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CONSTITUTION
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‘Societal Culture and Constitutions: The case of Tuvalu’

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Tuvalu comprises eight main islands. The name Tuvalu translates commonly as ‘eight united islands’ although it has nine islands. The islands are generally grouped into the northern, central and southern islands. The northern islands include Nanumea, Nanumaga and Niutao. Nukufetau, Nui and Funafuti make up the central islands while Nukulaelae and Niulakita make up the southern islands. Administratively, Niulakita is part of Niutao and for that matter it is not counted as an independent ninth island.

Historically, the islands were independent prior to British colonisation although they had frequent encounters with other peoples during their various ocean travels. The islands traded in various items and made friendship pacts that are traditionally recognised today. These relationships carry sacred meaning to the islands involved and are respected in Tuvalu. At the head of every island of Tuvalu, but depending on which island you come from, is the equivalent of a King known locally by various names Tupu, Ulu Alik, Manisi or Pule Fenua.

The islands were colonised by Britain from 1892 as a protectorate and then as a colony under the Gilbert and Ellice Island Colony (GEIC) from 1916. The headquarters for the GEIC were in the Gilbert Islands, which are now known as Kiribati. As such, the islands of Tuvalu continued in their island traditions almost free from physical colonial control. The island ways of life enjoyed limited colonial control.

The islands became Tuvalu when they successfully voted in a referendum in 1975 to be separated from Kiribati. In 1976 Tuvalu officially separated from the Gilbert Islands and became independent from Britain on 1 October 1978.

Constitutional background

Upon independence in 1978, Tuvalu had what is known as the Independence Constitution. On 24 November 1982, the Parliament of Tuvalu established a select committee to review how appropriate that Constitution was for Tuvalu and whether certain amendments were required. The result was the 1986 *Constitution* which despite revisions in 1990 and 2008 remains without major amendments.

The 1986 *Constitution* was based on consultations with the islands and provided for increased recognition of island understandings, values and practices, and traditional forms of island living. The important parts of the *Constitution* dealing specifically with societal culture include the Preamble, the Principles of the Constitution and the Bill of Rights in Part II.

The *Teonea v Nanumaga* [2009] TVCA 2 case altered the constitutional meaning of the relationship between island rights and individual rights as initially understood by the people. The case prioritised individual rights over island rights or practices. This case resulted in a constitutional amendment set

out in the *Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010*. This law prioritises the use or recognition of laws supporting traditional standards, values and practices over other constitutional freedoms that may be divisive and threatening to Tuvaluan values. The amendment is yet to be tested in a court of law.

Apart from societal culture and its impact on constitutional development in Tuvalu, Tuvalu's political culture from the same period onwards has raised important constitutional challenges that necessitate another review of the current constitution. It will be interesting to see what the outcome of the Tuvalu constitution review process currently underway in 2018 will be.

In what ways is culture reflected in the substance of the Tuvalu Constitution, including constitutional text? What are the implications (both positive and negative) of this, for example for local ownership, national identity, constitutional interpretation?

The term 'culture' appears seven times in the Tuvalu Constitution. There is no reference to culture in the Interpretations Act nor is the term defined in the Constitution. There are various references to Tuvaluan values, custom and traditional practices. Most importantly, there is a running theme within the Constitution for protecting Tuvaluan values and custom which encompasses societal culture, as defined in the context of this Forum.

The *Falekaupule Act*, which was enacted to give more recognition to customary practices and respect for Tuvaluan values and custom defines these values and customs as Aganuu or 'the traditional local custom and usages of an island'. It is almost the same as the definition for customary law provided in the Laws of Tuvalu Act, s 5. The important difference is that the Laws of Tuvalu Act definition refers to individuals whereas the definition in the *Falekaupule Act*, s 2 refers to the practices of the island. Is the difference a mere drafting anomaly or are the two meant to be very different? (see *Teonea v Nanumaga Kaupule* [2005] TVHC 5, *Nukufetau v Metia* [2012] TVHC 8).

Despite the various references and terminology used in the Tuvalu Constitution and other Acts, indigenous Tuvaluan culture within the context of this Forum is well reflected in the Constitution including the constitutional text. In fact, the constitutional recognition of Tuvaluan island culture may not have any equivalent in other Pacific Island Constitutions (see Ward CJ's judgment in *Teonea v Nanumaga Kaupule* [2005] TVHC 5).

