

Obstacles to growth: gender, discrimination and development in Tonga

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Tonga is a patriarchal society that is undergoing significant change, with women becoming well educated and an important part of the workforce. Girls are now attending school at similar rates to boys and more women than men are undertaking tertiary education (Department of Statistics 2003). In 2003, women constituted 40 per cent of the workforce and this figure rose to 43 per cent in 2006 (Department of Statistics 2003, 2006). Women dominated the craft and handicraft trades as well as the service industry, working in shops and markets. Women's groups that have been active in community projects to improve health and family welfare are becoming advocates of equal rights, including calling for the adoption of the Convention for the Elimination of All forms of Discrimination Against Women (CEDAW).

It is clear that women are a force to be reckoned with and have the potential to contribute enormously to the economy; however, they face many impediments to engaging in business and entrepreneurial activities. This article explores the socio-political and legal barriers through a gendered lens. It is in four parts. First the fundamental barrier women face—the prohibition on land ownership is examined.

It denies women access to a resource essential for all forms of private sector activity. Second, we analyse the legal barriers entrenched in the laws of Tonga that disadvantage women either directly or indirectly. Third, the political and institutional barriers that further entrench this discrimination are examined. The final section considers the manner in which human rights discourse could provide a way of thinking, bringing all stakeholders together to collaborate in alleviating these barriers in the future.

Prohibitions on land ownership and restricted land rights—a fundamental barrier

Tonga adopted a distinctive form of land rights that was different from all its Pacific neighbours. In the mid nineteenth century, Taufa'ahau, the first monarch of Tonga, prohibited all sales of land to Europeans—in part to avoid colonisation by European powers, as had occurred in Samoa, Fiji and Tahiti (Alaric and Feleti 1987). Although successful in limiting the foreign ownership of land, this action also resulted in prohibiting women from owning land. Traditionally, women's rights to land depend on the good-

will of men and on the custom of *fahu*—the traditional duties of a brother to his sister. The custom includes a woman's right to request land from her brother or maternal uncle. Although this custom exists in theory, it has been considerably weakened by the pressures of modern life and the decreasing availability of land (Jalal 1998).

Under the constitution and the *Land Act*, all land belongs to the King and only Tongan citizens can own land. These two pieces of legislation are the sources of the primary restrictions on a woman's right to land. There are only three kinds of entitlements to land in Tonga: the hereditary estate, *tofia*; the allotments—tax allotment (*'api 'uta*) and the town allotment (*'api kolo*); and leasehold. Women's rights under the first two are minimal, whereas the leasehold route offers a complicated and unpredictable pathway.

The hereditary estate was originally distributed among members of the royal family and other male title-holders (James 1995). There are 31 noble families in Tonga—the title of hereditary noble being passed down through the oldest male in each family. The constitution provides for inheritance in accordance with the principles of patrilineality (through the male lineage) and male primogeniture (through the oldest legitimate male). As inheritance is based on patrilineal lines, women generally do not have any rights to inherit this land. The only way by which women can own land is if the male lineage dies out, in which case the oldest female will succeed (Jalal 1998).

Allotments aimed to provide land for all adult Tongan men from the noble's estate to use for their home and growing crops. King Topou's motivation might have been to force chiefs to allot portions of land to the people, thereby freeing Tongan commoners from chiefly power over their lives, diluting the power of strong rival chiefs and consolidating his own authority (James 1995). These allotments are held

permanently as long as taxes are paid to the government and rent to the estate holder.¹ When the allotment holder dies, the law prescribes that the land passes to the deceased's oldest legitimate son.

Under the law, women are not entitled to these allotments—with one exception. They are legally entitled to be registered as the holder of an allotment only if they are the widow of an allotment holder. In such a case, the widow's rights are to hold the allotment for the remainder of her life as trustee for her oldest legitimate son. The *Land Act* clearly states that widows cannot deal with the land themselves since their only function is to hold the land as trustee. In *Matavalea vs Uata* (1988, Land Case 1/85, unreported), Chief Justice Martin stated that the widow had only 'what her late husband held at the date of his death subject to any matters which affected the land then'. She may not be in a stronger position than the person through whom she claims. A widow may surrender her holding during her lifetime to her oldest legitimate son if he wishes to take succession of the land before his mother dies—thus providing one mechanism to get around the legislation and enable women to sell land. The widow loses her life interest in the deceased husband's allotments on her remarriage or on proof in legal proceedings in the Land Court that she has 'committed fornication or adultery'—clearly requiring her to be sexually faithful to her deceased husband or risk losing her home.² This rule was applied in the case of *Tu'itavake vs Masila* ([2002] TOLC 4), in which a widow lost her right to the allotment when she remarried.

