

# 1

## The rule of law: principles, issues and challenges

In this chapter, I set out the analytic frameworks and theoretical positions that inform and govern this study, and introduce the issues that I will focus on in the remaining chapters. The rule of law, both as theory and as praxis, occupies the centre and the circumference of the entire edifice. And justice, broadly defined in procedural and substantive terms, constitutes the overriding test of both legal theorisation and the social practice of law.

### **The paradigmatic significance of the rule of law**

The rule of law is a site of multiple meanings and nuances—a contested site. There is a broad consensus, however, concerning the paradigmatic significance of the rule of law: it is ‘an unqualified human good’ that should never be belittled through intellectual abstraction or by giving up ‘the struggle against bad laws and class-bound procedures, and to disarm ourselves before power’, thereby exposing citizens of the body politic to ‘immediate danger’ (Thompson 1975:266).

Subject to qualifications and caveats set out below, this text accentuates the value of the rule of law as the legal and moral warrant of government rule, and, equally importantly, as a bridle on government powers. This is a basic dogma in Western jurisprudence, from Aristotle’s idealisation of law as reason without passion to St Thomas Aquinas’ natural law theory and Vincent Albert Dicey’s strictures of positive law. Take away the rule of law and government becomes a euphemistic government of men—naturally vulnerable to extravagant notions of power—and citizens surrender themselves to the discretion of political rulers. History has shown (sadly, I might add) that even the best rulers

have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith.

A critical issue is the actual application of this 'unqualified human good' in Pacific societies. This is the ultimate test of the significance of the rule of law—whether or not it has practical effect in the life of a given community, and the nature—good or bad—of that effect. In order to adequately appraise this, the rule of law must be approached as both legal theorisation and as praxis framed in jurisprudential terms. By following the complex operation of the rule of law, we endeavour to evaluate its worth—whether it has procured justice and curbed injustice, where it has failed when its principles are bent and twisted to suit the whims of rulers, how its noble values are falsified in practice when it becomes an instrument of arbitrary rule, or when it is violated to serve the interests of sections of the community. To do this, investigative analysis must enter into the fray of the communities in which the rule of law is supposed to operate. My interest in the broader jurisprudential debate about the nature, meaning and function of the rule of law is, therefore, more specifically circumscribed by how Western conceptions translate into Pacific theory and praxis. In pursuing this focus, the rule of law must be treated as more than a theoretical construction or an abstract model of some utopian praxis divorced from practical reality.

The rule of law, in other words, cannot be sensibly detached from the wider normative context of a community's history, politics, morality, ethics and culture. The grounding of the rule of law in concrete existential contexts thus broaches the following caveat of caution: for the rule of law to have any force or value at all, there must be a shared commitment from both government and governed to uphold the dictates of the law; such a commitment is based on common respect for the foundational values deemed essential to a just society, and in the absence of which the rule of law is not likely to command a powerful following.

The practical implication is clear: in order for the rule of law to compel fundamental change in society and to cause a public stir when it is violated or even abandoned, it must first win the minds and hearts of the people, command their respect and satisfy their acquiescence therein. Adopting a postmodern perspective, '[w]e start from where we are', (Rorty 1989:198) with our moralities and notions of justice that are always embedded in our different cultures. As Alasdair MacIntyre (1984:265–6) puts it, '[m]orality which is no particular society's morality is to be found nowhere'. Put simply, the rule of law must be firmly

grounded in the existential reality of a given community's political morality, ethical judgment and cultural underpinnings. Failing that, we run the risk of reducing the rule of law to just an abstract model of rules without any practical relevance.

The significance of the rule of law also lies in its ambivalent intersection with democracy: it both confirms and limits democracy by curbing the excesses of majority rule. Accordingly, democracy is conceived, not as the simplistic notion of majority rule, rather, as majority rule subject to constitutional limits and controls. The underlying logic for this is simple—the will of the majority is important in that it provides the mechanism for making decisions for the body politic. But there is always the danger that majority rule may degenerate into the tyrannical rule of despots who ruthlessly destroy rights, enact oppressive laws and casually manipulate the rule of law to suit their whims.

The rule of law, therefore, mandates that even democratic majority rule is limited by law: '[t]he first requirement for a liberal democratic society...is the rule of law' (Walker 1995:187). Majority rule is important; but, as T.R.S. Allan (2001:25) has pointed out, it deserves 'no special political or constitutional reverence except in so far as it is truly consistent with the values of equal human dignity and individual autonomy: politics, in its ordinary institutional forms, should be the servant of justice rather than its master'.

The limitation of government rule by law is the essence of constitutionalism, privileging the rule of law and setting out the rules that define government powers and their limits in advance of government action. Though engendered by the emergence of Leviathan states in the past, this constitutional wisdom is equally relevant today given the inherent proclivity of modern states (including Pacific nations) to enlarge their orbit and increase their power. Constitutionalism thus appropriately seeks to pre-empt the emergence of more political monsters through the practice of limited and enumerated government powers.

