

The Bougainville independence referendum consultations impasse

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Abstract

The mandatory Joint Papua New Guinea–Bougainville Leaders Consultations on the implementation of the 2019 referendum results provided for by the relevant laws reached an impasse. The disagreement is due to diverse interpretations of the *ratification* provision of Bougainville Peace Agreement (BPA) article 311a. PNG interprets that the National Members of Parliament are deliberating on consultations outcome and voting on Bougainville’s political future, while Bougainville argues that its political future has already been determined via a 97.7% vote for independence and ratification is merely endorsement by the PNG parliament.

Keywords: Referendum, non-binding, consultations, ratification, independence, impasse and constitutional

Introduction

This paper presents issues pertaining to the joint PNG and Autonomous Bougainville Governments (ABG) consultations on 2019 Bougainville independence referendum results. These consultations are focused on how the referendum results will be translated towards determining lasting Bougainville’s political future. In progressing the implementation of the referendum results, three consultation were held in 2021, in which the impasse was reached at the third meeting in December 2021.

The referendum was held between 23 November and 7 December 2019. Voters were offered the choice of greater autonomy from PNG or independence, after lengthy consultations with Bougainvilleans throughout the main centres in PNG and within the region through a ‘referendum-ready’ program (Regan, 2019). With 87.5% Bougainvilleans and other eligible voters qualified under BPA article 135 turning up, 97.7% voted for independence. The referendum is considered to have been free and fair, in fact the mood was peaceful and festive (Bougainville Referendum Commission, 2020).

The impasse has somewhat stalled the process. In an attempt to address the dispute, interpretation of the *ratification* was sought from the PNG’s State Solicitor and the Attorney General. Both recommended s349 of the PNG Constitution, a provision in the Constitutional Regulations as a way-forward, which commenced in April of 2021.

Theoretical Conception

Scholars, policy makers and legal experts globally discuss referendum and implementation of its results from various perspectives. According to Saraswat (2017) and Benz (2003) referendums are legal mechanisms by which a government refers any issue of public importance such as repealing or acceptance of laws, and more so the right to self-determination for the people to choose by popular vote. Qvortrup (2018) described referendum as people’s veto power used for general purposes for ensuring checks and balances for policy/law making. In most cases the outcome of a referendum is legally binding under the law of the state. Binding referendums usually have thresholds, both for the voter turn-out and the final results. In some cases, a referendum is synonymous with a *plebiscite* while in others there is a very small difference, as plebiscite is a kind of a referendum held by the government to determine the strength of the desire for self-determination seeking views of a targeted portion of the people. The outcome of a plebiscite may or may not be legally binding on the government.

One critical aspect highlighted in Duhaime’s Law dictionary (2012) is, although a referendum may carry great political weight and a government may choose to act on the basis of the results obtained, such results are non-binding in the absence of legislation requiring a government to act. Saraswat (2017) highlighted the following advantages and disadvantages of the referendum.

Advantages:

- A referendum is regarded as the purest form of governance, on the basis that it extends a platform for the voters to directly express their voices on important national issues.
- It is one of the most effective methods of empowering citizens vis a vis government.
- It helps to resolve the most difficult issue amicably.
- It gives legitimacy to the decision taken by the people.

Disadvantages:

- Limitation in terms of complexity of the questions that may be placed before the people for approval. Every issue cannot be reduced to simple Yes or No.
- The citizens may not be able to place national interest above their own while voting in the referendum. Thus the outcome may not be in the national interest.
- The outcome of referendum tends to support the majority viewpoint and may ignore the interest of minorities. It is especially considered to be unsuitable in a diverse country like India.
- Voters may decide an issue with relatively little information and may heavily rely on political messaging communicated by political leaders. Hence, the outcome of a referendum need not reflect the collective opinion of people, and may instead demonstrate the opinion of a political alliance.
- The legitimacy of a referendum is virtually lost if the margin of approval or disapproval by voters is very narrow. In such cases instead of resolving an issue, it may complicate an existing issue.

In the context of Bougainville's referendum framework, the question of self-determination is the third pillar of the BPA, signed in Arawa on 30 August 2001 which ended the conflict (1988–1997) (Bougainville Peace Agreement, 2001). Part C of the BPA (Agreed Principles on Referendum) includes a requirement for amendments to PNG's constitution to guarantee a referendum. These were duly made in the form of Sections 338–343 of Part XIV ('Bougainville Government and Bougainville Referendum'), now part of PNG's constitution.

The legal basis for the referendum includes not only amendments to PNG's constitution but also the Organic Law on Peace-Building in Bougainville – ABG and Bougainville Referendum – Provisions Relevant to the Referendum; and sections 193 and 194 of Bougainville's constitution. The current PNG-ABG consultations phase are guided by s342 of the PNG Constitution, and also article 311 of the BPA which states:

(a) The amendments [to PNG's constitution] will provide that the outcome will be subject to ratification (final decision-making authority) of the National Parliament (b) The autonomous Bougainville Government and the National Government will consult over the results of the referendum (PNG Constitution, 1975).