The last route to gain access to land is through a lease, which offers only a slim chance for women. Leases may be formalised by being registered under the *Land Act* or they may remain informal. Informal leases, although common, are risky as they are impossible to enforce in a court and par-

ties report being charged exorbitant rents.³ Further, in the case of the death of the lessor, the lessee's rights vanish. Gaining a formal lease, however, comes with many problems. The *Land Act* prohibits nobles from leasing more than 5 per cent of their total hereditary estate, which means that the allotments are more frequently available for lease. Leases are usually very expensive to obtain and the process for registering a lease takes an average of 108 days (World Bank 2008). Where there is a mortgage over the land, the process is even more complex, requiring the approval of the Minister of Lands. It is therefore no surprise that very few leases are held in women's names. The law takes particular care to clarify that a widow is prohibited from leasing her deceased husband's land.

The most common route for women to gain access to land is to use land belonging to a male relative or to obtain a lease in the name of a male relative. It is therefore very difficult for women to gain access to the asset that is the basis of most business activity, including the space where most entrepreneurial activities are conducted and which can be used as collateral for the purposes of borrowing money to start or extend businesses. Although the Royal Land Commission has been appointed to inquire into Tonga's land laws, its terms of reference state that the 'work of the Commission is not to change the basic land tenure of Tonga', which clearly precludes legislative reform to repeal the discriminatory laws in the *Land Act* and the constitution.

Other legislation impeding women's autonomy

Equal rights to inheritance, on divorce and during employment—which are taken for granted in the industrialised world—are not available to Tongan women, impeding

their ability to participate fully in business activities. This section reviews discriminatory laws that hinder women's autonomy by limiting their options and prioritising men. The courts have at various stages been critical of these practices and have called for reform.

Although Tonga is a religious country, divorce is becoming more common and is dealt with in the *Divorce Act*. The legislation recognises societal change by providing for 'fault'-based divorce and 'no-fault' divorce, whereby the parties can separate for a period of two years in order to satisfy the legislative requirements. Women do not, however, fare well on divorce as they are allowed to retain only the assets they bring into the marriage. While this can be to the advantage of a woman who enters a marriage with substantial assets, it works against women who bring few assets to the marriage – is most often the case. The law is silent on how the property that has been accumulated by the couple during the marriage will be divided and this issue is left to the court, which has recognised that women are often severely disadvantaged in such situations and has called for law reform (*Halapua vs Tonga*, [2004] TOCA 5).⁴ In theory, a woman who uses her husband's allotment land to build a shop during the marriage must remove or relocate the shop at the end of the marriage or forfeit it to her husband.

Women also do not fare well on the death of their husbands. As discussed above, a widow's right to land is only a life estate, which is terminated in the case of 'adultery'. Further, as it is not general practice to write wills, the *Probate and Administration Act* is the default legislation that applies in most cases. This Act codifies customary law and is inherently discriminatory—for example, it provides that when a man dies, his wife inherits one-third of the estate while two-thirds goes to the children in equal shares.

The position changes, however, when a woman dies—her husband inherits the whole estate. Further, when a person dies, leaving behind the father, brother and sister, the father inherits the estate. When, however, a person dies leaving behind the mother, brother and sister, the estate is divided equally between them.

Within marriage, little attention is given to protecting women from domestic violence. Tonga's National Centre for Women and Children has reported that domestic violence is increasing, although it is rarely publicised. There is no domestic violence legislation, which would be the first step in showing commitment to safeguarding women's rights.

The important place of equal employment laws in encouraging women's participation in the workplace has been recognised since the 1970s in Australia and New Zealand. There are, however, no such protections for Tongan women—hence there are no affirmative action laws, maternity laws or laws prohibiting sexual discrimination. Anecdotal evidence suggests that some businesses provide maternity leave to valued employees, but there are many women who lose their jobs when they fall pregnant. It also appears common for women in government employment to use their casual/annual leave for maternity leave purposes. Such practices demonstrate that it is doubly hard for women to remain in the workforce.

