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WHY LAND TENURE REFORM IS THE KEY TO POLITICAL STABILITY IN TONGA

Kersti Harter Kennedy[†]

Abstract: The Kingdom of Tonga, a South Pacific country, erupted in violent pro-democracy riots in late 2006 after decades of political unease. Tonga's people are divided into two main classes: the nobles and the commoners. These two classes have long differed in political and land rights in a hierarchy that is typical of chiefdoms such as Tonga. Tonga's government has attempted to deal with the sometimes violent, commoner-led pro-democracy movement by amending its Constitution to allow commoners to vote for more of the members of the Legislative Assembly. The resulting government and the noblemen have not, however, shown a commitment to land reform in favor of commoners, and it is unlikely that the recent amendments will result in changes to the land tenure system. In Tonga, the rising population and declining land productivity within a context of insecure land rights have prompted individuals to engage in conflict with the government and nobility, both of which have become less powerful. Evolutionary ecology predicts this result, and, in conjunction with insights from economics, is also a fertile approach for finding solutions to political instability. This comment argues that only extensive land reform will likely end political violence in Tonga. It suggests changes in the Constitution and the Land Act to end or reduce the nobles' power over commoner lands, to allow for more commoners to occupy land, and to improve the productivity of commoner lands. These changes would require Tongans to place individual liberties above some cultural traditions.

I. INTRODUCTION

On December 22, 2010, U.S. Secretary of State Hillary Clinton praised the Kingdom of Tonga for “taking another step toward democracy” through its unprecedented election, in which the nation's commoner class voted for a majority of the Legislative Assembly members.¹ Secretary Clinton's sentiment has since been echoed, with many Westerners applauding Tonga's efforts at achieving democracy.²

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¹ *US Praises Democratic PM Move in Tonga*, GOOGLE NEWS, Dec. 22, 2010, http://www.google.com/hostednews/afp/article/ALeqM5hKdFqXLpZ3itR9LvUFC-oqgN_tNA?docId=CN.G.68697541854bfd3351f30efeb7965b11.361.

² For example, the U.S. State Department has been especially supportive of Tonga's political reforms: “I applaud the Tongan government for promoting democracy through political reforms and preserving the balance of power enshrined in your Constitution.” Victoria Nuland, *The Kingdom of*

In the shadows of the warm reception, however, lurks the possibility of continued political violence like the 2006 riots. On November 16, 2006, pro-democracy rioters destroyed much of the capital of Nuku'alofa, targeting government- and elite-controlled property.³

The government ultimately responded to the violence by increasing the number of commoner representatives in the Legislative Assembly.⁴ Commoners comprise a majority of Tonga's population of over 100,000 people,⁵ while there are only thirty-three nobles.⁶ Commoners and nobles, however, used to have nine representatives each in parliament,⁷ even though commoners outnumbered nobles in population. In November 2009, a Constitutional committee recommended introducing a parliament in which commoners would choose a majority of the members.⁸ The amended Constitution did away with an assembly that the powerful noblemen had previously dominated.⁹ In November 2010, the election under the new Constitution finally took place.¹⁰

In light of Tonga's history, the *de jure* changes to Tongan law were revolutionary. Tonga is the last remaining monarchy in the South Pacific,¹¹ and though a constitutional monarchy, it has functioned more like a dictatorship, with the king or queen controlling the government.¹² Although never formally colonized, Tonga became a British protectorate in 1901 but remained autonomous in its domestic affairs; in 1970, it became fully independent.¹³ The Tongan monarchy and nobility have thus been paramount in the country's governance, even through the protectorate period.

Tonga's Constitution Day, UNITED STATES DEPARTMENT OF STATE (Nov. 3, 2011), <http://www.state.gov/r/pa/prs/ps/2011/11/176613.htm>.

³ See *Tongan Riots After Reforms Delay*, BBC NEWS, Nov. 16, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/6153238.stm>.

⁴ See Audrey Young, *Tongans Ready to Vote Under 'Ordinary Peoples' Constitution*, N.Z. HERALD, Nov. 25, 2010, http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10689869.

⁵ See *Tonga*, WORLD BANK DEVELOPMENT INDICATORS—GOOGLE PUBLIC DATA EXPLORER, http://www.google.com/publicdata/explore?ds=d5bnepjof8f9_&met_y=sp_pop_totl&idim=country:TONGA&dl=en&hl=en&q=tonga%27s+population (last visited Feb. 10, 2012).

⁶ MARTIN DALY, *TONGA: A NEW BIBLIOGRAPHY* 9 (2009).

⁷ See *id.*

⁸ CONSTITUTIONAL AND ELECTORAL COMMISSION, FINAL REPORT, 115 (Nov. 5, 2009), available at http://pidp.eastwestcenter.org/pireport/special/cec_final_report.pdf [hereinafter CEC FINAL REPORT].

⁹ See Young, *supra* note 4.

¹⁰ *Id.*

¹¹ GEORGE E. MARCUS, *THE NOBILITY AND THE CHIEFLY TRADITION IN THE MODERN KINGDOM OF TONGA* 2 (The Polynesian Society, Inc. 1980) (1978).

¹² See DALY, *supra* note 6, at 9.

¹³ JERRY DUPONT, *THE COMMON LAW ABROAD* 1215, 1216-18 (2001).

The monarchy and nobility's control of much of the population is not surprising considering Tonga's ecology. The country's population is dense, owing to its successful agricultural intensification.¹⁴ This population is spread over three main island groups in the South Pacific between Fiji and New Zealand.¹⁵ Tonga has long been a "chiefdom,"¹⁶ which can be defined as "an autonomous political unit comprising a number of villages or communities under the permanent control of a paramount chief."¹⁷ Chiefdoms commonly appear in circumscribed island environments where competition for resources is fierce.¹⁸

Tonga transitioned legally to a constitutional monarchy in 1875,¹⁹ but the hierarchy of the chiefdom has largely remained and will likely continue, even with the Constitutional amendments. The monarchy and nobles will probably work to keep the land tenure system of the chiefdom intact because competition over land continues to grow, and the social and legal hierarchy of the chiefdom ensures that those in charge can control land use and access. The pro-democracy movement and the 2006 riots indicate that commoners are ready to change the system, with violence if necessary.

Human behavioral ecology ("HBE"),²⁰ a theoretical branch of evolutionary anthropology, provides possible long-term solutions to Tonga's instability, because it looks at root causes of human conflict. This comment uses evolutionary ecological theory, in conjunction with insights from economics, to argue that insecure land rights, rising population, and declining land productivity, combined with the decreasing power of the nobles, has led to the recent commoner uprising and pro-democracy movement. Further, although the Tongan government has attempted to solve its instability problems by increasing political representation for commoners, the recent amendments are unlikely to change land laws. Therefore, instability will continue until Tonga reforms its land laws and policies or makes extensive political reforms ultimately resulting in land tenure

¹⁴ Shankar Aswani & Michael W. Graves, *The Tongan Maritime Expansion: A Case in the Evolutionary Ecology of Social Complexity*, 37 *ASIAN PERSP.* 135, 143 (1998).

¹⁵ DALY, *supra* note 6, at 1.

¹⁶ Aswani & Graves, *supra* note 14, at 144.

¹⁷ Robert L. Carneiro, *The Chiefdom: Precursor of the State*, in *THE TRANSITION TO STATEHOOD IN THE NEW WORLD* 37, 45 (G. D. Jones & R. R. Kautz eds., 1981) (defining "chiefdom").

¹⁸ *Id.* at 64.

¹⁹ DALY, *supra* note 6, at 9.

²⁰ HBE is defined as "the evolutionary ecology of human behaviour. Its central focus is how the behaviour of modern humans reflects our species' history of natural selection." Monique Borgerhoff-Mulder, *Human Behavioural Ecology*, in *ENCYCLOPEDIA OF LIFE SCIENCES* 1, 1 (2003).

changes. The proposed changes require Tongans to place individual liberties above some cultural traditions.

The remainder of this comment supports this thesis. Part II provides the legal and historical background leading up to the pro-democracy movement. Part III examines the Tongan government's attempts to deal with instability by modestly changing the structure of the Legislative Assembly. Part IV argues that, to stabilize Tonga and quell future violence, the government must reform its land laws and policies.²¹ Working within the current governmental framework, this comment offers several possibilities for amending the Constitution and the Land Act to end or reduce the nobles' power over commoner lands, to allow for more commoners to occupy land and to create new policies to improve the productivity of commoner lands. This comment addresses the problem of political violence, which Tongans recognize and ostensibly want to solve, but it argues that the adopted solution is insufficient. It therefore takes a consequentialist perspective to legal and policy reforms, though the changes prescribed may accord with deontological perspectives as well. Those who applaud Tonga for its growing acceptance of "democracy" should keep in mind that Tonga is not only far from being a free society, but also that the nation must make extensive reforms before achieving its goal of stability.

II. TONGAN LAW MAINTAINED A DISPARITY BETWEEN COMMONER AND NOBLE RIGHTS, BUT THE PRO-DEMOCRACY MOVEMENT DEMANDED CHANGE

As mentioned in Part I, pre-Constitutional Tonga was a chiefdom with an inegalitarian political system. The Constitution of 1875, and later, the Land Act, reduced the nobility's power and respected commoner rights somewhat, but the commoner-noble distinction remained largely intact. The pro-democracy movement reacted to this disparity, eventually ushering in the recent Constitutional reforms. Subsections A and B detail Tongan law and history related to land and political rights before the 2009 amendments in two main stages: 1) before and 2) after the Constitution of 1875. Subsection C then explains how the pro-democracy movement and riots encouraged the 2010 changes. This part discusses law in a broad sense,

²¹ When discussing land reform, this comment uses a broader definition to include reforms that seek to increase the ability of commoners to access land and secure their rights in it, rather than simply redistributive reforms. See Roy L. Prosterman & Tim Hanstad, *Land Reform in the Twenty-First Century: New Challenges, New Responses*, 4 SEATTLE J. SOC. JUST. 763, 763 (2006).

viewing the customary legal system of pre-Constitutional Tonga as equally as legal as the laws of Constitutional Tonga.²²

A. *Pre-Constitutional Tonga Was a Chiefdom Wherein Commoners Had Few Rights*

Humans have lived in Tonga for around 3,000 years.²³ Most of the Tongan islands stretch over 300 square kilometers of the South Pacific, and are bunched into the four groups of Tongatapu, Ha'apai, Vava'u, and Niuatoputapu.²⁴ Tonga has a dense population due to its extensive and successful agriculture.²⁵

Tonga's population density induced an ancient battle for control of the islands.²⁶ Large monuments appeared around 1000 C.E., suggesting a power struggle among chiefs resulting in the advertisement of chiefly abilities.²⁷ By the eighteenth century C.E., the four island groups were politically integrated into the Tongan chiefdom.²⁸ A monarch has ruled this expanding chiefdom beginning as early as 950 C.E., when the first Tu'i Tonga king is believed to have lived.²⁹ Local chiefs controlled smaller social units, and their seniority depended on their relationship to the sacred Tu'i Tonga.³⁰ As mentioned before, this type of polity is called a "chiefdom."³¹

The precise nature of commoner rights in the chiefdom is unclear, with different scholars reaching different conclusions. Earlier scholars "depict chiefs as having a rather despotic domination over commoners," whereas later researchers characterize the relationship between the classes as

²² One evolutionary legal scholar has defined law as "all rules that are necessary to a stable society. All law that is meant to keep a society stable can be called law, even if it results in the suffering of members of society." HENDRIK GOMMER, *A BIOLOGICAL THEORY OF LAW: NATURAL LAW THEORY REVISITED* 35 (2011).

