

“The Legal Politics of Constitutional Reform in the Pacific”

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The approach taken in this paper hopes for a “democratic peace” constitutionalism for the Pacific states. This is a multi-disciplinary, or “integrative” approach to constitutionalism and constitutional review. It agrees with Katz’ functionalist, realist, suggestion that constitutions are *made*, not *found*; that they are more than a set of *formal arrangements*, that they are “...human creations, products of convention, choice, the specific history of a particular people, and (almost always) a political struggle in which some win and others lose...” (Hanna Fenichel Pitkin, quoted in (Katz 2002) (p292) Katz has defined constitutionalism as:

a process within a society by which the community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values. (Katz 2002) (p292)

A majority of the constitutional exercises conducted in Pacific jurisdictions have sought devolution and better regulation of politics, while others were related to self-determination, conflict prevention, and post-conflict peace-building. Constitutional exercises focused on devolution and better regulation of politics have taken place in Papua New Guinea, Vanuatu, Tuvalu, Tokelau¹ and Niue.² There are also important but little known campaigns for constitutional change such as that conducted for a half century by the Fai Chuuk in the Federated States of Micronesia. (Hezel 2004)

Constitutional development as part of post-conflict consolidation of the state has been undertaken in Papua New Guinea, New Caledonia, and Solomon Islands.³ The Constitutional exercise in Nauru came in response to a unique form of state-building to follow a financial as much as political crisis. (The Nauru Constitutional Review Commission 2007) (Le Roy 2006) (Balm and Le Roy 2006) Constitutional review in Fiji is motivated by the need for conflict-prevention, and much remains to be considered

¹ Tokelauans failed at votes on self-determination in 2006 and again in 2007 to obtain 2/3 majority consent for self-determination.

² Niuean Prime minister Sani Lakatani in March 1999 announced a possible referendum to make changes to the Constitution.

³ In the wake of ethnic violence concerning principally Malaitans and the people of Gaudalcanal. Nanau, G. L. (2002). "Uniting the fragments: Solomon Islands constitutional reforms." Development Bulletin(December): 17-20.

concerning prospects for success in that venture. (Ghai and Cottrell 2007) The issue of constitutional reform in Tonga has been a focus of conflict, whichever way the politics in that country are interpreted. (Powles 2006)

It is apparent that constitutional review exercises are a common phenomenon in the Pacific. They have generated significant scholarship and commentary through the works of such legal scholars as Angelo, Ghai, (Ghai and Regan 2002) Lal, (Lal 2003) Le Roy, (Le Roy 2005; Le Roy 2006) Powles, (Powles 1992; Powles 2005; Powles 2006; Powles 2007) Regan, (Regan 1988; Regan 2002; Regan 2002) and Peterson, (Peterson 1993; Petersen 1994; Peterson 2005); as well as such other scholars as Campbell (Campbell 2005), So'o (So'o 2008) and Tuimalae'ifano – the latter two of whom have recently written on the politics of tradition in Samoa – works which don't deal with reform exercises, but do clarify the operation of Samoa's modern polity. Other recent scholarship of interest to constitutional reform focuses on electoral systems in Pacific states, and their impact on the operation of government systems. (Levine and Roberts 2005) (Fraenkel 2006; Fraenkel and Firth 2007)

Yet, despite the extent of constitutional review activity in the Pacific, there are very few purpose-built institutions in the region devoted to this important activity. In Papua New Guinea, the Constitutional Development Commission established in 1997 and amalgamated with the law reform Commission in 2004) is possibly the lone exemplar. The "Constitutional Reform Unit" in Solomon Islands emerged from the Department of Provincial Government, but has always been closely associated with the Office of the Prime Minister.

Pacific constitutions, which express these societies' political, economic, and social aspirations, and the processes by which they are revised, elicit a number of questions and concerns – of which this paper will only mention three: the problematic role of "the people" in Pacific constitutionalism, the degree to which constitutional deliberations evade capture by special interest groups; and prospects for "democratic peace" constitutionalism.

The problematic role of “The People” in Pacific constitutionalism

- : The gap between the province and the
- : communities was never addressed. Area
- : Councils were established but never
- : activated. It was never given priority in the
- : past governments. – blogsite contribution

For all the references to “we the people” in Pacific constitutions, there are but a few jurisdictions in the region in which constitutional change occurs through popular vote. This appears to depend on the constitutional tradition – republican or monarchical – inherited at independence. In general, therefore, Micronesian constitutions allow for periodic peoples’ constituent assemblies, and change through an act of popular will.⁴ For the remainder, final say rests with elected representatives and the Crown.

