

Constitutional Issues on the Future of the Autonomous Region of Bougainville

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Introduction

The Autonomous Region of Bougainville (AROB) may soon become an independent country after South Sudan in 2011, following the 97.7% vote by Bougainvilleans in a 2019 referendum. The referendum emanated from the constitutional settlement of the peace agreement after the decade-long civil war on the island.¹ But the current political negotiations between the Papua New Guinea national government and the Autonomous Bougainville Government (ABG) of AROB on the question of whether the latter should be granted independence, after the conflict and economic blockade that claimed some 20,000 lives, have the potential of “dismembering” Papua New Guinea’s Constitution if the ABG should unilaterally declare independence without the Papua New Guinea national government complying with its internal constitutional process to formally release Bougainville. This paper looks at the political background, the constitutional amendments, and the questions around the constitutional changes that must take place for Papua New Guinea to grant Bougainville independence. This can happen at any time, depending on the national government’s political will and ABG’s political clout. James Marape, the Papua New Guinea prime minister, has said Bougainville’s independence realisation must comply with due process and follow the Papua New Guinea Constitution.² On the other hand, the ABG President Ismael Toroama, a former Bougainville Revolutionary Army commander during the civil war, has made it clear that stakeholders must not shy away from using the word “independence” in their narrative.³ Other provinces, such as New Ireland, have publicly voiced their strong desire for political autonomy.⁴ Given the fragile character of Papua New Guinea’s modern statehood in the Westphalian sense, these changes will have serious implications for Papua New Guinea’s unity and sovereignty over its 20 provinces (in addition to AROB and the National Capital District) tied together by the 50-year Constitution, if the national government does not negotiate these agitations well.

Brief Political History of Bougainville

A brief background of Bougainville is necessary. Bougainville is an island (or rather a group of two large islands (Buka and Bougainville), smaller islands and atolls) lying to the east of mainland Papua New Guinea, with a population of roughly 350,000 people, a geographical size of 9,834 km² (3,623 square miles) and a maritime border with the country of Solomon Islands. Indigenous Melanesian Bougainvilleans have been living on the islands for 30,000 years. A relatively recent migration into the outer islands of Bougainville about 3,000 years has seen

*The article was first published in Vergil Narokobi, “Papua New Guinea,” Luis Roberto Barroso and Richard Albert (eds) *The International Review of Constitutional Reform* (published by University of Texas at Austin) 352.

¹ Anthony Regan and Katy Le Roy, “Bougainville’s homegrown independent constitution, part 1,” (16 July 2024) Devpolicy Blog <<https://devpolicy.org/bougainvilles-home-grown-independence-constitution-part-1/>>.

² The Editor, “Address affairs head-on: Toroama,” *The National Newspaper* (25 November 2025) <<https://www.thenational.com.pg/address-affairs-head-on-toroama/>>.

³ The Editor, “Address affairs head-on: Toroama,” *The National Newspaper*.

⁴ Maholopa Laveil, “Internal politics and other threats to New Ireland’s autonomy plans,” (13 June 2024) Devpolicy Blog <<https://devpolicy.org/internal-politics-and-other-threats-to-new-irelands-autonomy-plans-202406013/>>.

the arrival of Micronesians and Polynesians. Because the majority of Bougainvilleans have very dark skin complexion, arguably one of the darkest races in the world, they have always regarded themselves as a separate people to the rest of Papua New Guinea.

Two weeks before Papua New Guinea's independence, leaders of Bougainville made a unilateral declaration of independence on 1 September 1975, calling themselves the "Republic of North Solomons." The declaration did not gain international traction, especially from the United Nations. On 16 September 1975, Bougainville became part of the Independent State of Papua New Guinea, when the country officially broke free from Australia.

Like the rest of Papua New Guinea, Bougainville is an island that is rich in natural resources. Very large gold and copper deposits are found on the island, and just before Papua New Guinea's independence, mining giant Rio Tinto as majority shareholder of Bougainville Copper Limited conducted one of the world's largest open-cut copper mines in the central part of the island of Bougainville, "Panguna Copper mine." Revenue from Panguna Copper mine supported Papua New Guinea's economy in its early years after independence. Their "apartness" because of their island geography, ethnicity and grievances from mining benefits and environmental destruction, have been reasons for their push for independence.⁵ Whilst Bougainvillean identity is a complex concept,⁶ notable anthropologist, Douglas Oliver who spent his life studying Bougainvillean people and culture, described them as "the black spot in an island world of brown skins."⁷