²³ Aswani & Graves, *supra* note 14, at 142.

²⁴ *Id.* at 140.

²⁵ *Id.* at 143.

²⁶ *See id.* at 143-44.

²⁷ *Id.* at 143; *see generally* Geoffrey Clark, David Burley & Tim Murray, *Monumentality and the Development of the Tongan Maritime Chiefdom*, 82 *ANTIQUITY* 994 (2008) (discussing Tongatapu's megalithic tombs and their link to the expansion of the Tongan chiefdom).

²⁸ Aswani & Graves, *supra* note 14, at 143-44.

²⁹ MARCUS, *supra* note 11, at 6 n.5.

³⁰ Kerry James, *Right and Privilege in Tongan Land Tenure*, in *LAND, CUSTOM AND PRACTICE IN THE SOUTH PACIFIC* 157, 160 (R. Gerard Ward & Elizabeth Kingdon eds., 1995).

³¹ *See* Carneiro, *supra* note 17, at 45.

one of interdependence.³² The former opinion fits better with the general pattern seen in chiefdoms.³³

The chiefs undoubtedly had extensive control over the commoners' land rights. Chiefs gained control of land by force or through loyalty to a higher chief.³⁴ In a system often referred to as "feudal," these chiefs would give land to *matapules* (chiefs' attendants) to dole out to patrilineal descent groups.³⁵ Though the kin groups held some land rights, the chief had authority to terminate these rights.³⁶ The people worked on this land as subsistence farmers, and the chiefs kept any surplus.³⁷ The chiefs acted more like rulers than landlords,³⁸ a pattern that is common in chiefdoms.³⁹

Around 1797, the Tongan chiefdom broke out into a civil war that continued throughout the first half of the 1800s.⁴⁰ The war was much bloodier than previous internal fighting because Westerners had introduced modern weaponry into Tonga.⁴¹ During this period, Tāufa'āhua, the son of the ruling chief of the Ha'apai island group, was growing up and learning to be a warrior.⁴² Tāufa'āhua was a primary instigator in the continuing war as he attempted to gain power over more of the islands.⁴³ By 1830, his power extended over Ha'apai, and he had converted to Christianity and renamed himself King George after the English king.⁴⁴ By 1833, he had consolidated Ha'apai and Vava'u under his power.⁴⁵

In 1839, King George implemented the Vava'u Code on these two island groups.⁴⁶ This code appointed judges to rule on criminal matters,

³² Charles J. Stevens, *Symbolic Action and Soil Fertility: Political Ecology and the Transformation of Space and Place in Tonga*, in *POLITICAL ECOLOGY ACROSS SPACES, SCALES, AND SOCIAL GROUPS* 154, 160 (Susan Paulson & Lisa Gezon eds., 2005).

³³ See Carneiro, *supra* note 17, at 67.

³⁴ See James, *supra* note 30, at 160.

³⁵ See Christopher G. Crawford, *Tongan Land Management: Putting the Brakes on the Global Economy*, 36 *J. OF PAC. HIS.* 93, 94 (2001); see also Alaric Maude & Feleti Sevele, *Tonga: Equality Overtaking Privilege*, in *LAND TENURE IN THE PACIFIC* 114, 115-16 (Ron Crocombe ed., 1987).

³⁶ Crawford, *supra* note 35, at 94.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See Carneiro, *supra* note 17, at 67.

⁴⁰ See NOEL RUTHERFORD, *SHIRLEY BAKER AND THE KING OF TONGA* 8 (1971).

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Helen Morton, *Remembering Freedom and the Freedom to Remember: Tongan Memories of Independence*, in *CULTURAL MEMORY: RECONFIGURING HISTORY AND IDENTITY IN THE POSTCOLONIAL PACIFIC* 37, 39 (Jeanette Marie Mageo ed., 2001).

⁴⁴ See RUTHERFORD, *supra* note 40, at 8-9.

⁴⁵ *Id.* at 9.

⁴⁶ Tim René Salomon, Comment, *A Balancing Act: Modern Equality vs. Traditional Nobility in Tonga*, 40 *VICTORIA U. WELLINGTON L. REV.* 369, 375 (2009).

limiting the local chiefs' powers.⁴⁷ The code also mandated that judges treat subjects equally.⁴⁸ Further, chiefs could no longer forcefully take agricultural produce from commoners, and they could now be tried like any other Tongan for their actions.⁴⁹

In 1845, King George, who became known as Tupou I, officially became king of Tonga by bringing the Tongatapu island group under his rule⁵⁰ and instituted the Code of Law for All Tongans in 1850.⁵¹ This code purported to create a uniform law for all Tongans, regardless of chiefly status.⁵² In addition, Tupou I claimed title to all of Tonga's land.⁵³ Sales of land to foreigners were prohibited, with leasing permitted upon government approval.⁵⁴

Continuing with his lawmaking streak and growing power, Tupou I created the Emancipation Edict of 1862, which ostensibly reduced much of the chiefs' power over the commoners.⁵⁵ In addition to ending the forced labor and tithing systems, the edict compelled the chiefs to "allot portions of land to the people as they may need, which shall be their farm, and as long as the people pay their tribute, and their rent to the chief, it shall not be lawful for any chief to dispossess them."⁵⁶

The Emancipation Edict of 1862, along with the Vava'u Code and the Code of Law for All Tongans, could be seen as expanding commoner rights vis-à-vis their chiefs. Tupou I's motivations in creating these codes should not be seen as entirely altruistic—he may have been simply trying to reduce his rivals' power.⁵⁷ Regardless of Tupou I's motivations, the Emancipation Edict allowed for the continued vitality of the chief-commoner disparity in land rights by granting chiefs the authority to receive tributes and rents in exchange for land. When Tupou I promulgated the Constitution of 1875, he simply transformed some chiefs into nobles, thus maintaining the ancient hierarchy.⁵⁸ Though commoners were better off with Tupou I's reforms, he

⁴⁷ *Id.* at 376.

⁴⁸ *Id.*

⁴⁹ ELISE HUFFER, *GRANDS HOMMES ET PETITES ÎLES: LA POLITIQUE EXTÉRIEURE DE FIDJI, DE TONGA ET DU VANUATU* 40 (1993).

⁵⁰ RUTHERFORD, *supra* note 40, at 10.

⁵¹ Salomon, *supra* note 46, at 376.

⁵² RUTHERFORD, *supra* note 40, at 10.

⁵³ Maude & Sevele, *supra* note 35, at 119.

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ *Id.* (citing Thomas West, *TEN YEARS IN SOUTH-CENTRAL POLYNESIA* (1865)).

⁵⁷ RUTHERFORD, *supra* note 40, at 10.

⁵⁸ *See* Salomon, *supra* note 46, at 376.

ultimately allowed chiefs to retain many of the powers they held in the chieftdom.

B. The Constitution of 1875 and Land Act Did Little to Improve Commoners' Political and Land Rights

Shirley Waldemar Baker, an Englishman and Methodist missionary, officially became Tupou I's advisor in 1872 and assisted him in Tonga's governance.⁵⁹ Their relationship grew out of mutual need—Baker needed Tupou I's support to establish his dream of an independent Tongan church, while Tupou I needed Baker's help to deal with the encroaching European powers.⁶⁰ Creating a Tongan Constitution was high on Baker's priority list.⁶¹ In 1873, Baker began drafting Tonga's Constitution after consulting with Australian and Hawaiian politicians, and when he finished the draft, he sent it to a firm of Auckland lawyers to tweak the language.⁶² On November 4, 1875, a *fakataha*, an assembly of title-holding chiefs, accepted the Constitution upon Tupou I's urging.⁶³

The new Constitution consisted of 132 articles and was divided into three sections: 1) individual rights, 2) form of government, and 3) land tenure.⁶⁴ The Constitution, though recognizing some commoner rights, perpetuated disparities in political power and property rights. Clause 4 proclaims that “[t]here shall be but one law in Tonga for chiefs and commoners,”⁶⁵ but the balance of the Constitution shows that this is a qualified statement.

The disparity in rights in Constitutional Tonga originates with Tupou I's creation of a landed nobility.⁶⁶ After the *fakataha* approved the Constitution, Tupou I proceeded to name only 20 of the chiefs as the new Tongan nobility, declaring, “I will read out the names of the nobles and in case some of you might be hurt because your names are not included, The [c]onstitution has this to say about it ‘The King will appoint 20 nobles.’”⁶⁷ These nobles received estates with the power to lease lots from them to

⁵⁹ RUTHERFORD, *supra* note 40, at 50.

⁶⁰ *Id.* at 50-51.

⁶¹ *Id.* at 55.

⁶² *Id.*

⁶³ *See id.* at 55-56; see also *Tupou I, The Speech of His Majesty Tupou I at the Close of Parliament on 4th November, 1875*, in TONGAN LAW REPORTS, Vol. II 3, 3 (D.B. Hunter ed., 1963).

⁶⁴ RUTHERFORD, *supra* note 40, at 56.

⁶⁵ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 4 (“Same law for all classes”).

⁶⁶ *See* RUTHERFORD, *supra* note 40, at 58.