I think this points to a fundamental weakness in the spirit of constitutionalism in the region – in strategic terms, the will of the people counts for less than the calculations of their representatives, who hold public office on their behalf. There is little of what Katz calls “constitutional respect” (Katz 2002) p 302 – and this has resulted from the realities of civil society formation in the island states, where approximately half of the population in each island group is rural-based, and where there are still high rates of illiteracy. The costs of effective public awareness campaigns – on any topic - are high. In such contexts, broad understanding of national affairs rests with the urban, educated elites, and the challenges of civic education are more commonly taken up by NGOs than by the state.

This is problematic for my call in this paper for the allocation of greater recognition of the constitutive role of “the people”. But if it is argued that constitutions are too complex

⁴ In Micronesia, several states, such as Palau, include in their constitutions clauses that give citizens the power to determine whether or not to conduct constitutional review. Johnson, L. S. (2002). "The Federated States of Micronesia’s Presidential Election System and Proposed Constitutional Analysis: An Analysis." Journal of South Pacific Law 14.

to lay before “the people” for decision, how is it that these same people are entrusted with electing representatives to oversee government on their behalf?

Four broad strategies have been used to undertake constitutional review in the Pacific: a) by parliaments sitting as constituent assemblies; b) by parliamentary committees; c) by expert commissions; and d) by specially created constitutional bodies. Choice of review instrument is generally determined by a cost/benefit calculation of the capacities, funds and time available. This decision can also be based on a presumptions about potential outcomes of each implementing strategy.⁵ The most important component in the design of a review process, evidently, concerns which body is empowered, at the conclusion of all public consultations and expert recommendations, to approve change.

Constitutional deliberations and their capture

: Now the UNDP and government is embarking on
: federal state government system which is done
: on the pretext of the desire of the people. I
: think this is either a genuine mistake of
: misrepresnetation of people's wish or it is a
: deliberate calculated strategy to enforce the
: political role of middle-men who will be
: taking up the various roles in the new
: states.In either case, if Solomon Islands
: adopt a federal system of government, it will
: not only be unnecessarily expensive for its
: worth but it will also be structurily similar
: to Provincial system of government. It makes
: me wonder, how people expected this Federal
: system to be any different from the
: Provincial system of government we currently
: have. – blogsite contribution

The main concen, in the absence of popular control over constitutional change, is that constitutional deliberations face “capture” by special interest groups – which in the Pacific context is in general a reference to political parties and their financial supporters – but can refer to provincial or ethnic interests.⁶

⁵ In Tonga, for instance, a 2004 proposal by the Human Rights Movement to hold a referendum together with general elections in 2005 to guage public support for democratic change was defeated in the parliament 15-10.

⁶ In Tuvalu, a 2004 Report to Government on political stability referred to this as “islandism” {Government of Tuvalu, 2004 #13564}

Here Habermas' distinction between "strategic" and "communicative" action is useful. (Habermas 1984) The intent is to clarify the distinction between advocacy of personal/sectional gains and advocacy of public interest gains – a distinction too seldom made in public discourse within the Pacific. In terms of constitutional deliberations, this refers to an effort to separate discussion of sectional or special interest aspirations, from discussion of those aspirations that all special interests hold in common.

Petit and others have demonstrated the possibilities of enhancing democracy by reducing the influence of political interests in decision-making. (Petit 2006) Steiner has explored the notion of "deliberative discourse" in the context of legislative performance. (Steiner, Bächtiger et al. 2004)⁷

There are projects of this nature in Pacific context. (Efi, Suaalii-Sauni et al. 2007) Halapua has implemented a "talanoa" process to re-engage contending political actors in Fiji and Tonga. (Pacific Islands Development Program 2001; Halapua n.d.) The Talanoa approach has been described as 'less formalised and possibly more 'intuitive' than formal mediation. When Fijian Prime Minister Qarase announced that a Talanoa Session had led to agreement on the Parliamentary Sugar Select Committee and on other important issues concerning the sugar industry reforms, ANU academic Professor Brij Lal questioned the suitability of costly, private sessions, between public leaders, as compared to having them discuss the same matters publicly, in the context of parliament.⁸ These were, indeed, discussions about the constitution more than constitutional dialogue. Five Talanoa sessions were held: November 2000, March, May and November 2001, and June 2002.⁹ The outcome of Talanoa IV was agreement on the need to examine four areas: building trust and reducing suspicion and fear among leaders and communities; fostering wide acceptance of the rule of law; ensuring all communities feel secure in Fiji as their

⁷ Steiner, J., A. Bächtiger, et al. (2004). Deliberative Politics in Action: Analysing Parliamentary Discourse. Cambridge, Cambridge University Press. Habermas would call these the 'illocutionary obligations' of communicative freedom: Habermas, J. (1996). Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Cambridge, Polity Press.

