] Willy H Verheye, *Technical Assistance in the Development Land Use Policy in the Kingdom of Tonga* (Food and Agricultural Organization, 2008), 18-9.
[43] Royal Land Commission, above n 2, 64-5.
[44] Ibid, 51.
[45] Ibid, 51-2.

recommended that women 21 years of age and older should be allowed to apply for a town allotment but not a tax allotment.[46] The Commission reasoned that 'a grant of a town allotment to women would more fairly mirror the modern woman's role in Tongan society.'[47] However, contrary to the Commission's position the 2011 population census results indicated that 22.5% of households were headed by women, that women were participating in agricultural and subsistence practices in increasing numbers, and that such a proposition is contrary to the principles of equality and non-discrimination.[48]

Despite public views in favour of women having equal rights with men, the Commission, constituted of men of high standing in society, defined women's role and determined what is in women's best interests. Their view on gender roles was not informed by any empirical study on women in Tonga which would have provided an accurate picture of the socio-economic landscape. They asserted that '[m]odern Tongan women continue to adhere to and value many of their traditional gender roles within society.'[49] This assertion homogenises Tongan women and has been contradicted by the views of some women as reported in the media.[50] Women are increasingly doing work that was predominantly done by men[51] and the 2011 population census results revealed that 59% of the labour force is male and 41% is female.[52] The Commission, beyond its expertise, gave its opinion on the impact of international standards on the local culture, in particular on the *fahu* custom, but as Chapter Five illustrated, the operation of the

[46] Ibid. The Commission that both men and women upon reaching the age of 21 can apply for an allotment (town allotment only for women).
[47] Ibid.
[48] Tonga Department of Statistics, *Census Key Indicators* vol 2, xiv (2011) <http://www.spc.int/prism/tonga>. It is worth pointing out that the 1983 Commission did not express such a view on gender equality and whether women should hold a tax allotment or not. Such a view would have befitted the 1983 Commission where change in socio-economic patterns was not as apparent then as it is today. The 1983 Commission also pointed out that changes due to migration and education affected the way people view land. Royal Land Commission, *Report of the Royal Land Commission 1983 on its Review of all Practices, Usages and Laws Relating to Land* (Royal Land Commission, 1985), 116.
[49] Royal Land Commission, *Final Report*, above n 2, 51.
[50] As pointed out in Chapter Five there is a lack of scholarly articles on culture from a Tongan feminist perspective, which leaves only views that have been reported in the local media and even on social media as sources of the views of some people on certain issues.
[51] Emberson-Bain, above n 42, 53.
[52] Tonga Department of Statistics, above n 49.

fahu custom is conditional on the existence of certain factors, and does not equate to gender equality.[53]

Further, the reasoning underpinning the Commission's recommendation is problematic. The current law, which came into force in 1882, gives a life interest to a widow over both her deceased husband's tax and town allotment. A daughter of a deceased father has a similar life interest over his tax and town allotment. However, the principle of a woman's right to her husband's tax allotment can be traced to Tonga's first written law, the Vava'u Code, 1839.[54] This illustrates how cultural claims must be carefully examined for their veracity, particularly when deployed to counter the recognition of human rights and gender equality. The Commission's view is a familiar example of the gender stereotyping and the ascribing of certain roles to women. This cultural relativist approach is not unique to Tonga as discussed in Chapter Two,[55] but is contrary to article 5 of CEDAW which requires States parties to modify customs that lead to stereotyped roles for men and women.

The impact of the current land law on women's economic rights and on the country's economic expansion was identified by the Tonga Association of Banks (ABT). The ABT, whose members include all four banks in Tonga,[56] was strongly in favour of women having the right to own both a registered tax and town allotment. The ABT stated that its members 'are "net contributors" to the Tongan economy and collectively support the view that components of current land practices under the *Land Act* are in urgent need of reform.'[57] The ABT argued that '[t]he land tenure system discriminates against women and effectively denies equal access to finance to the significant

[53] Such factors include being the eldest daughter, and having a brother who has children over whom she can exercise her right as fahu. Some might argue that some landholders give land to children of the fahu but not all landholders do and such claims need to be supported by empirical evidence. The complexities surrounding the fahu custom, as discussed in Chapter Five, suggest that the custom is not always as idealised as some claim it to be.

[54] This law gave the rights to the deceased's plantations and property to his wife and children. See Chapter Three.

[55] Curt Muller, *Plaintiff in Error v The State of Oregon 208 U.S. at 412* as cited in Martha A Fineman, 'Evolving Images of Gender and Equality: A Feminist Journey' (2009) 43 *New England Law Review* 437, 441.

[56] The Bank of the South Pacific replaced Westpac Bank of Tonga in 2015.

[57] Association of Banks in Tonga (ABT), 'Submission to Royal Land Commission (Tonga) (August 2009)' in Royal Land Commission, *Final Report*, above n 2, Appendix 14, 2. The seven- page ABT submission was not paginated. The page numbers stated here are my own.

proportion of labour force made up by women on the basis that Tongan women subject by birth are unable to inherit or own registered allotments.'[58]

The ABT submitted that women with good financial standing were unable to borrow money on an equal basis with men because they do not hold tax or town allotments.[59] Unless a woman is a leaseholder she must use a male family member's land as security for a loan with the latter as co-borrower.[60] The ABT recommended that the *Land Act* be amended to allow women to inherit or to apply for a town and/or tax allotment.[61] Since the law does not allow a widow to deal with her deceased husband's land, the ABT proposed that a widow should be allowed to mortgage the land if there is no heir or if there is an heir, with his consent.[62] Although the recommendation seems favourable to widows, the heir's consent is not required under the current law if an allotment holder wishes to mortgage the relevant land, making this a regressive step.

Although the ABT's proposal is commendable for arguing that women should be allowed to hold both a town and tax allotment, the ABT proposed that the current limitations on mortgages (which presently can only be granted for a maximum of 30 years) should be increased to 99 years. Increasing the term to 99 years is unusual given that the maximum mortgage period in other parts of world is 25–30 years,[63] a period which aligns more closely with the length of time a mortgagor may have, in real terms, to pay off the debt secured by the mortgage. Under the current law, a financial institution has the right to take possession of the land where a mortgagor dies without paying off the mortgage. However, the current practice is that if a mortgagor dies, the bank arranges with his widow and children to take over paying off the mortgage. The Commission did not accept the proposed increase of the mortgage period to 99 years.

[58] Ibid.
[59] Ibid.
[60] Ibid. However if the borrower defaults in payment the co-borrower or guarantor would be liable for the outstanding amount otherwise the bank would take possession of the collateral.
[61] Ibid. The relevant sections in the *Land Act* to be amended are sections 7 and 43. The ABT overlooked mentioning that the Constitution would also have to be amended.
[62] Ibid.
[63] John Y Campbell, *Mortgage Market Design* (August 2012) <http://scholar.harvard.edu/files/campbell/files/mortgagemarketdesign081612.pdf> 2 and Figure 2.

6.4.2 Inheritance

The Land Act provides that only the eldest son can inherit his father's tax and town allotments.[64] Public views on inheritance during the Commission's consultations varied. These views included that:

(a) a daughter should be entitled to succeed to an allotment after her brothers and that the daughter's right should be retained after marriage;[65]
(b) the eldest child should succeed regardless of whether that child is a son or daughter;[66]
(c) parents should choose which of their children should succeed to the parents' allotment(s);[67]
(d) the current law of succession should be replaced by the creation of a family trust under which all children would be beneficiaries and have equal rights to the family land.

All but the final proposal are discriminatory. The first proposal (a) still gives preference to sons. The second and third proposal (b) and (c) gives inheritance rights to one child to the exclusion of all others and is discriminatory against the excluded children, whether male or female and whether chosen by parents or mandated by law. However, although the shared inheritance recommended in proposal (d) is the ideal situation, it would create practical problems when there is not enough land to be meaningfully subdivided between all children. It is clear, however, from the public views as reported by the Commission that many members of the public seek changes to the basic land tenure to ensure that all children of a landholder have equal rights to their father's land. There is no uniformity of view in relation to the nature and form of that change.

The Commission ultimately recommended that daughters should inherit but only after sons. It proposed a complex (largely unworkable) framework for succession.[68] The

[64] Provided that his father holds both a town and a tax allotment as many men have a town allotment but not a tax allotment.
[65] Royal Land Commission, *Final Report*, above n 2, 33.
[66] Ibid, 34.
[67] Ibid. In this case it would become a quasi-testamentary disposition. In regard to succession to the throne and nobles' estate, neither the 1983 or the 2008 Commission discussed those issues and neither was it brought up by any member of the public.

Commission proposed that if there are no sons, then daughters should inherit for life beginning from eldest to youngest.[69] When all daughters have died the eldest daughter's children will inherit in accordance with the current rules of succession.[70] This is a novel and confusing proposition which is still discriminatory against women and girls. Inheritance continues along the eldest male line until there are no sons but when it comes to daughters, the eldest daughter will inherit followed by her sister instead the eldest daughter's own children. Indeed, the only differences between the Commission's proposal and the existing law are that daughters will not forfeit their life interest upon marriage and that inheritance is passed along a female line if there is no male heir. Additionally, the proposed framework is likely to create tensions among those in line to inherit. It could create an expectation among the children of the daughter who currently holds the title that they will inherit the land when instead it will pass to their mother's sister.[71]

6.4.3 Inherited land versus newly acquired land

Some members of the public differentiated between inherited land and newly acquired land in relation to inheritance by women and girls.[72] Newly acquired land is defined as land acquired directly by the allotment holder himself, from the Crown or from an estate holder and not inherited from the allotment holder's father.[73] Neither the Constitution nor the Land Act makes a distinction between inherited or newly acquired land. No explanation was given as to why such a distinction should be made but the proposal in relation to the removal of the conditions on a daughter's life interest revealed the rationale behind it.

Some members of the public argued that the conditions on a daughter's life interest should be removed but only in relation to newly acquired land. Such a distinction favours brothers of landholders who stand to inherit land if the landholder does not have any sons. Therefore, such a distinction is discriminatory and there is no principled

[68] Ibid, 53.
[69] Ibid. That is, sons first before daughters.
[70] Ibid.
[71] and eventually to the mother's eldest sister's son and his heirs (if any).
[72] Although the Commission stated that the differentiation was raised by the public the Commission also based some of its recommendations on the differentiation. The 1983 Commission's report also noted the same differentiation.
[73] Royal Land Commission, *Final Report*, above n 2, 52-3.

reason why a daughter should not be entitled to her father's land whether it is inherited or newly acquired. The Commission was not in favour of such a distinction and recommended that the conditions should be removed regardless of whether the daughter's life interest is through inherited land or is a newly acquired interest because all members of the family contribute to the development of the land during their lifetime.[74] The Commission did not explain what it meant by development of the land and did not recommend that evidence of contribution to development of the family home be provided by all members of the family. Thus, the Commission did not confine its definition of 'development of the land' to actual financial input into the building or renovating of the family home but extended it to non-financial contribution. It assumes that all members of the family contribute to the home's development, for example, through domestic labour that enables an earning spouse to maximise her paid work potential by caring for children so that the earning spouse does not have to pay for child-care and through other non-financial contributions to the maintenance of the house and property.

6.4.4 Daughters' and widows' life interest

The current law gives daughters of allotment holders a life interest in their father's land when their father dies, if they have no brothers. The daughters forfeit their life estate upon marriage or if found guilty of fornication or adultery. The Commission recommended that these conditions should be removed because such conditions are not imposed on men and are discriminatory to women.[75] In relation to widows, the Commission recommended that similar conditions, denying a widow a life interest if she is found guilty of fornication or adultery, should also be removed.[76] The Commission was more receptive to the direct and obvious discrimination implicit in the *dum casta* law than to the discrimination in the law of succession where it recommended the retention of the discriminatory prioritisation first of sons and then to daughters.

[74] Ibid, 53.
[75] Ibid, 52-53. The Commission used the words 'to promote fairness'.
[76] Ibid, 54.