⁶⁷ Tupou I, *supra* note 63, at 3.

commoners, as well as positions in the Legislative Assembly.⁶⁸ Baker and Tupou I likely created the new nobility in order to placate the more powerful chiefs.⁶⁹

This new nobility was undoubtedly privileged under the Constitution in both political and land rights. Clauses 32, 60, 67, and 71 placed limits on commoner political rights.⁷⁰ Clause 60, for example, established the scheme for representation in the Legislative Assembly.⁷¹ Originally, it guaranteed each noble a spot in the Legislative Assembly, with an equal number of commoner representatives allotted by region,⁷² although commoners certainly outnumbered nobles. In 1914, this number was reduced to seven of each class, and was later increased to nine of each class.⁷³

Besides creating inequality in representation, the Constitution made certain subjects off-limits for the People's (commoners') Representatives. For example, Clause 32 established that in certain cases, the nobility may select successors to the throne without commoner input.⁷⁴ Further, Clause 67, titled "Privilege of nobles," states that "it shall be lawful for only the nobles of the Legislative Assembly to discuss or vote upon laws relating to the King or Royal Family or the titles and inheritances of the nobles."⁷⁵ Additionally, Clause 71 prohibited commoner representatives from participating in trials to impeach nobles.⁷⁶ The effect of these articles is both that commoners are underrepresented in the Legislative Assembly, and also that their representatives have limited powers on subjects related to the nobles and monarchy.⁷⁷

The Constitution also vested the twenty new nobles with some special land rights, while limiting every man's control over his land. Clause 104 states that "[a]ll the land is the property of the King" and allows for the

⁶⁸ *Id.* at 4-5.

⁶⁹ See RUTHERFORD, *supra* note 40, at 58.

⁷⁰ THE ACT OF CONSTITUTION OF TONGA (1988).

⁷¹ *Id.* at cl. 60 ("Representative members").

⁷² MARCUS, *supra* note 11, at 74.

⁷³ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 60 ("Representative members").

⁷⁴ *Id.* at cl. 32 ("Succession to the Throne"); see also Salomon, *supra* note 46, at 371.

⁷⁵ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 67 ("Privilege of nobles"); see also Salomon, *supra* note 46, at 372.

⁷⁶ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 71 ("Noble may be deprived of his seat"); see also Salomon, *supra* note 46, at 372.

⁷⁷ See generally Salomon, *supra* note 46, at 371-73. Besides the Legislative Assembly, commoners also receive some representation via the *fono*, or public meeting, held by a noble, a government official, or the town, or village. The meetings may be held so that the chief can give orders, but some may be willing to allow commoners to influence local decision-making. Ropate Qalo, *Tonga*, in *DECENTRALISATION IN THE SOUTH PACIFIC* 238, 242 (Peter Larmour & Ropate Qalo eds., 1985).

nobles of Tupou I's choosing to have hereditary estates that only other nobles may inherit.⁷⁸ Though no one may sell land, they may lease it in accordance with the Constitution—Clause 105 limits the term of leases to 99 years, unless the Privy Council gives approval otherwise.⁷⁹ Further, Clause 114 requires the cabinet's approval for all leases, subleases, and transfers lasting 99 years or less, and the Privy Council's approval when over 99 years.⁸⁰

Tupou I intended that the nobles would allot land from their hereditary estates to commoners.⁸¹ On the close of the new parliament on November 4, 1875, however, Tupou I implored his newly-created nobility not to be hasty in making allotments to commoners.⁸² The nobles must have taken this seriously—they had granted no allotments by 1880.⁸³ To remedy this, Shirley Baker became minister of lands in 1880 and two years later created the Land Act, which “established the right of each male Tongan of taxpaying age sixteen to be granted a town allotment and a gardening or ‘tax’ allotment by the owner of the estate on which he lived.”⁸⁴ Tax allotments are heritable in the male line and are to be up to 8.25 acres.⁸⁵ The same year, Tupou I granted thirty hereditary estates to an expanded nobility and six to *matapules*, or the spokesmen for the chiefs.⁸⁶ The rest of the land became government land, so commoner allotments are apportioned from the hereditary nobles' estates, from land held by the monarchy, and from some land designated as “government” land.⁸⁷ A majority of commoners live on the hereditary nobles' estates.⁸⁸

The Land Act has not changed much since 1882. In 1891, however, the Act was changed to make the government responsible for granting allotments, and the estate-holders had only the right to receive the rent.⁸⁹

⁷⁸ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 104 (“Land vested in crown—sale prohibited”); see also Salomon, *supra* note 46, at 372.

⁷⁹ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 105 (“Terms of leases”). The status of this clause is unclear after the 2010 Constitutional amendments related to executive power. See CEC FINAL REPORT, *supra* note 8, at 108.

⁸⁰ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 114 (“No lease etc. without consent”). The status of this clause is unclear after the 2010 Constitutional amendments related to executive power. See CEC FINAL REPORT, *supra* note 8, at 108.

⁸¹ Tupou I, *supra* note 63, at 5.

⁸² *Id.*

⁸³ See RUTHERFORD, *supra* note 40, at 99.

⁸⁴ Maude & Sevele, *supra* note 35, at 120.

⁸⁵ The Land Act of 1988, § 7 (“Right to allotment”) (Tonga).

⁸⁶ Maude & Sevele, *supra* note 35, at 121.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 120.

The trend toward limiting the nobles' power over the land was reversed in 1915, when nobles earned the statutory right to be consulted before the minister of lands could make an allotment on their estates.⁹⁰ The Land Act also requires commoner occupants to pay their nobles a yearly rent.⁹¹

In 1976, the Land Act was amended to allow for mortgages of allotments, and in 1980, the maximum mortgage period was set to thirty years.⁹² In practice, the mortgages allowed by the Land Act are not very valuable, as banks may only foreclose on the remaining period; banks are thus reluctant to make loans.⁹³

Commoners were also granted the ability to lease out their tax allotments for up to 10 years and town allotments for up to 99 years with the cabinet's approval and for more than 99 years with the Privy Council's approval.⁹⁴ The cabinet has tended to allow increasingly shorter leases, usually of 50 years; the 99-year leases are rare.⁹⁵ The cabinet may place other restrictions on the leases as well.⁹⁶

The specialized Land Court hears any disputes involving the Land Act.⁹⁷ The king and the Privy Council appoint the judge of the Land Court and a panel of assessors.⁹⁸ An appeal lies of right, but this appeal must be taken to the Privy Council rather than to the supreme court.⁹⁹ The king also appoints a minister of lands in his Privy Council, who is invariably a noble.¹⁰⁰

Though an allotment is legally due to them, many Tongan men will not receive one. In practice, it is easiest for men to inherit land.¹⁰¹ However, Tongan families are large, so many men will not inherit land and must acquire a vacant allotment.¹⁰² This can be difficult because in some areas all the allotments have been registered.¹⁰³

⁹⁰ *Id.* at 120-21.

⁹¹ The Land Act of 1988, § 31 ("Holder's right to rents") (Tonga).

⁹² Maude & Sevele, *supra* note 35, at 121.

⁹³ Crawford, *supra* note 35, at 98.

⁹⁴ Maude & Sevele, *supra* note 35, at 122.

⁹⁵ Crawford, *supra* note 35, at 97.

⁹⁶ *Id.*

⁹⁷ The Land Act of 1988, § 149 ("Jurisdiction of court defined") (Tonga).

⁹⁸ *Id.* at § 147 ("Appointment of judge").

⁹⁹ *Id.* at § 162 ("Appeal lies to Privy Council within 60 days").

¹⁰⁰ James, *supra* note 30, at 164.

¹⁰¹ Maude & Sevele, *supra* note 35, at 122.

¹⁰² *Id.* at 123.

¹⁰³ *Id.*

Once a Tongan man finds an allotment, his difficulties may not end. Nobles can continue to exercise power over the commoners in allotting parcels of their estates:

Noble lands have not been completely allocated and/or registered. A noble's signature is required before land on a noble's estate can be registered in a commoner's name. Many nobles are reluctant to allow their people to register land. By simply allocating land for commoners' use but not allowing registration, the noble retains control over the land. The promise of registration requires that the commoner remain on good relations with the noble. This often means obeying the noble's orders and providing him with 'gifts' of food, money, handicrafts or imported goods. It may also mean leaving the land to make way for someone (often foreigners) who has the capital to lease the land for themselves from the noble.¹⁰⁴

Thus, finding an open allotment on a noble's estate will not guarantee security in land rights for the commoner occupant. The Land Act's requirement of noble approval for allotment allows for these extra-legal abuses.

The lucky men who do register their allotments may face additional hurdles. The Land Act requires that holders of registered allotments pay eighty *seniti* (totaling only about fifty U.S. cents) in yearly rent for their holdings.¹⁰⁵ Those on nobles' estates must pay this to the noble; the nobles frequently ask for payment in the form of tribute of other items.¹⁰⁶ These tributes often exceed the statutorily-mandated amount, and the sum requested may be "debilitating."¹⁰⁷ In this system, the noble acts much like a traditional chief, and it is unclear whether commoners go along with it because they believe it is legally required or for some other reason.¹⁰⁸ It also does not seem that they do this because of fear of eviction—few people have

¹⁰⁴ Crawford, *supra* note 35, at 96.

¹⁰⁵ The Land Act of 1988, § 31 ("Holder's right to rents") (Tonga).

¹⁰⁶ Crawford, *supra* note 35, at 96.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* One anthropologist described the nobles' demands (often couched as traditional feasting obligations) as hostile: "Feasting obligations require long-range planning by farmers, and an unexpected feast demanded by a chief or noble may upset otherwise carefully managed smallholder resources." Stevens, *supra* note 32, at 156. Each family may have to contribute as much as "six piglets, the quarter section of one large pig, one roasted goat, two large baked fish, eighty kilograms of yams, about fifty kilograms of sweet potatoes, and three twenty-kilogram giant taro" as well as firewood, lobster, and even octopus. *Id.* at 157-58.

been evicted from their allotments.¹⁰⁹ For whatever reason that commoners allow this manipulation, the Land Act's mandate that rent be paid to the noble legally enables it.

In 1984, allotted, unregistered land made up 19.28% of the total area of Tonga, with 43.28% held as registered allotments, 8.07% under leasehold, and only 6.94% remaining to be allotted.¹¹⁰ This means that (if these or similar statistics still hold true) nobles could cause insecurity in land rights on much of Tonga's land. Meanwhile, the population of Tonga continues to grow, and the government can no longer provide the statutory allotment owed to its men in some areas.¹¹¹ The scarcity of land and the insecurity in existing allotments create a precarious situation for Tongan commoners.

These legal and factual issues have caused a black market in land tenure to appear. Beginning around the first half of the twentieth century, Tonga's commoners have "bought" and "sold" allotments illegally to others, although what they are really doing is buying the landholder's right to use the allotment.¹¹² The government largely ignores these extra-legal exchanges.¹¹³ Though the black market can provide commoners with income, it falls far short of providing the benefits that institutionally-recognized land rights could bring.

While Tonga has changed in its structure from chiefdom to Constitutional monarchy over the past 137 years, it has enshrined and perpetuated the disparity between commoners and nobility in both property and political rights through positive law and *de facto* practice. As one writer put it, "[r]oyalty and nobility effectively work together through Constitutionalized government institutions, to ensure perpetuation of the monarchy's and the nobility's strong position as estate holders."¹¹⁴ Tonga's past and present show that Tongan institutions do enshrine the ancient hierarchy to the commoners' detriment.