One of the underlying principles of Papua New Guinea's Constitution is the decentralisation of political power from the central government to the political and geographical periphery of the linguistically and culturally diverse country. This was recommended by the Constitutional Planning Committee in 1974 to the pre-independence House of Assembly, the precursor to the present legislature, for three levels of power-sharing administrative capability - a national government, a provincial government, and a local level government.⁸ When the *Constitution* was enacted in 1975, the decentralisation proposal was shelved. As was noted above, Bougainville had declared independence, and so to appease Bougainville, the first amendment by the national parliament in 1976 to the Papua New Guinea *Constitution* introduced the provincial government system.⁹ North Solomons province was the name it had at that time.

While North Solomons province may have been ready to be a province in 1976, the newly introduced provincial government system applied across the whole country, and 19 provinces were created, many of which were not ready for their newfound legal status and political power,

⁵ Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict* (Pandanus Books, Research School of Pacific and Asian Studies, Canberra, 2005).

⁶ Anthony J Regan, "Identities Among Bougainvilleans," in Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict*, at 418.

⁷ Cited by Anthony J Regan and Helga M Griffin, "Introduction," in Anthony J Regan and Helga M Griffin (eds) *Bougainville Before the Conflict*, above no. 5 at xxv.

⁸ Constitutional Planning Committee Final Report of the Constitutional Planning Committee, Part One (Government Printer, Port Moresby, 1974), see Chapter 10A.

⁹ John Lawrence Momis, "Shaping Leadership Through Bougainville Indigenous Values and Catholic Seminary Training - A Personal Journey," in Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict*, Above no. 5 at 300; Mathew Devlin, *Decentralisation Without Disintegration: Provincial Government in Papua New Guinea, 1972-1985*, 2010, *Innovations for Successful Societies*, Princeton University,

<https://successfulsocieties.princeton.edu/sites/g/files/toruqf5601/files/Papua%20New%20Guinea%20ToU_1.pdf>.

as some have argued.¹⁰ The geographical territory of the provinces largely corresponded to the districts created in the Territory of Papua and New Guinea administered by the Commonwealth of Australia before Papua New Guinea's independence. Each provincial government had constituencies who voted their provincial member into their "provincial parliaments," who would then elect a premier. The constitutional revision was implemented by amending the *Constitution* and enacting an Organic law on provincial governments. Organic Laws although less superior to the *Constitution*, stand next to the *Constitution*, having the legal status of a "Constitutional Law."¹¹ An Organic law cannot be enacted unless it is expressly envisaged by the *Constitution*.¹² Organic laws give fuller details as it were of the framework provided in the *Constitution*. The 1976 Organic Law on Provincial and Local Level Government granted to the provinces legislative power over a list of defined subject areas.

Peace and Constitutional Settlement

From 1976 to 1995, there was vigorous contest for resources and political power between the national government and the provincial governments, often ending up in court.¹³ In addition, constitutional changes were introduced in 1995, reforming the provincial government system, limiting their autonomy. No longer was there an elected provincial parliament. Members of the national parliament also became ex officio members of the provincial legislatures. While all this was happening, a bloody civil war erupted on Bougainville in 1988 between secessionist forces, the Bougainville Revolutionary Army and the national government. Causes of the conflict are complex but generally it would be the long-standing view of Bougainville's separate identity and secessionists sentiments being ventilated by long-standing unresolved grievance of the local people with the benefit sharing arrangements, and the environmental damages from the mine waste.¹⁴ It was not until 30 August 2001 that a peace agreement was signed to end the civil war. The Peace Agreement had three objectives:

- Autonomy for Bougainville.
- Weapons disposal.
- A referendum on Bougainville's future, which would be non-binding, and subject to the national parliament's ratification.

The peace agreement resulted in three significant changes to Papua New Guinea's constitutional regime. Firstly, the *Constitution* was amended on 27 March 2002. It introduced new provisions creating the region of AROB, and its government, that is the ABG. The *Constitution* prior to the 2002 amendment stopped at Part XIII, "Immediate and Transitional Provisions," and had as its last provision, s 275, "Chairmanship of Tribunals to Review Internments." Amendments in 2002 brought in Part XIV of the *Constitution*, "Bougainville Government and Bougainville Referendum," creating 74 additional new provisions, ending in s 349, "Constitutional Regulations." A broad range of subjects are covered, basically to set up the fundamentals of the ABG governance framework, which will then have laws enacted by

¹⁰ John Lawrence Momis, "Shaping Leadership Through Bougainville Indigenous Values and Catholic Seminary Training – A Personal Journey," in Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict*, Above no. 5 at 315.