Political and institutional barriers entrenching discriminatory practices

The political and institutional framework in Tonga supports the legislative frameworks that cement discriminatory practices. While the need for reform is recognised, it is, however, also widely acknowledged that Tonga

is a small, tightly knit community, without an outspoken media, where historically the King has had complete control. Therefore, any reform has to be a top-down process, initiated by the King and supported by the establishment.

The composition of parliament also disadvantages women. The Legislative Assembly comprises 32 seats of which 14 are reserved for cabinet ministers appointed by the King, nine are for nobles selected by the country's 33 nobles, while nine are elected by popular vote. Only men can be nobles, which means that women do not participate in electing the nine nobles in the assembly. In May 2009, there were two women in the Legislative Assembly: the recently appointed Minister of Information and Communication, Eseta Fusitu'a, and the outgoing Minister of Justice, Alisi Taumoepeau. Women therefore do not participate in electing 33 per cent of their representatives in parliament.

The King retains considerable power in Tonga. He appoints the cabinet without election and they serve at his pleasure. He also appoints the prime minister, who can be removed at the King's discretion. The King also presides over the Privy Council, which makes major policy decisions. Any legislation passed in the Legislative Assembly must be ratified by the Privy Council and assented to by the King before it becomes law.

Reports indicate that official corruption and abuses are continuing problems in Tonga, causing public dissatisfaction with the government and hindering economic growth.⁵ Nobles and others with connections to the political élite own large tracts of land and dominate large and medium-sized businesses. Parliamentarians and members of the royal family are also heavily involved in private sector activity.

Although Tongans are unremittingly loyal to the King, a study has shown that 74 per cent of respondents support

having more women in parliament (Ofa Guttenbeil-Likiliki, 'Advancing women's representation in Tonga', http://www.forumsec.org/UserFiles/File/Report_4_-_Advancing_Women_s_Representation_in_Tonga_143_-_208.pdf). Reform proposals being considered by the Constitutional and Electoral Commission include changing the composition of the cabinet to comprise 12–14 members, with at least two-thirds of those being elected members of the Legislative Assembly and with one-third being independent appointments by the king.

Decision-making by state institutions is not transparent. This is particularly problematic given the wide discretionary powers granted to ministers, who are called on to exercise these powers with few guidelines. This applies to a host of situations including minor matters such as the granting of a lease where there is a mortgage or obtaining a business visa. Practice shows that ministerial decision-making is not transparent or time efficient, with reports that a business visa can take up to two years to obtain. Parliament sits irregularly and its reactions are often difficult to predict, meaning that pathways for reviewing ministerial decision-making are few and unpredictable.

Human rights and gender equality

The important role of human rights treaties in providing 'a legal regime of accountability and enforceability for regional development plans, filling the lacunae in them' is widely acknowledged (Jalal 2006:4). Once a country ratifies a human rights treaty, it has a moral, ethical and legal obligation to amend national laws to bring them into line with such treaties and to integrate the principles into all its programs. Although human rights laws rely on governments

to implement them, ratification of these international treaties brings governments, civil society, donor bodies, corporations and citizens together to consider the manner in which the spirit of the treaties can be embraced. It also provides for external and internal monitoring of these efforts and the possibility of censure of the efforts being made by governments by other governments and institutions.

Tonga has committed itself to gender equality through a number of regional and international commitments including the following:

- Beijing Platform for Action of Women (September 1995)
- Millennium Development Goals (September 2005)
- Commonwealth Plan of Action for Gender Equality 2005 – 2015 and
- Revised Pacific Platform for Action on Advancement of women and Gender Equality 2005 – 2015.

However Tonga has not signed three key treaties, central to addressing gender discrimination: Convention on the Elimination of All Forms of Discrimination Against Women, International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights.