It may be noted that Samoa (like most Pacific nations) lies squarely on this trajectory of constitutional thinking. The fact that Samoa has a written constitution is important.<sup>1</sup> As a written text, the *Constitution of Samoa 1960* is a positive, bold and highly evocative legal metaphor expressing optimistic faith in the power of the written word to construct reality and impose order on the potentially disordered. Even more critical is the constitutional mandate that the Constitution is supreme

law (article 2) and that the Samoan judiciary has power to declare invalid laws that are inconsistent with constitutional provisions (that is, to the extent of the inconsistency) pursuant to article 2(2).<sup>2</sup> The supremacy provision, fortified by the inconsistency clause, is not about the supremacy of a written document; rather, it means that law is not, and should not be, the arbitrary will of the lawmakers, usually grounded in caprice and self-interest; that state laws bind both government and governed; and that the Constitution creates the institutions of government, defines their powers and functions, and imposes limits on those powers. That is, parliament, the executive and the judiciary in Samoa are creatures of the Constitution—created, governed, limited and controlled by the Constitution. The rule of law takes priority over every institution of the state.

The precedence of the rule of law is important for the citizens of the state. Confronted with a political construct that is always predisposed to extend its reach and increase its power, citizens cannot help feeling overwhelmed by the machinery of government. Given also that the state is involved in virtually all areas of life, citizens are constantly threatened by the arbitrary use of government powers. This highlights the need for better protection of citizens' rights and liberties. The written Constitution, given in the name of the people as supreme law and one that embodies an entrenched bill of rights, goes a long way towards meeting that need through the Constitution's control of the powers and reach of government.

But herein lies a familiar contradiction—a Constitution that, as supreme law, overrides the representative will of the people appears to undermine democracy in a mighty act of anti-majoritarianism and renders the term constitutional democracy almost oxymoronic.<sup>3</sup> To elucidate this matter, it can be purported that the threat of a despotic government with unlimited powers is always real and immediate. Shielding citizens against that threat, constitutional democracy presents a bulwark against despotism. That bulwark is the rule of law. Ultimately, constitutionalism is about keeping government under control; it is 'the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order' (Hamilton 1931:255). This order is achieved by limiting the reach of government and setting out fixed, *a priori* ground rules for the exercise of public power.

Finally, the intersection between the rule of law and good governance, deemed to be a precondition to development, is now a

common motif in reform discourse. Good governance apparently means different things to different people.<sup>4</sup> A recommendation of the authors of the *Eminent Persons' Group Review of the Pacific Islands Forum* regarding good governance in the Pacific is noteworthy.

Good governance inspires confidence among citizens and partners, both regional and international. In fact, we would argue that observation of the principles of good governance is vital to the future development of the Pacific. The promotion of good governance must be carried out in ways that are meaningful to Pacific societies and people. Often in the Pacific there is tension between inherited political and legal structures and pre-existing cultural traditions. There is a need to work towards achieving a better 'fit' between the two in order to achieve more relevant, responsive and accountable patterns of governance (Eminent Persons' Group 2004:n.p.).

Within the diversity of meanings and interests that now inform the good governance agenda, the centrality of the rule of law is a constant and resounding theme. This seems reasonable since public and private sector reforms, protecting rights and liberties, reforming property rights and reducing poverty—all presuppose the operation of a strong rule of law. There is, in fact, a growing conviction that all aspects of good governance and development hinge on the rule of law, and that promoting the rule of law is a way of advancing both principles (human rights, accountability, democratic forms of government) and profits (by establishing free, unregulated markets). Now offered as a panacea for the social, political, legal and economic ills of developing economies, the rule of law has become a battle cry of the reform movement. Accordingly, improving and strengthening the rule of law is a major objective of many aid projects in developing economies, including those of the Pacific. Beyond the outcomes of those projects and the reasons for their success or failure, the broad issue for present purposes is the ambiguous meaning of the term rule of law and its problematic use as an engine of socioeconomic development.

### **Rule of law: the problem of definition**

It is difficult to ascribe a precise meaning to the term rule of law as it is a contested concept with an 'unstable meaning' (Dallmayr 1990:1451). Is it a mere Aristotelian ideal to which every just state should aspire? Or perhaps it is nothing more than a refrain of the politico-economic jargon that drives reform, one that conflates the different goods of 'democracy promotion' (Alford 2000:1678). Is it nothing more than a facade masking the rule of a class for the protection of property interests

as classical Marxists would have it,<sup>5</sup> or a means of facilitating ‘exploitation and discrimination’ (Adelman and Foster 1992:39), masquerading as political democracy? To what extent has it become a reified concept itself justifying the reification of other concepts such as property rights, contract, trusts and wills? And if so, the possibility exists that such reification is not only a distortion but also ‘a form of coercion in the guise of passive acceptance of the existing world within the framework of capitalism’ (Russell 1986:19).

