



Annual Review of --- Constitution-Building --- Processes: 2015

2. Constitution-building in the Pacific in 2015

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International IDEA resources on constitution-building processes

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This is an extract from *Annual Review of Constitution-Building Processes: 2015* (Stockholm: International IDEA, 2016)

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2. Constitution-building in the Pacific in 2015

Anna Dziejczak and Cheryl Saunders

Overview of the Pacific region

The Pacific region—classified by the United Nations as Oceania—has unique characteristics from the perspective of constitution-building. If Australia and New Zealand are excluded, the region comprises 12 UN member states, all of which are small island developing states and four of which are listed among the least developed states in the world (UN Statistics Division 2013).

The Pacific also comprises other polities that lack full international status and thus are dependent on other states to varying degrees. These include territorially defined areas with a degree of self-governance that are fully incorporated into other states (e.g. Bougainville and West Papua); territories that are not incorporated but nevertheless are considered part of another state, including American Samoa and Guam; distinct self-governing states in a form of ‘free association’ with other states that affects the exercise of their external sovereignty, such as the Cook Islands in its relationship to New Zealand; and former colonies (now territories) that remain linked to the former colonial power via arrangements that differ from case to case (e.g. French Polynesia and New Caledonia).

These characteristics are significant in the context of constitution-building for several reasons. First, at least some of the constitution-building that takes place in the region does so in relation to polities that lack full statehood, which affects both the process and the substance of constitution-building. Second, irrespective of international status, all constitutions in the Pacific are made for polities with small populations. The largest is Papua New Guinea (PNG), with a population of 7.7 million people, but a vast majority of the island states have populations less than 300,000; most are much smaller still (Pacific Regional Statistics 2013). This factor has implications for both constitutional design and process.

Other characteristics of the region and the communities within it are also relevant to constitution-building. The first concerns demographics. Most polities in the region have a large majority (or at least a substantial minority) of peoples who, to some degree, have a traditional lifestyle and consider customary law to be important. As elsewhere in the world, some are affected by deep societal cleavages that have implications for constitution-building. Some of these are attributable to ethnic divisions, for example in Bougainville and Solomon Islands. Other societal cleavages, however, are rooted in divisions between indigenous peoples and others who have arrived more recently through colonialism, migration or both. Albeit in different ways, Fiji and New Caledonia are in this category. As both examples show, divisions of this kind require careful management.

A second relevant characteristic concerns geography. All Pacific polities are islands, and many comprise multiple islands. All Pacific communities are under stress from climate change, experienced both through rising sea levels that are inundating low-lying islands and violent geophysical events, including cyclones, earthquakes, tsunamis and droughts (UN University 2014: 10). Both factors complicate the business of government, contribute to people's insecurity and may begin to be reflected in the constitutions that are created.

The three sub-regions of the Pacific—Melanesia, Micronesia and Polynesia—reflect ethnic and cultural similarities in areas in which ties between polities may be closer. Colonialism has affected this dynamic to some degree, leaving behind different languages, legal systems and networks; the most salient are attributable to France, the United Kingdom and the United States. Irrespective of ties or divisions, a considerable degree of coordination takes place between Pacific states in relation to shared needs and challenges, including, for example, aviation and higher education. Formal regional integration, however, remains fragmented and weak; the Pacific Islands Forum is the most significant regional body (Australian Department of Foreign Affairs and Trade n.d.).¹

This chapter examines the principal examples of constitution-building activity in the Pacific in 2015, in relation to seven polities: Bougainville, Fiji, the Marshall Islands, New Caledonia, Solomon Islands, Tonga and Tuvalu. It divides constitution-building into three phases as a framework for analysis. The first phase comprises the vast array of steps that may take place before drafting a new constitution begins, sometimes stretching back for a considerable period of time, to trace the impetus for constitution-building. The second phase comprises the high-profile activities of negotiating, designing and drafting a new constitution—or making major changes to an existing constitution—and bringing it into effect. The third phase



involves implementing the new constitutional regime, which is critical in the immediate aftermath of promulgation but may also be a drawn-out affair. The chapter identifies relevant case studies, describes developments in each in 2015 and concludes with reflections on the insights they suggest for global experience with constitution-building.