6.4.5 Deserted wife

Some members of the public proposed that an 'innocent wife' who has been deserted by her husband should continue to live in the family home.[77] The *Land Act* is silent on such a situation and arguably a wife cannot be evicted from her matrimonial home under the current law.[78] Further, maintenance of deserted wives is provided for in the *Maintenance of Deserted Wives Act (Cap 31)*.[79] The Commission recommended that a deserted wife should continue to remain in the matrimonial home until she remarries or dies.[80] It was not necessary for the Commission to make such a recommendation because the current law does not require that the woman leave the family home if deserted by her husband. Some members of the public supported the proposal only if there were children in the marriage and if the wife had taken care of her husband.[81] Such views are common in other societies and are indicative of a deeply patriarchal society. Tonga's first written law, the *Vava'u Code of 1830*, allowed a woman to claim her husband's plantations and property if he left her and no exceptions were made for couples without children.[82]

6.4.6 Lease

A number of proposals from the public were made in regard to leases but none specifically referred to women's rights. The Commission noted that landholders can lease land to their daughters and female relatives but did not encourage landholders to do so.[83] The Commission also recommended that public awareness programs should be held to inform the public of the operation of the law.[84] The Commission's comment that leasing to daughters is permissible under the current law is insufficient to change social attitudes about women's land rights. The Government needs to take concrete action by

[77] Ibid, 56. The term 'innocent wife' does not appear in the *Maintenance of Deserted Wives Act* and the Commission did not explain what it meant. It could be inferred from other provisions of the Act that it means a wife who has not committed adultery as the committing of adultery by the wife is a ground for not allowing her to stay in the family home if deserted by her husband (*Maintenance of Deserted Wives Act*, s 3).
[78] Matrimonial in the sense that the couple lived in the home during marriage although the husband is the sole owner of the land.
[79] Sections 2 and 5.
[80] Royal Land Commission, *Final Report*, above n 2, 56.
[81] Ibid.
[82] As discussed in Chapter Three.
[83] Royal Land Commission, *Final Report*, above n 2, 101.
[84] Ibid, 70-1.

changing the law to enable women to hold and inherit a town and tax allotment. If left to public support, cultural relativists or conservatives are likely to appeal to cultural traditions to support the maintenance of the existing discriminatory law.

6.4.7 Family Trust

The Commission reported that many people were supportive of the establishment of a family trust whereby all members of the family would contribute to how the family land is managed and distributed.[85] The Commission noted that the creation of a family trust is possible in other jurisdictions such as New Zealand where there is freehold land.[86] However, the Commission's report on the public discussion on family trust is very brief and, the public was not fully informed about the nature of a family trust.[87] It appears from the Commission's report that those who supported the idea of a family trust were simply supporting equal inheritance or equal rights by all children of the allotment holder especially in a situation where there is enough land to be divided among the children of the landholder. This is evident in what was raised by those members of the public who are dissatisfied with the current system which allows the landholder to subdivide land to be given to non-family members.[88] This was also evident in the overwhelming opposition to the introduction of freehold land. Thus, people preferred a modification of the current system to ensure that every child of the landholder is given a piece of land or has equal rights to the landholder's land upon his death. This would replace the current sole inheritance system through the eldest son.

Many subdivide land and grant it to other family members including leasing land to female family members. Additionally, ensuring that each child receives part of the

[85] Ibid, 101. It is not clear whether it was the Commission or the public who raised the idea. The Commission said that the concept of family trust was put to the family and yet it stated that recommending for its introduction was outside its mandate.

[86] Ibid.

[87] A family trust in New Zealand for example (which the Royal Land Commission referred to briefly) is created by a trust instrument or a will. One of the purposes of a trust is to protect family assets from the personal liability of the settlor(s), the owner of the property. The settlor transfers property to the trustees although settlors can be trustees themselves, to manage on behalf of the beneficiaries. Settlors and the settlors' children are the discretionary beneficiaries under the trust and final beneficiaries will also be named as those to whom the trust property will go when the trust finishes. See New Zealand Law Society, *The Family Trust* <https://www.lawsociety.org.nz/__data/assets/pdf_file/0005/69224/The-Family-Trust-11-Mar-13-WS.pdf>. A family trust would not work in Tonga because the people prefer to deal directly with their land on a day-to-day basis. They may not want the burden of creating a trust and be subject to the requirements of a trust.

[88] Royal Land Commission, *Final Report*, above n 2, 101-2.

landholder's land is arguably compatible with George Tupou I's intention that every family should have land on which to live and to grow food.[89] As the Commission noted, King George Tupou I's wish was 'that land was distributed to the people to ensure prosperity, happiness and the provisions of food and other necessaries of life.'[90] However, land law as it is today no longer delivers King George Tupou I's vision. Socio-economic changes have resulted in members of some families having no land. The demand by some members of the public for equal rights to the family land reflects dissatisfaction with the current inheritance system allowing heirs to give parts of the land to non-family members rather than to their siblings.[91] The Royal Land Commission was an opportunity to reform the law to accord with King George Tupou I's vision to the extent that it is suitable in contemporary Tongan society.

[89] Although it was an individual landholding system that King George Tupou I put in place, he did not foresee subsequent changes such as the introduction of the mortgaging system and the /commodification of land which has led to family land being surrendered by the heir, as it has happened in many cases, to non-family members.
[90] Royal Land Commission, *Final Report*, above n 2, 130.
[91] Ibid, 102.

Part II – Advancing Women's Land Rights through Law Reform

Tonga's land law is complex and unique. It does not offer formal equality to women, who are denied some of the land rights enjoyed by men, and it does not offer formal equality to men because of the socio-political hierarchy which favours men in the Royal Family and nobility over commoner men. For women, discrimination based on their class compounds the discrimination they face based on their gender. In determining a way forward however, workable practical solutions that are likely to be successful must be developed.[92] At the outset, it must be acknowledged that the immediate achievement of substantive equality for women is unlikely because the rights of current landholders cannot be removed without constitutional change.[93] The proposed reforms are also likely to be contentious and therefore adherence to Nyamu's critical pragmatic approach will also be necessary. The approach propounded in this thesis requires balancing the long term goal of achieving substantive equality with a critical pragmatic approach that prioritises reforms that are likely to be adopted in the short term. The ruling class and ordinary people who accept the status quo and do not support or desire reform are likely to oppose change.[94] It would be counter-productive to advocate reform to the rules of succession that apply to the titles and estates of the monarch and the nobles if those two classes do not support reform.[95] This thesis therefore does not propose any changes to the rules of succession of those two classes in the short term.

6.5 Basic principles needing reform

This thesis makes recommendations in relation to three basic principles of land tenure in the Constitution. First, formal equality should be guaranteed in the Constitution along with the prohibition of gender and sex discrimination. Second, this thesis recommends the phasing out of the law of succession to a tax and town allotment. The third

[92] Nyamu, above n 1, 381, 403; Coomaraswamy, 'Are Women's Rights Universal?', above n 95, 1, 11; Radhika Coomaraswamy, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2003) 34 *George Washington International Law Review* 483, 494.

[93] Clause 20 of the *Act of Constitution of Tonga* states, '[i]t shall not be lawful to enact any retrospective laws in so far as they may curtail or take away or affect rights or privileges existing at the time of the passing of such laws.' Thus, the law can be changed to take effect in respect of future landholders but not current landholders.

[94] Nyamu, above n 1, 381, 416-7.

[95] It should be noted that only the nobles in parliament can vote on matters pertaining to the titles and estates of the nobles (*Act of Constitution of Tonga*, cl 67) and the King has absolute power of veto over legislation passed by parliament.

recommendation is to allow both men and women to apply for a town or tax allotment or both, subject to the availability of land. The long term aim is to achieve equal land rights for women over a period of time, gradually bringing community attitudes into line as part of the process. This thesis argues that these reforms will effect changes in other aspects of women's rights to land such as the removal of the conditional life interest for widows and daughters. Under the proposals below women will be able to hold an allotment the effect of which would be that if they married they would have security of tenure because they would not be living on land which belonged to their husband. Additionally and importantly, the reforms below will impact beneficially on community attitudes towards women holding land and, as a result, increase women's opportunities to hold land through leases.

6.5.1 The right to equality

Any change to the land law provisions must be accompanied by a right to equality and non-discrimination on the grounds of sex and gender under the Constitution. The current clause 4 of the Constitution provides for equal protection before the law guaranteeing the 'same law for all classes'. However, as the Constitution discriminates between women in the various social 'classes' as well as men, clause 4 should be repealed and replaced with provisions which guarantee equality to all regardless of sex and gender and other grounds. Clause 4, or a new clause, should also prohibit discrimination, both direct and indirect, on the grounds of sex and gender and include a definition of discrimination against women using CEDAW as a guideline. Provisions which define and prohibit discrimination against women are necessary given the history and the persistence of discrimination against women. Legislative or other measures aimed at quickening the process of closing the gender gap should also be in place. A new clause 4 on the right to equality and freedom from discrimination should therefore contain the following components:

a) equality of all persons before the law and the right to the equal protection, treatment and benefit of the law;[96]

[96] Similar to the corresponding provision in Fiji's Constitution (art 26 (1)).

b) a definition of equality that includes the full and equal enjoyment of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field;[97]
c) a prohibition of discrimination by the State or any person (including incorporated bodies), directly or indirectly, on the basis of, but not limited to, sex, marital status, race, ethnic origin, gender, language, religion, political or other opinion, national or social origin, property, health status, disability, birth or other status;
d) a definition of discrimination along the lines of the definition in article 1 of CEDAW;
e) the adoption of temporary special measures to promote the achievement of equality and to protect or advance persons, or categories of persons, disadvantaged by discrimination,[98] and that the adoption of such measures should not be regarded as discrimination against those to whom such measures do not apply. The special measures must cease once equality is achieved.

In particular, the proposal to utilise temporary special measures in relation to the land rights of women would be highly contentious. However, employing a temporary special measure to set quotas for women's representation in parliament was recently proposed by the only female Member of Parliament.[99] As Tongan society becomes more informed and receptive to the concept and realisation of substantive equality, utilising temporary special measures to achieve substantive equality in land rights may become acceptable.

A weakness of the above proposed changes, which would also apply to the new constitutional provisions proposed below, is that, they take a minimalist approach to constitutional reform. If the amendments proposed are incorporated into the Constitution, the new provisions would exist alongside provisions which entrench privileges of the royal family and nobility thus maintaining social and political inequality between those two classes and the commoners. If a holistic and fully comprehensive approach towards constitutional reform is not taken, inequality may

[97] Similar to the corresponding provision in Fiji's Constitution (art 26 (2)).
[98] Similar to corresponding provision in the *Constitution of the Republic of South Africa*, 1996 (Chapter 2: Bill of Rights, art 2).
[99] The Tongan government is still considering that proposal. Public debate has not heightened on the issue, and perhaps will not until it is provided for in a legislative Bill.

continue to exist underpinning both the constitution and society more generally. In relation to the past constitutional reform process, Powles stated:

> It seems that Tongan constitutional planners are faced with a dilemma. A decision merely to make some critical changes here and there in the Constitution probably appeals to those leaders, including now the King and most of the current Cabinet, who feel that groups in society opposed to change, and perhaps the people generally, would be unwilling to interfere with their traditional system of royalty and nobility, except to the extent strictly necessary to achieve certain limited objectives. Respect for and allegiance to the royal family and nobility remain fundamental values for most Tongans, and the NCPR has, if anything, reinforced those values. Perhaps it is only the lawyers and law drafters who are horrified at the realisation that a minimalist approach to change will probably mean that the Constitution will be divided into "old" and "new" parts.[100]

A holistic and comprehensive approach to constitutional reform, however, would involve changing the socio-political class structure which would be highly contentious. As the experience of the King devolving some of his constitutional powers in 2010 demonstrates, Tongan people seems to prefer such changes to come from the King himself rather than through the constitution.[101] Taking a critical pragmatic approach reforms which are likely to be implemented such as allowing women to hold and inherit a tax and town allotment, may be more advantageous in the long term

6.5.2 The right to an allotment

The 1983 and the 2008 Commissions and other scholars have argued that the constitutional right of every Tongan male over 16 years of age to a tax and town allotment can no longer be realised due to the increasing population and limited

[100] Guy Powles, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynesiénne* 111, 128. NCPR stands for the National Committee of the Kingdom of Tonga for Political Reform established by the Legislative Assembly in October 2005 to hold public consultations on constitutional reform and to make recommendations for new legislation aimed at 'building national unity and promoting the social and economic advancement of the people'; Powles at 133.

[101] Those powers which impinge on legislative changes will remain.

remaining land available for grant.[102] The population, according to the 2011 census, is 103,252[103] compared to around 20,000 in 1900, excluding those Tongans who have migrated overseas.[104] It is estimated that the Tongan diaspora which began in the second half of the last century is close in number to the current population in Tonga.[105] However, the land held by people migrating overseas remains theirs, leaving many allotments vacant or unoccupied.[106] The 2008 Commission found that the exact amount of land that is available for grant is unknown as the Ministry of Lands and Survey does not have accurate information.[107] The Ministry of Lands did not have any information on land allocated and/or occupied by people but not registered.[108] Further, the Ministry of Lands has a huge back-log of files on registration, drafting and surveying works.[109] Therefore, the claim that there is limited land available should not be taken as accurate until the Ministry's records are updated.

In terms of leases, the current maximum of five per person for town allotments and ten for tax allotments should be reduced especially in relation to foreigners and companies (both local and foreign). Regardless, lack of available land should be not a reason for not giving women equal rights to land. As a fundamental human right, equality should not be denied on any grounds. Therefore, women should have equal access to land even

[102] Royal Land Commission, *Final Report*, above n 2, 47; Alaric Maude and Feleti Sevele, 'Tonga: Equality Overtaking Privilege' in Selwyn Arutangai and Ron Crocombe (eds), *Land Tenure in the Pacific* (University of the South Pacific, 3rd ed, 1987), 128.