⁸ Talanoa 'wastes tax money', Fijilive.com, Wednesday August 18, 2004, online at <http://www.fijilive.com/news/show/news/2004/08/18/Fijilive8.html>

⁹ See <http://pidp.eastwestcenter.org/pidp/talanoa.htm>

home; and examining the constitution.¹⁰ Although little subsequent progress was made with this process (and although Halepua re-engaged some of the main parties during a visit to Suva in June 2008), the Talanoa sessions are the closest approximation to multi-party dialogue that seeks communicative rather than strategic communication.¹¹

But, in commentary on such ‘open-ended’ processes, Powles counsels: “Experience also shows that consultation amounts to more than asking people what they think about the issue at hand. The materials presented would include drafts of ways of expressing alternative policies and laws. Understanding the issues, and how the law will deal with them, is more important than comprehension of the statutory text, and has the prospect of legitimating the law in the perception of members of the public.” (Powles 2005) He is supported in this view by Alipate Qetaki, formerly Executive Chairman of the Fiji Law Reform Commission, who stated: “Without consultations, without engagement with the law reform process, there can be no sense by the community of the relevance of the laws to their way of life and the importance of the rule of law in their day-to-day business. Without this engagement there is always the potential for conflict and political upheaval.”¹² Quoted in (Powles 2005)

Political parties and Westminster in the Pacific

The question as to what role political parties play in the political systems of Pacific Island countries has generated a range of views. A “developmental” approach presumes that representative democracy requires parties, and that where parties don’t currently exist, or are not fully functioning, they will mature in the course of time. A “contextual” approach, in contrast, questions the universalization of party systems, and asks whether alternative forms of democratic organization may better suit Pacific contexts.

¹⁰ Pacific Islands Development Program (2001). Talanoa IV. Leaders Statement on Harmony and Stability in the Rebuilding of Fiji. 4 November 2001. Hawaii, East-West Center.

¹¹ This section is from Hassall, G. (forthcoming). The mediation of public policy disputes in Pacific islands: the case of Fiji. Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace. D. Bagshaw and E. Porter, Routledge.

¹² A Qetaki, ‘Commentary on “Law Reform in the Pacific Area”’ (Paper presented at Australasian Law Reform Agencies Conference: Access to Justice—Rhetoric or Reality, Wellington, 15 April 2004).

The reality is that most political parties active in Pacific Island states are fluid, populist, legally unrestrained, policy-poor and administratively bare.¹³ Whereas much scholarship on Pacific politics literature presumes as much, little of it is empirically based or offers reasons why this is so.¹⁴ At the current time only Papua New Guinea has enacted legislation regulating the conduct of political parties. Papua New Guinea's Organic Law on the Integrity of Political Parties and Candidates 2003 requires political parties to have a minimum of 500 subscribed members and to hold incorporation under the *Associations Incorporation Act 1966* if it seeks to field candidates in general elections.¹⁵ Despite this requirement, current records held by the Office of the Registrar of Political Parties are only as complete and correct as the information provided by party officials.¹⁶

Elsewhere in the region, parties may chose some form of legal registration, but a majority do not. Thus, in Solomon Islands for instance, while twelve of the seventeen parties that are considered to be currently active enjoy legal status under the Charitable Trust Act of 1964, five choose not to, and of all these parties only the Solomon Islands Social Credit Party of former Prime Minister Manasseh Sogavare maintains records of party members and party meetings. For the remainder, party memberships are estimated, and no official records of meetings are maintained.

The Bougainville Constitutional Commission set out clearly in its 2004 report attitudes toward political parties held by a broad cross-section of Bougainvillean society:

“1. People do not want political parties because:

They will cause division in Bougainville

- that division will come from different people and groups in Bougainville supporting different parties
- we need to maintain the unity developed during the peace process

¹³ This section draws on {Duncan, 2007 #14693}

¹⁴ Fourteen papers published in two journal issues consequent to the 2004 PIASDG conference on “Political Culture, Representation and Electoral Systems in the Pacific Islands Commonwealth and Comparative Politics 43:3, November 2005 and The Journal of Pacific Studies, 29:1 (May 2006) make a significant contribution to an understanding of party performance at elections without subjecting party organization and structure to any significant analysis. A recent edited volume of political parties in the Pacific island countries does not address the issue of their legal status: {Rich, 2006 #13379}

¹⁵ http://www.paclii.org/cgi-bin/disp.pl/pg/legis/consol_act/olotioppac2003542/olotioppac2003542.html?query=political%20parties

¹⁶ We are grateful to Paul Bengo, Registrar of Political Parties, for providing party registration information.