Pre-constitution making

In any constitution-building exercise, a variety of important steps will be taken and decisions made before the processes of constitutional negotiation and design can begin. Exactly what these steps and decisions comprise depends on the context for constitution-building, although they will always involve decisions on process and may involve pre-commitments on substance as well. In 2015, three polities in the Pacific—Bougainville, New Caledonia and Tuvalu—engaged in precursor activities to constitution-making. Two of these, Bougainville and New Caledonia, prepared in 2015 for referenda on their future status: independence was one of several possible options. These polities are part of a group of ‘states-in-waiting’ in the region (Andrews 2016). The third case study in this category is Tuvalu, which has been an independent state since 1978. In 2015 it sought to design a constitutional review process to give effect to an election campaign commitment.

Bougainville

Bougainville is an autonomous region of PNG that experienced 10 years of conflict, sparked in 1988 by tensions between local and national interests in a copper mine. The conflict renewed movements, active since the 1960s, for a separate identity and/or independence for Bougainville.

The conflict formally ended with the negotiation of a ceasefire in 1998 and a peace agreement in 2001 that consisted of three pillars.² The first provided for an Autonomous Bougainville Government, with its own constitution and government institutions, to exercise powers devolved to it by the national PNG Government. The second pillar guaranteed a referendum on the question of Bougainville’s future status. The third pillar provided for disarmament. Key provisions of the peace agreement were included in a new chapter of PNG’s Constitution.³ Significant progress towards the referendum was made in 2015. Under the terms of the 2001 peace agreement, the five-year window for holding the referendum opened in June 2015—the same month in which John Momis, an experienced pro-independence leader, was re-elected president of the autonomous region. His government is responsible for steering Bougainville towards the referendum.

Two key procedural decisions must be made in the lead-up to the referendum. Both require negotiation between the governments of Bougainville and PNG. The first relates to the timing of the referendum. The peace agreement stipulates that the referendum shall be held on a date agreed between the Bougainville Government and the PNG Government. Before setting the date, the governments must also agree that weapons have been disposed of in accordance with the peace agreement, and that the government of Bougainville meets internationally accepted standards of good governance. President Momis has proposed 2019 as the year for the vote, although this is yet to be agreed to by the PNG Government.

The second issue concerns the question to be put to voters in the referendum. The peace agreement provides that the Bougainville and PNG governments must agree on the question, and that it must include a choice of full independence for Bougainville. Because the peace agreement states that the outcome of the referendum is subject to ratification by the national PNG Parliament as the ‘final decision-making authority’, early engagement with the PNG Government is also important to ensure that all parties will accept the outcome. It is not yet clear how the negotiations between the two governments will play out; they may be further complicated by the outcome of national PNG elections in 2017. The implications for constitution-building, however, are clear. The requirements for consultation and post-referendum ratification by the national PNG Parliament are likely to influence both the timing of the referendum and the options that are put to the people. The obvious alternative to independence is that Bougainville continues as an autonomous region of PNG, but other options may serve as middle points between independence and autonomy. The need to manage the expectations of the government and the people of Bougainville—and to minimize the risk of renewed conflict—weighs heavily.

The substantive constitution-building that has occurred alongside these formal negotiations is also important, in part because ‘good governance’ is a specified precondition for holding the referendum. The creation of an autonomous government and the deferral of the referendum have given both governments and the people time to see how self-government might work in practice, enabling a more informed choice about independence. In 2015 the view seemed to be that the Bougainville Government had made a better case for independence than the PNG Government had made for autonomy within PNG (Woodbury 2015). The Bougainville Government has established key government institutions and held three democratic elections, while criticising delays by the national PNG Government in devolving functions and providing the promised funding to Bougainville.



New Caledonia

A referendum is also pending in New Caledonia, a French territorial community with a special transitional status pending a final decision on independence. Its population is divided between the indigenous Kanak people (who comprise around 40 per cent of the population), descendants of those who arrived in connection with French colonization, and more recent arrivals from France and the Pacific region. Conflict between groups seeking independence and other groups favouring continued dependence on France was mediated through the 1988 Matignon Agreements, which placed independence on hold for a decade, at the end of which was a vote on whether to vote on self-determination.⁴ The Noumea Accord of 1998 agreed that a referendum on New Caledonia's political status should take place between 2013 and 2018.⁵ In the meantime, substantial powers were transferred from France to New Caledonia, which acquired special status under the French Constitution (Title XIII). French legislation established new national and provincial institutions pursuant to the Accord to govern New Caledonia in the interim.