The Constitutional Principles contained in the Preamble are the platform for interpreting the Constitution and any law in Tuvalu. The Principles recognise and reiterate the importance of Tuvaluan culture and respect for them as a basis for understanding the Constitution and law in Tuvalu. The Constitution, while respecting individual rights, accepts that a proper respect of Tuvaluan culture may justify curtailing individual rights in certain circumstances. For instance, it permits limiting an individual's freedom of religion where its exercise may cause social unrest, as witnessed in Nanumaga in the *Teonea* case. The Constitutional Principles also recognise that the interpretation of the constitution and the principles may change as the world evolves and new meanings become more acceptable. The challenge in Tuvalu is to understand the relationship between court-made law under this provision and the constitutional requirements for Parliament's law-making powers. Does the provision authorise the courts to declare a new law or adopt international conventions where parliament has not legislated to that effect?

The cases mentioned are good examples that highlight the disconnection between legal understandings and indigenous or societal understandings of the application of the Constitution. The cases highlight a misguided societal understanding that island living is protected by the Constitution and takes precedence over individual rights. Consequently, amendments were made to the Constitution to ensure that the issues in the *Teonea* case do not repeat themselves and cause further divisive practices and behaviours on the islands. In other words, the *Constitution (Recognition of Traditional Standards, Values and Practices) Amendment Act 2010* was enacted to ensure that the protection of Tuvaluan values and custom according to indigenous Tuvaluan understandings will be the applicable law in Tuvalu. It will be interesting to see if any new court challenges arise and how the courts deal with the new amendment.

Where culture is not reflected in the substance of the Constitution, how do the two co-exist?

As mentioned previously, culture (as understood in the context of the Forum) is the foundation on which the *Constitution of Tuvalu* is premised as far as island understanding is concerned. The Constitution of Tuvalu, in its preamble and principles and the Bill of Rights, to a certain extent emphasise the importance of culture. The constitutional and cultural understanding had always been that culture takes precedence over individual rights. It was not until the case of *Teonea* in 2003 that the people of Tuvalu were first made aware that their understanding may not be correct. Yet, it was an understanding that had provided for the peaceful coexistence between custom and law since the inception of the 1986 Constitution. The *Teonea* case awakened indigenous understandings that the culture of legal interpretation is not what they understood matters to be.

The original understanding, which was challenged in the *Teonea v Nanumga* case as well as the *Nukufetau v Metia* case, was that the protection of Tuvaluan values is of paramount importance and takes precedence over individual rights. The collective culture of island living in Tuvalu means there is always greater support for collective rights over individual rights. In the islands therefore, it is easily accepted that where the exercise by an individual of his or her rights becomes offensive, divisive or unsettling to the islands, it is reasonable and acceptable for such a right to be controlled.

Other than certain restrictions on individual rights in times of war or emergency situations, the protection of Tuvaluan values is an important consideration that allows for limiting an individual's right. In the context of Tuvaluan living, respect for culture is mostly about respecting island custom, values and practices. The relationship between law and custom amongst the islands of Tuvalu was best summed up by Ward CJ in *Teonea v Nanumaga Kaupule* [2005] TVHC 5:

Each of the eight island communities of Tuvalu has much in common with the others but each also has its own unique traditions. Some are preserved better than others and some communities hold to theirs more tenaciously than others. Clearly many will change, as the 7th Principle of the Preamble acknowledges and the inclusion of many of the human rights and freedoms themselves is testimony to the changing attitudes and demands of the wider world in which we live. Where our Constitution is different is that it is firmly founded on the desire of the legislature, as an expression of the wish of the people, to hold to their traditions even if to do so means that some individual rights may be curtailed or restricted.

Prior to the *Teonea* case, the understanding had always been that collective island rights override individual rights where such individual rights may be divisive or threatening to Tuvaluan values. Individual rights were always understood to be used only with respect to the rights and feelings of others in the society. Hence, if the majority of the island did not support you, whether it is a business

venture or anything that was seen as causing divisions on the island, the common understanding was that the island decision overrides an individual's interest and right. The courts in the two cases mentioned did not agree with that indigenous understanding and provided a new meaning or interpretation of the interaction between custom and law in the Tuvalu Constitution.

Do aspects of culture provide points of continuity, even as the written constitution changes? If so, how?