[103] Tonga Department of Statistics, *2011 Population Census* <http://www.spc.int/prism/tonga/index.php?option=com_content&view=article&id=98&Itemid=310>

[104] James, above n 27, 220. Population figure for the year 1900 is taken from historical accounts. See, A W Murray, *The Bible in the Pacific* (first published James Nisbet, 1888; 2013 Forgotten Books), 65.

[105] Government of Tonga, *Tonga Strategic Development Framework 2015–25: A More Progressive Tonga, Enhancing Our Inheritance* (Ministry of Finance and National Planning, 2015) 37.

[106] James, above n 27, 217. The issue of absentee landholders was discussed during the Commission's inquiry. Most absentee landholders live overseas but some live in Tonga. Some members of the public proposed that unused land should be made available to be used by others with the landholder's consent. Other members of the public proposed that unused land should be seized by the Government which would then become Crown land. The Commission reported that most Tongans living overseas objected to having their land taken away. Some argued (although not clear from the Commission's report, whether they held land in Tonga or not) that Tongans living overseas contribute to the Tongan economy with remittances and therefore should not have their land taken away (although it is not just Tongans who have migrated overseas who send money back to Tonga). Royal Land Commission, *Final Report*, above n 2, 38.

[107] Royal Land Commission, *Final Report*, above n 2, 48.

[108] Ibid.

[109] Ibid, 168. Confirmed by a Ministry of Lands and Survey official to still be the case as at November 2016. Communication on 14 November 2016. The Commission also found that the 'Ministry seriously lacks in a single national, centralized computer database that reliably monitors and controls all land records for Tonga' and recommended that the Ministry should have such a database. Royal Land Commission, *Interim Report* (Ministry of Lands, Survey and Natural Resources, 2010) 27. To find out who owns what land, a cartographical audit should be conducted.

if there is not enough land to be distributed to women. The practical reality of insufficient land should not preclude incorporation of the equality principle into the Constitution and the *Land Act*. Women should be equally positioned with men when confronting, and finding solutions for, a shortage of land.

The 2008 Commission also recommended that women should be entitled to a town allotment but not a tax allotment. However, as explained in Part I of this chapter, the Commission's argument against women holding a tax allotment, because such a holding would be incompatible with 'well-defined gender roles', is not supported by evidence and therefore should be disregarded. If a tax allotment holder wishes to surrender all or part of a tax allotment to be granted to a female family member, upon the coming into force of the proposed law reforms, then he should be allowed to do so. In addition, the minimum age of a person able to apply for either a tax or town allotment should, irrespective of gender, rise from sixteen to twenty one years, along the lines of the 2008 Commission recommendations. Young people will be more mature and better able to make informed decisions about the future course of their lives at twenty one years rather than sixteen years.

It is proposed that native Tongans, both male and female (excluding naturalised foreign citizens) may be granted a tax or town allotment or both, subject to the availability of land. The effect of the 1997 amendment to clause 113 to the Constitution should also be clarified so that there is no automatic right to an allotment. In the past it has been the practice that, before lodging their application with the Ministry of Lands, many applicants for an allotment had already made arrangements with the estate holder or allotment holder to grant a piece of land (in the case of land on an estate) or surrender an allotment or part of an allotment to be granted to them (the applicants). A new clause 113 on 'Application for an allotment' (instead of 'Right to allotments') should provide that every eligible native Tongan man or woman, twenty one years of age or older, may apply for a tax or town allotment, or both, subject to the availability of land. The choice of who gets the allotment when there are more applicants than there is land, would be a matter for the Minister of Lands to decide and is beyond the scope of this thesis.

From a feminist perspective the proposed amendment would not conform to a substantive equality approach because men currently hold most of the land. A

substantive equality approach requires remedying that inequality by, for example, putting in place a temporary special measure which favours women. A critical pragmatic approach however might instead reason that a temporary special measure could be used to close the inequality gap in land rights in Tonga, however it would be highly contentious and may result in stalling any proposed reform. Therefore, focusing on giving women the right to apply for, or to inherit, a tax and/or town allotment may be a more pragmatic approach (which could gain traction). The proposed amendment would not further compound the problem of land shortage because the right to hold an allotment is subject to the availability of land.

6.5.3 Inheritance

Section 82 of the Land Act sets out the law of succession (or inheritance) regarding a tax or town allotment, prescribing that such allotments pass down through the eldest son. If there is no son, then after a widow's life interest has been determined, an unmarried daughter can inherit for life, conditional upon the daughter remaining unmarried and chaste. The Commission recommended a revised but perplexing rule relating to the inheritance of allotments. The recommendation was that daughters would inherit if there were no sons, and if there were more than one daughter, the eldest would inherit for her lifetime with the allotment then passing to the next surviving daughter. After all daughters succeeded to the land in their various lifetimes, the land would then pass to the eldest daughter's son and then to his son. The Commission's recommendation is problematic. It purports to provide equality for women but is discriminatory. Any law which gives one child, because he or she is the firstborn, the sole right to inherit his father's land discriminates against all the other children, whether

male or female. This thesis proposes therefore that equal rights of inheritance by all children must be guaranteed.[110]

The Commission did not fully consider the proposal for equal rights which was proposed by some members of the public. However, equal rights in inheritance are important so that no child is excluded from the family land. Without equal inheritance, discriminatory consequences for women and girls impacting on many aspects of their lives are inevitable. It is recommended that land held by both men and women individually or jointly should be passed down to their children, including legally adopted children, to be held jointly, if there is not enough land to be divided between the children in accordance with the current prescribed size for allotments.[111] If any child asserts individual authority over a jointly held land to which the other children disagree, the others can enforce their joint right in court. To accustom the community to such change and as a pragmatic solution for reform, this thesis recommends a gradual phasing out of the law of succession over a fixed and certain time period is, rather than immediate repeal.

However, an allotment holder who has enough land to be equally subdivided among his children would be forced to undertake such a subdivision.[112] Meanwhile, a landholder living overseas who wished to surrender his land to a sibling (or siblings) who resided

[110] Testamentary disposition is not considered here because it would be impractical. The hereditary system has been in place for over a century and most people live close to their extended families. Further, it is fair to say that Tongan society does not acknowledge reckless, irresponsible or cruel children and prefers a non-testamentary alternative regardless of the heir's or children's behaviour. It appears that most people would be against the introduction of any further changes to the basic land tenure. I guess the Tongan preferences means that testators cannot use testamentary disposition as a tool of social control. Think King Lear. Just an aside. No need to add anything. This was not only reflected in the findings of the 2008 Royal Land Commission, but also in comments expressed in the printed media and social media. The closest proposal to a testamentary disposition according to the findings of the Royal Land Commission was that parents should choose whom amongst their children (not outsiders) should inherit the family land. There has not been any alternative proposal to the law on inheritance such as a system whereby all land was returned to the Crown for redistribution on the death of the allotment holder work. Tongan people are emotionally tied to the land on which they grew up and have a sense of ownership over that land as opposed to the common law principle that the land does not belong to any individual. They do not view it as a resource to be re-distributed once it belongs to a family. Some people have proposed that land should be passed down to the person who could look after it best, but only within the family.

[111] The current section 82 gives the right of inheritance only to legitimate sons, although in terms of maintenance, the mother of an illegitimate child can apply for an affiliation order and for an order that the father provides maintenance for the child until the child reaches the age of 16; *Maintenance of Illegitimate Children* (CAP 30), s 2). The 2008 Royal Land Commission recognised that some couples or landholders have adopted an illegitimate child and that child grew up and took care of them. The Commission recommended that an adopted child should have a right to inherit if the couple has no natural children.

[112] The Land Act uses the term 'subdivision' rather than 'partitioning'. See Land Act, s 51.

in Tonga would be able to do so. The 2008 Commission reported that some people were in favour of dividing land amongst all the landholder's children. The Commission noted that many people were not aware that they could subdivide their land under the current law although such a subdivision is subject to the approval of the Minister of Lands and Cabinet. Thus, a proposal to oblige current landholders to subdivide their land among all children, including legally adopted children, harmonises well with existing law.

The eldest son of a landholder (born before the date on which the amendments to the Constitution and the *Land Act* proposed in this thesis come into effect) would succeed to his father's land if the land in question were a town allotment only.[113] The phasing out of the law of succession would apply in such a situation so that when the eldest son inherits his father's land, the joint inheritance and ownership regime proposed above would apply to his children. If a landholder has both a town allotment and a tax allotment, the eldest son would inherit the town allotment and the tax allotment would be subdivided into plots of 30 perches each for the rest of the landholder's children. Any remaining land would be left as a tax allotment for all the landholder's children to share equally.

If an allotment holder has enough land to be subdivided among all his children, giving them at least 30 perches (8167.5 ft²) each as residential plots, he may do so upon the coming into force of the amendment. Any land remaining after that subdivision should be left as a tax allotment that all the allotment holder's children would jointly inherit and own for farming purposes or any other purpose to which they jointly agreed.[114] If a landholder dies without such a subdivision already in place, the Minister of Lands should subdivide the landholder's land equally among his children and have it registered in their individual names as sole landholders. Children who are able to obtain land for themselves or who wish to migrate overseas permanently should be enabled, if they wish to do so. Those children should be able to surrender their right to a share of the family land with the effect that that land is available for distribution to, and registration by, the siblings who remain living in Tonga.

[113] A tax allotment is of greater area and can be subdivided.
[114] This is because only a tax allotment is large enough to be subdivided between two or more children.

Such an approach is necessary where there is not enough land to be subdivided between siblings. If there is only one child then he or she should able to register the land in his or her name as the sole landholder. An allotment holder who permanently resides overseas with his or her family should be allowed to surrender his land or part of it to any person residing in Tonga, siblings without land first and before non-family members. An allotment holder should be allowed to surrender or lease all or part of his or her land to another person if there are no children. Thus, there will be two types of landholding – sole ownership and joint ownership. Section 82 of the Land Act should, therefore, be repealed and replaced with a new section titled Equal Rights of Inheritance to Allotments.

Any proposal to change the law on inheritance is likely to be strongly opposed despite some public views expressed during the 2008 Commission inquiry, favouring some enhanced land rights for women. In addition, a number of problems are likely to arise in relation to equal inheritance. Many landholders hold a town allotment only which is thirty perches in size. The children of such landholders would have equal rights to that allotment but rights to the land comprising those allotments would become more problematic when those children have children of their own. (The allotments would reach a point where they could not be subdivided.) Hence a decision would need to be made on what will happen to the land in relation to the second generation. The successors of the original holder could be left to decide amongst themselves who would inherit the family land but reaching a consensus under this approach is likely to be a problem. However, Tongan society has an inbuilt system for negotiation and conflict resolution within extended families which may assist in this difficult exercise. The current system of male primogeniture is more problematic than the one proposed because primogeniture permits only one child to inherit the land and denies the other children (some of whom may be women) the right to assert an interest in their father's land.

Part III – Basic Principles to Remain

6.6 The prohibition of the sale of land to remain

This thesis proposes that the prohibition on the sale of land should continue. The introduction of freehold land in any form should be rejected such as the proposal by the 2008 Commission that land should be reclaimed at sea areas adjacent to the seafront for the purpose of attracting foreign investment and would become freehold land. As previously discussed, if freehold tenure were introduced it would be a significant departure from the basic land tenure principles on which Tongan land law has relied and it would be in direct contradiction to King George Tupou I's vision that land should remain in Tongan hands in perpetuity so that the native people of Tonga could continue to have access to land for residential and farming purposes. The sale of land was prohibited in the 1950 Code of Laws and the prohibition provision is the only provision of the early laws that was incorporated into the Constitution in 1875. Although the proposal to introduce freehold title came from the country's leaders, both the 1983 Commission and the 2008 Commission,[115] recommended that freehold title should not be introduced. Some argue that only wealthy people would be able to afford freehold land, a concern that was also raised during the 1983 public meetings.[116] Further, there is limited unallocated land available and it is likely that freehold land would be acquired by corporations thus decreasing the opportunities for women to acquire land for registration.[117] A shift to freehold tenure would be most likely accompanied by the introduction of markets. Unregulated markets can lead to the exclusion of weaker

[115] The 1983 Commission's definition of 'freehold' however did not resemble the common law definition of freehold. The freehold system proposed by 1983 Commission was vague and won little support from the public. Royal Land Commission, *Review of all Practices*, above n 49, 16-7.

[116] Royal Land Commission, *Final Report*, above n 2, 34.