Given the ‘unstable meaning’ of the term rule of law, the issue is the ideological abuse of the concept. Beyond its usual rhetorical significance, the rule of law rather unfortunately betrays an ambivalent character as both a blessing and a threat—

an object of understandable suspicion as much as one of reverence: its uncertain and contested content allows it to be readily invoked in support of positions whose cogency might not withstand careful scrutiny (Allan 2001:1).

Part of the problem is that the rule of law is a complex phenomenon combining different legal, moral and ethical, political and democratic principles. In addition, every proposed definition faces a number of issues—the formal/normative (substantive) distinction, the internal/external perspective dichotomy, the legitimate functions of the law, and so forth. The rule of law, however, can and must be understood as the guiding ‘principle of legitimate governance’ and which, as a basic component of liberal constitutionalism, forms ‘an integrated theory of constitutional government’ (Allan 2001:4, 31). This is a principal tenet of the guiding theory for this study.

### **Rule of law as the governance of rules**

Whatever else the rule of law is, it is fundamentally a form of social control—‘the enterprise of subjecting human conduct to the governance of rules’ (Fuller 1969:124). There seems to be an implicit assumption that people will follow the rules set down by their institutions (including the state, social clubs, churches, schools and other forms of human association) because human beings are ‘rule-following animal[s] as much as purpose-seeking one[s]’ (Hayek 1973:11).<sup>6</sup> For the rules to have maximum effect they must be widely known, concretely rooted in the community’s political culture, and actually command the citizens’ assent.

This optimistic faith in the governance of rules,<sup>7</sup> and the alleged human predisposition to follow legal rules aside, rule-following is a

complex phenomenon. A common explanation is the fear of punishment when rules are not obeyed (Bentham 1970), but such negative rationales are not complete. In more prosaic circumstances, people obey the law for reasons other than the fear of sanctions, which suggests that more positive dynamics are at play. The predisposition to adhere to society's underlying political morality is one important consideration. Invested with pre-emptive authority, political morality demands obedience to institutional rules, perhaps as a moral duty or simply as a matter of ordinary prudence.

In some contexts, rule-following is also a function of custom. Max Weber described this as 'a result of unreflective habituation to a regularity of life that has engraved itself as a custom' (Weber 1966:12). Custom, broadly defined, includes mores, institutions, traditions, protocols, practices and processes that together make up the sum total of a people's way of life. Embedded in custom are the community's normative rules and the entrenched reasons for rule-following. The proposition that custom is a legitimate source of law, legal validity, authority and normativity (subject, for example, to the requirements of justice, such as respect for individual liberties) is a major refrain running through this text.

In summary, the different explanations show that rule-following is a complex phenomenon that resists reductive description.<sup>8</sup> The varying explanations are nevertheless based on the common presumption that rule-following results in the attainment of some common good—social equilibrium, public order, security and justice. The extent to which rules and behaviour correspond is another matter.

### **Beyond legal rules: procedure and substantive evaluation**

Beyond the general (though not universal) recognition of the rule of law as the governance of rules, there is no agreement regarding the nature of those rules. Is the law only rules of evidence and formal procedure, or more? This is the focal point of the debate between proponents of a formal definition of the rule of law and those who argue for a normative or substantive meaning.

The main difference between the two positions is that formal theories generally posit 'an important distinction between law and justice' (Allan 2001:23), a distinction wherein justice is construed as an external criterion of evaluation. Eschewing (subjective) external evaluations (moral, ethical, political, etc), a characteristic feature of formal theories

is their professed moral neutrality and the exclusion of value judgments. The rule of law, according to a formalist reading, is strictly defined by formal characteristics: it is prospective, open and clear, and is relatively stable; the lawmaking procedure is governed by stable, open and clear general rules, and an independent judiciary. This distinction is predicated on the concern that by extending the meaning of the rule of law beyond procedural justice, as defined by the rules of evidence and formal procedure, procedural justice will be confused with some other theory of justice (for example, religious or racial). Understandably, in a society like Fiji, with its ethnic and religious pluralism, such a theory is not likely to command universal assent. The issue is the potential divisiveness of competing or conflicting versions of justice, once we leave the certainty and formalism of the terrain of procedural justice. Furthermore, formal theorists argue, it is naïve to hold that the rule of law means the rule of the good law, one predicated on some moral ideal of justice. 'We have no need to be converted to the rule of law', Joseph Raz (1979:211) argues, 'just in order to discover that to believe in it is to believe that good should triumph'.

I take the position that the rule of law consists not only of rules of evidence and formal procedure, but also standards and principles. As the authors of the *Document of the Copenhagen Meeting of the Conference on Human Dimension of the CSCE* put it,

[t]he rule of law does not merely mean formal legality which assures regularity and consistency in the achievement and enforcement of democratic order, but justice based on the recognition and full acceptance of the supreme value of the human personality providing a framework for its fullest expression (Commission for Security and Cooperation in Europe 1990:3).