¹⁰⁹ Maude & Sevele, *supra* note 35, at 125-26.

¹¹⁰ *Id.* at 128.

¹¹¹ *Id.* at 125.

¹¹² See James, *supra* note 30, at 188-89.

¹¹³ *Id.* at 189.

¹¹⁴ Crawford, *supra* note 35, at 101. The continuation of the Tongan hierarchy, despite the Constitutional reforms, is discussed further in Morton, *supra* note 43, at 45.

C. *The Growing Pro-Democracy Movement, Including the 2006 Riots, Made it Clear that the Tongan Government Would Have to Reform its Legal System*

The 2006 riots in the capital of Nuku'alofa shocked the Tongan government, which appeared ill-prepared to deal with the violence. Dubbed "16-11," the November 16, 2006 chaos began as protestors took to the streets to object to the Legislative Assembly's plan to adjourn for the year, though it had done nothing appreciable to honor its promise of advancing democracy.¹¹⁵ The protestors became violent, tipping cars, burning buildings, and looting; eventually, eight protestors were killed.¹¹⁶ They targeted government and elite-owned property and left the business district in ruins.¹¹⁷ The surprised Tongan government asked New Zealand and Australia to send troops to quell the riots.¹¹⁸ The next day, the Tongan government declared a state of emergency in the area, which was not lifted until February 2011.¹¹⁹ It not only limited the size of gatherings in certain areas,¹²⁰ but also allowed police to stop and frisk anyone in the area without requiring any level of suspicion.¹²¹

The riots were the culmination of the modern pro-democracy movement, which is thought to have originated in the 1970s and 1980s.¹²² The movement has generally focused on a call for an expanded legislature and a more accountable executive.¹²³ The pro-democracy reformers held several Constitutional conventions throughout the 1990s, and they offered three different proposals for political reforms—one in 1997 and two in 2002.¹²⁴ There was no discussion of changes to Part III of the Constitution ("The Land"), and ultimately the Legislative Assembly and executive took

¹¹⁵ *Tongan Riots After Reforms Delay*, *supra* note 3; *see, e.g.*, OKUSITINO MAHINA, 16/11 TONGA HE FEPAKI—TONGA IN CRISIS (2010) (referring to the riots as "16/11").

¹¹⁶ *Tongan Riots After Reforms Delay*, *supra* note 3; *Riot Death Toll in Tonga Reaches Eight*, RADIO N.Z. INT'L., Nov. 17, 2006, <http://www.rnzi.com/pages/news.php?op=read&id=28357>.

¹¹⁷ *See Tongan Riots After Reforms Delay*, *supra* note 3; Guy Powles, *Testing Tradition in Tonga: Approaches to Constitutional Change*, 13 REV. JURIDIQUE POLYNESIENNE 111, 112-13 (2007).

¹¹⁸ *WikiLeaks Cable: New Zealand Active in Tonga and Fiji*, N.Z. HERALD, Dec. 20, 2010, http://www.nzherald.co.nz/politics/news/article.cfm?c_id=280&object.

¹¹⁹ *Tonga Government Removes Emergency Regulations*, RADIO N.Z. INT'L., Feb. 13, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=58583>.

¹²⁰ *Tonga Continues to Enforce Emergency Regulations a Year After Destructive Riots*, RADIO N.Z. INT'L., Nov. 12, 2007, <http://www.rnzi.com/pages/news.php?op=read&id=36359>.

¹²¹ *See Tonga Reimposes Emergency Regulations*, RADIO N.Z. NEWS, Sept. 10, 2008, <http://www.radionz.co.nz/news/world/3616/tonga-reimposes-emergency-regulations>.

¹²² I. C. Campbell, *The Quest for Constitutional Reform in Tonga*, 40 J. OF PAC. HIS. 91, 92 (2005).

¹²³ *Id.* at 94.

¹²⁴ *Id.* at 94-102.

no notice of the proposed reforms, though they were quite conservative in scope.¹²⁵

Though the conventions did not discuss land, Tongans have considered land reform.¹²⁶ In 1975, the Tonga Council of Churches held a seminar on land tenure in which many commoners voiced their complaints about the land tenure system.¹²⁷ The push for land reform eventually led to the Land Act amendments allowing mortgages and leases of tax allotments, but went no further.¹²⁸ The pro-democracy proponent ‘Akilisi Pohiva has also called for reform of the land tenure system from time to time, but he has been largely ignored.¹²⁹

The riots were seemingly the Tongan government’s final wake-up call for reform: four years later, an election would be held under a new Constitution in which commoners would vote for more of the Legislative Assembly members.¹³⁰ The next part explains how this purported “ordinary peoples’ constitution” will change little in Tonga in terms of commoners’ rights, especially land rights.

III. THE 2010 AMENDMENTS DID LITTLE TO CHANGE POLITICAL REPRESENTATION AND ARE UNLIKELY TO INFLUENCE LAND LAWS

The pro-democracy movement and the riots were the impetus for the 2010 Constitutional amendments, but whether these amendments will change anything for commoners is doubtful. This part will: 1) describe the 2010 changes to the Tongan Constitution, which altered the structure of the Legislative Assembly, 2) argue that these changes have done little to increase political effectiveness for commoners as the 2010 election shows, and 3) suggest that these changes will also not lead to commoner-friendly land reform.

A. *The 2010 Amendments Aimed to Give Commoners Increased Political Representation*

The riots pressured the Legislative Assembly to pass the Constitutional and Electoral Commission Act in 2008, which created a

¹²⁵ *Id.*

¹²⁶ James, *supra* note 30, at 186.

¹²⁷ *Id.*

¹²⁸ *Id.* at 186-87.

¹²⁹ *See, e.g., id.* at 188.

¹³⁰ *See* Young, *supra* note 4.

commission that is “required to make interim and final reports and recommendations on Constitutional and electoral reform to the Privy Council and the Legislative Assembly.”¹³¹ In creating policy for these reforms, the commission’s members went from district to district in Tonga and held meetings to assess public opinion.¹³² The Constitutional and Electoral Commission (“CEC”) created several reports, which detailed the results of these meetings, and in the last report, the CEC recommended that Tonga implement a Legislative Assembly with increased commoner representation.¹³³ The government accepted this advice, amending the Constitution in 2010.¹³⁴

The 2010 amendments were seemingly revolutionary. Under the new Constitution, which has been called the “ordinary peoples’ Constitution,” the commoners may elect seventeen members of the twenty-six member Legislative Assembly; previously they could only elect nine of the thirty-three representatives.¹³⁵ Additionally, the prime minister must be elected from and recommended by the assembly; before, the king appointed the prime minister.¹³⁶ The CEC recommended that the first election under this “new” Constitution be held in 2010.¹³⁷

B. The 2010 Amendments Have Done Little in Practice to Change Commoner Political Representation

In the November 2010 election, candidates from the Democratic Party of the Friendly Islands (“DPFI”) and many independent candidates vied for the seventeen commoner seats.¹³⁸ DPFI members took eleven seats, and independents took the remaining six.¹³⁹ When the parliament met to decide the new prime minister (“PM”), all of the independents voted with the

¹³¹ See CEC FINAL REPORT, *supra* note 8, at 1.

¹³² CONSTITUTIONAL AND ELECTORAL COMMISSION, INTERIM REPORT, 4-5 (June 5, 2009), available at pidp.eastwestcenter.org/pireport/special/tonga-report.pdf [hereinafter CEC INTERIM REPORT].

¹³³ See CEC FINAL REPORT, *supra* note 8, at 115.

¹³⁴ THE ACT OF CONSTITUTION OF TONGA amend. (2010).

¹³⁵ *Tonga’s Pro-Democracy Movement Hails Assembly Reform*, RADIO N.Z. INT’L, Apr. 21, 2010, <http://www.rnzi.com/pages/news.php?op=read&id=53125>; THE ACT OF CONSTITUTION OF TONGA amend. (2010), § 2 (“Clause 60 replaced – Representative members”).

¹³⁶ THE ACT OF CONSTITUTION OF TONGA amend. (No. 2) (2010), § 13 (“Clause 50A inserted – Prime Minister”).

¹³⁷ CEC FINAL REPORT, *supra* note 8, at 98.

¹³⁸ Crosbie Walsh, *Tonga’s Election: Some Change . . . But Nothing Too Substantial*, PAC. SCOOP, Jan. 3, 2011, <http://pacific.scoop.co.nz/2011/01/tongas-election-some-change-but-nothing-too-substantial/>.

¹³⁹ *Id.*

nobles and elected the noble Lord Tu‘ivakano as PM.¹⁴⁰ Dr. Crosbie Walsh, a professor of the University of the South Pacific, remarked:

There is an obvious moral to this story. Tonga has taken a small step forward towards a more representative parliament but effective power and authority continues to reside in the same hands Appearance not substance is what counts. Overseas armchair democrats and politicians can be content. There has been an “election”—and little substantial change.¹⁴¹

Walsh’s remarks, made in an online commentary published on January 3, 2011,¹⁴² came during rapid political changes in the new government in late 2010 and early 2011. The new Tongan PM was already under fire by December 30, 2010, because he named two unelected ministers to his cabinet.¹⁴³ Then, on January 14, 2011, the PM’s new health minister, the commoner and pro-democracy reformer ‘Akilisi Pohiva, stepped down.¹⁴⁴ Pohiva, a member of DPFI, refused to sign an agreement to not vote against the government and had previously expressed anger at the appointment of the two unelected members.¹⁴⁵ For these reasons, he stepped down seventeen days after his appointment.¹⁴⁶ After Pohiva’s resignation, only one DPFI member remains in the cabinet.¹⁴⁷

Lord Tu‘ivakano’s election as PM, combined with these rapid changes soon after the November election, indicate that perhaps the CEC’s suggested amendments have not changed much at all, and commoners continue to lack an ability to effect change in their government. Further, Pohiva’s resignation and the resulting discord may be early symptoms of growing political instability.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *New Tongan PM Names His Cabinet*, EXPRESS, Dec. 31, 2010, <http://www.express.co.uk/posts/view/220351/New-Tongan-PM-names-his-cabinetNew-Tongan-PM-names-his-cabinet>.

¹⁴⁴ Michael Field, *Tonga’s Democracy Campaigner Quits*, STUFF, Jan. 14, 2011, <http://www.stuff.co.nz/world/south-pacific/4541054/Tongas-democracy-campaigner-quits>.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Reports of Discord Among Tonga Democrats After Pohiva Resignation*, RADIO N.Z. INT’L., Jan. 14, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=58189>.