- the activities of political parties in PNG work against the interests of the people – we do not want that in Bougainville
- political parties do not operate on the basis of principle or policy. All they are seeking is power. They are not looking after the people.

2. political parties can come later:

- after the systems of government are tried and tested
- after the referendum

3. What's wrong with Melanesian consensus? Political Parties are not consistent with consensus politics because they highlight division not unity. They are by their nature looking for an opportunity to criticise their opponents not at how they can work together to find consensus. (Bougainville Constitutional Commission 2004) p. 226)

Much of the concern about the operation of party systems in Pacific Island context concerns the “fluidity” of political parties, and the movement of MPs between them. Such “floor-crossing” tactics have had considerable impact on the formation and exercise of legislative and executive power. The most direct impact of party fluidity is executive instability, which is manifest in no-confidence votes, shifts of allegiance, pre-occupation by successive heads of government with maintaining loyalties, and the performance of legislatures (numbers of sitting days, performance of parliamentary committees, progress with passage of legislative programs etc).

Responses to these problems have focused on reforms to mandate stability: party registration, discouragement of independent MPs, restraints on party-hopping, automatic triggering of dissolution through no-confidence votes, power of constituencies to exercise recall, and enlargement of cabinet size to accommodate more sectional interests.¹⁷

¹⁷ In 2007 PNG Prime Minister Somare allocated ministry or vice-ministry positions to at least one member of each of 14 parties in his coalition and wanted to expand the cabinet beyond the existing 28 ministries. An expansion in the size of cabinet has also been made in Tuvalu.

review processes

In this section reference is made to review processes in four countries: Papua New Guinea, Vanuatu, Solomon Islands, and Fiji.

Papua New Guinea

Papua New Guinea continues to struggle to identify a constitutional framework that balances central coordination with devolution. In 1976, one year after independence, Bougainville's threat to secede from the young nation forced the introduction of provincial government in the first constitutional change. Sweeping reforms took place in the 1990s – notably the organic law on provincial and local-level governments - on the strength of the Helsingut and Micah reports. In 2007 the National Executive Council (NEC) established a taskforce on “Government and administration” to make proposals for government reform at sub-national level. (Hollaway 2008) Taskforce member Barry Hollaway has outlined three options for reform:

1. Retain the preset three tiered legislative system and make only incremental change.
2. Change to a two tiered legislative system, which retains a position of Provincial Governor and removes the position from the National Parliament, and abolishes provincial assemblies.
3. Change to a two tiered legislative system that retains provincial electorates but removes the provincial members from the existing parliament and instead elects one male and one female senator from each province, to create a new second house of Parliament – a Senate with a core number of 40 members (that is two members from each province). (Hollaway 2008)

Whilst much has been made of the extensive public consultations held by the Constitutional Drafting Committee chaired by John Momis in preparation for independence, the proposals of that Committee were considered not by “the people” but by the members of the 1972 House of Assembly, which sat for three weeks as a Constituent Assembly. No subsequent constitutional exercise in PNG has had such a wide audience. The Constitutional Development Committee's reform agenda in the mid-

1990s, which resulted in passage of the Organic Law on Provincial and Local Level Government, whilst aimed at establishing more efficient and effective government at provincial and local levels, was at the same time an effective move by national-level politicians to crush their political opponents at the two lower levels. Current feeling is that local level government has been insufficiently cultivated, and that the influence of national MPs over executive branches of government, and into lower levels of government, is too great.

Vanuatu

There have been several attempts at review of the Constitution of Vanuatu. Walter Lini spoke of revising the 1980 Constitution sometime after general elections in 1991.¹⁸ The subsequent Kalpokas government had parliament meet as a constitutional review committee, but this initiative was suspended by the subsequent Korman government.¹⁹ President Jean-Marie Leye Lenelcau Manatawai suggested at a ceremony in October 1995 marking the constitution's 16th anniversary that a constitutional review committee be established. By 2001 a "Constitutional Reform Committee" had been established. Its findings were delivered to parliament approximately 2004, but these have not been subsequently considered, and even the secretary to the Committee, apparently, cannot locate a copy.