¹¹ *Constitution*, Sch. 1.2.2. "Meaning of certain expressions."

¹² *Constitution*, s 12. "Organic Laws."

¹³ See for example *SCR No. 3 of 1986; Ref By Simbu Provincial Executive* [1987] PNGLR 151 <<https://www.paclii.org/pg/cases/PGSC/1987/17.html>>.

¹⁴ James Tanis, "Nagovisi Villages as a Window on Bougainville in 1988," in Anthony J Regan and Helga M Griffin (eds), *Bougainville Before the Conflict*, Above no. 5 at 447.

the ABG legislature to enable the autonomous governance framework to function autonomously. In the meantime, the laws of Papua New Guinea will continue to apply, until such time the ABG puts into effect the implementing laws. Constitutional framework in Part XIV mirrored Papua New Guinea's governance system, providing for leader's code of conduct, rights and freedoms, national judicial system, government service, Bougainville police, Bougainville correctional service, constitutional office holders and emergency powers. Other areas provided for are:

- Arrangements for the establishment of Bougainville government.
- Division of powers between national government and Bougainville government.
- Powers and functions of the Bougainville government.
- Fiscal arrangements.
- Intergovernmental relations and review.
- Bougainville referendum.
- Immunity from prosecution.

The right to a referendum on the political future of Bougainville took place in 2019. The questions put to the Bougainvilleans were jointly determined by the national government and the ABG. Two questions were asked in the referendum: firstly, whether the people wanted political independence, and secondly, in the alternative, greater political autonomy. A referendum was conducted under the auspices of the United Nations, observing the requirement for it to be free and fair.¹⁵ Bougainvilleans voted overwhelmingly for political independence by 97.7%. These results would then have to be provided to the Papua New Guinea national parliament to make the final decision on the future of AROB, by either accepting the referendum results or rejecting it.¹⁶ It is now 2026, and the results have not been tabled in the national parliament to consider and vote on whether it should ratify the outcome of the referendum, and what steps the national government should then take.

To supervise the transfer of power from the national government and resolve disputes between the governments an entity called the Joint Supervisory Body (JSB) was created. Two members from the national government and two members from the ABG would compose the JSB. The JSB assumes the role to facilitate ongoing discussions between the national government and the ABG.

The second constitutional change was the conversion of the 2001 peace agreement into an Organic Law, "The Organic Law on Peace -Building in Bougainville-Autonomous Bougainville Government and Bougainville Referendum 2002," (ABG Organic Law). Specific processes are created in the ABG Organic Law for the transfer of powers from the national government to the ABG. Essentially, both the national government and the ABG will jointly prepare agreed plans to cooperate to facilitate the transfer of functions and powers to the ABG.¹⁷ The plans must include criteria, indicators and targets of capacity and resources available to or required by the ABG.¹⁸ Specific mention is made of the transfer of police functions and powers, with an allowance to follow an agreed plan for a gradual transfer.¹⁹ There

¹⁵ Constitution, s 341.

¹⁶ Constitution, s 342.

¹⁷ Organic Law on Peace -Building in Bougainville-Autonomous Bougainville Government and Bougainville Referendum 2002, s 3(1).

¹⁸ Section 3(2)(a).

¹⁹ Section 3(2)(b)

are some 59 powers that can be drawn down. At present only 11 of the 59 powers have been transferred from the national government to the ABG.²⁰

The third constitutional change is the enactment of the Bougainville *Constitution*. After a period of consultation with the Bougainville people by the Bougainville Constitutional Commission, the Bougainville Constituent Assembly enacted its own Constitution. The Bougainville *Constitution* came into force in 2004. The Bougainville *Constitution* was enacted so as not to conflict with the national Constitution and would in effect implement Part XIV of the *Constitution* and the ABG Organic Law. Bougainville *Constitution's* structure followed the Papua New Guinea model, with an extensive preamble, three arms of government, human rights provisions, a leadership code and constitutional office-holders. A Bougainvillean is defined in the Bougainville *Constitution*.²¹ One major difference is the executive head of the ABG, its president who is directly elected by Bougainvilleans, a different model to Papua New Guinea's Westminster system where the prime minister is elected by the legislature. The Bougainville house of representative is composed of the following²²:

- President, as head of the executive, elected by all voters in Bougainville;
- Thirty-three (33) Members representing single member constituencies;
- Three (3) women members to represent interests of women, one representative for each region (North, Central, South);
- Three (3) former combatants to represent interests of former combatants, one for each region (North, Central, South);
- The Speaker, who is an elected member of the House of Representatives appointed by a vote of the members of the House;
- The Vice-President, who is appointed by the President from among the members of the House from the region other than the region from which the President comes from; and
- The Bougainville Members of the National Parliament (able to take part in debate but cannot vote and not counted towards a quorum).