C. *The Recent Amendments Are Unlikely to Change Land Tenure Laws*

If little has changed politically, even less is likely to change in the land tenure system. Professor Guy Powles, an expert in Tongan Constitutional law, anticipated that the issue of noble estates would be one of the most contentious areas of Constitutional reform.¹⁴⁸ He doubted that any real reform to the noble estate system could happen without significant change in the Tongan political structure.¹⁴⁹ As noted above, the country's elite still largely controls the new government, so it seems unlikely that they will allow for any statutory or Constitutional changes in property laws.

The 1875 Constitution and its related reforms brought some stability to Tonga and respected commoner rights to an extent, but still recognized some Tongans as privileged. So far, the recent reforms appear to be much of the same—they bring the facade of change, but really do little. The next part explains why land reform, though controversial, is necessary for Tonga's stability.

IV. WITHOUT LAND REFORM, TONGA'S POLITICAL INSTABILITY WILL CONTINUE

Tonga's Constitutional and Electoral Commission ("CEC"), in its first progress report, observed that commoners were more concerned about land tenure than changes in political representation:

In every district, there was repeated concern about the land issue and the fear of the consequences of any change in the present laws relating to it, especially the likelihood of alienation. In many cases this appeared to be a matter of more significance and concern than electoral and representational change or other changes to the [c]onstitution. It is noteworthy that the concerns about land had been foreshadowed in some of the written submissions by groups of members of the public. The Commissioners had frequently to explain that all issues about land and public administration, local or national, were outside of the statutory purview of this Commission It was apparent that many ordinary Tongans have little interest in politics or the structure of the government. This may arise partly from a lack of ability to affect change over many

¹⁴⁸ Powles, *supra* note 117, at 124.

¹⁴⁹ *Id.*

generations but comments in the outer districts suggest it also stems as much from the need to support themselves and their families and a perception that *government, however formed, will simply continue to neglect their interests.*¹⁵⁰

The CEC's observations are telling in two ways: they demonstrate that practical land issues are of great concern to Tongans, perhaps more so than electoral change, and they also acknowledge that the nobility-controlled government did not grant the CEC the power to suggest changes relating to the land system.¹⁵¹

This part argues that the concern over land is predictable and has deep roots, which can be explained using models from evolutionary ecology. This part will clarify why Tonga's political instability is about land, and explain why this instability has happened recently. Then it will give some suggestions on how Tonga can tame instability by amending the Constitution and Land Act to: 1) reduce the nobles' power over land rights, 2) allow for more commoners to at least occupy land, and 3) institute policies that would improve the productivity of commoner lands.

A. *Evolutionary Ecological Models Suggest That Tonga's Political Instability Is Closely Tied to Its Land Tenure System*

If law's principal endeavor is to influence human behavior according to societal norms, its ability to change behavior, and to do so efficiently, is a function of the accuracy of the behavioral models relied upon.¹⁵² These models predict how human behavior will change in response to particular laws.¹⁵³

Evolutionary ecology, and in particular the subfield of Human Behavior Ecology ("HBE"), can provide fertile ideas for how to change human behavior using law.¹⁵⁴ HBE focuses on the evolutionary origins of

¹⁵⁰ CEC INTERIM REPORT, *supra* note 132, at 5 (emphasis added); *see also* Josephine Latu, *Tongans Worry About Land, Administration More Than Politics, Says CEC*, PACIFIC MEDIA WATCH, June 10, 2009, <http://www.rnzi.com/pages/news.php?op=read&id=45692>.

¹⁵¹ The Royal Land Commission has been charged with reviewing land laws to determine if they serve Tongans' current needs. *Tonga's Royal Land Commission Reviews Land Laws*, RADIO N.Z. INT'L, Mar. 31, 2009, <http://pacificmediacentre.blogspot.com/2009/06/tongans-worry-about-land-administration.html>. The author is not aware of any major changes suggested by this group.

¹⁵² Owen D. Jones & Timothy H. Goldsmith, *Law and Behavioral Biology*, 105 COLUM. L. REV. 405, 413 (2005).

¹⁵³ *Id.*

¹⁵⁴ Evolutionary theory may also, however, be relevant for deontological conceptions of law. *See generally, e.g.,* GOMMER, *supra* note 22.

behavior and thus provides a valuable framework for predicting it. Accordingly, it is a useful tool for solving complex social problems, including those involving law. This theoretical approach understands human behavior as an evolved response to the socio-environmental context; that is, the human psyche's flexibility in responding to socio-environmental cues is itself an adaptation, allowing individuals to adjust their behavior in order to promote personal interests.¹⁵⁵ These adjustments are not made as a result of conscious striving for fitness (that is, reproductive success),¹⁵⁶ but are accomplished through intermediate goals, such as aiming for increased prestige in one's social group, finding mates, and securing material resources.¹⁵⁷

Working under this theoretical umbrella, HBE researchers have two main predictions for human behavior: "individuals will behave in ways that best suit their reproductive interests," and "the prediction that people will try to influence the social rules and other aspects of their culture in such a way as to promote their reproductive interests."¹⁵⁸ A society's laws will thus "tend to assume a form that serves the reproductive interests" of the powerful.¹⁵⁹ These predictions make sense when considering Tonga's nobles, who have commandeered the legal system to serve their interests. But what about the commoners?

It is paradoxical that hierarchical human societies like Tonga should exist at all, given the pull of individual interests. Formations of human societies result from individuals weighing the costs (for example, "increased competition for resources, increased exposure to disease") and benefits (for example, "enhanced access to resources or mates") of joining the group, and "[w]here benefits outweigh costs, groups should form and continue to grow as long as all the members benefit relative to dispersal or alternative affiliation."¹⁶⁰ Inequality and exploitation occur when individuals have a lack of options:

¹⁵⁵ William Irons, *Anthropology*, in *THE SOCIOBIOLOGICAL IMAGINATION* 71, 76 (Mary Maxwell ed., 1991).

¹⁵⁶ For more on behavior and reproductive success, or fitness, see W.D. Hamilton, *The Genetical Evolution of Social Behaviour I*, 7 *J. THEORETICAL BIOLOGY* 1 (1964).

¹⁵⁷ Irons, *supra* note 155, at 76-77.

¹⁵⁸ *Id.* at 77.

¹⁵⁹ *Id.*

¹⁶⁰ James L. Boone, *Competition, Conflict, and The Development of Social Hierarchies*, in *EVOLUTIONARY ECOLOGY AND HUMAN BEHAVIOR* 301, 301 (Eric Alden Smith & Bruce Winterhalder eds., 1992).

Under conditions of intense competition or where unoccupied territory no longer exists, the lack of alternative strategies for individuals may promote group affiliation even in the face of extreme disadvantage to some, perhaps most, of its members. And it is under these conditions that particular individuals, kingroups, or coalitions can exploit the lack of alternative strategies as leverage to gain control of resources at the expense of others. The result is hierarchical social organization based on unequal access to resources [G]roups characterized by exploitation and inequality can be said to develop out of mutual self-interest, even if many members of the group are seriously disadvantaged.¹⁶¹

This reasoning explains why Tonga is inegalitarian: the sea circumscribes the islands, limiting people's ability to leave, even when highly disadvantaged in political and land rights.¹⁶² In other contexts, individuals may move to unoccupied territory or may be able to migrate out of the area completely.¹⁶³ Additionally, fighting with those who control or hold resources may be a viable strategy for some people.¹⁶⁴ However, in some contexts, the best strategy is for the commoners to accept their lot, even though they are highly disadvantaged relative to the elite.

Throughout their history, Tongan commoners have pursued strategies other than submission. Early on, inland migration and migration to other islands in the archipelago was common.¹⁶⁵ Migration to other nations is also common—Tongan migration to Australia has been extensive.¹⁶⁶ The Church

¹⁶¹ *Id.* at 302.

¹⁶² Robert Carneiro explained circumscription theory thusly: "As population density increases, and arable land comes into short supply, fighting over land ensues. Villages vanquished in war, having nowhere to flee, are forced to remain in place and to be subjugated by the victors Chiefdoms arose most readily in environmentally circumscribed areas such as islands and narrow valleys." Carneiro, *supra* note 17, at 64; see generally Robert L. Carneiro, *A Theory of the Origin of the State*, 169 *SCIENCE* 733, 733-38 (1970).

¹⁶³ See Boone, *supra* note 160, at 302, 317.

¹⁶⁴ See J.R. KREBS & N.B. DAVIES, *AN INTRODUCTION TO BEHAVIOURAL ECOLOGY* 155-56 (1993).

¹⁶⁵ See Aswani & Graves, *supra* note 14, at 142.

¹⁶⁶ Wendy E. Cowling, *Motivations for Contemporary Tongan Migration*, in *PACIFIC DIASPORA: ISLAND PEOPLES IN THE UNITED STATES AND ACROSS THE PACIFIC* 99, 102-03 (Paul Spickard, Joanne L. Rondilla, & Debbie Hippolite Wright eds., 2002). By 1986, there were 8,000 Tongans in Australia. *Id.* at 103. The Wesleyan Church has played a prominent role in this migration. *Id.* at 102.

of Jesus Christ of Latter-day Saints has greatly facilitated Tongan migration to the United States.¹⁶⁷

Fighting the elite for control of resources is another strategy, and it is one that Tongans have pursued at various times. Tonga has been unstable during periods in which individuals fought for control of the islands as noted in Part II. Individuals may choose to fight resource-holders under certain ecological conditions¹⁶⁸—for example, they may fight resource-holders when the resource fought for is very valuable, or when the resource-holder is an easy target, or when both are true.¹⁶⁹ Thus, the particulars of an environment determine which resources are valuable enough to fight for and the respective costs of those fights.¹⁷⁰ As one anthropologist put it, “competition for resources in limited supply can directly influence the reproductive success of the individual competitors.”¹⁷¹ In Tonga, land is a limited resource as commoners are still largely dependent on subsistence farming, and land is in short supply.¹⁷² Thus, we would expect to see aggression related to land in Tonga. Lastly, “fighting” need not be formal conflict or warfare—aggressive displays, including violent protests, can serve the same purpose by intimidating resource-controllers into forfeiting some of their control.¹⁷³

B. While Land Has Become Scarcer and Less Productive in Tonga, the Controllers of Land Have Become Easier to Fight

Scholars have posited various theories to explain why the recent push for Tongan democracy did not occur until late in the twentieth century. Some have attributed the pro-democracy movement to education, while others have explained it through teleological theories of cultural advancement, among other rationales.¹⁷⁴ None, however, have attempted to explain the pro-democracy movement as a direct result of increasing population pressures within a nation of insecure land rights. Past tensions in

¹⁶⁷ Lee Davidson, *One of Every Four Tongans in the U.S. Calls Utah Home*, SALT LAKE TRIBUNE ONLINE, Sept. 11, 2011, <http://www.sltrib.com/sltrib/politics/52551592-90/california-family-hawaii-population.html.csp>.