At least three important questions were on the table in 2015 in preparation for the referendum. The first relates to the options to be put to the voters in the referendum—the possibilities range from full sovereignty to various forms of association with France to continuation of the status quo (Courial and Melin-Soucramanien 2013). A French commission visited New Caledonia in 2015 to explore the implications of these options (Fisher 2016).

A second controversial issue concerns who may vote in the referendum. The Noumea Accord acknowledged the impact of colonization on the indigenous Kanak peoples and sought to redress it by restricting the right to vote in the referendum to people born in New Caledonia and long-term residents. Some groups have advocated universal voting rights instead. Concerns about the inclusion of ineligible voters on the roll were raised before a UN committee in 2015 (UN Decolonization Committee 2015). An exceptional meeting of New Caledonian and French authorities agreed upon a process to vet the roll and deal with disputes, but controversy lingers.

Finally, the date of the referendum has yet to be set. Under the Noumea Accord, the New Caledonian Congress can set a date with the agreement of a three-fifths majority. Currently, the Congress is divided between parties who support independence (which together hold 25 seats) and three separate conservative parties that oppose independence (which together hold 29 seats) (McClellan 2014). If Congress does not agree on a date by 2017, France will conduct the referendum before the end of 2018. Decision-making about the

timing and conduct of the referendum is likely to be further complicated by the French national elections in 2017. While the 2018 deadline is intended to keep the process on track, it is also placing considerable pressure on the parties to make decisions on critical issues.

Tuvalu

In 2015 the independent state of Tuvalu also found itself in the preliminary stages of constitution-building. In 2012–13, Tuvalu experienced a period of political instability as a consequence of shifting majorities within Parliament. A constitutional crisis ensued, in which the then-prime minister refused to summon Parliament in order to avoid a no-confidence vote, the governor-general sought to dismiss the prime minister and the prime minister advised the Queen to remove the governor-general. A vote in Parliament ultimately led to the appointment of the then-opposition leader, Enele Sopoaga, as prime minister.

In 2015, Sopoaga was re-elected prime minister after campaigning on the promise that his government would undertake a review of the Constitution with a view to stabilizing government (Radio New Zealand 2015a). The Constitution of Tuvalu can be amended with a two-thirds vote of all members of Parliament.⁶ Less formal procedures of canvassing public opinion may also be used. The Tuvalu Government is now considering options for the constitutional review process. The UN Development Programme (UNDP) and other international agencies and experts are reported to be providing advice and support for the constitution-making process.

Reflections

The experiences of Bougainville, New Caledonia and Tuvalu demonstrate some of the ways in which critical aspects of constitution-building arise in the period prior to commencing formal constitution-making. Bougainville and New Caledonia are examples of negotiated, incremental and regulated processes for constitutional change following conflict. They share a further—less common—feature: both are presently incorporated into another sovereign state in circumstances that make independence a potential outcome. In both cases, interim constitutional arrangements provide for a government framework in which sovereignty is shared, and address the timing of future decisions about constitutional status and the process by which these will be made. The relatively long transition time required by this approach has given each polity the capacity to experiment with institutional forms and to gain experience in the processes of self-government. It seems likely that at least some of these constitutional arrangements will remain in place irrespective



of the outcome of the referendums. In both cases 2015 was a significant year, as the clock ticked down to the scheduled referendums and the pressure to make decisions about referendum processes increased. Critical decisions such as who may vote, who determines the question, and what options are on the ballot may affect the legitimacy of the outcome and any constitution-making that ensues. A common challenge is accommodating the need for careful and continuing negotiations between and within national and subnational governments with an eye to future sustainability and peace.

All three cases demonstrate how and why the decisions made during the pre-constitution-making period are critically important. They reinforce the need for decision-making at this stage to be as inclusive and transparent as circumstances allow, in the interest of public ownership of the outcomes, the accountability of political representatives and effective constitution-making processes.

Constitution-making

In 2015, two states in the region were engaged in formal constitution-making processes—the Marshall Islands and Solomon Islands.

The Marshall Islands

The current Constitution of the Marshall Islands dates from 1979 and imposes a duty on the *Nitijela* (Parliament) to report every ten years on whether the constitution should be amended or a referendum held on whether to call a convention to report on constitutional change (article XII, section 6).⁷ A special committee of the *Nitijela* prepared such a report in 2013. After some delay, in 2015 the *Nitijela* passed legislation to call a Constitutional Convention to consider the proposed amendments.⁸ Elections to the 45-member convention are likely to be held in 2016, with the convention itself to follow within a month. The legislation set out the procedures, duties and powers of the convention and provided for an appropriation to fund its work.