[117] The experiences in other developing countries have shown that land-grabbing has disproportionately disadvantaged women. See Jessica Chu, 'Gender and 'Land Grabbing' in Sub-Saharan Africa: Women's Land Rights and Customary Land Tenure' (2011) 54(1) *Development*, 35; Oxfam International, *About GROW* <www.oxfam.org/en/grow/issues/land-grabs>. Land-grabbing reduces the opportunities for women to access land; see OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (United Nations, 2013) 3.

parties and can be accompanied by distortions. Tonga could end up with the position in other countries where housing is out of the reach of a lot of people.[118]

Many members of the public during the Commission's inquiry did not support the right to sell land in general. They proposed that land should remain within the family and not to be granted or leased by the landholder to a non-family member.[119] However, it is unrealistic that landholders should be prevented from surrendering or leasing land to another person as in practice surrenders and leases have already become part of the fabric of Tongan land law. Many people, especially in the Nuku'alofa area, live on land originally belonging to someone to whom they were not related. The land was surrendered and passed down to the current holder.[120] Such lands belonged to past landholders who had tax allotments with a size of up to twelve acres.[121] The proposed amendments (above) allow future landholders to surrender their land according to pre-existing and current land law practices provided that they have first allocated land to all their children.

6.7 Land shortage

Both the 1983 and 2008 Commission identified a land shortage problem although as observed above the latter acknowledged that the current status of land distribution is unknown due to incomplete records at the Ministry of Lands. Further, the 2008 Commission did not recommend that the Constitutional entitlement of every male over sixteen years of age should be abolished. The Commissions were aware that such a move would be strongly opposed by the people although opposition would be based on sentimental ideals and the perception that land tenure is timeless.

Some of the factors which contribute to the problem of land shortages have been identified. These include, first, absentee landholders who have migrated overseas without granting any part of their land to residents in Tonga.[122] By not granting the land

[118] ABC, 'Massive decline in affordable housing adding to number of homeless in Melbourne' News 19 Oct 2016 http:`//www.abc.net.au/news/2016-10-19/affordable-housing-decline-adds-melbournes-homeless/7946800.
[119] Royal Land Commission, *Final Report*, above n 2, 34.
[120] Maude and Sevele, above n 102, 125.
[121] Ibid, 121.
[122] Some such landholders have returned to Tonga to subdivide their land.

to others and consequently making it available for use, the land remains under-exploited. In response, some proposals regarding absentee landholders were put forward during the 2008 Commission's inquiry but ultimately the Commission was reluctant to make any recommendation to deprive such owners of their land on the basis that Tongans overseas contribute to the economy by sending money and goods back.[123] A second factor contributing to land shortages, especially in the main island of Tongatapu where 73% of the total population now lives, is that of internal migration from the outer islands.[124] As tax allotments are becoming less available on the main island, policies should be developed to encourage land use on the outer islands for farming purposes, both for local consumption and for commercial purposes. More than half of the islands in Tonga are uninhabited but some could be used for farming or other commercial activities if the necessary infrastructure is put in place. Some people who live in Tongatapu are already using the outer islands for farming, but a comprehensive land use policy that encourages people to use land judiciously and productively is recommended.

Some people during the Commission inquiry supported making more land available to the people by reclamation of shallow sea water areas.[125] Others proposed that only people who live along the seafront next to any reclaimed land should acquire land reclaimed from the sea.[126] Others were concerned about the environmental impact that reclamation would have on the area to be reclaimed as well as about the elimination of people's livelihoods.[127] However, some people live on reclaimed or partially reclaimed land in swampy areas and the lagoon waters in Tongatapu. Thus, this proposal is not novel. Reclamation of sea water areas to address land shortage is an option. It could be introduced without dependence on freehold title but environmentalists would not see it as a viable option.

Conclusion

The work and findings of the 2008 Royal Land Commission are laudable because of the breadth of the Commission's coverage of all matters related to land use and practice. It

[123] Such an observation has not been qualified by available data. Additonally, some Tongan residents overseas who do not own land may still send money based on family ties.
[124] Government of Tonga, *Strategic Development Framework*, above n 105, 37-8.
[125] Royal Land Commission, *Final Report*, above n 2, 34.
[126] Ibid.
[127] Ibid.

is also encouraging that the Commission went outside its mandate and considered and made favourable recommendations about women's land rights. Despite shortcomings in its findings on women's land rights the Commission's work is an opportunity to develop a response to the present position of women's unequal land rights in Tonga. Some of the radical ideas put forward in its report, as well as those of the 1983 Commission, came from the leaders themselves. Because the report has not been endorsed by the government and acted on, the public is not aware of such radical proposals and the contents of the report more generally. Publicising the report along with the reforms contained in this thesis will assist in creating an awareness of the issues, and the more rapid realisation of equal land rights for women. As demonstrated above, this thesis draws on and develops what the public and the two Royal Land Commissions have proposed. If and when the reform process designed to guarantee equality for women gets underway in Tonga, there will be opposition to it, particularly from the privileged classes of Tongan society.

By using a feminist analysis of the principles of equality and non-discrimination, and deploying feminist interventions in the cultural relativism versus universalism debate, this thesis has proposed a way forward drawing on women's human rights; rights that expose the arguments based on culture as unsubstantiated. This thesis has also offered proposals that are pragmatic, fair and meet Tonga's international obligations in terms of gender equality. Although the outlined proposals would not necessarily result in the immediate realisation of substantive equality, they may be regarded as progressive steps on the journey towards full gender equality in relation to land law in Tonga. Importantly, they reflect a critical pragmatic approach grounded in compromise and the art of the possible. Some of the proposed reforms however, in particular the maintenance of the prohibition on the sale of land and the inability of foreigners to hold an allotment, discriminate against foreigners. Despite that, it is not always necessary to adopt international best practices if local circumstances do not warrant it, especially if the further marginalisation of many locals would be exacerbated by the adoption of such international best practices.

Notwithstanding the above, the three key reforms proposed in this chapter are imperative. They are that:

- the current clause 4 of the Constitution, which purports to be an equality provision, should be replaced with a provision which guarantees equality and non-discrimination in accordance with international human rights law;
- women should be able, just as men, to apply for and hold or inherit a tax and town allotment;
- all children of a landholder must inherit the landholder's land equally if the landholder, in his or her lifetime, does not subdivide land to provide for each of his or her child to hold land for residential purposes.

Chapter Seven – Conclusion

Discrimination against women in land rights on the basis of their gender is a violation of their fundamental human right to equality. Such discrimination in land rights, in turn, impacts upon, women's economic rights because they cannot hold one of the most important natural resources from which many other economic benefits derive. They cannot own their own home or possess collateral for a loan to build a house, start a business, finance family needs or for any other purpose which requires a substantial amount of money. In Tonga women do not have equal land rights in law because the Constitution and the Land Act provide that only men can hold hereditary estates (King, nobles and six ceremonial attendants) and allotments (commoner men). Women can lease land but as observed in Chapter Three, there are financial and social challenges to women acquiring a leasehold.

This research addresses a significant gap in the literature. It is the first academic research on women's land rights in Tonga from a feminist legal perspective. The research is also the first comprehensive work that traces the development of the current land tenure system from the early laws of Tonga, the 1939, 1950 and 1962 Codes of laws, the 1875 Constitution, and the Hereditary Lands Act 1882.

The theoretical framework set out in Chapter Two focused on two main bodies of feminist legal theory. The first was feminist approaches to equality and non-discrimination. The second was the feminist response to the human rights debate on universalism versus the cultural relativism. The chapter began with a discussion of the feminist response to direct discrimination in the law, against women, and explained how the formal recognition of the equality of men and women was the initial goal of feminist legal theorists. Although the formal equality approach is limited in many ways, particularly because it does not address the structural barriers that perpetuate and reinforce inequality, in Tonga formal equality has not yet been achieved. Thus, Chapter Two concluded that both formal and substantive equality must be guaranteed in law and achieved in practice.

Chapter Two also considered the theoretical debate in international human rights law on universalism and cultural relativism in relation to human rights. Universalists argue that fundamental human rights are possessed by every human being regardless of nationality and culture. Cultural relativists on the other hand argue that human rights are Western values and are not applicable in non-Western societies. Instead, every society has its own values. Although there are a diversity of feminist positions, this thesis is aligned with a feminist perspective which argues that it is only those cultural aspects causing harm to women which need to be abolished. This thesis also aligns with the feminist perspective that where deference to culture is used as a pretext to maintain discriminatory laws and cultural practices, it is appropriate to question who is making the claim and what could be his or her motive for making such a claim. Some universalists and feminists argue that those who benefit from maintaining a system which places them in a position of power are the ones who oppose change. Additionally, those who benefit from the maintenance of the status quo often also assume the right to define culture to be followed by the rest of society. A critical pragmatic approach, which aims at eliminating discriminatory laws and practices while considering and balancing complex local situations which, if ignored, could render any effort towards reform futile is also deployed in this thesis.. Cultural relativistic views have been advanced against the acceptance and advancement of women's rights in Tonga. Some such views have been directed towards women's land rights specifically.

In setting out the basic principles of land law in Tonga as stipulated in the Constitution and the *Land Act*, Chapter Three showed that formal equality for women in Tonga has not yet been achieved. In particular, women are still directly discriminated against in land law. The chapter also demonstrated that the Constitution establishes a socio-political class hierarchy with the King and the Royal Family at the apex, underneath which sits the nobility and the commoners. The King and the nobles hold vast areas of land called hereditary estates making them both economically and politically powerful. The Constitution does not expressly guarantee equality between men and women which leaves women with no legal basis in which to ground claims that Tongan law should embrace gender. Clause 4 of the Constitution provides for the equal treatment of all *classes* of people before the law but that clause has not been interpreted to include gender equality. In addition, the Constitution established an unequal socio-political order as well as landholding principles which are discriminatory against women. Thus,

despite the mandate of the Constitution to provide equal treatment for all classes it does not do that or embrace gender equality.

Chapter Three, drawing on the theory of intersectionality outlined in Chapter Two, also illustrated that women's opportunity to access land diminishes according to one's position on the socio-political hierarchy. The lower down a woman or girl is positioned, the less access to land she has. Although all women are discriminated against regardless of the socio-political class to which they belong, the law differentially affects women in the various classes. The position in society of women in the royal family and in the nobility places them at a much greater advantage socially, economically and politically than commoner women. Royal and noble women may, for example, lease land at no cost from their estate-holding male relative for residential or business purposes. They are also likely to marry within their class, thus maintaining their privileged position. Women in the upper two socio-political classes, therefore, have greater opportunity to access land for lease although they, like all women, face discrimination in the law of succession and inheritance. Because of their privileged position in society the majority of royal and noble women, are unlikely to support equal land rights reform. Indeed, it is commoner women, who comprise the majority of the female population and are most affected by land law, who may end up being the driving force for land reform.

The thesis however does not address directly the hierarchical socio-political structure which impacts on the land tenure system. That very structure perpetuates inequality in various forms but deference to traditional authority (which was codified in the Constitution) is still strong. Human rights challenges traditional authority and although the class structure, which confers land rights on the monarchy and the nobility, obstructs women's land rights, it is not the central focus of this thesis. The central focus is on women's land rights.

Chapter Three also reinforced that the present land law does not correspond to the reality of people's lives. Although the transfer of allotments is technically not possible it is common for allotment holders, especially those with large tax allotments, to surrender part of their tax allotment so that it can be allocated to a female family member's son. However, once in the son's hand the (tax) allotment continues to pass down the male line of inheritance beginning with age seniority. The land is not held by the female

relative (and the discrimination remains), but it was given to her son because of her. That practice, together with the leasing of land to female family members, demonstrates that there is some dissatisfaction with the present legal constraints on land and that creative measures are being implemented to circumvent formal restrictions. Some of these measures reflect a desire for methods which allow women to hold land. However, the fact that there has never been any strong public demand for women to own allotments is indicative of the prevalence of strong patriarchal norms.[1] In addition, although the sale of land is prohibited, in practice landholders have surrendered land so that it could be granted to non-family members as an allotment. In return large sums of money or some other valuable consideration has been provided. These examples demonstrated that the present system of land law is not serving Tonga well. If it were, there would be no need to implement creative methods designed to circumvent the operation of the present law. Thus, the argument that the land tenure system should be maintained is in contradiction to the way key aspects of land law actually operate.

Since there is no legal avenue in the domestic law for women in Tonga to abolish the discriminatory land law, international law, in particular CEDAW, provides a standard to which local women's rights advocates can work toward. Chapter Four provided an overview of Tonga's international obligations to guarantee gender equality. This was followed by a discussion of Tonga's participation in the first two cycles of the Universal Periodic Review which saw an overwhelming interest by other UN member countries in Tonga's failure to recognise women's rights in Tonga. Indeed, some countries specifically pointed to discrimination against women in the land law. Developments after Tonga's second UPR review illustrated however that the UPR has had little influence, to date, on the advancement of women's rights in Tonga. Chapter Four, in the final section, considered CEDAW and its core articles on discrimination, equality and land rights. CEDAW requires States parties to work towards substantive equality. Although Tonga has not acceded to CEDAW, partly because a guarantee of equal land rights would be required, it has made a series of public commitments towards accession.