Solomon Islands is deliberating on a federal model much mooted since independence in 1978. A first major review concluded in 1987, (Solomon Islands. Provincial Government Review Committee. 1987) did not result in any substantial change. The Kemakeza government obtained UNDP support for constitutional review in 2002, and this exercise has continued through the Sogovare and Sikua governments. The Constitutional Congress in Solomon islands launched by then PM Sogovare on 13 June 2007 and scheduled to conclude its work by October 2008, comprises 32 persons representing the

¹⁸ Issues at the time included an intention to restrict the activities of religious groups, to increase the role of custom and the authority of chiefs, to limit access to courts of appeal, and clarify the functions and powers of the Head of State

¹⁹ The constitutional review commission was headed by Joseph Calo and included all 46 MPs plus other representatives.

country's nine provinces, plus seventeen "distinguished Solomon Islanders". Le Roy has commented in an as yet unpublished paper on several concerns about the process in Solomon islands. (Katy Le Roy 2008)

Powles has recently noted that: "Two current projects in Solomon Islands, which ... have proceeded without being subjected to a national law reform standard, are those concerned with proposals for a customary disputes tribunal, and for developing a federal constitution..."

In the case of Fiji, review of Fiji's 1997 was conducted by a three-person panel, whose recommendations were modified by committees of the Fiji parliament. (Reeves, Vakatora et al. 1996) Prasad observed (preciently in 1996) that the report was to be presented to the Prime Minister and via him to the Parliament:

.. A parliamentary subcommittee comprising ten representatives each from the Fijian and other groups in parliament will then be charged with working out a consensus for consideration by the whole parliament. It in effect means that the CRC report will form the basis for a race-based political bargaining; albeit by elected representatives of the different racial communities. There are no further requirements for public consultation during this phase, nor indeed is their any prior role set for the CRC itself.

One remarkable absence has also to be noted about the official review process. There are no procedures or requirements for consultation with civic organizations that have some direct stake in the constitution review process or the people more generally after the report of the CRC is submitted to the President and eventually the Parliament. Racially elected MP's are assumed to have the mandate and authority to debate and agree on a future constitutional settlement for all of Fiji. (Prasad 1996)

As it turned out, Fiji's parliamentary committees (there were three that examined the constitutional proposals) reversed some of the Reeves' Report's main recommendations. Whereas more "open seats" and fewer "communal seats" were recommended, for example, the parliament established the reverse.

Tonga

Regarding the situation in Tonga, Powles observed in 2006:

The constitutional debate has been onesided. Government has declined to consider any of the suggestions put forward over the years. Why this is so cannot be said with certainty: it might be the self interested conservatism of an anachronistic elite reluctant to hasten its own demise; it might be a matter of protocol, the reformists having gone about their task in ways that offended the aristocratic sense of propriety and respect; it might also be a matter of personalities, of individuals having taken such offence at the style of others that they refuse to listen to the message.²⁰

“democratic peace” constitutionalism

“Democratic peace” theory suggests that societies that govern themselves democratically are less prone to engage in conflict, particularly with other similarly democratic societies. (Ray 1997; Mousseau 2000) In combining concepts from political and legal theory we suggest that societies that engage in discussion about democracy and constitutionalism using peace-building democratic procedures, are more likely to generate a sense of “constitutional legitimacy” which can in turn lead to peaceful resolution of potentially conflict-laden structural issues.

The Case of Bougainville

Preparation of Bougainville’s constitution illustrates the time and effort required to conduct a constitutional review exercise.²¹ Bougainville’s Constitutional Commission was established in 2002 as part of the Bougainville Peace Agreement (BPA) (Carl and Garasu 2002) and existed for approximately two and a half years. The peace process included the development in 2004 of a constitution for the Autonomous Province of

²⁰ Powles, G. (2007). “Testing Tradition in Tonga: Approaches to Constitutional Change.” *Revue Juridique Polynésienne* 13: 111-141.

²¹ I am grateful to the following informants for background to this section: Joseph Watawi, Nick Peniah, Buka, 7 April 2005; Joel Banam, the late Sir James Fraser, Peter Sohia, Chris Siriosi, interviewed in Buka, April 8 2005.

Bougainville (Bougainville Constitutional Commission 2004) and for changes to the constitution of Papua New Guinea.

An office was established in Buka with approximately twenty support staff, and meetings of the commissioners were held alternately in Buka and Arawa.²² The commissioners, three of whom were women, divided into teams, each responsible for one of five geographic regions (Atolls, Buka, North, South, and Central). At least three tours were conducted, the first to collect ideas, the second to confirm the findings, and a third to re-check these findings. Each tour lasted approximately one month. Though this consultative process the commissioners heard at length the people's views on environmental management, family life, business and economic aspirations, and forms of leadership.

At times during the Commission's tenure there was a lull in activities, due at some times to a lack of resources and at others by the time taken for the National government to take stock of developments. On submission of the 2nd draft constitution, for instance, there was considerable delay while the NEC referred it to the Attorney General's Office to determine its compatibility with the PNG constitution, the Bougainville Peace Agreement, and PNG's human rights commitments.