The proposals of the special committee are annexed to the legislation. Foremost among them is a proposal to move away from the current parliamentary system, in which the president is both head of state and head of government and is elected by (and answerable to) the *Nitijela*, to a presidential system in which the people directly elect the president. This change would also entail replacing current provisions for removing the president and cabinet via no-confidence votes with procedures for impeachment modelled on arrangements for removing judges. Other proposed changes include reserving

parliamentary seats for women, expressly prohibiting sexual discrimination in the Bill of Rights, requiring that appropriation bills be balanced, and establishing an ombudsman's office.

The work of the Constitutional Convention is constrained by constitutional and legislative provisions. The Constitution prohibits the convention from considering or adopting amendments that are unrelated to or inconsistent with the proposals presented to it by Parliament. The convention itself does not have the authority to alter the Constitution. Its role is to consider whether to adopt proposals for change and to prepare the proposed amendments for submission to referendum.

The convention and other government institutions also play an important role in ensuring that the people understand the implications of the proposed changes. The proposal to adopt a presidential system is largely driven by the desire to avoid the instability caused by frequent no-confidence votes, but the convention will need to consider the full range of strengths and weaknesses of different systems of government in the particular context of Marshall Islands before recommending significant change.

Solomon Islands

Solomon Islands has a population of around 400,000 people. It comprises an archipelago in which more than 70 languages are spoken. Its current Constitution dates from 1978 and is scheduled to the Solomon Islands Independence Order of the same year.⁹ The Constitution provides for a unitary system of government with a degree of decentralization through a system of provinces, to be established by Parliament. Legislation to establish the provinces came into effect in 1981 and has been modified over time. Since 1995, the country has been divided into nine provinces, plus Honiara as the capital city.

Solomon Islands has been engaged in a drawn-out process of constitution-making since 2000. The initial catalyst was the civil conflict that broke out in 1998, initially between militant groups on the islands of Guadalcanal and Malaita but also involving the capital. Peace agreements in 1999 (the Honiara Peace Accord) and 2000 (the Townsville Peace Agreement) laid the foundations on which peace might be built, including constitutional change, but failed to restore order.¹⁰ On the invitation of the Solomon Islands Government, an international assistance force, the Regional Assistance Mission to Solomon Islands (RAMSI), entered the country in 2003 with a view to supporting law and order.¹¹ Armed conflict subsided, a degree of normality was restored and constitution-making has been underway ever since. An analysis undertaken



by the UNDP in 2005 identified the principal contentious issues as land ownership, bringing governance arrangements closer to the people, the need to reinforce the authority of traditional leaders and insensitive development driven by international actors (expat *wantokism*) (McGovern and Choulai 2005).

The proposed constitutional changes are substantial. Local autonomy was one of the central planks of the Townsville Peace Agreement (Part 4), requiring change from a unitary to a federal system. The implications of federalism in Solomon Islands are unclear, which has been a complicating factor in constitutional negotiations. There have also been concerns about the financial and administrative costs of implementing a federal system. From the outset there has been no comprehensive framework or timetable for constitution-making in Solomon Islands. As a result, processes to broaden the range of interests represented, obtain technical advice and facilitate public participation have evolved over time. Since 2004 a series of drafts has been prepared and reviewed by international experts, government taskforces, Parliament and public consultations (Le Roy 2008).

In 2007 a Constitutional Congress and an Eminent Persons Advisory Council were established to finalize the draft. In 2014–15 the Constitution Reform Unit within the Office of the Prime Minister organized public awareness consultations across the provinces and with Solomon Islanders living overseas.¹² A final draft of the new constitution is expected to be approved by the Congress and the Advisory Council in 2016 and submitted to the prime minister for adoption by a supermajority of Parliament in accordance with section 61 of the current Constitution.

Reflections

These two examples of constitution-making in the Pacific region are very different, reflecting the widely different contexts of the Marshall Islands and Solomon Islands. It is nevertheless possible to draw some connections between the two cases that have wider relevance to constitution-making in the Pacific and elsewhere.