Consideration of CEDAW is important because it is the only human rights treaty which deals with the rights of women comprehensively. Moreover, it is likely that Tonga will

[1] Despite the history of women being militant and engaging in protest.

accede to it although with reservations to preserve its discriminatory laws including the land law. Additionally, the standards set by CEDAW may be used by local women's rights advocates to argue for the advancement of gender equality and the pursuit of both formal and substantive equality.. CEDAW prohibits all forms of discrimination against women and requires States parties to guarantee and attain formal and substantive equality. Although CEDAW does not contain an explicit right to land for all women, several articles are related to land rights such as the right to social and economic benefits (art 13), the rights of rural women to land and agrarian reform (art 14) and the equal rights of a husband and wife to own, manage and dispose of property (arts 15 and 16). Pursuant to these articles, the Convention does indeed prohibit discrimination against women in all its forms including discrimination in land rights.

Chapter Five discussed the way law and culture mutually reinforce each other to maintain the status quo and frustrate, in the Tongan context at least, land reform proposals aimed at giving women equal rights. The King has absolute power to veto legislation and the nobles have nine permanent seats in parliament elected from among themselves by themselves. The people's representatives have only seventeen seats. Therefore, even if land reform legislation is passed by parliament it can be subject to veto by the King which would prevent it coming into effect. While there has not been any proposed law to guarantee equal land rights, cultural relativist views against gender equality have been argued by the country's leaders in the recent past. The previous Sevele government opposed accession to CEDAW and made some ill-informed remarks such as a remark which claimed Tonga would disintegrate into chaos if gender equality were guaranteed. Inherent in Sevele's remarks was the view that gender equality would destabilise a presently stable country. Reticience towards embracing CEDAW was also reflected in the words of the Head of the Tongan Delegation to Tonga's second UPR review. He (a noble) stated before the UN Human Rights Council that 'the introduction of new human rights' would be weighed against factors such as core cultural Tongan values, Christian principles and liberal ideologies. He added that consideration of those factors was the reason why Tonga had not ratified core human rights conventions.

Chapter Five also discussed the *fahu* custom; a custom which has been advanced by conservatives as indicative of the fact that women in Tonga are not discriminated against and instead are, in reality, considered superior to men. The Chapter evaluated

this argument and found that the purported enhancement of women's status under *fahu* does not equate to clearly established land rights for women. Indeed the *fahu* custom does not operate to override land law in order to give the *fahu* any right to land. Additionally, not all women have the customary privilege of being a *fahu* because the status is conditional on certain factors. For example, it is dependent on a woman being the eldest sister in a family where there also exists a brother with a child (the child over which the *fahu* is superior and can accordingly exercise the privileges of being a *fahu)*.

An examination of the custom was necessary to evaluate and debunk arguments which claim to demonstrate that Tongan women have achieved equality. .Further examination of the *fahu* custom facilitated evaluation of, the argument that the ideal Tongan woman is an obedient wife or daughter who does not desire, or is unsuited to equality. An examination of historical sources revealed the reality of politically active women in traditional Tongan society, especially chiefly women, who were not steeped in the gendered roles of women in 20th century Tonga. Advancing arguments about the continuation of traditional gender roles in Tonga is not only anachronistic and bears little resemblance to the reality of people's lives today but also serves to perpetuate discrimination against women.

The predominant view that women should not own land in accordance with tradition, hampers any effort to reform the law. Chapter Five revealed that the arguments against equal land rights based on cultural traditions have no basis because the basic principles of land tenure were derived from English common law although those principles were adapted to form a unique land tenure system.

Principles, such as primogeniture, a subject with which this chapter also dealt are, of course, not unique to Tonga. In reinforcing an adherence to primogeniture, the 2008 Royal Land Commission argued that women should not hold a tax allotment because such a holding is incompatible with traditional gender roles. However, many women not only participate in agricultural activities, but many work away from home in jobs that are also performed by men. Some women hold leases and some run their own businesses or manage internationally-owned businesses. Moreover, widows and daughters' have had life interests in both tax and town allotments guaranteed by the law since the 1880s.These examples are inconsistent with the view that only men can and

should hold land and that only men are capable of making important decisions. By maintaining the current discriminatory land law, many women are devalued and denied the full range of social, economic and political benefits associated with land ownership. In short, such woman are denied the opportunity to be fully-functioning citizens.

Chapter Six employs the feminist critical pragmatic approach to propose a way forward in the pursuit of equal land rights for women. The approach emphasises the possible rather than the ideal (although it seeks not to lose sight of the ideal). It relies on an assessment of the complexities as evidenced in the local context and situation and it aims to deliver workable solutions. Hence, it involves immediate solutions and reforms 'while simultaneously working toward changing the larger social matrix of national legislation, constitutions, and administrative institutions.'[2] The work and findings of the Royal Land Commission have provided a basis to address women's (unequal) land rights in Tonga because all stakeholders were involved in its inquiry – women individually and women's organisations, the various types of landholders, government, banks and civil society organisations. The reforms to land law proposed in this thesis build therefore on the recommendations of the Commission.

The thesis examined the 2008 Royal Land Commission which did not support allowing women to hold tax allotments because in its view women holding tax allotments would conflict with 'well established gender roles in Tonga'. The intended result of the Commission's recommendation was for women to hold a town allotment only whilst men could hold both a town allotment and a tax allotment. Contrary to this view the thesis argued in Chapter 5 that gender roles in Tonga had transformed over time and now represent a different reality to that presented by the Commission. Women do participate in agriculture and although most are involved in the selling of the produce (locally) stage, it is envisaged that as women become more aware of the economic gains they can make in agriculture, many more women may choose to be involved at the initial stage of planning and growing.

A critical pragmatic approach also involves some compromise in working towards achieving gender equality or equal land rights. This thesis argues that that compromise

[2] Jessica Chu, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381, 416-7.

should be in the law of inheritance to allotments. However, the suggested compromise is limited to certain situations. Consequently, the thesis recommended that reforms to land law provisions in the Constitution and the *Land Act* should take place simultaneously with an amendment to the Constitution guaranteeing gender equality and the prohibition of any form of discrimination.

An immediate repeal of the law on inheritance is likely to be strongly opposed and therefore this thesis argued that inheritance law be gradually reformed, allowing women in the short term to apply for and register, a tax and town allotment. One of the issues which arose during this research is the competing rights of a widow in relation to her deceased husband's land and the right of her deceased husband's siblings, who are excluded by law from any right to the family land. It is envisaged that when the law is reformed along the lines of the proposals made in this thesis so that they give women equal land rights and result in equal inheritance by all children of a family, this problem will not arise. If a man or woman marries someone who inherited family land with the consent of all family members, there would not be any competing rights because the matter would have been already been settled. Therefore, until equal rights and equal inheritance come into force, widows should only be allowed to deal with newly acquired land and not inherited land, because siblings of the landholder would have been excluded from having any right to that land. Division of matrimonial property should be applied only to newly acquired land but not inherited land for the same reason.

The reforms proposed in Chapter Six are primarily still situated within the basic land tenure system which is consistent with the pragmatic approach to reform that this thesis employs. Some relevant approaches in other jurisdictions are not adopted because they would not function within the current land law and the local circumstances. For example, the rights of spouses to dispose of property upon divorce or upon death of either one of them are precluded by the inheritance system. Equal inheritance is likely to give rise to the problem that there is not enough land to be distributed among an allotment holder's children. However, the thesis argued that maintaining the current law on inheritance is not the solution. Equally, freehold tenure is not the solution. Instead, children of the family should be prevented from selling the family land and dividing the proceeds. It was argued that such an option would be impractical in Tonga and may

bear harshly on both women and poorer members of the community whose opportunities to hold land may be further diminished. .

The second phase of the Royal Land Commission's inquiry discussed the problem of unlawful land deals in the island of Vava'u and demonstrated that some foreigners were willing to buy land in Tonga.[3] Reclamation of sea and swamp areas, as is the current practice, should continue but first priority should be given to women. Tonga is a developing small island country with a poor economy and low material standard of living. Most people do not have the financial capacity to acquire land in exchange for money. These local circumstances, together with the complex social and political dimensions associated with them, must be considered before arguing for the introduction of international best practices.

The reform proposals in this thesis emphasise the importance of commencing the reform process by way of a series of deliberate, carefully considered steps so as not to jeopardise nor derail any greater, long-term reform process. The proposals should, therefore, be envisioned as initial and practical responses to Tongan land law's lack of equality for women. Accordingly, they play an important role in a future agenda setting by providing a starting point for further research and they provide, in a more immediate response, a practical way forward. Importantly, the proposals in this thesis sit within the overall fabric of the land tenure system that currently governs land law in Tonga. They envisage small, cautious steps as positive tools of pragmatism rather than signalling a lack of will or obstacles to reform. Small steps often have catalytic effects.

[3] Royal Land Commission, 'Second Interim Report - Land dealings Vava'u and elsewhere in Tonga through the internet', Tonga, 2010. Foreigners continue to be interested in buying leaseholds. Personal communication with a Ministry of Lands official, 7 April 2017.

References

ABC, 'Invest in People, Infrastructure and Technology for Future Prosperity', *Lateline* 30 June 2014 <http://www.abc.net.au/lateline/content/2014/s4036416.htm>

ABC, 'Massive decline in affordable housing adding to number of homeless in Melbourne' News 19 Oct 2016 <http://www.abc.net.au/news/2016-10-19/affordable-housing-decline-adds-melbournes-homeless/7946800>

ABC Radio Australia, 'Tongan Royal Historian Dr Elizabeth Wood-Ellem Dies', *Pacific Beat* 11 September 2012 <http://www.radioaustralia.net.au/international/radio/program/pacific-beat/tongan-royal-historian-dr-elizabeth-woodellem-dies/1014098>

Abebe, Allehone M, 'Of Shaming and Bargaining: African States and the Universal Periodic Review of the United Nations Human Rights Council' (2009) 9 *Human Rights Law* 1

'Ahopanilolo Technical Institute, *'Ahopanilolo Technical Institute* <http://www.atitonga.com>

Alloo, Fatma and Wendy Harcourt, 'From the South to the North: Evolving Perspectives on Gender and Poverty' (1997) 5(3) *Gender and Development – Poverty* 9

Anleu, Sharon L R, 'Critiquing the Law: Themes and Dilemmas in Anglo-American Feminist Legal Theory' (Winter 1992) 19(4) *Journal of Law and Society* 423

Agarwal, Bina, 'Gender, Resistance and Land: Interlinked Struggles Over Resources and Meanings in South Asia' (1994) 22(1) *Journal of Peasant Studies* 81

Asian Development Bank, *Tonga – Economic Update and Outlook 2012* (Author, 2013)

Attorney-General's Office, *Tongan Government Online Legislation* <http://crownlaw.gov.to/cms>

Australian Postal History and Social Philately, *John Thomas, Wesleyan Methodist Missionary Society, Tonga* <http://www.auspostalhistory.com/articles/371.php>

Banda, Fareda, 'Global Standards: Local Values' (2003) 17 *International Journal of Law, Policy and the Family* 1

Barelli, Mauro, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 58 *International Comparative Law Quarterly* 957

Baxter, Rosilyn, 'Reeve, Edward (1822–1889)' in *Australian Dictionary of Biography* (Melbourne University Press, 1976) <http://adb.anu.edu.au/biography/reeve-edward-4462>

BBC, *Israel Boycotts UN Rights Council in Unprecedented Move* (29 January 2013) <http://www.bbc.com/news/world-middle-east-21249431>

Becker, Mary, 'The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics' (1998) 40 *William and Mary Law Review* 209

Binder, Guyora, 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buffalo Human Rights Law Review* 211

Blanchfield, Luisa, *CEDAW: Issues in the U.S. Ratification Debate* (Congressional Research Service, 2011)

Bleakley, C, 'Women of the New Millennium: Tongan Women Determine Their Development Direction' (2002) (14)1 *The Contemporary Pacific* 134

Brems, Eva, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse' (1997) 19 *Human Rights Quarterly* 136

Brotman, Sam, Emma Katz, Jessie Jarnes, Winter West, Anne Irvine and Diana Daibes, *Implementing CEDAW in North Africa and the Middle East – Roadblocks and Victories* (Middle East and North Africa (MENA) Report) (CEDAW, 2008)

Campbell, I C, *Island Kingdom Tonga Ancient and Modern* (Canterbury University Press, 1992)

I C Campbell, 'The Quest for Constitutional Reform' (2005) 40(1) *Journal of Pacific History* 91

Campbell, I C, 'Progress and Populism in Tongan Politics' (2006) 41(1) *Journal of Pacific History* 49