¹⁶⁸ See KREBS & DAVIES, *supra* note 164, at 155-56.

¹⁶⁹ *Id.*; see also Joseph H. Manson & Richard W. Wrangham, *Intergroup Aggression in Chimpanzees and Humans*, 32 CURRENT ANTHROPOLOGY 369, 369 (1991).

¹⁷⁰ See KREBS & DAVIES, *supra* note 164, at 155-56.

¹⁷¹ William H. Durham, *Resource Competition and Human Aggression, Part I*, 51 THE Q. REV. OF BIOLOGY 385, 390 (1976).

¹⁷² Stevens, *supra* note 32, at 163.

¹⁷³ “Intergroup aggression” is defined in Manson & Wrangham, *supra* note 169, at 369-70.

¹⁷⁴ See Kerry E. James, *Tonga’s Pro-Democracy Movement*, 67 PAC. AFFAIRS 242, 242-43 (1994).

Tonga were inextricably entwined with the fight for control of land—why should the current tensions be any different?

In the decades before the current pro-democracy movement gained steam, a confluence of factors tended to reduce the amount of land available for allotment and the value of land that commoners already held. Population growth continued exponentially,¹⁷⁵ due in part to the then-monarch's (Queen Salote's) focus on improving health.¹⁷⁶ Migration became more difficult,¹⁷⁷ so those who would have moved off the islands had to stay. Further, soil quality deteriorated so commoner allotments were less productive.¹⁷⁸

Additionally, the perceived ability of the monarch and the nobility to hold and defend their power and their lands may have declined. The elite landholders may have become less likely to violently repel commoners engaged in protests for fear of involvement from New Zealand, Australia, or other powerful states. In fact, during the 2006 riots, the New Zealand government refused to send troops if it would appear to be supporting the established power structure against the pro-democracy movement.¹⁷⁹ The Tongan government, however, has been training its military in counter-insurgency drills as a result of the 2006 riots,¹⁸⁰ which will make the struggle for commoner rights even harder. The state of emergency, as mentioned in Part III, also shows that the elite are using force to quell violence rather than improving commoners' lives.¹⁸¹ Unfortunately, it appears as if Tonga's elites may work to strengthen their own power, rather than improving land tenure for commoners, in order to deal with Tonga's instability.

C. *Solutions to Tonga's Political Instability Lie in Amending the Constitution and the Land Act and in Creating New Agricultural Policies*

Tonga's instability could be solved in two ways: by strengthening the power of the elite, so that commoners are cowed into accepting noble exploitation, or by instituting land reform that would make violence less attractive to the commoners. Rather than strengthening the elite, Tonga should alter its laws and policies to secure commoner land rights, to allow

¹⁷⁵ James, *supra* note 30, at 180.

¹⁷⁶ See I. C. CAMPBELL, ISLAND KINGDOM: TONGA ANCIENT AND MODERN 142, 162 (1992).

¹⁷⁷ Cowling, *supra* note 166, at 179.

¹⁷⁸ Stevens, *supra* note 32, at 162-63.

¹⁷⁹ *WikiLeaks Cable*, *supra* note 118.

¹⁸⁰ *Tonga Military Exercise to Focus on Counter Insurgency*, RADIO N.Z. INT'L., Aug. 14, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=62390>.

¹⁸¹ *Tonga Government Removes Emergency Regulations*, *supra* note 119.

for more commoners to access land, and to improve the productivity of occupied land. To secure commoner land rights, noble control over land must be reduced or eliminated. To allow for more commoners to access land, allotment size may have to be reduced, new surveys must be taken, and public works projects should focus on areas such as outer islands and other rural areas, which may have unused and potentially productive lands. Additionally, allotments could be revoked from commoners living abroad. In order to harness the capital of occupied lands, the system of leases and mortgages must be wrested from government control. Further, community development banking may be beneficial for improving allotment productivity. In addition, reforming the inheritance system would also encourage commoners to better use their lands. As discussed below, changes in the political representation system are probably necessary before the Legislative Assembly would implement these reforms. Lastly, any disputes regarding land issues should be appealable to the supreme court. If executed, these reforms could improve commoner fitness and thereby reduce the chances that commoners would engage in violent behavior against the elite.

1. To Secure Commoner Land Rights, Noble Control over Land Must Be Reduced or Eliminated

Noble control over commoner lands should be eliminated by allowing commoners who currently occupy allotments to own them outright.¹⁸² The benefits of private property in developing economies are too numerous to discuss in this comment,¹⁸³ except to point out that secure private property gives owners the incentive—that is, self-interest—to use land most productively:

¹⁸² Recently, the government tried to set up the Royal Town of Neiafu in Vava'u in order to create a local administration that would help change traditional land laws. *Tonga Government Advised Against Change in Neiafu*, RADIO N.Z. INT'L., Sept. 9, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=63231>. The residents have reportedly rejected this local administration, and the government has moved out. *Id.* The reporting on this topic has been unclear, and it is difficult to discern why exactly commoners have rejected the government's scheme.

¹⁸³ For a general overview of the importance of private property to economic development, see Gerald P. O'Driscoll Jr. & Lee Hoskins, *Property Rights: The Key to Economic Development*, POLICY ANALYSIS, Aug. 7, 2003, available at <http://www.cato.org/pubs/pas/pa482.pdf>; see also Hernando de Soto, *The Mystery of Capital*, 38 FINANCE AND DEVELOPMENT 1 (2001), available at <http://www.imf.org/external/pubs/ft/fandd/2001/03/desoto.htm>.

Why does an individual invest unless to gain something for himself and his family? How can he ensure that gains flowing from his activity be appropriated and secured other than through a system of well-defined property rights? To suppose otherwise, is to suppose that human nature will change. That road is a dead end.¹⁸⁴

Secure property rights would encourage commoners to use their lands more productively—commoners would not expect the excess produce to be diverted to nobles as tribute, nor that their lands would be suddenly snatched from them to give to a noble's new favored occupant. Increased allotment productivity, combined with gains from the resources that would have gone to nobles, will improve commoner fitness and will make it less likely that commoners will resort to force to access and control resources. Increased allotment productivity should also improve the Tongan economy for all Tongans.¹⁸⁵

One could argue that because Tongan families often use allotments as a family, that ownership should be vested in all of them. However, familial ownership may make it difficult to alienate the land or make decisions regarding its use. Allotments have been granted in only one man's name since their inception,¹⁸⁶ so it would not be a shock to Tongans to vest ownership in one person as well. In addition, if alienation becomes legal, nothing would stop Tongans from purchasing and holding property in the names of all the family members if they so desire.

Several Constitutional amendments are required to grant commoners a fee simple¹⁸⁷ interest in their allotments.¹⁸⁸ Most importantly, Clause 104 ("Land vested in crown—Sale prohibited") would have to be modified to remove the language "All the land is the property of the King" and "It is hereby declared by this [c]onstitution . . . that it shall not be lawful for anyone at any time hereafter whether he be the King or any one of the chiefs or the people of this country to sell any land whatever in the Kingdom of Tonga."¹⁸⁹ Allotments would no longer be the property of the king, and commoners could freely alienate their lands.

¹⁸⁴ O'Driscoll & Hoskins, *supra* note 183, at 7.

¹⁸⁵ The ability of a formal, private property system to unlock the capital in assets is discussed in de Soto, *supra* note 183.

¹⁸⁶ Maude & Sevele, *supra* note 35, at 120.

¹⁸⁷ Fee simple is defined as "[a]n interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs." BLACK'S LAW DICTIONARY 691 (9th ed. 2009).

¹⁸⁸ See *infra*, Part IV.C.4, for the process of Constitutional amendment.

¹⁸⁹ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 104 ("Land vested in crown—Sale prohibited").

Interestingly, the Constitution already provides a due process clause (Clause 18 in the Declaration of Rights), which states that “[a]ll the people have the right to expect that the Government will protect their life[,] liberty[,] and property and therefore it is right for all the people to support and contribute to the Government according to law”; it also declares that fair value will be paid in cases of eminent domain.¹⁹⁰ This clause would, given proper judicial interpretation, help secure commoner property rights.¹⁹¹ Lastly, Clause 113 (“Right to allotments”) could be amended to transform the “right to hold an hereditary tax and town allotment”¹⁹² into the current occupant’s right to hold a fee simple interest in that allotment, but this could also be achieved by amending the Land Act. The language in Clause 113 requiring the allotment-holder to pay rents¹⁹³ would also have to be removed. These amendments will obviate much of the Land Act, which deals heavily with commoner allotments.¹⁹⁴

The Tongan legal system is perhaps better suited to instituting a formal private property system than other developing countries, because it already has a centralized system in place for recording deeds.¹⁹⁵ Centralized, formal recordation is necessary for a viable private property system, as it allows a way to prove one’s interest in a specific property as well as an efficient and secure means to prove the transfer of the property.¹⁹⁶ Indeed, Clause 110 of the Constitution (“Registration of deeds”) states that “no lease or transfer will be considered valid or recognized by the Government unless registered in the office of the Minister of Lands.”¹⁹⁷ Part VIII of the Land Act (“Registration of Title”)¹⁹⁸ sets forth the steps required to register allotments and leases, and the Act also contains required forms for allotments, leases, and mortgages, which include a description of

¹⁹⁰ *Id.* at cl. 18 (“Taxation. Compensation to be paid for property taken”). It is worth noting that the focus seems to be on what the government gets in exchange for according due process to its citizens, an orientation that is not surprising given Tonga’s history.

¹⁹¹ A keyword search in the South Pacific legal research site paclii.org did not turn up any relevant cases interpreting Clause 18.

¹⁹² “Every person who holds a tax and town allotment shall pay such rents therefore as may be determined by the Legislature.” THE ACT OF CONSTITUTION OF TONGA (1988), cl. 113 (“Right to allotments”).

¹⁹³ *Id.*

¹⁹⁴ See generally The Land Act of 1988 (Tonga).

¹⁹⁵ See THE ACT OF CONSTITUTION OF TONGA (1988), cl. 110 (“Registration of deeds”); The Land Act of 1988, part VIII (“Registration of Title”) (Tonga).

¹⁹⁶ The importance of a formal registration system is discussed in de Soto, *supra* note 183.

¹⁹⁷ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 110 (“Registration of deeds”).

¹⁹⁸ The Land Act of 1988, part VIII (“Registration of Title”) (Tonga).

the property involved.¹⁹⁹ This system could easily be modified for deeds held in fee simple. Tonga's formal representational system would allow Tongans to fully unlock the potential of the capital in their lands.