In the Marshall Islands, constitution-making has been initiated through a process of constitutionally mandated periodic appraisals of the Constitution, while in Solomon Islands it is one of a range of steps taken in the course of post-conflict nation- and state-building. In both cases, however, the proposed changes address fundamental structures: those of government (the Marshall Islands) and of the state (Solomon Islands). The significance of the changes being considered has implications for the process, including the need to

ensure that constitution makers and the people understand the reasons for the change and the implications such change may have across the constitutional system.

In this sense, a notable difference between the two cases is the degree to which the constitution-making process is regularized. The Marshall Islands Constitution sets out in detail the procedures for proposing, considering and implementing constitutional change, and both government elites and the people are familiar with the process. In Solomon Islands, where the Constitution may be amended by Parliament, procedural devices designed to ensure wider public participation (such as constitutional conventions and referendums) are less familiar, but—as the process to date demonstrates—crucial when considering such extensive constitutional change.

Implementation

In 2015, another two Pacific states, Fiji and Tonga, were engaged in the implementation of relatively new constitutions. As their experience shows, implementation requires more than putting in place institutions and laws prescribed in the constitution, although these are important too. It also requires attention to the interpretation of new provisions, which may ultimately fall to courts but in practice also involves political actors and the public at large as the meaning of the constitution becomes clear. Further, implementation extends to the development of a culture to support the effective operation of a new constitution by, for example, adjusting political practice and accepting the independence of courts and other accountability institutions. While the nature and magnitude of the challenges of implementation vary by context, this phase is likely to last for a period of years after a new constitution is adopted.

Fiji

The Constitution of Fiji came into effect in 2013 after a highly contentious process (Dorney 2013).¹³ At the time, Fiji was under military rule following a coup in 2006, which ultimately led to the abrogation of the 1997 Constitution in 2009 (ConstitutionNet n.d.). The government initiated a constitution-making process in 2012, comprising a Constitutional Commission to prepare an initial draft and a Constituent Assembly to deliberate it and bring it into law. The commission conducted public consultations and drafted a constitution, which the government rejected, and the idea of a Constituent Assembly was also ultimately abandoned. Instead, the government prepared its own draft and promulgated it by decree after a period of public feedback. Consistent



with the government's stated intention from the outset, the 2013 Constitution provided for a single voters' roll and equal Fijian citizenship, eliminating the racial divide that had characterized earlier Fijian constitutions. It was open to criticism in other areas, however: it retained office holders' immunity for events that occurred in the wake of the coup; provided for broad limitations on constitutional rights; gave the military an ongoing role in ensuring the 'well-being' of Fijians; included institutional arrangements that offered the potential for considerable executive control; and introduced procedures that made the Constitution almost impossible to amend.

In such circumstances, the implementation phase becomes even more important, and bears a considerable burden in shoring up a constitution's legitimacy, which is otherwise rather weak. In 2015, a number of important events occurred in Fiji related to constitutional implementation. Elections had already taken place in 2014, enabling a Fijian Parliament to sit for the first time since 2006. The Constitution calls for many other institutions and laws, several of which were in place by the end of 2015. Some of these, such as the Human Rights Commission, were already formally in existence and the task of implementation involved staffing and funding (rather than establishing) them. Others, such as the Constitutional Offices Commission (section 132), needed to be created anew. Formal compliance with constitutional provisions of this kind is considered technical implementation. Much has been done to fulfil constitutional requirements in this way, although important matters remain outstanding. Notably, the Accountability and Transparency Commission has not yet been established, as required by section 121, and access to information legislation has not yet been passed to give effect to the right in section 25.

Much more difficult in the Fijian context has been the cultural change necessary to move from military rule to constitutional democracy has been much more difficult, particularly since Voreqe Bainimarama, the leader of the outgoing military government, was returned as prime minister following the elections. The challenge is rendered more complex still by continuing divisions within Fiji over the 2006 coup, the military rule that followed and the legitimacy of the 2013 Constitution.

There are signs that the failure to make this transition is inhibiting both Parliament's capacity to hold the government to account and the emergence of an electoral democracy in which power changes hands from time to time through free and fair elections. In one example, clashes between the government and the parliamentary Public Accounts Committee in 2015 led to amendments to rule 109(2)(d) of the rules of Parliament to enable a government member to chair the committee (rather than requiring an

opposition member to do so) and the restriction of its mandate to the scrutiny of expenditure ‘in accordance with the written law’ (Gounder 2016).¹⁴

Equally, a delayed transition to a culture of constitutional democracy can impede the effectiveness of independent constitutional public bodies, either through the appointments made to them in a government-controlled process or through a general caution in carrying out their responsibilities, derived from the period of military rule. Concerns of this kind surfaced in 2015 when the opposition nominee to the Constitutional Appointments Commission resigned, claiming that the commission was politicized and criticizing government actions in appointing an acting commissioner of police (Sauvakacolo 2015).