Campbell, John Y, *Mortgage Market Design* (August 2012) <http://scholar.harvard.edu/files/campbell/files/mortgagemarketdesign081612.pdf>

Canterbury City Council, *The Law and Allotments* <https://www.canterbury.gov.uk/media/892659/The-Law-and-allotments-summary-Appendix-28.pdf>

Catholic Women's League, *Gender: Women in Tonga* <http://www.mercyworld.org/_uploads/_ckpg/files/mirc/brief/SenolitaVakata.pdf>

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Botswana, 45th sess, UN Doc CEDAW/C/BOT/CO/3 (26 March 2010)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Cook Islands, 39th sess, UN Doc CEDAW/C/ COK/CO/1 (10 August 2007)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Dominica, 43rd sess, UN Doc CEDAW/ C/DMA/CO/AR (26 January 2009)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Egypt, 45th sess, UN Doc CEDAW/ C/EGY/CO/7 (5 February 2010)

CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Fiji, 46th sess, UN Doc CEDAW/C/ FJI/CO/4 (16 September 2010)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Liberia, 62nd sess, UN Doc CEDAW/C/LBR/CO/6 (7 August 2009)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Mauritania, 38th sess, UN Doc CEDAW/C/ MRT/CO/1 (11 June 2007)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Samoa, 52nd sess, UN Doc CEDAW /C/WSM/CO/4 -5 (27 July 2012)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Sierra Leone, 38th sess, UN Doc CEDAW/ C/SLE/CO/5 (11 June 2007)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Singapore, 49th sess, UN Doc CEDAW/C/ SGP/CO/4 (10 August 2011)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Sri Lanka, 48th sess, UN Doc CEDAW/C/ LKA/CO/7 (8 April 2011)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Tanzania, UN Doc CEDAW/ C/TZA/6 (11 July 2008)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Timor Leste, 54th sess, UN Doc CEDAW/C/ TLS/CO/1 (7 August 2009)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Tuvalu, 44th sess, UN Doc CEDAW/C/TUV/CO/2 (7 August 2009)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Vanuatu, 38th sess, UN Doc CEDAW /C/VUT/CO/3 (11 June 2007)

CEDAW, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women* – Yemen, 41st sess, UN Doc CEDAW/C/ YEM/6 (1 July 2008)

CEDAW, General Recommendation No. 3 (6th sess, 1987)

CEDAW, General Recommendation No. 19 (11th sess, 1992)

CEDAW, General Recommendation No. 21 (13th sess, 1994)

CEDAW, General Recommendation No. 24 (20th sess, 1999)

CEDAW, General Recommendation No. 25 (30th sess, 2004)

CEDAW, General Recommendation No. 28 (47th sess, 2010)

CEDAW, *Progress Achieved in the Implementation of the Convention on the Elimination of all Forms of Discrimination Against Women – Report by the Committee on the Elimination of Discrimination against Women*, UN Doc A/CONF.177/7 (4 September 1995) <http://www.un.org/documents/ga/conf177/aconf177-7en.htm>

CEDAW, *Report of the Committee on the Elimination of Discrimination Against Women*, 13th sess, UN Doc A/49/38

CEDAW, *Report of the Committee on the Elimination of Discrimination against Women*, 56th sess, UN Doc A/56/38 (20 September 2001)

CEDAW, *Ways and Means of Expediting the Work of the Committee on the Elimination of Discrimination against Women*, 41st sess, UN Doc CEDAW/C/2008/II/4 (16 May 2008)

Charlesworth, Hilary, 'Feminist Ambivalence About International Law' (2005) 11 *International Legal Theory* 5

Charlesworth, Hilary, 'No Principled Reason' (November 1997) *Eureka Street* 24

Charlesworth, Hilary, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613

Choudhury, Cyra Akila, *Law, Gender and the Burden of Culture* (Florida International University Legal Studies Research Paper No. 13-34, 2, <http://ssrn.com/abstract=2320040>

'Church Leaders Take Petition to Palace' *Matangitonga* (online) 22 May 2015 <http://matangitonga.to/2015/05/22/church-leaders-take-petition-palace>

Clark, Lesley and Charmaine Rodrigues, *Utilising Temporary Special Measures to Promote Gender Balance in Pacific Legislatures: A Guide to Options* (UNDP, 2008)

Constitutional and Electoral Commission, *Final Report* (Constitutional and Electoral Commission, 2010)

Coomaraswamy, R, 'Are Women's Rights Universal? Re-Engaging the Local' (2002) 3 *Meridians: Feminism, Race, Transnationalism* 1

Coomaraswamy, R, 'Identity Within: Cultural Relativism, Minority Rights and the Empowerment of Women' (2003) 34 *George Washington International Law Review* 483

Corrin, Jennifer and Don Paterson, *Introduction to South Pacific Law* (Routledge Cavendish, 2007)

Crawford, Christopher G, 'Tongan Land Management: Putting the Brakes on the Global Economy' (June 2001) 6(1) *Journal of Pacific History* 93

Crenshaw, Kimberle, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics' (1989) *University of Chicago Legal Forum* 139

Crocombe, Ron, *Land Tenure in Tonga, The Process of Change: Past, Present and Future* (discussion paper for the Tonga Council of Churches Seminar on Land Tenure and Migration, 21–26 September 1975, Nuku'alofa) (South Pacific Social Sciences Association, 1975)

Crocombe, Ron, 'The Pattern of Change in Pacific Land Tenures' in R G Crocombe (ed) *Land Tenure in the Pacific*, (University of the South Pacific, 1987, 3rd ed), 1

Crocombe, Ron, 'Trends and Issues in the Pacific', in Ron Crocombe and Malama Meleisea (eds) *Land Issues in the Pacific* (University of the South Pacific, 1994), 9

Cummins, H G, 'Missionary Politicians – Church and State in Tonga: The Wesleyan Methodist Missionaries and Political Development 1822–1875 by Sione Lātūkefu' (1975) 10(2) *The Journal of Pacific History* 105

Cutura, Jozefina and Christine Van Hooft, *Women in Business in Tonga – Key Findings from the February 2008 Scoping Mission* (AusAID, 2008)

Daly, Martin, *The Bible and the Sword John Thomas and the Tongan Civil War of 1837* (2010) <http://www.methodistheritage.org.uk/missionary-history-daly-tongan-civil-war-2010.pdf>

Day, Gregory R and Salvatore J Russo, 'Poverty and the Hidden Effects of Sex Discrimination: An Empirical Study of Inequality' (2014) 37(4) *University of Pennsylvania Journal of International Law*

Demirguc-Kunt, Asli, Leora Klapper and Dorothe Singer, 'Financial Inclusion and Legal Discrimination Against Women Evidence from Developing Countries' (Policy Research Working Paper 6416, The World Bank, April 2013)

Dimitrijevic, Vojin, 'Customary Law as an Instrument for the Protection of Human Rights' (Working Paper 7, Istituto per gli Studi di Politica Internazionale (ISPI), 2006)

Donnelly, J, Cultural Relativism and Universal Human Rights, (1984) 6 Human Rights Quarterly 400

Duclos, Nitya, 'Disappearing Women: Racial Minority Women in Human Rights Cases' (1993) 6 *Canadian Journal of Women & Law* 25

Ellis, William, *Polynesian Researches, During a Residence of Nearly Six Years in the South Sea Islands; including Descriptions of the Natural History and Scenery of the Islands–with Remarks on the History, Mythology, Traditions, Government, Arts, Manners, and Customs of the Inhabitants*, Vol II (Fisher, Son & Jackson, 1829)

Emberson-Bain, 'Atu, *Women in Tonga – A Country Briefing Paper* (Asian Development Bank, 1998)

Engle, Karen, 'International Human Rights and Feminisms: When Discourses Keep Meeting' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 47

Faaumu-Niutei, Emeline, *Tonga Custom "Fahu"... A Perspective* (24 September 2013) <http://prosperity-link.com/tongancustomfahuaperspective-en>

Facio, Alda, 'A Magna Carta for All Women' (2011) 1(1) *feminists@law* 1

Farran, Susan Elizabeth, *Vanuatu: Lands in a Sea of Islands* (PhD thesis, Northumbria University, 2013)

Farran, Sue, 'Land Rights and Gender Equality in the Pacific Region' (2005) 11 *Australian Property Law Journal* 131

Farran, Sue, 'Land as a Fundamental Right: A Cautionary Tale' (2010) 40 *Victoria University Wellington Law Review* 387

Farran, Sue and Don Paterson, *South Pacific Property Law* (Cavendish Publishing, 2004)

Fineman, Martha A, 'Evolving Images of Gender and Equality: A Feminist Journey' (2009) *43 New England Law Review* 437

Food and Agricultural Organization of the United Nations, *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) – Guidelines for Reporting on Article 14* (FAO, 2005) <http://www.fao.org/docrep/008/y5951e/y5951e00.htm>

Food and Agricultural Organization of the United Nations (FAO), *Fisheries of the Pacific Islands Regional and National Information* (FAO Regional Office for Asia and the Pacific, 2011)

Fredman, Sandra, 'Beyond the Dichotomy of Formal and Substantive Equality: Towards a New Definition of Equal Rights', in Ineke Boerefijn, F Coomans, Jenny E Goldschmidt, R Holtmaat and R Wolleswinkel (eds), *Temporary Special Measures: Accelerating de Facto Equality of Women Under Article 4(1) UN Convention on the Elimination of All Forms of Discrimination Against Women* (Intersentia, 2003)

Fredman, Sandra, 'Reversing Roles: Bringing Men into the Frame' (2014) 10(4) *International Journal of Law in Context*, 442

Fredman, Sandra and Beth Goldblatt, 'Gender Equality and Human Rights' (Discussion Paper No 4, UN Women, 4 July 2015)

Freeman, Marsha, 'The Human Rights of Women under the CEDAW Convention: Complexities and Opportunities of Compliance' (1997) 91 *American Society of International Law* 378

Fua, Seuʻula Johansson, Tuʻilokamana Tuita, Siosiua Lotaki Kanongataʻa, and Koliniasi Fuko, *Cultural Mapping, Planning and Policy: Tonga* (Secretariat of the Pacific Community on behalf of the Ministry of Education, Women's Affairs and Culture, Government of Tonga, 2011)

Fukofuka, Viliami, 'New Directions in Land Development Policies in Tonga' in Ron Crocombe and Malama Meleisea (eds), *Land Issues in the Pacific*, (Institute of Pacific Studies, University of the South Pacific, 1994)

Gabr, Naela, *General Recommendation on Article 14 of CEDAW* <http://www.ohchr.org/Documents/HRBodies/CEDAW/30thAnniversaryCEDAW/GeneralRecommendationOnArticleNaelaGabr.pdf>

Gaer, Felice D, 'A Voice Not an Echo: Universal Periodic Review and the UN Treaty Body System' (2007) 7(1) *Human Rights Law Review* 109

Ghai, Y, 'Universalism and Relativism: Human Rights as a Framework for Negotiating Interethnic Claims' (2000) 21 *Cardozo Law Review* 1095

Gifford, Edward W, *Tongan Society* (Bernice P Bishop Museum, 2002)

Gilbert, Jeremie, 'Land Rights as Human Rights: The Case for a Specific Right to Land' (2013) 18 *SUR International Journal on Human Rights* 115

Golam, Sarwar, Rezaul Islam and Monzoor Shahorin, *Women's Rights to Land in Bangladesh: Roles, Limitations and Transformation* (Unnayan Onneshan – The Innovators, Centre for Research and Action on Development, 2007)

Goldblatt, Beth, 'Intersectionality in International Anti-discrimination Law: Addressing Poverty in its Complexity' (2015) 21(1) *Australian Journal of Human Rights*

Government of Tonga, *Committee on the Elimination of Racial Discrimination: State Party Report, Tonga*, UN Doc CERD/C/362/Add.3 (23 April 1999)

Government of Tonga, *Tonga. A Situation Analysis of Children, Women and Youth* (United Nations' Children's Fund, 2006)

Government of Tonga, *Tonga National Statement to the Commission on the Status of Women on its Fifty Sixth Session* (Government of Tonga, 2012)

Government of Tonga – Prime Minister's Office, 'Government Agrees to Ratify CEDAW' (Media release, 9 March 2015) <pmo.gov.to>

Government of Tonga, *Tonga Strategic Development Framework 2015–25: A More Progressive Tonga, Enhancing Our Inheritance* (Ministry of Finance and National Planning, 2015)

Grainger, Greg, 'The Fakaongo Exiles from Tonga to Fiji 1887–1890' in Elizabeth Wood-Ellem (Ed), *Tonga and the Tongans: Heritage and Identity* (Tongan Research Association, 2007)

Gray, Janice, *Property Law in New South Wales* (LexisNexis Butterworths, 2007)

Graycar, Reg and Jenny Morgan, 'Examining Understandings of Equality: One Step Forward, Two Steps Back?' (2004) 20 *The Australian Feminist Law Journal* 23

Graycar, Reg and Jenny Morgan, 'Thinking About Equality' (2004) 27(3) *UNSW Law Journal* 833

Griffin, Ben, 'Class, Gender, and Liberalism in Parliament, 1868–1882: The Case of the Married Women's Property Acts' (2003) 46(1) *The Historical Journal* 59

Habitat for Humanity International, *Shelter Report 2016 – Level the Field: Ending Gender Inequality in Land Rights* (Habitat for Humanity International, 2016)

Halatuituia, Sione N, *Tonga's Contemporary Land Tenure System: Reality and Rhetoric* (PhD thesis, University of Sydney, 2002)

Herda, Phyllis, 'Gender, Rank and Power in 18th Century Tonga: The Case of Tupoumoheofo' (1987) 22(4) *The Journal of Pacific History* 195

Higgins, Tracy E, 'Anti-essentialism, Relativism and Human Rights' (1996) 19 *Harvard Women's Law Journal* 89

Human Rights Council, GA Res 60/251, UN GAOR, 60th sess, UN Doc A/RES/60/251 (3 April 2006).