Allowing commoners a fee simple ownership interest in their allotments may not be a realistic reform in the near future, given the influence of the nobles. The Land Act could nevertheless be modified to remove the nobles from the allotment and registration process in order to reduce their control of commoner lands. This should allow for greater allotment productivity and for commoners to keep more of what they produce. As discussed above, before 1915, nobles were severed from the allotment process—their consultation was not required for the minister of lands to register a plot to a commoner.²⁰⁰ The commoner would simply apply for the allotment, the minister of lands would approve it, and the commoner would pay rent to the noble through the government.²⁰¹ This system kept the noble from requiring commoners to pay tribute or to otherwise ingratiate the noble in exchange for the ability to register the allotment. The Land Act was again amended in 1915, requiring the noble's consultation for allotment,²⁰² and thus allowing nobles to go back to demanding tribute in exchange.

The Land Act should be amended to its pre-1915 version on this issue. This requires striking the language in Sections 8 and 34 stating that the noble's consultation is required for registration.²⁰³ It may be difficult, however, to enforce this provision if commoners do not know about the legal change. The Ministry of Lands could educate commoners, perhaps through flyers, explaining that a noble's permission is no longer required to register land. These flyers could be distributed to churches to ensure that large numbers of commoners see them. To discourage nobles from violating this new rule, those who do so may be fined, or the amount of rent they receive could be reduced. Nobles are already subject to criminal penalties (as well as civil damages) under the Land Act for unlawfully dispossessing an

¹⁹⁹ See, e.g., *id.* at schedule IX ("Application for lease") (Tonga).

²⁰⁰ Maude & Sevele, *supra* note 35, at 120-21.

²⁰¹ *Id.* at 120.

²⁰² *Id.*; The Land Act of 1988, § 8 ("Tofias to provide allotment") (Tonga) ("land comprised in an hereditary estate shall not be granted as a tax or town allotment without prior consultation with the holder of the hereditary estate").

²⁰³ The Land Act of 1988, § 8 ("Tofias to provide allotment") (Tonga). Section 34 currently requires the minister of lands to grant any contested allotment, but that the noble may appeal the decision within three months to the land court. *Id.* at § 34 ("Holder may not refuse land for allotment"). This commoner-friendly provision legally removes some noble control, but it does not eliminate the nobles' incentives to exploit the commoners in exchange for not causing trouble in the registration process.

allotment holder,²⁰⁴ so these proposed penalties for nobles would not be atypical.

Further, the Land Act should be amended to protect commoners who have already registered allotments. Before 1915, the Land Act required that commoners pay the government their rents in cash, and the government would pay the rent to the noble; this was later amended so that the noble was again paid directly.²⁰⁵ The government should revert to the pre-1915 Land Act on the issue of allotment rent as well, so that the nobles would find it more difficult to demand other tributes instead of rent. This would require inserting language into Section 31 that mandates that a noble will receive the statutory rent from the government after the commoner has paid the rent, rather than directly from the commoner. The Ministry of Lands should send notices to occupants to ensure this provision is followed, and fines should be imposed on nobles who attempt to extract additional tributes from commoners. Another option would be to allow the nobles to continue receiving rents directly but to subject them to fines if they try to demand tributes instead of the statutory rents. Again, criminal penalties for nobles who try to circumvent this provision could be easily inserted into the Land Act.

A last option would be to eliminate the noble completely and allow the crown to collect and retain the rents. However, such a scheme may make commoner land rights more insecure, as power over land would be concentrated in the crown rather than diffused among the crown and the thirty-three nobles,²⁰⁶ possibly increasing the chances for abuse. The above reforms are thus more likely to be palatable to both nobles and commoners.

2. *Tonga Should Amend the Land Act and Change its Land Policies to Increase the Amount of Land Available for Allotment*

These reforms, however, do not directly address the problem of the ever-increasing number of young men who will not receive land at all, though private property may be the eventual solution to land scarcity. Allowing current commoner occupants to own their allotments in a fee-simple interest could eventually move many Tongans away from a subsistence lifestyle, alleviating some land scarcity. For example, a Tongan

²⁰⁴ *Id.* at § 32 (“Holder may not dispossess allotment holder”).

²⁰⁵ *Id.* at § 31 (“Holder’s right to rents”); Maude & Sevele, *supra* note 35, at 120.

²⁰⁶ See David Boaz, *Defining an Ownership Society*, CATO INSTITUTE, available at http://www.cato.org/special/ownership_society/boaz.html.

man who owns his land may use it more productively and keep more of the fruits of his labors, allowing him enough capital to start a business in the city, and perhaps to sell his allotment. Freeing the potential capital in Tongan lands may solve the land scarcity problem as commoners move into new market sectors and as land is used more efficiently. Instituting a private-property system would also allow women to own land, something that may not be possible without permitting commoners to alienate their lands. It is difficult to see how women could also be entitled to allotments given Tonga's current population pressures.

If Tonga makes only modest reforms and continues to entitle each man to an allotment, land scarcity will be a more pressing problem. This problem could be addressed by reducing the maximum size of allotments in the Land Act.²⁰⁷ In Section 7 ("Right to allotment"), the Land Act entitles each man to up to 3.3387 hectares as a tax allotment, as well as a smaller town allotment for his house.²⁰⁸ The Legislative Assembly could amend the Land Act, reducing the maximum amount a man is entitled to. The viability of this reform may depend on whether smaller allotments would be adequately productive, a question that would require scientific study.

Further, there may be more land available for allotment than is currently assumed. Tonga has performed cadastral surveys before, most notably in 1962, and has redrawn allotment boundaries,²⁰⁹ but an updated survey will accommodate the changes of the past few decades. The Land Act allows the minister of lands to conduct boundary surveys;²¹⁰ nobles, however, have tended to resist surveys, as they are concerned about control over their estates.²¹¹ Past surveys came at the crown's urging,²¹² so it seems likely that a new one would have to come at the king's behest. This would show where new allotments could be drawn.

There may also be more open land in outer islands and other rural areas, but this land may not be as desirable because of problems such as poorer disaster preparedness.²¹³ Recently, the Asia Development Bank, in conjunction with Australia's AusAID, gave Tonga over 12 million U.S.

²⁰⁷ This change has been suggested before in Maude & Sevele, *supra* note 35, at 138.

²⁰⁸ The Land Act of 1988, § 7 ("Right to allotment") (Tonga).

²⁰⁹ See James, *supra* note 30, at 182.

²¹⁰ The Land Act of 1988, § 23 ("Minister to define boundaries") (Tonga).

²¹¹ Maude & Sevele, *supra* note 35, at 124.

²¹² See *id.*

²¹³ See *Disaster Preparedness: Coping Communities (DPCC)*, TONGAN COMMUNITY DEVELOPMENT TRUST, <http://www.tcdt.to/dpcc.html> (last visited Feb. 10, 2012).

dollars for infrastructure developments in Nuku‘alofa.²¹⁴ But life in Nuku‘alofa is already desirable and relatively functional as its burgeoning population shows—perhaps a better plan would be to use some aid to develop less inhabited areas of Tonga in preparation for further allotments. A new cadastral survey could show whether there is productive land for allotment that would benefit from new infrastructure.

Lastly, to increase the availability of land, the government could heavily tax or revoke allotments from Tongans living abroad who are not productively using their land. This reform was proposed before, and commoners did not receive it well,²¹⁵ perhaps because relatives of those living abroad use that unoccupied land. The problem of inefficiently-used allotments highlights the difficulties that come with legally entitling people to property, though they do not necessarily deserve to appropriate land from nature. Commoners who hold allotments but do not use them certainly seem to violate the Lockean proviso.²¹⁶ The nobles cannot, therefore, be blamed for all of Tonga’s land issues, as this particular problem stems from Baker’s reforms—the Land Act does not require commoners to use their allotments productively, except for a provision that mandates that each allotment-holder plant 200 coconut trees or face a fine of up to fifty Tongan dollars (about twenty U.S. dollars).²¹⁷

To be fair to those who are using abandoned allotments productively, they could potentially apply for the allotment to be re-registered in their name. The Land Court has stated that “ownership” of allotments can mean something more than simply a name on a deed, and thus the court may consider the labor that occupants have invested.²¹⁸ This broader definition of ownership could inform possible statutory changes permitting those who are using the land to have the deed re-registered in their name. This change should also lead to better environmental outcomes because commoners who use their relatives’ allotments may not have an incentive to use the land sustainably if they know their tenure is limited.²¹⁹

²¹⁴ *Infrastructure Development in Tonga’s Capital to Get International Help*, RADIO N.Z. INT’L., Nov. 5, 2011, <http://www.rnzi.com/pages/news.php/index.php?op=read&id=63823>.

²¹⁵ Maude & Sevele, *supra* note 35, at 140.

²¹⁶ “Nor was this appropriation of any parcel of Land, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use. So that in effect, there was never the less left for others because of his inclosure for himself.” JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 291 (Peter Laslett ed., Cambridge University Press 1988) (1698). For more on the just acquisition of property, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 174-82 (1974).

²¹⁷ The Land Act of 1988, § 74 (“Allotment holder’s duty to plant, etc.”) (Tonga).

²¹⁸ See James, *supra* note 30, at 173.

²¹⁹ See Stevens, *supra* note 32, at 164.

3. *Tonga Should Create Land Laws and Policies that Allow Commoners to Capture the Capital Available in Their Lands*

As noted above, better security in land rights should improve allotment productivity, and creating more allotments will appease more commoners who may be inclined to act out violently. But the government could make other improvements by further amending the Land Act and the Constitution, as well as by encouraging changes in aid policies. These changes would allow commoners to use their lands more productively.

Whether or not Tonga becomes a freehold system, modifying the system of leases and mortgages will help commoners harness the capital in their allotments. Commoners should be allowed to lease or mortgage both their tax and town allotments for whatever duration they see fit, without having to go through the government to do so. Mortgages should also be allowed for the duration that commoners and the banks desire, without interference or need for approval from the government. This will ensure that commoners can use their assets efficiently, improving life for commoners and reducing the likelihood of violent behavior.

Any Constitutional or statutory provisions relating to leases and mortgages should be eliminated. Two Constitutional provisions must be struck: first, Clause 105 (“Terms of leases”), which requires cabinet approval for leases and restricts their length, and second, Clause 114 (“No lease etc. without consent”), which also requires cabinet or Privy Council approval for leases.²²⁰

The Land Act regulates leases and mortgages extensively. Section 56 further restricts allotment leases to twenty years²²¹ and should be removed. Further, Section 89 (“Consent of Cabinet”) reiterates the requirement of consent of the cabinet and should also be removed.²²² Section 100 (“Conditions of mortgage by allotment holder”) requires the minister of land’s approval for mortgages and limits the mortgage period to thirty years.²²³ This provision should be removed—as noted in Part II, banks are reluctant to make mortgages in which they may only foreclose on the

²²⁰ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 105 (“Terms of leases”), cl. 114 (“No lease etc. without consent”). The status of these clauses is unclear after other 2010 Constitutional amendments related to executive power. *See* CEC FINAL REPORT, *supra* note 8, at 108.