It is still early days for constitutional implementation in Fiji. The emerging problems offer insights into the kinds of difficulties that are likely to accompany constitution-building after a period of authoritarian rule in any state. In Fiji, three additional factors further complicate the transition. First, the equal citizenship that the new Constitution provides is itself controversial in some parts of the country. Second, a generation of young Fijians has spent its adolescence under military rule and has no inherited understanding of how constitutional democracy should work. Third, much of the legal system remains based on military decrees, which are shielded from judicial review by the terms of the Constitution (section 173).

Tonga

The Kingdom of Tonga has a population of just over 100,000 people. It comprises 169 islands, 36 of which are populated. Its Constitution dates from 1875, making it the oldest written constitution in the region.¹⁵ This Constitution was made by King George Tupou I with the approval of an Assembly of Chiefs, with the aim to demonstrate and maintain Tonga’s sovereignty and independence in the face of Western colonialism (Latukeyu 1975). It created a centralized monarchy in which the king held and exercised executive power, and legislative power was shared between the king and the Legislative Assembly. This Constitution continued in force when Tonga was a British Protectorate (from 1900) and after independence in 1970.

Significant changes were made to the Constitution in 2010 following a period of unrest caused in part by concerns about government accountability (The Commonwealth n.d.). The amendments drew on a 2009 report by the Constitutional and Electoral Commission, which was established by the Privy Council in 2008 (Tongan Constitutional and Electoral Commission 2009). One effect of these amendments was to change the composition of the



Legislative Assembly to comprise nine noble representatives and 17 elected representatives of the people. Previously it had been made up of the Privy Council as appointed by the monarch, nine noble representatives elected by 30 holders of titles, and nine representatives of the people. In addition, the changes shifted executive power from the monarch to a cabinet, consisting of a prime minister elected by the Legislative Assembly and ministers nominated by the prime minister.¹⁶ Under a further amendment in 2011 the structure and composition of the judiciary was also changed to reflect the diminution of the monarch's power.¹⁷

The changes did not represent a complete shift of authority away from the monarch, who retains significant power, for example in relation to appointing judges, summoning and dismissing the assembly, and treaty-making. In the context of Tonga the changes are very significant, which presents a range of implementation challenges. Some have been the predictable challenges that accompany any transition of this kind. The new Constitution has required an Electoral Commission to be established, electoral boundaries to be drawn and elections held.¹⁸ The Legislative Assembly also necessarily needed to assume a new, more significant role. The Electoral Commission is now in place and two rounds of elections have been held, in 2010 and 2014. In 2010 a party that won 12 of the 17 popularly elected seats failed to form a government because it did not have the support of a majority in the Assembly. In 2012 there was a period of instability following the death of King George Tupou V, who had led the reforms and shifts in political allegiance within the Legislative Assembly, which led ultimately to a no-confidence motion in the government that took four months to resolve (Fonua 2012). In 2014, while the election results were still inconclusive, the leader of the party with the largest number of popular seats was appointed prime minister (Metuamate 2015). From this perspective, the transition to the new constitutional regime seems to have gone relatively smoothly.

Other dimensions have proved more difficult, however. For example, a review of the new Constitution in 2012 under the auspices of the Commonwealth Secretariat was highly critical of the new structures for the courts on the grounds that they divided responsibility for the judiciary between three bodies, including a newly created Office of Lord Chancellor, and 'established alien institutions with no legal, cultural or historical ties' with Tonga (Latu 2014). There is often a question during the implementation phase of a new constitution about whether changes should be made to remedy any defects that have emerged, or whether the constitution should be allowed to be fully implemented before such decisions are made. In this case the argument for change was strengthened by claims that the changes to the judiciary had

not been included in the original recommendations of the Constitutional and Electoral Commission (Moala 2014). Constitutional amendments were reported to have been passed by the Legislative Assembly in August 2014, but to have been delayed by the king until 2015 due to the advice of some of his legal advisers (Fonua 2014). As of early 2016, assent has not yet been given. These events are significant not only because they have failed to address concerns about the structure and operation of the judiciary, but also because they demonstrate that only a limited transfer of monarchical authority has occurred.

