

Tuvalu's 2023 Constitution

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Background

Tuvalu has had two constitutions prior to 2023, the independence one of 1978 which was later amended to a large extent with the influence of Tuvaluan politicians in 1986.¹ In 2016, Prime Minister Enele Sosene Sopoaga tried to fulfill an election promise by creating a constitutional review project with the funding and assistance of United Nations Development Project and Australia.² By 2019, the constitutional review committee could not agree on many amendments in the constitutional bill therefore it was not passed at the first reading in parliament.³ The Kausea Natano government in late 2019 established a new parliamentary select committee to revisit the bill and following the work from the previous committee which had 66 contentious issues decided to continue with 40 of these.⁴

Climate Change and Statehood

Pre-2023 constitutions never mentioned climate change nor a permanent claim over its territory irrespective of climate change

impacts. The new constitution articulates the response Tuvalu has with regard to the climate crisis. In Section 2 it sets out Tuvalu statehood: “(1) The State of Tuvalu within its historical, cultural and legal framework shall remain in perpetuity in the future, notwithstanding the impacts of climate change or other causes resulting in loss to the physical territory of Tuvalu.”

The section goes on to define the area of Tuvalu, affirming that the baseline coordinates declared in a schedule to the Constitution “shall remain unchanged, notwithstanding any regression of the low water mark or changes in geographical features of coasts or islands, due to sea-level rise or other causes, until and unless otherwise prescribed by an Act of Parliament.” The significance of this for Tuvalu is that it is redefining statehood in the hopes that the Pacific, Small Island Developing States, Alliance of Small Island States, and like-minded countries will recognize this through bilateral agreements and consider passing similar legislation.

¹ Mohammed Mozeem, ed., *Tuvalu Constitutional Review Project Annual Report (Jan-Dec 2017)* (UNDP), <https://info.undp.org/docs/pdc/Documents/TUV/Tuvalu%20CRP%20Annual%20Project%20Report%20Jan-Dec%2017.pdf>.

² “If Re-Elected, Sopoaga Pledges to Review Tuvalu Constitution,” *Radio New Zealand*, February 5, 2015, <http://www.radionz.co.nz/international/pacific-news/265355/if-re-elected,-sopoaga-pledges-to-review-tuvalu-constitution>.

³ Interview with Parliament staff, 2022.

⁴ Ibid.

Bill of Rights and Traditional Standards, Values, and Practices

The pre-2023 constitution only stated in Section 15 that a court may have regard to traditional standards, values, and standards when determining if an act or law is reasonably justifiable in a democratic society. More emphasis is placed on traditional standards, values, and practices in the 2023 Constitution as the government wanted to strengthen the customary ways of Tuvaluan life which is expressed in the principles Section 4 states as the values Tuvalu seeks to maintain. The 2023 Constitution has inserted a wholly new provision, Section 43, which states the various duties and responsibilities of Tuvaluans as a declaration of the core values of Tuvaluan society. The courts are bound to consider these duties and responsibilities when dealing with any issues arising from the application of the rights and freedoms enshrined in the constitution.

In essence, no progress has been made towards the protection of human rights, but I believe this is more so due to the strong personal views from members of the committee rather than the views of the public.

Separation of Powers

The new Section 113, limiting when a vote of no confidence can be tabled in Parliament, is

a major political reform. This was a suggestion I discussed in length in a research paper which I had adopted from Papua New Guinea to ensure there are limits placed on votes of no confidence which, if successful, leads directly to changes of government and political instability.⁵ Now, only 12 months after a parliament term begins and prior to the last 12 months of a parliamentary term can an MP put forth such a motion. This will at least give the new government a year to work on their main concerns and security from being ousted.

In terms of judicial reforms, any Tuvaluan who has practiced as a barrister or solicitor for more than five years in Tuvalu or another country with a similar legal system may qualify to become a judge now.⁶ Further, the new constitution has set up a judicial service commission that appoints judges in Section 126. This not only removes the conflict of interest that cabinets previously had in appointing judges including the chief justice, but it also adds strength to the separation of powers in this new constitution.

Equality Before the Law

The pre-2023 constitution non-discrimination Section 27 included race, place of origin, political opinion, color, religion, or lack of religious beliefs. In the 2023 constitution, disability and sex is added to the list of groups for the non-discrimination clause. This is a significant

⁵ Lisepa Paeniu, "Can Parliamentary Democracy Function More Effectively in Small Pacific Island Countries Such as Tuvalu and Nauru," *Journal of South Pacific Law* 14, no. 2 (2012): 6-19, <https://www.usp.ac.fj/discipline-of-law/wp-content/uploads/sites/128/2022/01/How-Can-Parliamentary-Democracy-Function-More-Effectively-in-Small-Pacific-Island-Countries-such-as-Tuvalu-and-Nauru-Lisepa-Paeniu.pdf>.

⁶ THE CONSTITUTION OF TUVALU 2023, § 127.

change to support gender equality and promote the recognition of the need to address a more disability friendly environment in policy and law.

Independent Entities

Unfortunately, the 2023 Constitution has removed the Public Service Commission (PSC) powers of independence from the cabinet about the appointment of the top government advisory positions (constitutional offices) altogether. In Section 163 of the 2023 Constitution, the secretary to government, secretaries to ministries, commissioner of olice, and the attorney general is now appointed by the head of state acting in accordance with the advice of the cabinet given after consultation with the PSC.

Further, the attorney general has prosecutorial powers reassigned to the director of public prosecution.⁷ Another responsibility removed from the attorney general is that of taking part in Parliament.⁸ This is again directly linked to the direct conflict of interest the attorney general has when advising the cabinet and then again in Parliament sitting where members of opposition also require the attorney general to give impartial advice. To remedy the matter, it was imperative to have a parliamentary counsel to sit in parliament meetings and assist in a more objective manner.

Conclusion

The new constitution reflects the views shared by a majority of Tuvaluans by strengthening traditional authorities and emphasizing cultural values, standards and practices. However, the minorities remain unprotected through the guise of cultural practices and traditional values. The personal interests of politicians controlling the reforms directed the discussions which led to the contents of the final draft. Given that there were more than twenty contentious issues which were swept under the mat from the previous review, it is unfortunate that the constitutional Bill was not put to the people by way of referendum. Nevertheless, credit is given to having statehood defined in a new way, sex and disability added to the non-discrimination clause, judicial reforms and political reforms to curb political instability. Should there be another review in the next forty years it should be conducted by an independent commission as Tuvalu has a large well-educated population who could better serve the people without any personal or political interests leading the discussion.

⁷ THE CONSTITUTION OF TUVALU 2023, §162.

⁸ THE CONSTITUTION OF TUVALU 1986, §79(5).

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