Justice as an external criterion of evaluation, rooted either in some divine command (as in Samoa with its privileging of God's commandments and Christian principles),<sup>9</sup> or in human nature (conscience and/or reason), is indeed an essential variable of jurisprudential analysis. Completely eliminating justice and other substantive values from the jurisprudential equation impoverishes legal theorisation. It also renders unjustifiable the claim to substantive legitimacy that formal theorisation is at pains to sustain. The impropriety of an *a priori* out of court rejection of substantive principles thus warrants an inclusive jurisprudence that does not screen out substantive considerations like justice and equity, but instead makes them the criteria and goal of the rule of law.



My point is that, as the guiding principle of good (that is, legitimate) governance, the rule of law cannot afford to exclude or ignore matters such as the monopolisation of political power by the *élite* few; inequities in the treatment of rich and poor, the influential and the impotent; and economic injustices—unremedied by the courts owing to institutional overpoliteness, lack of jurisdiction, or sheer weakness. Excluding or ignoring such matters destroys the moral fabric of the community we are trying to aid, creates a new set of socioeconomic problems without solving old ones, and constructs new forms of exploitation and alienation, and/or reinforces existing ones. In light of those potential problems, good governance and development agendas, and the rule of law that legitimises them, cannot afford to shut up normative principles. These, too, are legitimate parties to a negotiated solution, one that respects the social and moral conscience of the community. Sometimes this requires us to move beyond a one-dimensional view of the world, and demands a better understanding of the morality (MacIntyre 1984), the ethics, and the notions of justice that regulate the lives of our intended beneficiaries in the Pacific and elsewhere.

The following definition accordingly risks the combination of procedure and substance. For the purpose of legitimate governance, a rigid distinction between the two is ‘artificial and unworkable’ since they are ‘closely linked in ways that a satisfactory theory of the rule of law must accommodate’ (Allan 2001:1, 26). This has important implications for legislators whose constitutional duty is to enact laws that not merely authorise the delivery of public goods but are consistent with ‘an acceptable order of justice’ (Allan 2001:41) achieved through public debate. Implications for the judiciary are also significant. In undertaking its constitutional role of checking the abuse of power by both the legislature and the executive, the courts should ensure that the state adheres to ‘a general scheme of just governance’ (Allan 2001:41). In a sense, this requires the courts to move beyond their preoccupation with procedural matters. Private citizens, while submitting to the promulgated laws of the state as demanded by their right of citizenship, nevertheless reserve the right to judge whether or not those laws are just, fair and equitable. They should never abdicate their moral judgment to the state.

Within this broad framework of legitimate governance, the rule of law is critical. The principle of the supremacy of law is central to this connection. In Dicey’s conception of jurisprudence, the rule of law

means ‘the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government’ (Dicey 1959:202). Although the rule of law ‘has diverse manifestations’, Keith Mason explains ‘each has one thing in common: the supremacy of law over naked power and unbridled discretion’ (Mason 1995:114). Hayek similarly opposed government’s exercise of discretionary powers as inherently arbitrary (Hayek 1960).<sup>10</sup> Pushing back the increasingly interventionist state, Hayek (1960:107) stated that

[l]aw, liberty, and property are an inseparable trinity. There can be no law in the sense of universal rules of conduct which does not determine boundaries of the domains of freedom by laying down rules that enable each to ascertain where he is free to act.

The pertinent issue here is the proper extent of government discretion—when does lawful discretion become arbitrary rule? Completely eliminating government’s powers of discretion (following Hayek’s model of the rule of law) would effectively strangle government and render it powerless to undertake important functions, for example, the redistribution of wealth and the management of the national economy. Joseph Raz (1979:211) makes this point in his critique of the privileging of the rule of law: ‘Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty’. Analysis suggests, however, that instead of diluting the requirement for total government compliance with the rule of law as Raz proposes, the Madisonian solution would be most appropriate. First, empower the government to govern on behalf of citizens and, next, oblige it to control itself. On this reading, the rule of law is the antithesis of arbitrary rule and unbridled power; the rule of law constitutes a fetter on the powers of government. This is important given the increasing proclivity of modern governments (including Pacific ones) to increase their power and extend their orbit.

Pre-empting the abuse of the state’s powers of coercion, the rule of law mandates punishment of a citizen only for a proven breach of a distinct legal rule. Thus, enjoined Dicey (1959:183–4), no one ‘can be lawfully made to suffer in body or goods except for a distinct breach of the law established in the ordinary legal manner before ordinary courts of the land’. This ensures that citizens are not punished merely for criticising or disagreeing with the government, and that government itself remains a government of laws. Government ‘must act in

accordance with the law...in everything it does' (Palmer 1987:13). The law ought to bind both the governed and the government. Put bluntly, 'no man is above the law' (Marshall 1971:138). Unless the law also binds the rulers, the rule of law has no binding moral or legal force; the law becomes a sham. This is the problem with some Pacific states: lawmakers are not bound by their own laws, the law loses its legal and moral force, and the rule of law becomes a mask for the unbridled power of those in government.