Another illustration of continuing ambiguity regarding the scope of monarchical authority concerns treaty-making. In 2015, the government's decision to ratify the Convention on the Elimination of Discrimination against Women ran into difficulties when the Privy Council asked the government to reconsider its decision on the grounds that only the king had the authority to ratify treaties (Radio New Zealand 2015b). While this is literally correct under sections 39 and 51(7) of the Constitution, most constitutional monarchies give this type of power to the elected government. The proposed ratification created other divisions within Tongan society, causing the government to retreat from its proposal to ratify and raising the possibility of a referendum on the question instead, if and when legislation to authorize a referendum is passed (Radio New Zealand 2015c).

Reflections

As with the other cases examined in this chapter, Fiji and Tonga are experiencing very different constitution-building processes, both generally and during the implementation phase. Nevertheless, they have enough in common for insights to be drawn that are relevant for the Pacific region and elsewhere.

In both cases, the degree of constitutional change was substantial. Therefore policymakers and legislators are inevitably required to take a wide range of actions in the immediate aftermath of promulgating a new constitution to bring it into practical effect. While such technical aspects of compliance with new constitutional provisions represent only a small part of constitutional implementation, they are nevertheless essential to provide the base on which other, subtler, aspects of implementation can build.

Ambiguities and imperfections may well emerge in the course of implementing far-reaching constitutional changes; it is desirable for them to be resolved in ways that support the constitutional transition. Some decisions involve a choice between seeking formal change and allowing institutions to become



more securely established to determine whether a problem persists. In Fiji, the problem concerned Parliament's standing orders rather than the Constitution itself. Changes were made—perhaps too hastily, given how recently representative processes have been re-established in Fiji. In Tonga, difficulties in designing the court system were deemed to require constitutional change, although this has not yet been forthcoming.

Both Fiji and Tonga also demonstrate the challenges of cultural adaptation to new constitutional arrangements in the course of a transition to democracy. In both cases, the transition was ambitious—from military rule (in Fiji) and strong monarchy (in Tonga) to democracy. Effective constitutional implementation in such circumstances requires compliance with the spirit as well as the letter of the new constitutional framework. This may take some time to achieve, but it is important to recognize the need and ensure that progress continues to be made. To further complicate the situation, in both Fiji and Tonga there is evidence that the transitions were intended to be only partial, leaving considerable authority with the military and with the monarch and their advisers, respectively. These realities inhibit the development of a constitutional culture on which the effectiveness of the constitution depends by increasing uncertainty about the meaning and effect of the new constitutional regime.

Conclusion

There is considerable and diverse constitution-building activity in the Pacific region, which addresses the broad spectrum of constitutional change, including pre-constitution-making issues, the substance and process of formal constitutional change, and the implementation of new constitutional arrangements. Shared challenges for constitution-building stem from the small size and degree of isolation of polities in the region, the varying external interests of former colonial powers and new geopolitical forces, and the degree to which polities are formally and informally dependent on other states. However, the contexts in which constitution-building occurs in the Pacific also speak to global experiences, including post-conflict state-building, transition to democracy and fragmentation of the state in circumstances of societal cleavage. As such, the region's experiences can provide valuable insights for a global study of constitution-building.

Notes

- 1 The Pacific Islands Forum comprises 16 members—Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Marshall Islands, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu—as well as a number of associate members and observers. See <<http://www.forumsec.org>>.
- 2 The terms of the peace agreement are outlined in United Nations Security Council, ‘Letter dated 22 October 2001 from the Secretary-General addressed to the President of the Security Council’, S/2001/988, 23 October 2001, <http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2001/988>, accessed 14 July 2016.
- 3 See the Constitution of the Independent State of Papua New Guinea, Part XIV, <<http://www.parliament.gov.pg/images/misc/PNG-CONSTITUTION.pdf>>.
- 4 The texts of the Matignon Agreements are available (in French) at <http://www.axl.cefanelaval.ca/pacifique/ncal-Matignon_1988.htm>.
- 5 The text of the Noumea Accord is available at <<http://www.austlii.edu.au/au/journals/AILR/2002/17.html>>.
- 6 Tuvalu Constitution of 1986, <http://www.paclii.org/tv/legis/consol_act_2008/cot277/>.
- 7 Constitution of the Republic of the Marshall Islands, <<http://www.rmiembassyus.org/Constitution.htm>>.
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