Human Rights Council, *Institution-building of the United Nations Human Rights Council*, 5th sess., 9th mtg, UN Doc A/HRC/RES/5/1 (18 June 2007)

Human Rights Council, *Report of the Working Group on the Universal Periodic Review (Tonga)*, 8th sess, Agenda Item 6, UN Doc A/HRC/8/48 (5 June 2008)

Human Rights Council, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 5 of the Annex to the Human Rights Council Resolution 16/1: Tonga*, 15th sess, UN Doc A/HRC/WG.6/15/TON/3 (29 October 2012)

Human Rights Council – Working Group on the Universal Periodic Review, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21 – Tonga*, 15th sess, UN Doc A/HRC/WG.6/15/TON/1 (9 January 2013)

Human Rights Council, *Report of the Working Group on the Universal Periodic Review – Tonga*, 23rd sess, Agenda Item 6, UN Doc A/HRC/23/4 (21 March 2013)Ikawa, Daniela, 'The Construction of Identity and Rights: Race and Gender in Brazil' 2014 (10)4 *International Journal of Law in Context* 494

Jalal, P Imrana, *Law for Pacific Women – A Legal Rights Handbook* (Fiji Women's Rights Movement, 1998)

James, Kerry, 'Cutting the Ground from Under Them? Commercialization, Cultivation, and Conservation in Tonga' (1993) 5(2) *The Contemporary Pacific* 215

James, Kerry, 'Is There a Tongan Middle Class? Hierarchy and Protest in Contemporary Tonga' (2003) 15(2) *The Contemporary Pacific* 309

James, Kerry, 'Right and Privilege in Tongan Land Tenure' in Gerard R Ward and Elizabeth Kingdon (eds) *Land, Custom and Practice in the South Pacific* (Cambridge University Press, 1995)

Japan International Cooperation Agency, *Country Gender Profile – The Kingdom of Tonga* (Author, 2010)

Jivan, Vedna and Christine Forster, 'What Would Gandhi Say? Reconciling Universalism, Cultural Relativism and Feminism through Women's use of CEDAW' (2005) 9 *Singapore Yearbook of International Law* 103

Kalabamu, Faustin, 'Patriarchy and Women's Land Rights in Botswana', (2006) 23 *Land Use Policy* 237

Keller, LINDA M, 'The Impact of States Parties' Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (2014) *Michigan State Law Review* 309

Kim, N, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1994) 25 *Columbia Human Rights Law Review* 49

Kuli, Loupua Pahulu, *Women's Rights to Land in Tonga: A Review of Policy and Legal Framework since 1983 Land Commission* (Master of Laws thesis, University of the South Pacific, 2016) <http://digilib.library.usp.ac.fj/gsdl/collect/usplibr1/index/assoc/HASH01cd/215a668c.dir/doc.pdf>

Landesa Rural Development Institute, Women's Secure Rights to Land: Benefits, Barriers, and Best Practices (Landesa Rural Development Institute, 2012)

Lastarria-Cornhiel, Susana and Zoraida García-Frías, 'Gender and Land Rights: Findings and Lessons from Country Studies' in *Gender and Land Compendium of Country Studies*, (Food and Agricultural Organisation of the United Nations, 2005) <http://www.fao.org/docrep/008/a0297e/a0297e08.htm>

Latu, Savae and Simon Dacey, 'LIS and Customary Land Tenure: The Tongan approach' (Paper presented at the 19th Annual Conference of the National Advisory Committee on Computing Qualifications (NACCQ 2006), Wellington, New Zealand, 10 July 2006)

Latu, T Savae and Ronald I Grenfell, 'The Evolution of Land Tenure in the Kingdom of Tonga' (1994) 39(4) *The Australian Surveyor* 241

Latukefu, Sione, 'The Case of the Wesleyan Mission in Tonga' (1969) 25 *Journal de la Société des Océanistes* 95

Latukefu, Sione, *Church and State in Tonga: the Wesleyan Methodist missionaries and political development, 1822-1875* (Australian National University Press, 1974)

Latukefu, Sione, 'The Definition of Authentic Oceanic Cultures with Particular Reference to Tongan Culture' (1980) 4(1) *Pacific Studies* 1

Latukefu, Sione, 'The History of the Tongan Constitution'. Paper presented at the Convention on the Constitution and Democracy in Tonga, Nuku'alofa

'Leading Women Divided Over CEDAW' *Taimi Online*, (20 October 2010) <http://www.taimionline.com/articles/178>

Legal Literacy Project – Tuvalu National Council of Women, *Tuvalu NGO Submission to the United Nations Universal Periodic Review*, 3rd sess, July 2008

Legislative Assembly of Tonga, Nuku'alofa, *Minutes of the Parliamentary Session*, 17 September 2009

Littleton, Christine A, 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburgh Law Review* 1043

MacKinnon, Catharine A, 'Reflections on Sex Equality Under the Law' (1991) 100 *Yale Law Journal* 1281

Mariner, William and John Martin, *Tonga Islands: William Mariner's Account: an Account of the Natives of the Tonga Islands in the South Pacific Ocean, with an Original Grammar and Vocabulary of Their Language* (John Murray, 1817)

Majury, Diana, 'The Charter, Equality Rights, and Women: Equivocation and Celebration' (2002) 40 *Osgoode Hall Law Journal* 297

Majury, Diana, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1

Maliknowski, Bronislaw, *Argonauts of the Western Pacific; An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (George Routledge & Sons, 1922)

Maliknowski, Bronislaw, 'Myth in Primitive Psychology' in Bronislaw Maliknowski, *Magic Science and Religion and Other Essays* (Doubleday, 1954)

Maloney, John and Jason Reed Struble, 'A New Day in Tonga: The Judiciary, the Reformers and the Future' (2007) 11(2) *Journal of South Pacific Law* 151

Manu, Viliami T, 'Tonga National Nutrition Statement' (Paper presented at the Second International Conference on Nutrition, Rome, 20 November 2014)

Marcus, George E, 'Land Tenure and Elite Formation in the Neotraditional Monarchies of Tonga and Buganda', (1978) 5(3) *American Ethnologist*, 509

Maude, Alaric and Feleti Sevele, 'Tonga Equality Overtaking Privilege' in Selwyn Arutangai and Ron Crocombe (eds) *Land Tenure in the Pacific* (University of the South Pacific, 3rd ed, 1987)

McGowan, Miranda, 'Stop the Fight for Equality', (2012) 28(1) *Constitutional Commentary* 139

Mercer P M, 'Oral Tradition in the Pacific', (1979) 14(3) *The Journal of Pacific History* 130

Merry, Sally Engle, 'Gender Justice and CEDAW: The Convention on the Elimination of All Forms of Discrimination Against Women' (2011) 9 *Journal of Women of the Middle East and the Islamic World* 49

Meyerowitz, Joanne, 'Introduction' in Joanne Meyerowitz (ed) *Not June Cleaver: Women and Gender in Postwar America, 1945–1960* (Critical Perspectives on the Past) (Temple University Press, 1994)

Ministry of Lands, Survey and Natural Resources, *Sea-bed Exploration in Tonga* <http://dsm.gsd.spc.int/public/files/meetings/TO_Deepsea%20Minerals%20Workshop%20in%20Nadi_RV.pdf>

Moengangongo, Mosikaka, 'Tonga: Legal Constraint and Social Potentials' in Cema Bolabola, Dorosthy Kenneth, Henlyn Silas, Mosikaka Moengangongo, Aiono Fana'afi and Margaret James (eds), *Land Rights of Pacific Women* (Institute of Pacific Studies, University of the South Pacific, 1986)

Moghadam, Valentine M, *The 'Feminization of Poverty' and Women's Human Rights* (SHS Papers in Women's Studies/Gender Research No 2) (UNESCO, 2005)

Munro, Peter, 'The Friendly Islands are No Friend to Women', *Sydney Morning Herald* (Sydney) 11 July 2015 <http://www.smh.com.au/nsw/the-friendly-islands-are-no-friend-to-women-20150709-gi8ora.html>Murray, A W, *The Bible in the Pacific* (first published James Nisbet, 1888; reprint Forgotten Books, 2013)

Nagarajan, Vijaya, 'Obstacles to Growth: Gender, Discrimination and Development in Tonga' (2009) 24(3) *Pacific Economic Bulletin* 132

Nayacakalou, R R, 'Land Tenure and Social Organisation in Tonga' (1959) 68(2) *Journal of Polynesian Study* 93

New Zealand Agency for International Development and the Government of Tonga, *Tonga Education Sector Study: Final Report* (Authors, 2003)

New Zealand Law Society, *The Family Trust* <https://www.lawsociety.org.nz/__data/assets/pdf_file/0005/69224/The-Family-Trust-11-Mar-13-WS.pdf>

Norwegian Refugee Council, *Violence Against Women and Housing, Land and Property in Monrovia* <http://womenshlp.nrc.no/wp-content/uploads/2014/02/Violence-against-women-and-HLP-Liberia.pdf>

Nyamu, Celestine 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (2000) 41 *Harvard International Law Journal* 381

Organisation for Economic Co-operation and Development (OECD) Development Centre, Gender Equality and the MDGs: What are the Missing Dimensions?', (2010) <https://www.oecd.org/dev/development-gender/45987065.pdf>

Organisation for Economic Co-operation and Development (OECD) *Gender Wage Gap* <https://www.oecd.org/gender/data/genderwagegap.htm>

Organisation for Economic Co-operation and Development (OECD), *PF2.1: Key Characteristics of Parental Leave Systems* (28 February 2016) <https://www.oecd.org/els/soc/PF2_1_Parental_leave_systems.pdf>

OHCHR, *Human Rights Mechanisms* <http://www2.ohchr.org/english/ohchrreport2012/web_en/allegati/8_Human_rights_mechanisms.pdf>

OHCHR, *United Nations Human Rights Council* <ohchr.org>

OHCHR, *Universal Periodic Review – Calendar of Reviews for the 3rd Cycle (2017–2021)* <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

OHCHR and UN Women, *Realizing Women's Rights to Land and Other Productive Resources* (United Nations, 2013)

Orange, James, *The Narrative of the Late George Vason* (Henry Mozley, 1840)

Paul, Joel R, 'Cultural Resistance to Global Governance' (2001) 22 *Michigan Journal of International Law* 1

Pollock, Nancy J, 'The Early Development of Housekeeping and Imports in Fiji' (1989) 12(2) *Pacific Studies* 53

Powles, Guy Charles, *The Persistence of Chiefly Power and Its Implications for Law and Political Organisation in Western Polynesia* (PhD thesis, Australian National University, 1979)

Powles, G, 'The Common Law as a Source of Law in the South Pacific: Experiences in Western Polynesia', (1988) 10 *University of Hawaii Law Review* 105

Powles, Guy, 'Testing Tradition in Tonga: Approaches to Constitutional Change' (2007) 13 *Revue Juridique Polynesiénne* 111

Powles, Guy, *Political Reform Opens the Door: The Kingdom of Tonga's Path to Democracy* (Comparative Law Journal of the Pacific – Monograph XV, 2012)

Powles, Guy, *The Tongan Monarchy and the Constitution: Political Reform in a Traditional Context* (State, Society & Governance in Melanesia Discussion Paper 2014/9) (Australian National University, 2014)

Pruitt, Lisa R, 'Deconstructing CEDAW's Article 14: Naming and Explaining Rural Difference' (2011) 17(2) *William & Mary Journal of Women and the Law* 346

Pursglove, Peter, *Review of the Constitutional Provisions Relating to the Judicial Structure of the Kingdom of Tonga* (Ministry of Justice, Tonga, 2014)

Queen Salote College, *Queen Salote College* <http://www.tongatapu.net.to/tonga/convictions/schools/tbu/qsc/default.htm>