Notably, according to a strictly formalist reading, the principles referred to above are encapsulated in the procedural criterion of equality under the law and related formal criteria, like certainty in the law when the laws are clear, specific about what they prohibit, understandable, relatively stable, not retrospective, and universal in their application. This is true to a large extent. Nevertheless, compliance with procedure may not provide sufficient protection against tyranny. When governments duly enact laws that rob citizens and the media of their freedoms (as recent events in the Pacific have shown), or take citizens' property without adequate compensation or with no compensation at all (as my discussion in the following chapters will show), obstruct the administration of justice (as the proposed bill on unity and reconciliation in Fiji is likely to do), and fundamentally change the nature of government from a government of, by, and for the people into some kind of business corporation (the end-result of public sector reforms now being undertaken in the Pacific), procedure does not save people from tyranny, injustice and unfairness. It is oppression, injustice and unfairness sanctioned by law.

In addition, theoretically, the formal understanding of the rule of law has its own blindspots. The discrepancy between the rules of evidence and formal procedure and the actual application of those rules is an issue, especially when there is a marked departure from the stated rules.<sup>11</sup> The selected formal characteristics also betray subjective preferences. Formal theories, in fact, proceed on the implicit presumption that compliance with the selected rules will result in a particular substantively-defined functional outcome, thus blurring the rigid distinction between substance and procedure which formal theorists are wont to maintain. Sometimes the proclaimed objectivity of formal theories is either misleading—a pretentious disengagement from the real world—or just a way of tranquilising the human senses through indifference. The proclaimed rationality of law as a predicate of formal theories similarly ignores the possibility that reason is

sometimes a function of the status quo, a servant of power politics or some other ideology, one that offers its services to the highest bidder.

But even if these issues were successfully resolved, there still remains the gnawing doubt that procedural justice will save citizens from tyranny at all. As Raz (notwithstanding his formalist inclinations) has had to admit, '[a] non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies' (Raz 1979:211). Procedure, in other words, is blind to the wider implications of either the whole legal system or specific laws, and their application to the practice of government. As a consequence, while not discounting the importance of procedural justice as a barrier against arbitrary power, we need to extend the formal conception of the rule of law to embrace 'more demanding constitutional conditions and constraints, once it is applied to the practice of law and government, while leaving ample scope for political choice according to the theories of justice that citizens and their representatives espouse' (Allan 2001:23). In the final analysis, the proper test of a theory of law is 'its capacity to illuminate the questions of legitimate constitutional governance...and here the connection between law and justice is intrinsic rather than contingent' (Allan 2001:28).

Pursuing legitimate governance, predicated on that intrinsic connection between law and justice, this study defines justice in broad terms: government's just treatment of its citizens; just and fair promulgated laws; proper exercise of government powers within prescribed limits and controls; honest performance of the functions for which government was instituted; reasonable gratification of citizens' legitimate expectations; equitable allocation of public resources; and secure protection of citizens' rights and liberties. This definition presupposes certain minimum conditions, such as a broad conception of the common good that is at once congruent with diverse systems of interests in society and transcendent of those interests vying for control of the social order. This, in turn, presupposes a shared social conscience regarding the common good.

For good governance and development propagandists, this demands getting into the mind, heart and soul of our communities of Pacific beneficiaries, and feeling the pulse of those communities (Ray 2003).

**Rule of law as guiding principle of legitimate governance: exit legal positivism; enter reciprocity, integrity and (quasi)naturalism**

The theory of law herein promoted has important implications. One is the rejection of a crude legal positivism that has nothing to do with morals or ethics (Allan 2001:6).<sup>12</sup> Although legal positivists do not strictly deny the importance of the moral, ethical and political dimensions of the law, most either push these matters to the periphery or ignore them altogether, thus effectively excluding them from serious consideration in jurisprudential analysis. I take the view that moral judgment and public ethics should occupy the centre of jurisprudential discourse, especially in this age of unbridled government powers. Thus, legal formalism, as the 'bastardisation of legal positivism' (McCoubrey and White 1993:187), should be seen to be of limited application for the purpose of legitimate governance. As Lon Fuller has noted, positive law serves 'only to fill that comparatively narrow area of possible dispute where conflicts are not automatically resolved by a reference to tacitly accepted conceptions of rightness', and outside that limited area there can be 'no sharp division between the rule that is and the rule that ought to be' (Fuller 1969:111).