These three constitutional changes, firstly the amendment to the Papua New Guinea *Constitution*, the enactment of the ABG Organic Law and thirdly the passage of the Bougainville Constitution have set the groundwork for ongoing dialogue between the national government and the ABG on the future political status of Bougainville. These developments are being closely observed by the rest of Papua New Guinea because of the likely implications on the rest of the country.

Constitutional Issues on the Future of PNG and AROB

For Papua New Guinea, the constitutional amendments may create the potential for its *Constitution* to be “dismembered” if the ABG were to unilaterally declare its independence. In 1975, Bougainville's declaration brought in the provincial government system. The second time was on 17 May 1990, it was during the civil war. If the third one were to happen, given the current state of constitutional settlement, the consequences might be difficult to predict, but

²⁰ Oliver Nobetau, “Bougainville's Future: The Hard Questions,” *theinterpreter* (2 May 2024) <<https://www.lowyinstitute.org/the-interpreter/bougainville-s-future-hard-questions>>.

²¹ Bougainville Constitution, s 7 “Bougainvillean.”

²² Official website of the Autonomous Bougainville Government, “Parliament,” <<https://abg.gov.pg/government/parliament/>>.

it would question the efficacy of the Papua New Guinea *Constitution* to address social and political tensions.

The potential for a unilateral declaration is presented by the curious lacuna created by the question of what parliament should do with the result of the referendum. Section 342 of the Constitution states:

342. Referendum Results and Implementation.
- (1) The National Government and the Bougainville Government shall consult over the results of the Referendum
 - (2) Subject to the consultation referred to in Subsection (1), the Minister responsible for the Bougainville Referendum shall take the results of the Referendum in the National Parliament and the Speaker of the National Parliament shall furnish to the Bougainville Executive a copy of the minutes of the relevant proceedings and any decision made in the National Parliament regarding the Referendum.

Two key elements of s 342 are that the national government and ABG must consult over the results, and secondly, the ratification of the referendum by the national parliament, that is, "...any decision made in the National Parliament regarding the Referendum." The obvious question is, what form should the decision of the parliament take? Should it be an ordinary resolution of parliament, a vote on a motion, a legislation or a constitutional amendment? There are no time frames provided either. If the national parliament was to accept the referendum result, what should be the content of the resolution and the same is true in the case of a rejection. There is no prescribed process as to what should then follow after the parliament makes its decision.

If the national parliament was to vote to ratify the referendum results, would it be by a simple majority or would it have to be the majority required for a constitutional amendment. No clear provision is provided in the Constitution on this question, too.

To answer some of these questions, a joint agreement was entered into between the national government and the ABG, described as the "Era Kone Covenant," (covenant) entered into in April 2022, signed by the prime minister of Papua New Guinea, James Marape, and the president of ABG, Ismael Toroama.²³ The agreement stated that the covenant fulfilled s 342(1) of the Constitution for consultation over the results of the referendum. In clear terms, the covenant stated the results of the referendum, that is, 97.7% voted for political independence, and that the voting was free and fair. Then the covenant stipulated that the 11th house, that is the current parliament (2022 to 2027), would receive and decide over the results of the referendum, no earlier than 2025 and no later than 2027. As to the specifics of what parliament should do, it was agreed that the national government would enact constitutional regulations under s 349 of the Constitution to prescribe the process. Perhaps the constitutional regulation would answer some of the questions left unanswered by s 342 of the Constitution.

