



Developing a Home-Grown Independence Constitution in Bougainville: Part Two — Key Features of the Draft Constitution

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This is the second part of a two-part In Brief concerning the history, context and key features of the proposed independence constitution that is in the process of being developed for Bougainville.

The draft constitution draws on numerous sources, including the Autonomous Bougainville Government (ABG) constitution, the Papua New Guinea (PNG) constitution, the Bougainville Peace Agreement 2001 (BPA), consultation reports, and various other constitutions (e.g. Kenya, 2010). It was also inspired by the 2012 draft constitution of Fiji.

Written in plain language for clarity and accessibility, the draft consists of a preamble, 14 chapters and 8 schedules. The short preamble draws on the ABG constitution, the consultation reports, and a draft crafted overnight by a Bougainville Constitutional Planning Commission (BCPC) member inspired by the previous day's discussion of the issues a preamble might touch upon. It recognises important cultural and historical points and future aspirations as a background and prelude to an independence constitution. It does not (yet) include a declaration of independence.

The draft's structure bears similarities to the Fiji 2012 draft, but the BCPC marked the significance of issues such as land, resources and environment, and good governance and leadership, by including them in early chapters.

Chapter 1, on founding provisions, establishes the Republic of Bougainville as a sovereign, democratic state, and sets out its core founding values, including human rights and freedoms, the rule of law, good governance, and respect for cultural and natural heritage. It makes the constitution the supreme law, imposes obligations to respect and uphold it, and contains guiding principles for office holders and social and economic objectives. It recognises as citizens members by birth of a customary land-owning clan, permits dual or multiple citizenship, and contemplates statutory provision for how others may obtain citizenship.

Responding to Bougainville's experience of devastating impacts of large-scale mining (HRLC 30/5/2023), Chapter 2 declares the responsibility of Bougainvilleans to care for and preserve the natural environment (including for future generations), recognises customary landowners as owners of natural resources, and articulates enforceable principles of land use and environmental protection. It also vests both the

state and entities involved in resource extraction and development with a duty to consult customary owners and other affected persons both before the granting of any permit and during the life of any approved project.

The consultation reports highlighted widespread concerns about leadership integrity and accountability. Drawing on the Fiji 2012 draft and PNG and ABG constitutional provisions for leadership codes, Chapter 3 imposes conduct and integrity obligations on public officers. Legislation must provide for criminal misconduct and forfeiture, and protection for whistleblowers is required. The Ombudsman and Integrity Commission will investigate and report on maladministration complaints, monitor Leadership Code compliance, and refer and prosecute alleged criminal misconduct by public officers. The Leadership Code is provided in Schedule 5.

Human rights and freedoms under Chapter 4 are progressive in the context of comparative constitutionalism, and provide broad standing for enforcement. They include civil and political rights as well as certain social and economic rights that, while not directly enforceable, impose obligations on the state and may in some circumstances require its positive action. They are modelled closely on the Fiji 2012 draft, with appropriate contextual modifications. The Bougainville Human Rights Commission will monitor, investigate and report on observance, and alleged abuses, of human rights, and exercise limited enforcement powers. The Supreme Court will have wide enforcement powers.

The legislative, executive and judicial institutions under Chapters 5–8 retain some key but unusual features of the ABG constitution, including four reserved seats each for women and veterans (up from three), and a directly elected president who sits in the House of Representatives (HoR), selects executive council members, and is both head of state and head of government. Unlike in the ABG constitution, there is provision for a position of leader of the Opposition, but only if at least five HoR members do not support the president and the cabinet (reflecting the strong cultural and post-conflict Bougainvillean preference for consensus decision-making). The legislature will of course have plenary legislative power, but provision is made for certain matters on which the HoR must or may legislate. They include sub-national government, one form being a Bougainville Chiefs Congress, to advise

government 'on matters relating to custom and the role of chiefs and other traditional leaders' (Article 64(2)(a)).

For the time being, the ABG Community Government Act 2016 will continue to operate, under which 45 community governments comprise eight to 15 wards that must each elect one female and one male representative, and also rotate male and female chairs after every four year term. Uncertainty here may arise from the requirement that sub-national government legislation 'must provide for the recognition of the roles of chiefs and other traditional leaders' (Article 63(2)). Although most of Bougainville's diverse language and cultural groups are heavily matrilineal, giving significant respect to and roles for women, they are also patriarchal, with some (though reducing) resistance to women playing public leadership roles. This means that women are generally regarded as not being capable of being chiefs, though some senior women have status as 'other traditional leaders'.

Chapter 9 establishes independent public offices, including a significant body in Bougainville's post-conflict context: the Peace, Truth and Reconciliation Commission. Independence of independent public offices is protected by guarantees of sufficient financial and other resources, freedom from direction or control, and security of benefits and tenure.

In addition to familiar public finance provisions in Chapter 10, drawing on the Fiji 2012 draft, expenditure must promote fair and balanced development of the nation. A sovereign wealth fund will receive a prescribed proportion of natural resource revenue.

Chapter 11 provides for key government services, such as the public service, police force, and teaching service, and Chapter 12 contains rules about interpretation, enforcement, progressive implementation, alteration (amendment) and review of the constitution every 15 years. Chapter 13 provides for states of emergency, and Chapter 14 for transitional provisions, including the provisional laws (above), and establishment of a constitution implementation commission and implementation oversight committee, modelled on Kenya's 2010 constitution (Article 262(4)-(5)).

Schedules contain matters of detail (land and sea boundaries, the flag and emblem, dictionary, etc.). Schedule 6 (closely modelled on the Fiji 2012 draft), on standards and procedures for removal from public office, includes rules for removal of the president and other public officers on grounds of incapacity. Unusually, it empowers the Ombudsman and Integrity Commission

to impose sanctions (reviewable by the Supreme Court) on public officers after finding a public officer (other than a judge) has breached the Leadership Code or another constitutional provision.

Conclusion

Bougainville's current process, directed at producing a 'home-grown' constitution, offers an unusual example of independence constitution-making, in terms of both content and — possibly — legal authorisation. With Bougainville seeking a reluctant PNG's agreement to its independence, the heavy influence of the PNG independence constitution-making process is perhaps ironic.

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Reference

HRLC (Human Rights Law Centre). 30/5/2023. Working with Bougainville Communities to Hold Rio Tinto to Account.



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