For the purpose of legitimate governance, therefore, positive law and substantive principles should be treated as mutually reinforcing. In an attempt to mitigate crude legal positivism, we could adopt H.L.A. Hart's 'minimum content of natural law' (in keeping with his modified positivism) on the ground that, without such a content, 'laws and morals could not forward the minimum purpose of survival which men have in associating with each other' (Hart 1961:189). Fuller's 'internal morality of the law', as a measure of proper lawmaking, can further elucidate this position. This notion comprises eight negative criteria described as 'eight ways to fail to make law', including the use of legal rules to 'express blind hatreds' (Fuller 1969:33,168) as in the totalitarian abuses of law in Nazi Germany.

It may be noted that, whereas no elected Pacific government has yet expressly enacted into law the systematic extermination of people based on 'blind hatreds', the violations of rights and liberties that frequently erupt in some quarters of the region (for example, the coups in Fiji and the recent situation in the Solomon Islands) are no less serious. The German experiment and Pacific tentative experimentation with legal oppression constitute a resounding reminder that the positivist notion that law is whatever a sovereign lawmaking power deems to be so

(regardless of moral imperatives), while important for descriptive analysis, is of limited use for the purpose of legitimate governance. It is therefore imperative to extend the definition of the rule of law beyond an exclusively descriptive frame of reference.

In extending our conception of the rule of law as the guiding and unifying principle of legitimate governance, Fuller's notion of reciprocity is of relevance.<sup>13</sup> Legitimate governance on the basis of this notion places mutual responsibility on both the citizens and the state: citizens comply with state laws, subject to moral scrutiny; the state, for its part, fulfils its obligations in keeping with citizens' legitimate expectations. This requires the maintenance of 'channels of communication' (Fuller 1969:186) between the citizens and their state through public debate and negotiation, and dismantles the crude positivist view of the law as a 'one-way projection of authority' which short-circuits the operation of the law as a process involving the 'discharge of interlocking responsibilities—of government toward the citizen and of the citizen toward government' (Fuller 1969:33). Law, in light of this reciprocal gratification of mutual obligations, is therefore a cooperative venture between the government and the governed.

Also of relevance to the practice of legitimate governance is Ronald Dworkin's notion of law as integrity.<sup>14</sup> Rejecting exclusive legal positivism as a rigid regime of legal rules, Dworkin argues that in cases where the law is unclear, the judiciary (the main focus of his analysis) must rely on principles such as individual and minority rights. This privileging of principles as opposed to policies (for example, a government policy in favour of a subsidy for the manufacture of aircrafts justified on the ground of improving national defence) informs his opposition to legal pragmatism.

Pragmatism does not rule out any theory about what makes a community better. But it does not take legal rights seriously. It rejects what other conceptions of law accept: that people can have distinctly legal rights as trumps over what would otherwise be the best future properly understood. According to pragmatism what we call legal rights are only the servants of the best future: they are instruments we construct for that purpose and have no independent force or ground (Dworkin 1977:22).

While permitting the pursuit of diverse interests in the community, law as integrity requires state action to be undertaken pursuant to 'a single, coherent set of principles even when its citizens are divided about [what] the right principles of justice and fairness really are' (Dworkin 1986:166).

In summary, a substantive theory of the rule of law is essential to legitimate governance. That is to say, 'we should not need wait for the

concentration camps' (Foucault 1982:210) to realise all over again the evils of unbridled power. Moral indifference—in the guise of moral neutrality—gives rise to gross irresponsibility. Leslie Stephen (1907:142) illustrates the sort of acquiescence cognate to moral indifference, arguing

[i]f a legislature decided that all blue-eyed babies should be murdered, the preservation of all blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it.

Refusing to resist such a law is to 'empty the idea of the rule of law of all meaning' (Dyzenhaus 2000:172). This example reveals normative evaluation to be an essential component of the rule of law, construed and applied as the guiding and unifying principle of legitimate governance. Of course, one cannot govern the state with the Sermon on the Mount as Chancellor Bismark once retorted. But neither should citizens surrender their conscience to the state; nor should they acquiesce to a popular morality that institutionalises racism and blind hatred, oppression and exploitation for whatever reason.

I must note that deference to such substantive principles as external criteria of evaluation is in keeping with the jurisprudential theory that guides the government of Samoa and most Pacific nations.<sup>15</sup> The introduction of the preamble to the Constitution of Samoa 1960 thus declares governance '[i]n the holy name of God, the Almighty, the Ever Loving'. This is underscored by the first recital of the preamble, which affirms that 'sovereignty over the Universe belongs to the Omnipresent God alone, and the authority to be exercised by the people of Samoa within the limits prescribed by His commandments is a sacred heritage'. Extending the requirement for governance within the parameters of substantive principles, the second recital of the preamble declares that the State of Samoa is to be 'based on Christian principles and Samoan custom'. Given that, it is difficult to avoid defining the term 'religion' and its cognate 'morality' as instituting reasonable restrictions on the exercise of rights and liberties guaranteed under part II of the Constitution.