Principle 7 of the Constitution states that

the people of Tuvalu recognize that in a changing world, and with changing needs, these principles and values, and the manner and form of their expression (especially in legal and administrative matters), will gradually change, and the Constitution not only must recognize their fundamental importance to the life of Tuvalu but also must not unnecessarily hamper their expression and their development.

While the above provision had been used by courts only to justify using foreign understandings and interpretations of legal principles as basis for their ruling on national cases, it should also be equally arguable that the same principle could be used to uphold changes in indigenous understandings, culture and Tuvaluan values that parliament is yet to legislate.

The beauty of culture is that it is not fixed. Where meanings and practices are predominantly understood and shared verbally, culture can easily adapt to change, as compared to a written constitution. In Tuvalu, discussions on codifying traditional practices, customs or Tuvaluan values have not been very successful. It seems that the only codification of our custom has been the Native Lands Act. The challenges experienced by people arising from the application of this codification may have influenced the reasons for not further codifying custom. In most cases, culture has evolved and everyday living and understanding is now very different from the codification.

In small societies like Tuvalu, where there may be increasing control from central government in relation to the role that custom and island life plays out on a daily basis, it may be fair to deduce that the future culture of Tuvalu may be shaped and influenced by written laws.

Who makes claims to societal culture? How is culture used to further a constitution building project? Can the concept of culture be misused or abused in this context?

Life in Tuvalu is all about the island. Societal culture is anchored in one's duties, responsibilities and obligations. Such duties, responsibilities and obligations provide a meaningful Tuvaluan identity. Because of the importance of duties, responsibilities and obligations to various islands and the different meanings that they bestow on individuals, understanding their proper application in the different islands is an important aspect of constitutional development.

Tuvalu was the name adopted at independence from British rule in 1978. During colonisation it was known as the Ellice Islands. The names signified a united group of islands which was given a constitution that generally assumed a united people where legal provisions may have equal application and understanding across the islands. Yet, the people of Tuvalu were more committed to their islands than the nation. Almost everything they do and work for was in the name of the island. The duties, responsibilities and obligations they proudly guard are in honour of their islands. This sense of island embeddedness is recognised by Government and the Parliament where appointments to

certain civil service positions may be influenced by the need for a fair distribution of employment opportunities amongst the different islands.

Whether or not culture could be misused or abused depends largely on the methodological approach used. Culture itself is only a reflection of society's understandings and beliefs in certain things at a certain time, which can change. A proper utilisation of such understandings can hardly amount to an abuse or misuse. The challenge lies with how such understanding may be used by people aspiring to exploit it for leadership roles and other personal benefits. Tuvalu is currently reviewing its Constitution with the intention of amending the existing Constitution, or creating a new Constitution. How do we measure how culture may have been misused or abused?

What are the implications of culture for (i) inclusive constitution building processes and (ii) the effectiveness of external assistance?

Tuvalu and its culture of island collectivity and interdependency means that from the outset it has a culture of inclusiveness. The challenge is respecting indigenous understandings where inclusiveness in the indigenous Tuvaluan context may not be acceptable to foreign understandings. For instance, traditionally, each island had its own arrangements for meetings and deciding issues pertaining to their island and people. These decisions are usually made by those considered elders of the island, aged 50 years and above. In some islands only the men 50 years and above finalise decisions. However, all of them are representative of the people aged 49 and below in what is traditionally known as *Mataniu* or *Matai Kaiga*. Most foreign assistance providers would not accept such practice.

Foreign misconceptions of indigenous understandings of inclusive constitutional- building processes are important in terms of external funding. Where external funding processes do not appreciate indigenous understandings, they will control a process which will ultimately suit their agendas but which lacks genuine indigenous understanding and appreciation. In the end, we get a project that not only wastes foreign assistance but may provide additional meaningless laws that if they are ever used may be constantly challenged in court.

A good appreciation of culture and the values that underpin it should act as a catalyst for any successful constitutional development process. It is when such processes disregard salient and important cultural values that culture may become or seen to be a hurdle in the constitution-building process.

Personal insights

Constitutional culture and societal culture may be different in form and substance but speak the same language. Both cultures function on the need to provide the best for human beings, human dignity or society at large. Whether written or not, both cultures have to try to be as close as possible to set clear parameters for the exercise and control of those in positions of power for the benefit of the citizens. Similarly, constitutional culture and societal culture are only as good as their custodians. No amount of perfect constitutional drafting can save a Constitution from custodians that won't respect it.

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