Key Features of the 2004 Constitution

The commissioners had adequate time to learn the aspirations of communities in all parts of Bougainville with regard to their future system of government, and their relationship with the state of Papua New Guinea. The determination of the number of members of parliament was a highly contested issue. The second draft provided for 33 members, a number that the Constituent Assembly wanted to increase, but which the PNG government wanted to reduce. Notwithstanding the amount of time taken by the review exercise, it was insufficient to undertake comparative work on autonomous provinces

²² Legal advisors included Chris Siriosi and Esikiel Masa. One commissioner was a lawyer representing Bougainvilleans abroad. There were several expatriate legal advisers, principally Ian Prentice (who was involved with the process from beginning to end), Anthony Regan, who resided on Bougainville during this period, and Sir James Fraser, formerly the principal legal draftsman in the Papua New Guinea parliament.

elsewhere. The principal draftsman, Sir James Fraser, was constantly under extreme time pressure to have drafts ready.

The constitution allocates three parliamentary seats for women (one each for north, south and central Bougainville) – a figure significantly lower than the ten originally proposed. This allocation is partly in recognition of the significant role that women played in the peace process as a whole. The constitution also provides three seats for ex-combatants. These seats will expire at such time as a vote on independence takes place. One clear desire was for a high level of autonomy at local level, and the incorporation of traditional, chiefly authority, in this.

As a constitution that was ultimately, in legal terms, subordinate to the PNG constitution, the Bougainville constitution was obliged to mirror its national constitution in a number of ways. The PNG Constitution is specific and wide-reading, and that there are also Organic Laws to recognize: each relevant clause required a matching clause in the Bougainville constitution. For instance, where the national constitution provides for Constitutional Office Holders, the Bougainville Constitution must include a corresponding clause establishing the relationship of the national power to the provincial. In the context of such constraints, the Bougainville constitution went through four drafts.²³ The first, dated 1st February 2003, most closely reflected the wishes of the people, but a number of modifications were made before the draft met the approval of the Papua New Guinea parliament and the legal advisors. The desire expressed all over Bougainville for government to be constituted without political parties was not adopted, removing from the final constitution one of the most distinctive features of the island's aspirations.

A comparative note can be made about similarities in the circumstances of Bougainville and Solomon Islands – two Pacific contexts in which constitutional exercises have followed violent conflict. Whereas in the case of Bougainville, the “Bougainville Peace Agreement” became embedded in Papua New Law and provided a legal framework for

²³ These were issued on 1st February 2003, 25th March 2003, ? and ?

the establishment of the Constitution of the Autonomous Province of Bougainville, the “peace agreements” that concluded conflict in Solomon Islands did not create law, and on-going efforts toward reconciliation appear to be parallel to, rather than part of, constitutional reform.

The future architecture of Pacific regionalism

A final note on constitutionalism and “democratic peace” concerns institution-making at regional level. It is interesting to note that the Pacific states have very few mutual legally binding obligations, and the pressures currently being experienced over matters of regional trade agreements, plus clarification of ownership of deep-sea natural resources, are the two looming sources of inter-state conflict.

The need for consolidation of governance at regional level in Pacific Islands is an additional incentive for looking more keenly at processes of constitutional design, and review. Till now, constitutional design has focused at national and sub-national levels of government. In the new period of ‘multi-level’ governance, (Bache and Flinders 2004) supra-national arrangements are being put in place, albeit without being recognised as having a constitutional intent. In 2004 Pacific leaders initiated the “Pacific Plan” and in 2005 strengthened the institutional arrangements for the Pacific Islands Forum. References to future “deeper integration” open possibilities ranging from enhanced cooperation to some form of political union, with the EU and other regional inter-governmental bodies as reference points. (Longo 2006) (Graham 2008)

Lessons for the future

Constitutional reform in the Pacific Islands has proven difficult. A number of constitutional exercises have commenced but not finished; others have taken a number of years. Significant questions are being asked in many Pacific countries about how their constitutions came to be, and whether or not they are delivering on their promises. Some questions concern the future of the Westminster model, the status and powers of

provincial and local government, the role of traditional structures and authority, methods of constitutional assessment, the possibilities for regional governance in addition to national government, and the relationship between national constitutions and global governance. At the most fundamental level, we must ask whether the Pacific constitutions have been *effective* in meeting their people's aspirations (and how we might know this).