From a formal legal positivist perspective, these recitals would seem to be nothing more than a declaration of the religious faith of the people, bereft of legal force. This was, in fact, the explanation given by one of the constitutional law advisers in the Constitutional Convention 1960 (Constitutional Convention of Western Samoa 1960:Vol.1, 886). Whereas Davidson's explanation might be correct in a strictly positivist sense, it is not so for the majority of the Samoan people, for whom the most

important and authoritative part of the national Constitution are the recitals cited above, construed as legal and moral prescriptions (Meleisea 1987:212). These contradictory views inevitably throw into sharp focus the discrepant views of the nature and function of the law in Samoa. The result is legal and moral confusion.

Offering a reappraisal, I note two possibilities here. One is that Samoa has adopted a species of natural law, skewed in favour of divine commands and Christian principles. Enshrined in the national Constitution and adopted as part of Samoa's political morality, these normative principles are essential variables of Samoa's jurisprudence. Law, on this naturalist reading, must conform to the standards of justice, morality and reason. Contrary to the legal positivist claim that the empirical existence of a legal rule is something independent from its merits or demerits, law means just, fair and reasonable promulgated laws that are compatible with moral principles. There can be no separation of law and morals here. Reconciling that divorce, Deryck Beyleveld and Roger Brownsword (1986:4) charge that 'our target...is the thesis that the concept of law is morally neutral, which involves *inter alia* the claim that the *de facto* [formal] criteria of legality are decisive...The central contention...is that this thesis is wrong'. Law, in other words, is a moral phenomenon, and the obligation to obey the law directly relates to the moral quality of the law.

Laws, for us, are morally legitimate prescriptions under the [principle of generic consistency], and they straightforwardly generate legal-moral obligations' (Beyleveld and Brownsword 1986:325).

State lawmakers, on this view, do not have legal or moral authority to authorise the murder of political opponents, violation of rights, misappropriation of public funds or property, or any such unlawful act. For the purpose of legitimate governance, natural law precepts like justice and equity constitute fetters on the exercise of government powers by requiring Samoan lawmakers to conform to and promote moral standards. In the extreme, the 'indisputable truth that the command of an earthly superior which violated the law of God or Natural Reason', enjoined Lord Radcliffe (1961:6) 'not only owned title to no obedience but might even involve the positive duty of resistance'.

Alternatively, the constitutional framers might have defined law in inclusive legal positivist terms. Inclusive legal positivism, as Jules L. Coleman (2001:108) defines it, 'is the claim that positivism *allows* or *permits* substantive or moral tests of legality; it is not the view that



positivism *requires* such tests'. Inclusive legal positivism does not necessarily posit any inconsistency between the core commitments of positivism and the existence of moral criteria of legality. As a theory of possible grounds of legality, legal authority and legal normativity, inclusive legal positivism

says, in effect, that a positivist can accept not just that moral principles can sometimes figure in legal argument; not just that such principles can be binding on officials; but that sometimes they can be binding on officials because they are legally valid or part of the community's law, and—most significantly—that they may even be part of the community's law in virtue of their merits—provided the rule of recognition has such provisions (Coleman 2001:108).

Evaluating it either as a species of full-blown natural law theory or as a case of inclusive legal positivism, we find that the fundamental law of Samoa expressly recognises moral tests of legality. The essential difference is that inclusive legal positivism merely allows or permits moral considerations as tests of legal validity; mainstream natural law requires moral principles as tests of legal validity. Be that as it may, the recitals and moral thrust of the Constitution of Samoa force a recognition of the moral component of the Constitution and the importance of both government and governed acting in accordance with morality; that morality is part of the chosen conceptual lens through which Samoans view reality, define what law is and what its legitimate functions are, and how they prefer to be governed.

This has important implications. First, it is incompatible with an exclusive legal positivist perspective. There is no separation between law and morality in Samoa's legal universe. For the purpose of legitimate governance, substantive principles must play a critical and decisive role. Second, Samoa's present lawmakers and government officials are responsible for giving effect to the constitutional framers' clear intentions, notwithstanding exclusive legal positivism's domination of the contemporary legal world. Against pretensions to universality, it must be said that

there is clearly strong reason to favour the view of one's jurisdiction that best serves the requirements of justice and the common good, as one understands them. It is foolish—an unfortunate by-product of legal positivism—to believe that even descriptive analysis, where it has practical consequences, can detach itself from normative judgment and evaluation (Allan 2001:5).

This connection requires a caveat. In a negative sense, religious bigotry—to some extent engendered by a conservative law/religion/politics alliance has the negative effect of undermining legitimate

governance in Samoa and other Pacific nations.<sup>16</sup> The problem is the violation of rights either in the name of religion or in the worship of some religious denomination's idiosyncratic sectional morality. Whenever that happens, morality is hijacked, owned and exploited in the service of narrow sectional interests, thereby reducing it to some kind of tribal harlot that offers its services to the highest bidder and thus undermining the significance, value and force of morality itself as a legitimate factor in the construction and maintenance of the community's legal universe. Problems like this make doubtful the propriety of haphazardly mixing positive law and morality, for example, in the Devlin sense of popular morality (Devlin 1965:13–4).<sup>17</sup> At stake is the protection of the unpopular religious minority from the popular religious majority.