Procedurally, this consultation phase will be concluded with an agreement stating whether Bougainville will gain independence or not. This agreement will be tabled for ratification (final decision-making authority) by the national parliament as per BPA 311a referred to above.

The three consultations held in 2021, commenced in Kokopo, East New Britain Province, in May. In this meeting, the two governments acknowledged that the majority of Bougainvilleans chose the independence option as their political future. The second was held in Wabag, Enga Province in July. Here the two parties agreed to a political timeline comprised of activities leading up to the determination of the Bougainville's political settlement. The timeline includes a transfer of all s290 powers effected by the end of 2022 and a constituent assembly to be established by 2024 with the aim of achieving full independence by 2025 (Regan, 2021). At the second meeting, Bougainville had sought an agreement for establishment of a political timeline comprised of steps through which PNG will give consent to Bougainville's independence and

would outline transition arrangements. Key transitional issues include planning a new constitution for an independent Bougainville and assuming the sovereign powers listed in s289(2) of the PNG Constitution, which were retained by the PNG Government until Bougainville's political future is fully secured. At the third meeting which was held in December 2021, it led to an impasse (Toroama, 2021). The parties diverged on their preferred path forward, each derived from the PNG Constitution: PNG sought to invoke a constitutional regulation from s349, whilst Bougainville opted for a treaty approach based on s342. Section 349, appearing at the end of Part XIV states:

(1) The Head of State, acting with, and in accordance with, the advice of the National Executive Council, may make Constitutional Regulations not inconsistent with this Part prescribing all matters that by this Part are required or permitted to be prescribed or that are necessary or convenient to be prescribed for carrying out and giving effect to this Part.

(2) The Constitutional Regulations under Subsection (1) shall not be made, amended or repealed except with the approval of the Bougainville Executive in accordance with the Bougainville Constitution and the Agreement. (PNG Constitution, 1975).

PNG's delegation argued that this provision will provide legal authority for the process for managing post referendum matters, especially the ratification provision by the PNG parliament and new arrangements by way of determining Bougainville's political future.

In Part XIV of PNG's constitution, s342 (Referendum Results and Implementation) states:

(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 of any decision made in the National Parliament regarding the Referendum (PNG Constitution, 1975).

In regard to these (above) provisions as alluded to by Qvortrup (2018) it is absolutely imperative for both the voters and authorities to understand the processes of the referendum to produce a credible, legitimate and accepted outcome, pertaining to its benefits, shortcomings, drawn lessons from other countries and jurisdictions for its design and implementation. With regards to the Bougainville's referendum, there were diverse views: The ABG team argues that joint ABG–PNG leaders' consultations will agree on the political future and that the outcome will be in the form of a treaty, while PNG opted for Constitutional Regulations whereby the laws are given prominence to determining Bougainville's political future. This is the essence of the impasse, which has now moved to next steps where both parties agreed for Era Kone covenant to serve as a framework for the development of the Constitutional Regulations. The intent here is that the constitutional provisions that provides for determination of Bougainville's political future will be given prominence, and any thing that is inconsistent with the constitution will not be considered.

The non-binding aspect of the referendum

The current divergence of views held by the parties in the consultations revolves around the non-binding nature of the referendum and the various understandings of the word 'ratification' as used in article 311a of the BPA. Among the commentators, Bohane (2019), Badley (2019), and McKenna and Ariku (2021) noted that the referendum was non-binding. Regan (2019) remarks that 'the use of the word, has caused considerable confusion' but states 'the outcome of the referendum is not binding on either government'. Accetti and Oskian (2020) described this type of referendum as consultative (as opposed to legislative). Dziedic and Saunders (2019) state: Whatever the precise meaning of the term 'ratification' in the context in which it appears, in practice it seems appropriate for the PNG Parliament to:

1. formally acknowledge the results of the referendum... and
2. receive and accept the agreed outcomes of the consultation in due course, and take whatever action is needed to give it effect.

Eminent persons

‘Eminent persons’ refer to PNG and Bougainville leaders who, in the early 2000s, were involved in the series of negotiations from which the foundational laws were derived for peaceful settlement of the 1989–98 conflict. Their involvement in the present consultations is deemed necessary from the perspective that they know the original intentions and the context of the relevant laws that establish and implement Bougainvillean Autonomy arrangements.

Consistent with the discussions by McKenna and Ariku (2021) the eminent persons group says the non-binding and ratification provisions originated from an international intervention by then Australian Foreign Affairs Minister Alexander Downer, when a compromise in the stalled peace agreement was reached by both sides agreeing to having a constitutionally required non-binding referendum, the results of which would be the subject of consultation (Regan, 2019). At that time this posed a challenge to both PNG and Bougainville: Bougainville was to showcase restoring normalcy in governance and delivery of goods and services, while PNG was challenged to demonstrate that it can effectively restore peace and harmony, delivery of goods and services and, in general, re-development for post-conflict Bougainville. Section 339 of the PNG constitution emerged from this arrangement, where good governance and weapons disposal were pre-requisites to the appointment of the final referendum date.