Powles (Powles 2005) has listed several constitutional reform issues that have broad relevance to Pacific states:

- a) issues surrounding the constituent elements of the legal system and their application to customary law spheres of activity and social relations, such as property (land, natural resources and cultural property), leadership, local government and social control, and dispute resolution relating to these spheres.
- b) the absence of fully operational rules and techniques for undertaking law reform through a standing commission or otherwise, with the associated risks that "... proposals for legal change in these culturally sensitive areas will be deferred, placed in the 'too hard basket', or dealt with out of sight of the general public..." and that "... major law reform may be driven by partisan politics, or obstructed in a way that forecloses public debate." (Powles 2005)

From any perspective – whether politics, law, economics, ethics or governance – the goal is a democratic and constitutional peace. In practice, constitutional review exercises have not been shielded from the political struggles and conflicts within Pacific societies. What lessons can be learnt?

Firstly, constitutions, if they are to be of the people, must receive "the peoples'" attention. Given the challenges of literacy and communications in the Pacific, this implies taking civic education far more seriously. Civics is a matter for civil society and NGOs, for school curricula, current Members of Parliament, public servants, media, and current elites, including traditional leaders and the business community.

Secondly, constitutional review exercises should adopt clear and agreed time frames and path-ways, so as to avoid the impact of delay and strategic moves by political actors. Constitutional processes can be “de-politicised” by shifting decision-making power to broader democratic groups. Decisions about whether or not to undertake constitutional review can be put to the people at defined intervals; and power to approve or deny constitutional amendments can similarly be shifted to popular decision. These shifts require greater inputs to civic education.

This paper has suggested that in the context of the Pacific states, constitutional review has been a source of conflict more than it has contributed to the establishment and consolidation of democratic and peaceful societies. With insufficient attention given to communicative rules of engagement the spirit of constitutionalism, which aspires to laying just and equitable foundations for political affairs, remains at risk.

Bibliography

- Bache, I. and M. Flinders (2004). Themes and Issues in Multi-level Governance. Multi-level Governance. I. Bache and M. Flinders. Oxford, Oxford University Press.
- Balm, K. and K. Le Roy (2006). Nauru Constitutional Review. Report on Public Consultations. Nauru.
- Bougainville Constitutional Commission (2004). Report of the Bougainville Constitutional Commission. Report on the Third and Final Draft of the Bougainville Constitution, prepared by the Bougainville Constitutional Commission. Arawa and Buka, Bougainville Constitutional Commission.
- Campbell, I. (2005). "The Quest for Constitutional Reform in Tonga." The Journal of Pacific History 40(1): 91-104.
- Carl, A. and L. Garasu, Eds. (2002). Weaving consensus: The Papua New Guinea – Bougainville peace process, Conciliation Resources.
- Efi, T. A. T. T., T. M. Suaalii-Sauni, et al., Eds. (2007). Pacific Indigenous Dialogue on Faith, Peace, Reconciliation and Good Governance. Apia, Alafua Campus Continuing and Community Education Program, University of the South Pacific.
- Fraenkel, J. (2006). "The Failure of the Alternative Vote as a Tool for Ethnic Moderation in Fiji." Comparative Political Studies 39(5): 663-666.
- Fraenkel, J. and S. Firth, Eds. (2007). From Election to Coup: the 2006 Campaign and its Aftermath. Suva, Institute of Pacific Studies and Asia Pacific Press.
- Ghai, Y. and J. Cottrell (2007). "A tale of three constitutions: Ethnicity and politics in Fiji." I-CON 5(4): 639-669.
- Ghai, Y. and A. J. Regan (2002). "Constitutional accommodation and conflict prevention".
- Graham, K., Ed. (2008). Models of Regional Governance for Pacific Island States: The Future Architecture of Pacific Regionalism. Christchurch, University of Canterbury Press
- Habermas, J. (1984). The Theory of Communicative Action: Reason and the Rationalization of Society. Boston, Beacon.
- Habermas, J. (1996). Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy. Cambridge, Polity Press.
- Halapua, S. (n.d.). "The Talanoa Process: The Case of Fiji." online at <http://unpan1.un.org/intradoc/groups/public/documents/UN/UNPAN022610.pdf>.
- Hassall, G. (forthcoming). The mediation of public policy disputes in Pacific islands: the case of Fiji. Mediation in the Asia-Pacific Region: Transforming Conflicts and Building Peace. D. Bagshaw and E. Porter, Routledge.
- Hezel, F. X. (2004). "The 'Chuuk Problem'. At the Foot of the Political Pyramid." Micronesian Counselor(50): March 31st.