Another sticking point as highlighted above, is the majority required by the national parliament to decide on the referendum outcome. The national government appears to take the view that it would have to be a majority like a constitutional amendment. ABG on the other hand would

²³ Era Kone Covenant on the Finalisation of the Bougainville Referendum on Independence, April 2022
<https://abg.gov.pg/images/misc/Signed_Era_Kone_Covenant_050422.pdf>

be more inclined for parliament's decision to be supported by a simple majority. Both governments have agreed for an international moderator to broker an agreement on this issue and have settled on the former Governor-General of New Zealand, Sir Jerry Mateparae, to undertake this responsibility to mediate between the governments.²⁴

Looking Ahead

The reasons for this constitutional lacuna may be intentional, so that it may be left to the people and their governments to decide, rather than prescribing a process that can leave stakeholders in a straitjacket, oblivious to the present needs of the people. But that does not mean that, like the constitutional settlements that have resolved ongoing tensions, the future of Bougainville should still be addressed within the framework of the Papua New Guinea Constitution.

The constitutional changes had evolved from a bloody conflict, and by many accounts it was a necessary change to end the war. For Bougainvilleans, the question is about giving expression to their choice, and there is no other option for Papua New Guinea; it is a foregone conclusion. From a Papua New Guinean perspective, granting Bougainville independence would dismember its Constitution, fragmenting its unity, and resurrect early Pre-independence micronationalist movements, as well as the potential loss of significant revenue from natural resources.²⁵ Providing AROB a high degree of autonomy, was fortuitous, as it has attracted a commentator to observe that ABG should focus on drawing down its vast powers from the national government and gradually move towards independence when it is fully functional as an autonomous government.²⁶ This process has the protection of Constitutional law, or as the notable Bougainvillean commentator Professor Anthony Regan of the Australian National University and his colleague Katy Le Roy highlighted, the protection of "double entrenchment" requiring the AROB legislature to approve any amendments.²⁷ This would give ABG the time it needs to fully benefit from the fruits of autonomy at their pace. One can now also say that there is "triple entrenchment" as Papua New Guinea's Supreme Court has, in addition, in a judicial review proceeding on the question of the constitutionality of ABG having a two-term president, upheld the constitutionality of the Constitution of Bougainville, on the grounds that it was not an unreasonable restriction on the rights of a person to hold public office.²⁸ The Supreme Court deferred to the views of the Bougainvilleans, who were widely consulted on the form and content of the Bougainville Constitution.²⁹

If all else fails the ultimate option for Bougainville is to make a unilateral declaration of independence, given that they already have a draft Constitution, and seek international recognition, which would then pressure Papua New Guinea to officially release Bougainville, without engaging its internal Constitutional process. Given the terms of the Era Kone Covenant

²⁴ Don Wiseman, "Bougainville and PNG confirm Sir Jerry Mateparae as moderator" Radio New Zealand (11 September 2024) <<https://www.rnz.co.nz/international/pacific-news/527675/bougainville-and-png-confirm-sir-jerry-mateparae-as-moderator>>

²⁵ Ron May (ed) *Micronationalist Movements in Papua New Guinea* (Department of Political and Social Change, Research School of Pacific Studies, The Australian National University, Canberra, 1982).

²⁶ Oliver Nobetau, "Bougainville's Future: The Hard Questions," Above no. 19.

²⁷ Anthony Regan and Katy Le Roy, "Bougainville's homegrown independent constitution, part 1," above no. 1.

²⁸ Special Reference Pursuant to Constitution, Section 19(1), Reference by the Bougainville Executive [2020] PGSC 42; SC1952 (29 May 2020) <<https://www.paclii.org/pg/cases/PGSC/2020/42.html>>.

²⁹ Special Reference Pursuant to Constitution, Section 19(1), Reference by the Bougainville Executive, see opinion of Chief Justice Sir Gibbs Salika at [4].

the potential for such a declaration would be high, if the national parliament does not decide by 2027.³⁰ Such a declaration would have the potential of moving outside of the present constitutional settlement, and it behoves the national government to give deep thought and priority as to how it should deal with this potential risk to its Constitution.

Further Reading

Anthony Regan and Helga Griffin (eds), *Bougainville Before the Conflict* (Pandanus Books, Research School of Pacific and Asian Studies, Canberra, 2005).

Special Reference Pursuant to Constitution, Section 19(1), Reference by the Bougainville Executive [2020] PGSC 42; SC1952 (29 May 2020)
<<https://www.pacii.org/pg/cases/PGSC/2020/42.html>>.

³⁰ Sue Ahearn, "Bougainville's people are being left in the dark " *The Strategist* (1 June 2023) <<https://www.aspistrategist.org.au/bougainvilles-people-are-being-left-in-the-dark/>>