Raday, Frances, 'Culture, Religion and CEDAW's Article 5 (A)' in Hanna Beate Schöpp-Schilling and Cees Flinterman (eds), *The Circle of Empowerment: Twenty-five years of the UN Committee on the Elimination of Discrimination Against Women* (The Feminist Press at CUNY, 2007)

Radio New Zealand, 'Tonga to Vote on Polarising UN Convention for Women's Rights' *Dateline Pacific*, 8 July 2015 <http://www.radionz.co.nz/international/programmes/datelinepacific/audio/201761434/tonga-to-vote-on-polarising-un-convention-for-women's-rights>

Ralston, Caroline, 'Deceptive Dichotomies: Private/public, and Nature/culture. Gender Relations in Tonga in the Early Contact Period' (1990) 5(12) *Australian Feminist Studies* 65

Rao, Nitya, *Women's Access to Land: An Asian Perspective* (UN Women, 2011)

Rebouche, Rachel, 'Labor, Land, and Women's Rights in Africa: Challenges for the New Protocol on the Rights of Women' (2006)19 *Harvard Human Rights Journal* 235

Redondo, Elvira D, 'The Universal Periodic Review of the UN Human Rights Council: An Assessment of the First Session' (2008) 7(3) *Chinese Journal of International Law* 721

Reitman, Oonagh, 'Cultural Relativist and Feminist Critiques of International Human Rights – Friends or Foes?' (1997) 100(1) *Statsvetenskaplig Tidskrift*

Resnik, Judith, 'Opening the Door: Ruth Bader Ginsburg, Law's Boundaries, and the Gender of Opportunities' (2013) 25 *Columbia Journal of Gender and Law* 81

Rifkin, Janet 'Toward a Theory of Law and Patriarchy' (1980) 3 *Harvard Women's Law Journal* 83

Royal Land Commission, *Report of the Royal Land Commission 1983 on its Review of all Practices, Usages and Laws Relating to Land* (Royal Land Commission, 1985)

Royal Land Commission, *Second Interim Report - Land dealings Vava'u and elsewhere in Tonga through the internet* (Royal Land Commission, 2010)

Royal Land Commission, *Final Report* (Royal Land Commission, 2012)

Runger, Mechthild, *Governance, Land Rights and Access to Land in Ghana – A Development Perspective on Gender Equity* (Good Governance Programme Ghana, 2006)

Rutherford, Noel, *Shirley Baker and the King of Tonga* (Oxford University Press, 1971)

Rutherford, Noel, *Friendly Islands A History of Tonga* (Oxford University Press, 1977)

Secretariat of the Pacific Community, *Stocktake of the gender mainstreaming capacity of Pacific Island governments – Kiribati* (Secretariat of the Pacific Community, 2015)

Sheehy, Elizabeth, 'Personal Autonomy and the Criminal Law: Emerging Issues for Women' (Background Paper Canadian Advisory Council on the Status of Women, September 1987)

Shanley, Mary Lyndon, *Feminism, Marriage, and the Law in Victorian England* (Princeton University Press, 1989)

Simkin, John, *1882 Married Women's Property Act* (August 2014) <http://spartacus-educational.com/Wproperty.htm>

Steans, Jill, 'Debating Women's Human Rights as a Universal Feminist Project: Defending Women's Human Rights as a Political Tool' (2007) 33 *Review of International Studies* 11

Stiglitz, Joseph, 'Macroeconomic Fluctuations, Inequality, and Human Development' (2012) 13(1) *Journal of Human Development and Capa*bilities 31

Stiglitz, Joseph, *The Price of Inequality: How Today's Divided Society Endangers Our Future* (W W Norton, 2012)

Taliai, Siupeli, 'Ko e Kau Fakaongo' in Elizabeth Wood-Ellem (ed), *Tonga and the Tongans: Heritage and Identity* (Tongan Research Association, 2007)

Taufe‘ulungaki, ‘Ana, ‘Women, Politics and Democracy in Tonga’ (Paper presented at the Convention on the Constitution and Democracy in Tonga, Nuku‘alofa, 24–27 November 1992), <http://planet-tonga.com/HRDMT/Articles/Convention_92/Convention_92.shtml>

Taumoefolau, Melenaite, ‘Women Issues in Tonga’ (Paper presented at the Panel of the NZ Federation of Graduate Women, Auckland, 3 October 2009)

Taumoepeau, Alisi and Guy Powles, ‘Constitutional Change in Tonga’ (Paper presented at the Australasian Law Reform Agencies Conference, Port Vila, Vanuatu 10-12 September 2008)

Thomas, John, *History of Tonga*, MS (National Library of Australia, MS 4070)

Thomson, Basil, *The Diversions of a Prime Minister* (Blackwood, 1894)

Tonga Department of Statistics, *2011 Population Census* (Government of Tonga, 2012)

Tupou Tertiary Institute, *Tupou Tertiary Institute* <http://www.tti.to>

‘Tongan Parliament Blatantly Ignores Women’s Rights’ *Matangitonga* (online) 19 September 2009 <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=9&num=5362>

‘Tongans March Against Women’s Equality’, *Cook Island News* (online) 26 May 2015 <http://www.cookislandsnews.com/regional/item/51956-tongans-march-against-women-s-equality/51956-tongans-march-against-women-s-equality>

‘Tonga Not Ready for CEDAW’, *Matangitonga* (online) 1 October 2009 <http://www.matangitonga.to/scripts/artman/exec/view.cgi?archive=9&num=5388>

‘UN Avoids Israel Showdown, Delays Rights Review’ *The Jerusalem Post* (online) 29 January 2013 <http://www.jpost.com/Diplomacy-and-Politics/UN-avoids-Israel-showdown-delays-rights-review>

United Nations Development Funder for Women (UNIFEM), *CEDAW and the Human Rights Based Approach to Programming: A UNIFEM Guide* (2007) <http://unwomen-asiapacific.org/docs/cedaw/archive/cedaw_hrba2007.pdf>

United Nations, *Report of the Committee on the Elimination of Discrimination against Women (Eighteenth and Nineteenth Sessions)*, UN GAOR, 53rd sess, Supp No 38, UN Doc A/53/38/Rev.1 (14 May 1998)

United Nations, *Human Rights Office of the High Commissioner* <http://www2.ohchr.org/english/law>

United Nations, 'Tonga's Reservation to the CERD', *Treaty Series* 660 <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en#EndDec>

University of the South Pacific, *Office of the Vice Chancellor* <http://www.usp.ac.fj/index.php?id=3765>

UN Women, Convention on the Elimination of All Forms of Discrimination Against Women, *Reservations to CEDAW* <http://www.un.org/womenwatch/daw/cedaw/reservations.htm>

Urbanowicz, Charles F, 'Motives and Methods: Missionaries in Tonga in the Early 19th Century', (1977) 86(2) *The Journal of the Polynesian Society* 245

Van der Grijp, P, 'The Making of a Modern Chiefdom State: The Case of Tonga', (1993) 149(4) *Politics, Tradition and Change in the Pacific* 661

Verheye, Willy H, *Technical Assistance in the Development Land Use Policy in the Kingdom of Tonga* (Food and Agricultural Organization, 2008)

Verloo, Mieke, 'Mainstreaming Gender Equality in Europe. A Critical Frame Analysis Approach' (2005) 117 *The Greek Review of Social Research* 11

Wickeri, Elisabeth and Anil Kalhan, 'Land Rights Issues in International Human Rights Law' (2010) 4(10) *Malaysian Journal on Human Rights* 1

WomenWatch, *Facts & Figures: Rural Women and the Millennium Development Goals* <http://www.un.org/womenwatch/feature/ruralwomen/facts-figures.html>

Wood-Ellem, E, 'Chief Justices of Tonga 1905-40' (1989) 24(1) *The Journal of Pacific History* 21

Wood-Ellem, E, Submission to the Royal Land Commission (2011) in Royal Land Commission, Appendix 4

World Economic Forum, *Stiglitz on Battling Economic Inequality* (20 November 2015) <https://agenda.weforum.org/podcast/podcast-stiglitz-on-battling-economic-inequality>

World Health Organization, *Western Pacific Country Health Information Profiles – Tonga* (Author, 2011)

Wren, Harold G, 'The Widow's Election in Community Property States' (1965) 7(1) *Arizona Law Review* 1

Case Law

Tongan case law

Fakafanua v Fakafanua (unreported) Tonga Land Court, LA 7/2008 (7 May 2008)
Falepaini v Tukufuka (2006); *Vai v ʻUliafu* [1989] Tonga LR 56
Fatafehi v Kuea [2011] TOLC 1 <http://www.paclii.org/to/cases/TOLC/2001/8.html>
Finau v Maamakalafi [2003] TOLC 2
Folau v Taione [2016] TOLC 2; LA6 of 2015 (18 April 2016) <http://www.paclii.org/to/cases/TOLC/2016/2.html>
Fonohema v Piukala [2001] TOLC 8 <http://www.paclii.org/to/cases/TOLC/2001/8.html>
Kama v Kama LA 3 of 2010
Kama v Kama [2012] TOLC 4
Lavaka v Pahulu (1923-1962) Vol.2 Tonga LR 109
Lali Media Group Ltd v ʻUtoikamanu [2003] TOSC 14
Leger v Niu (1989) [1989] TOLawRp 2
Manu v Tauheluhelu [2002] TOLC 2
Nakao v Afeaki [2002] TOSC 37 FD 086 2002 (17 December 2002) <http://www.paclii.org//cgi-bin/disp.pl/to/cases/TOSC/2002/37.html?query=matrimonial%20property>
OG Sanft and Sons v Tonga Tourist and Development Co Ltd [1981] TOLC 1 <http://www.paclii.org/to/cases/TOLC/1981/1.html>
Tafa v Viau (unreported) Tonga Land Court, LA 15/2005 (24 April 2006) <http://www.paclii.org/to/cases/TOLC/2006/2.html>
Taione v Kingdom of Tonga 374/2004 SC Tonga <http://www.paclii.org/to/cases/TOSC/2004/47.html>
Taufa v Tahaafe [2015] TOCA 7, Court of Appeal of Tonga, 31 March 2015
Tuʻihaʻateiho v Tuʻihaʻateiho [1962-73] TLR 22
Tuita v Minister of Lands [1926] TLR 1
Tu'itavake v Masila [2002] TOLC 4
Tukuafu v Latu (unreported) Tonga Court of Appeal, CA 5/2005 (15 August 2005) <http://www.paclii.org/to/cases/TOCA/2005/12.html>
Vance v Guerra [2008] TOLawRp 32

Veikune v Kingdom of Tonga [2007] Tonga LR 284 <http://www.paclii.org/to/cases/TongaLawRp/2007/53.html>

Overseas case law

Ephraim v Pastory (2001) AHRLR 236 (TzHC 1990)

Noel v Toto [1995] VUSC 3; Civil Case 018 of 1994 (19 April 1995) <http://www.paclii.org/vu/cases/VUSC/1995/3.html>

Vishaka and others v. State of Rajasthan and others (1997) 6 SCC 241

Legislation

Tongan legislation

Act of Constitution of Tonga

1839 Code of Vava'u

1850 Code of Law

The 1862 Code of Laws

1882 Act to Regulate Hereditary Lands

Constitutional and Electoral Commission Act 2008

Divorce Act 1927 (Tonga)

Government Act (Cap 3)

Land Laws of 1903

Land Act 1927 (Cap 132)

Maintenance of Deserted Wives Act

Maintenance of Illegitimate Children (CAP 30)

Media Operators Act 2003

Nationality Act (Tonga), (prior to amendment in 2007)

Newspaper Act 2003

International legislation

1822 Code of Laws of Huahine, Tahiti

Constitution of the Independent State of Samoa 1960

Constitution of the Republic of Fiji

Constitution of the Republic of Vanuatu
Kingdom of Hawaii Constitution of 1852
Succession to the Crown Act 2013 (UK)
The Constitution of Kiribati
The Constitution of Solomon Islands
The Constitution of Tuvalu

International Treaties and Non-Binding Instruments

Beijing Declaration (1995)
Charter of the United Nations (1945)
Commonwealth Plan of Action for Gender Equality
Convention on the Elimination of All Forms of Discrimination Against Women
Convention on the Elimination of All Forms of Racial Discrimination (CERD)
Convention on the Rights of the Child (CRC)
Convention on the Political Rights of Women (1952)
Convention on the Nationality of Married Women (1957)
Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962)
International Covenant on Civil and Political Rights
International Covenant on Social, Economic and Cultural Rights
Platform for Action (Beijing, 1995)
Recommendation on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages
Treaty of Amsterdam Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts
1900 Treaty of Friendship between Great Britain and the Kingdom of Tonga
Vienna Convention on the Law of Treaties
Universal Declaration of Human Rights (UDHR)