It has been argued that the government is promoting gender equality without it being a signatory to these treaties and that Section 4 of the Constitution provides the basis for equal rights (Palefau 2008). Section 4 states that there '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.' As discussed above, however, it is clear that there are many examples of discrimination, with a significant example being the

prohibitions against women owning land. One view from a prominent MP was that women's rights should await the political reform process and that the struggle for full democracy should take precedence over women's rights. It was argued that when Tongans won the right to elect their leaders fully then the CEDAW should be considered (RRRT 2006). It has been stated that, essentially, both struggles need to be advanced simultaneously as the CEDAW is about gaining democratic freedoms for women (Jalal 2006). Democracy and gender equality are interconnected and it is not possible to preference one over the other. Women's groups note that gender issues are marginalised in important consultations and their concerns are unable to compete with other national priorities (Cutura and van Hooft 2008).

The current land-ownership system appears to be the main reason for Tonga's reluctance to ratify these human rights treaties. Article 107 of the *Tongan Constitution* and the *Tongan Land Act* breach Article 2(a) of the CEDAW because they dictate that males are preferred to females with respect to land inheritance and that females can inherit only when there are no males. Land legislation as it stands is therefore a clear bar to ratification of the convention (Jalal 2006). Human rights norms, particularly those in the CEDAW, are also perceived as threatening the domestic status quo because they challenge the patriarchal nature of society—and in Tonga, this patriarchy is enshrined in the country's land law.

Efforts are being made in many directions to encourage the adoption of these human rights treaties. Non-governmental organisations are beginning to address this issue, and in 2005 the Tongan Catholic Women's League and Pacific Regional Rights Resource Team produced the booklet *Ko e hâ 'a e CEDAW?*, which contained 10 questions and answers about CEDAW—all

of which were pertinent to Tonga. The booklet aimed to demystify the convention from a Tongan perspective and provide relevant information about it. The booklet was also intended to encourage parliamentarians to support its ratification. In 2006, the Pacific Regional Rights Resource Team, in conjunction with Langafonua National Council of Women, the Tongan Civil Society Forum, the Catholic Women's League and the Women's Development Centre of the Office of the Prime Minister, conducted a one-day seminar for 22 Tongan MPs. The workshop discussed the clashes between culture and human rights and the internationally recognised human rights contained in the CEDAW.

The courts too have demonstrated a willingness to apply international treaties despite Tonga being a non-signatory. In *R vs Vola* ([2005] TOSC 31), the Supreme Court applied Article 6(1) of the International Covenant on Civil and Political Rights—which protects every human being's inherent right to life. The Tongan Supreme Court considered whether it should impose a death penalty in a murder case. Section 91 of the Criminal Offences Act provided for a sentence of death or life imprisonment. Justice Webster stated: 'There is much international legal authority about the death penalty and its effect and effectiveness, and although these do not apply directly to Tonga, the principles in these cases are very important' (*R vs Vola*:2). In addition, Justice Webster stated that the death penalty was the arbitrary taking of life, and he looked to the content of the International Covenant on Civil and Political Rights 1966, for direction. His Honour pointed out that although Tonga did not appear to be a party to that covenant, the principles it set out were important—illustrating the commitment from judicial circles in Tonga to human rights norms.

Donor bodies, including the World Bank and AusAID, in their work with government bodies, have not focused on gender issues directly because the government has not prioritised these issues. More recent initiatives, however, including the Gender and Investment Climate Reform Assessment by the International Finance Corporation and AusAID, as well as the AusAID community development schemes, are closely examining connections between gender and development in Tonga. These projects will work to bring back to centre stage the importance of eliminating gender discrimination and incorporating women as equals in the universal goal of sustainable economic development.

Notes

- ¹ Due to the shortage of land, such allotments have not been made for several decades.
- ² Section 80 of the Land Act: 'In such case, the Land Court may entertain proceedings to determine whether proof of such fornication and adultery exists and, if so, terminate the widow's estate.'
- ³ See the case of Taumoepeau vs Taumoepeau ([2000] TOSC 47), in which it was held that the registered interests prevailed over unregistered interests. This emphasises the need for women to register their leases in order to be able to assert their claims in court.
- ⁴ See the discussion by Farran (2009), who proposed that the courts should adopt a comparative law approach in such situations.
- ⁵ In October 2006, former Australian Ombudsman John Wood presented a report to the government recommending the formation of an anti-corruption commission. The report recommended that legislation should be in place before the commission was established, because of the need for the commission to have the authority to deal with corruption, unlike the existing Public Relations Commission, 'which has no such authority'. No steps to establish a commission have been taken.

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