This group sees the non-binding and ratification provisions as an outcome of mediation in peace negotiations which had required significant effort from both PNG and Bougainville. Drawing from the original intentions enumerated by the eminent persons view, ratification is seen as a symbolic action to be performed by the PNG government in formalising the decision reached at the referendum and further consolidated by leaders’ consultations. The eminent persons further allude that at the original (1998-2001) peace negotiations, the ratification was intended to give a level of comfort to the PNG government. On the other hand, Regan (2019) observes that during the compromise negotiations in December 2000 ‘Bougainville conceded that the referendum alone would not decide the question of independence. In any case, ratification should not be given the highest prominence, overshadowing referendum results.

PNG versus Bougainville positions on ratification

The Bougainville team argues that the decision on their political future has been substantially determined by the people themselves, by voting 97.7 per cent for separate independence, from the two choices on the ballot sheet, rejecting the greater autonomy option. Bougainvillean leaders argue that the overwhelming vote for independence is the fundamental determination from which the next steps going forward should be focused on, in administratively developing transition arrangements for Bougainville to assume full sovereignty. This position was predominantly reflective of the timeline agreed to at the second joint consultations referred to above. The ratification provision should be merely an endorsement of the agreement reached at consultations as per s342 above. This parliamentary process, a vote by PNG parliamentarians, should be a consensus-oriented vote, otherwise the ratification would be, in effect, another referendum by PNG parliamentarians, which would overshadow the 2019 referendum results.

On the other hand, the arguments by PNG include, first that the ratification process is taken to mean that PNG parliamentarians will take a vote in the National Parliament to determine the final political status of Bougainville as per BPA article 311a. This position was expressed by the PNG Prime Minister at the first consultation when appealing to Bougainvilleans to accept if Parliament will say no to independence (Marape, 2021). This implies the referendum results are merely an advisory indicator to guide leaders’ consultations. In any case, there is no specific mention of the word ‘*non-binding*’ in the laws (Peace

Agreement, Organic Law on Peace Building and both the Bougainville and PNG constitutions) that govern the referendum.

With their position on ratification PNG argues that Bougainville must wait until consultations are concluded, and the final decision on Bougainville's political future is ratified before they proceed with sovereign aspects/powers, in particular the amendment of PNG's constitution part IV, as well as assuming of 289 powers. PNG argues such action can be deemed as pre-empting the outcome of the consultations and the ratification.

Observations

One likely contentious issue is that s117 of PNG's constitution already has provisions on treaties, so PNG might push to apply it in its original meaning, which may not be within the context of Bougainville and likely to result in an unfavourable outcome for the Bougainvillean side.

There are politically oriented arguments outside of legal parameters of the referendum result consultations: s342 of the PNG constitution states 'consultations will be over the referendum results'. For example, PNG argues that granting of independence to Bougainville might set precedence for fragmentation of PNG when its provinces with similar features (e.g. resource rich) will request the same.

PNG also argues there is an absence of a constitutional basis for granting Bougainville independence, which is actually a question of sufficiency of s338 of the PNG constitution where referendum choices provide for a separate independence option.

Bougainville argues that more than 15,000 lives have been lost for this cause, as mentioned by Bohane (2019), so the people's wish consolidated via the referendum results cannot be watered down with some political, procedural or even legal jargon. This indicates a need for effective management of the leaders' consultations.

While pursuing the constitutional regulation approach in determining Bougainville's political future, in the event there maybe continued stalemate the intervention of a moderator (Mr. Bertie Ahern) maybe required to facilitate dialogue. An additional option is to utilize dispute-resolution mechanisms (mediation, arbitration and courts) as per sections 334, 335 and 336 of the PNG Constitution. By way of recent progress, in January of 2022, PNG's State Solicitor provided legal advice that there are general aspects that have a bearing on determining whether an aspirant state is qualified, and he enumerated responsibility of the parent state as well. The criteria are: having a permanent population, fixed territorial boundary, effective governance and capacity to enter into international relation. He further notes that Bougainville substantially lacks the fourth criteria. Recently the issue has been escalated to seeking views of the PNG's Attorney General who also recommended constitutional regulations as the way-forward.

Conclusion

Amidst the legal and procedural controversies, the path to determining Bougainville's final political future remains obscure. Whether the *Era Kone Covenant* which intends to conclude the consultations over the referendum results and facilitate development of the constitutional regulations will peacefully resolve the impasse remains unknown. Obviously, Bougainville's position is a desire for nothing less than full independence as re-enforced by their president who requested PNG to 'let his people go' at the December 2021 consultations.

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