²²¹ The Land Act of 1988, § 56 (“Tax or town allotment may be leased”) (Tonga). Note that Section 57 ensures that the registered allotment holder remains liable to the noble for the yearly rent. *Id.* at § 57 (“Rentals”).

²²² *Id.* at § 89 (“Consent of Cabinet”).

²²³ *Id.* at § 100 (“Conditions of mortgage by allotment holder”).

allotment for the balance of the thirty years. Eliminating these restrictions will allow commoners to lease and mortgage their lands in their own best interests. Interestingly, rents were previously determined by executive order, but later “His Majesty in Council ordered that the rental be such as is agreed between the parties.”²²⁴ Allowing the parties to set their rates indicates that the Privy Council may not be averse to allowing them to decide the length of their leases and mortgages as well.

The above reforms on mortgages may not be effective if banks remain leery of loaning to commoners. Tonga should encourage its many international development donors to provide credit to individual parties to improve their allotments, rather than to the Tongan government. This approach requires that Tonga seriously consider the negative impact that foreign aid may be having on its economy. Traditional development banking has been at its worst harmful to economic development, and at its best, inconsequential.²²⁵ As noted above, development aid could possibly be better used in preparing unoccupied areas of Tonga for allotment. But a sounder approach may be to encourage foreign governments, such as Australia, to switch from development banking to community development banking (“CDB”). CDB focuses on loaning to individuals, placed in small community or family groups, rather than to governments.²²⁶ It has not been successful everywhere, but success stories, including the famous Bangladeshi Grameen banks and banks in other communities “with relatively homogeneous and geographically immobile populations,”²²⁷ provide some evidence that CDB would work in Tonga. Successful CDB banking schemes share some common themes: 1) each loan is relatively small, 2) the villages participating are small, so monitoring of CDB members is easier, 3) family ties of participants are strong, and 4) rural laborers are not able to substitute their labor for urban work, thereby decreasing the chances for default.²²⁸ In Tonga, family ties are strong,²²⁹ and people are generally rural laborers who may have little possibility of labor

²²⁴ *Id.* at § 57 (“Rentals”).

²²⁵ See generally WILLIAM EASTERLY, *THE WHITE MAN’S BURDEN: WHY THE WEST’S EFFORTS TO AID THE REST HAVE DONE SO MUCH ILL AND SO LITTLE GOOD* (2006).

²²⁶ Ralph Chami & Jeffrey H. Fischer, *Community Banking, Monitoring, and the Clinton Plan*, 14 *THE CATO J.* 493, 493 (1995), available at www.cato.org/pubs/journal/cj14n3-7.html.

²²⁷ *Id.* at 493-94.

²²⁸ *Id.*

²²⁹ See MARCUS, *supra* note 11, at 15-16.

substitution.²³⁰ Migration from Tonga could create default problems, but the decreasing ability of Tongans to migrate would make this less likely. Tonga seems an ideal place to try CDB. Donors really have nothing to lose—the Tongan government recently misplaced hundreds of thousands of dollars in New Zealand aid, a mishap that was later found to be an accounting error.²³¹

Other opportunities for change include reforming the inheritance system to allow allotment holders more freedom in deciding to whom to divest their allotment. For example, women have no inheritance rights unless no male heir exists, and when there are no legally-prescribed heirs at all, the plot of land escheats to the noble estate-holder or to the government.²³² Allowing the commoners more freedom in disposing of their allotments may encourage them to invest more in their land and to use more environmentally-sound agricultural practices for the benefit of their desired heirs.²³³

4. *Extensive Changes in the Tongan Political Structure May Be Necessary to Achieve Land Reforms*

The current government is unlikely to make changes in the land tenure system, but it would serve them well to do so. In the past, land disputes were decided with war, and the possibility of large-scale commoner violence may no longer be so remote. Without some change, commoners will be likely to act aggressively and may endanger nobles and their property.

However, some kind of further political change is probably necessary to reform the land tenure system.²³⁴ Currently, commoners are calling for a Constitutional amendment that would allow them to elect the noble members as well as the people's members.²³⁵ This may be a good compromise position for now—nobles would still hold power, but would have to compete to garner commoner support.

²³⁰ Labor substitution is probably the factor most likely to undermine community development banking in Tonga, as there has been a general trend of internal migration toward urban areas. James, *supra* note 30, at 181.

²³¹ *Audit of Tongan Aid Money Finds No Fraud*, RADIO N.Z., Dec. 4, 2011, <http://www.radionz.co.nz/news/political/92753/audit-of-tongan-aid-money-finds-no-fraud>.

²³² THE ACT OF CONSTITUTION OF TONGA (1988), cl. 111 (“Law of succession”), cl. 112 (“Estate without heirs to revert to the crown”).

²³³ See Stevens, *supra* note 32, at 164.

²³⁴ See Powles, *supra* note 117, at 124 (arguing that changes to the Constitution relating to noble estates will be difficult under current political conditions).

²³⁵ *Push to Further Extend Democracy in Tonga*, RADIO N.Z. INT’L, Oct. 24, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=63930>.

More political representation may help commoners pass amendments related to land. The Constitution can be amended according to Clause 79, which allows the Legislative Assembly to discuss amendments not related to succession of the throne and the estates and titles of nobles.²³⁶ The Legislative Assembly must pass the amendment three times, and the Privy Council and cabinet must be unanimously in favor of the amendment, at which point the king can assent to the amendment and sign it into law.²³⁷ While Clause 79 seems to give commoner representatives a lot of hoops to jump through, the Privy Council and cabinet did agree to the recent amendments with public pressure. As noted above, however, any amendments related to land tenure may be much more difficult to pass,²³⁸ and whether Clause 79 would outlaw discussion of the proposed Constitutional amendments is another issue. Clause 79 may effectively constrain land tenure reform to the bounds of the Land Act.

Though Constitutional or statutory reforms are necessary to secure commoner land rights, they are not sufficient. To ensure commoners can enforce their rights, the court system must be modified. The Land Court, made up of judges and assessors appointed by the king, and the Privy Council, which hears appeals,²³⁹ may not be sympathetic to the claims of commoners. To remedy this, the Land Court should include commoners, or at the very least, its decisions should be appealable only to the supreme court and court of appeal, which have recently handed down quite pro-commoner decisions.²⁴⁰ Unfortunately, the king has recently taken steps to regain control of the judiciary by controlling appointments, which an independent commission had previously made,²⁴¹ so it is unclear how pro-commoner the supreme court and court of appeal will remain.

²³⁶ THE ACT OF CONSTITUTION OF TONGA (1988), cl. 79 (“Amendments to Constitution”).

²³⁷ *Id.*

²³⁸ Powles, *supra* note 117, at 124.

²³⁹ THE ACT OF CONSTITUTION OF TONGA amend. (No. 3) (2010), § 10 (“Clause 86A inserted—Land Court”); The Land Act of 1988, § 146 (“Powers of Judge and Assessor”), § 147 (“Appointment of Judge”), § 162 (“Appeal lies to the Privy Council within 60 days”) (Tonga).

²⁴⁰ See *Lali Media Group, Ltd. v. Lavaka Ata*, [2003] TOSC 27, and *Utoikamanu v. Lali Media Group, Ltd.* [2003] TOCA 6, for two cases in which the supreme court and court of appeal protected the free speech rights of Tonga’s commoner-owned Lali Media Group.

²⁴¹ *Tonga King Announces Changes to the Judicial System*, RADIO N.Z. INT’L., June 2, 2011, <http://www.rnzi.com/pages/news.php?op=read&id=60965>.

5. “Culture” Should Not Come Before Commoner Rights and National Stability

A common counterargument to significant land reform in Tonga is that the land tenure system, including the traditional role of the nobles, is an essential part of Tongan culture and must be protected. There are indications that commoners are angry with the king and the nobles, and that they find the “cultural” requirement to defer to them to be burdensome or unsavory. On an internet discussion forum called the “Kavabowl,” Tongans discuss political issues in their country and are free to comment on the social hierarchy that exists there.²⁴² One Tongan commented: “values and moralities are being exploited, in political terms, by the authorities to maintain the status quo in the name of a monster so called ‘Tradition’ (the idyllic and romanticized past).”²⁴³ In another post, a member wrote a poem that concluded: “It was not the nobles with their greedy and grand old ploys/Who gave us freedom that our little island now enjoys.”²⁴⁴ Such displays of commoner disrespect toward nobles are not rare.²⁴⁵ In any case, if such a cultural norm does exist, Tongans must still decide if it is worth more than equality.

One anthropologist noted the tension between the commoners’ obligations to culture and the pursuit of their freedoms:

I concluded that the demand had originated from the noble himself The feast demand occurred when commoner parliament members were spearheading a movement for democratization Coincidentally, in another village close to where I worked, commoners had recently refused to use their own resources to provide their noble with a demanded feast.²⁴⁶

Commoners must decide whether it is worth enduring these demands in the name of culture. The pro-democracy movement, the 2006 riots, and the recent Constitutional amendments indicate that commoners are beginning to place their rights and freedoms ahead of culture. This comment suggests legal and policy strategies for formally prioritizing individual liberties over tradition.

²⁴² Morton, *supra* note 43, at 51.

²⁴³ *Id.* at 52.

²⁴⁴ *Id.*

²⁴⁵ See Stevens, *supra* note 32, at 158-60.

²⁴⁶ *Id.* at 157.

V. CONCLUSION

Tonga's ancient hierarchy was largely enshrined in the 1875 Constitution and the 1882 Land Act. The election of 2010 under the "ordinary peoples' Constitution," allowing for increased commoner representation, has created a government unlikely to reform land laws and policies in favor of commoners. However, the laws must change if the government wishes to quell violent political protests, as people will continue to be motivated to fight for increased access and control of land. This comment offers solutions in the form of changes to the Constitution and the Land Act, and new land policies, which would decrease noble control of commoner lands, open up more lands for allotment, and help make commoner lands more productive.

The CEC's first report on Constitutional changes cautioned that the pro-democracy movement should be balanced by considering ancient Tongan culture.²⁴⁷ Yet, Tongans themselves, both nobles and commoners, must decide whether "cultural preservation" is more important than equality in land and political rights and thus more important than their country's stability.

²⁴⁷ See CEC FINAL REPORT, *supra* note 8, at 2.