- Hollaway, B. (2008). Rethinking Political and Administrative Structures in Papua New Guinea. Workshop on Reforming Decentralization and National Fiscal Policy in Papua New Guinea. Port Moresby and Canberra, online at http://rspas.anu.edu.au/papers/melanesia/conference_papers/0804_decentralisation_png_Hollaway.pdf.
- Johnson, L. S. (2002). "The Federated States of Micronesia's Presidential Election System and Proposed Constitutional Analysis: An Analysis." Journal of South Pacific Law 14.
- Katy Le Roy, K. (2008). "Constitutional Renewal in the Solomon Islands: Public Participation in Theory and Practice."
- Katz, S. N. (2002). "Constitutionalism, Contestation, and Civil Society." Common Knowledge 8(2): 287-303.
- Lal, B. V. (2003). "Fiji's Constitutional Conundrum." The Round Table 372: 671-685.
- Le Roy, K. (2005). "Participatory constitution making as a peace-building tool." Paper prepared for Peace, Justice and Reconciliation in the Asia Pacific Region Conference, Australian Centre for Peace and Conflict Studies, University of Queensland, April 1-3, 2005.
- Le Roy, K. (2006). "Nauru Constitutional Review. Background and Discussion Paper."
- Levine, S. and N. S. Roberts (2005). "The Constitutional Structures and Electoral Systems of Pacific Island States." Commonwealth and Comparative Studies 43(3): 276-295.
- Longo, M. (2006). Constitutionalizing Europe: Processes and Practices. Great Britain, Ashgate.
- Mousseau, M. (2000). "Market Prosperity, Democratic Consolidation, and Democratic Peace." Journal of Conflict Resolution 44(4): 472-507.
- Nanau, G. L. (2002). "Uniting the fragments: Solomon Islands constitutional reforms." Development Bulletin(December): 17-20.
- Pacific Islands Development Program (2001). Talanoa IV. Leaders Statement on Harmony and Stability in the Rebuilding of Fiji. 4 November 2001. Hawaii, East-West Center.
- Petersen, G. (1994). "The Federated States of Micronesia's 1990 Constitutional Convention: Calm before the Storm?" The Contemporary Pacific 6(2): 337-369.
- Peterson, G. (1993). Ethnicity and interests at the 1990 federated states of Micronesia constitutional convention. Canberra, The department of political and social change Research school of Pacific studies The Australian National University Press.
- Peterson, G. (2005). "On checks and balances within the Federated States of Micronesia's Presidential System." Journal of Pacific Studies.
- Pettit, P. (2006). Depoliticizing Democracy. Deliberative Democracy and its Discontents. S. Besson and J. L. Marti. Aldershot, Ashgate: 93-106.
- Powles, G. (1992). Changing Pacific Island Constitutions: methods and philosophies. Essays and Documents on Human Rights in the Pacific.

- Powles, G. (2005). The Challenge of Law Reform in Pacific Island States. The Promise of Law Reform. B. Opeskin and D. Weisbrot. Sydney, The Federation Press: 404-421.
- Powles, G. (2006). "Constitutions and People's Values: Changing the Constitution of Tonga." TRA Book.
- Powles, G. (2007). "Testing Tradition in Tonga: Approaches to Constitutional Change." Revue Juridique Polynesienne **13**: 111-141.
- Prasad, S. (1996). "Limits and Possibilities for Civil Society Led Re-democratization: The Fijian Constitutional Debates and Dilemma." Conciliation Resources. Occasional Papers Online at <http://www.c-r.org/resources/occasional-papers/fiji-constitutional-debates.php>.
- Ray, J. L. (1997). "The Democratic Path to Peace." Journal of Democracy **8**(2): 49-64.
- Reeves, P., T. T. Vakatora, et al. (1996). The Fiji Islands. Towards A United Future. Report of the Fiji Constitution Review Commission, Parliament of Fiji.
- Regan, A. (1988). Case Study Bougainville. From: Democracy and Deep-Rooted Conflict: Options for Negotiators. P. H. a. B. Reilly. Stockholm, International IDEA: 171-178.
- Regan, A. (2002). Resolving two dimensions of conflict: the dynamics of consent, consensus and compromise. Weaving consensus: The Papua New Guinea – Bougainville peace process. A. Carl and L. Garasu, Conciliation Resources.
- Regan, A. J. (2002). "The Bougainville political settlement and the prospects for sustainable peace." Pacific Economic Bulletin **17**(1): 114-129.
- So'o, S. (2008). Democracy & Custom in Samoa: an uneasy alliance. Suva, IPS Publications.
- Solomon Islands. Provincial Government Review Committee. (1987). Report of the Provincial Government Review Committee, 1986-1987. Honiara, Solomon Islands, Ministry of Home Affairs & Provincial Government.
- Steiner, J., A. Bächtiger, et al. (2004). Deliberative Politics in Action: Analysing Parliamentary Discourse. Cambridge, Cambridge University Press.
- The Nauru Constitutional Review Commission (2007). "Naoero Ituga" (Report. Yaren, Nauru.