While these problems do not signal a final victory for exclusive legal positivism, they do raise important issues. One is the essential need to protect freedom of conscience within reasonable limits. The other is that community morality does not necessarily mean the institutionalisation of immoral practices such as racial hatred, religious intolerance and interpersonal enmity. There is also the important reminder that one should not coercively impose one's religious beliefs on others through mad acts of violence, and that the violation of rights is as much a moral issue as it is a legal one. I will return to these issues below.

### **The internal/external perspective dichotomy: an integrated viewpoint**

In addition to the rejection of legal positivism, another implication of the theory of law promoted here relates to the dichotomy between the internal perspective of officials (judges, lawyers and lawmakers), on the one hand, and the external, third-person perspective of outsiders, on the other.<sup>18</sup> I adopt a broad perspective combining the internal and external perspectives, because this allows a more comprehensive assessment of the justice of particular laws and indeed the entire legal system and their application to the practice of government—jurisprudence requires this.

Even dogmatic proponents of the internal perspective concede this much, albeit half-heartedly. Arguing against the external slant in John Austin's theory of law (that is, law as a system of commands backed by sanctions imposed from above), Hart postulated law as a system of rules that enables members of a given society to behave in an orderly manner. This insight led Hart to hold that laws have both an external perspective

and an internal one, and that jurisprudence must take into consideration both perspectives 'and not to define one of them out of existence' (Hart 1961:88,55). Similarly, Dworkin, though intent on critiquing Hart's conception of law, emphasises the need for both perspectives and that 'each must take account of the other' (Dworkin 1986a:13).

This challenges the one-sided promulgation of the internal point of view, sometimes advanced with a non-negotiable dogmatism, that forecloses conversation with external critics as if the terms, procedures and objectives internal to the social practice of the legal system need neither explanation nor justification. Such dogmatism unfortunately entails the exclusion of the external perspective of anthropologists, sociologists, economists, development agencies, cultural theorists, postmodernists, postcolonial theorists, feminists and others less inclined to adopt the perspective of law officials. But, as Alan Hunt (1987:12) correctly notes, '[i]nternal theory is simply too close to its subject matter'. While not hopelessly mired in the internal perspective all the time, the internalist retreat behind 'Chinese walls' and exclusive focus on internal matters such as *ratio decidendi* and *stare decisis* often preclude serious questioning of the legal system as a whole and the justice of particular statutes and regulations. This often stifles development of the law in keeping with the needs, expectations and distinctive nature of a given society. The external perspective, because it is really critical of the law as praxis, is therefore necessary to balance the somewhat static focus of strict legal analysis and account for diversity in the social practice of law.

We find a compelling interest in law as praxis in the US version of legal realism. Legal realism, reacting against the black-letter approach to law, shifts the focus of legal analysis away from law in the books to law in action. It asserts both the influence of extra-legal, external factors (for example, class, race, gender and morality) in judicial decision-making and also the significance of the law as a vehicle of change. Oliver Wendell Holmes contention is instructive on this matter,

[t]he life of the law has not been logic, it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed (Holmes, in Lerner 1943:51)

A similar focus on law as praxis is central to the critical legal studies genre, which is characterised by a distrust of traditional legal reasoning as in legal positivism, and a strong preference for the external perspective on the social practice of law. The critical legal studies view,

like legal realism, problematises the internal/external distinction, asserting the influence of extra-legal, external factors in judicial decision-making and rejecting a value-free conception of the law. It posits that legal theory must take into account the wider implications and consequences of the social practice of law, and affirms the law as an essential 'aspect of the social totality, not just the tail of the dog' (Kennedy 1990:47).

But both legal realism and critical legal studies could ultimately be crippling for the traditional ideal of the rule of law. While scepticism is warranted, absolute scepticism is self-defeating. The claim that the legal system is ultimately flawed, biased and arbitrary could throw the entire legal order into chaos. At worst, it would result in a kind of legal nihilism whereby the entire legal system is utterly and perilously distrusted. Further, the unlimited incursion of the law into the extra-legal arena seemingly advocated by legal realism and critical legal studies risks reducing law to politics or collapsing it into economics. The positive contribution to jurisprudence of these critical legal genres is the recognition that the law is infected with ideologies, power relations and power structures that need to be exposed and redressed, and that the law has a legitimate role to play in the other dimensions of the social order.

For the purpose of legitimate governance—the specific focus of this study—one needs to look not only at the internal working of the law (the internal perspective) but also at the functional significance of the legal system as a whole for other dimensions of the social order (the external perspective). This emphasises the need for both perspectives. Abjuring a one-sided focus on either, a more reasonable approach admits the legal system as a coherent decision-making process while, at the same time, subjecting that process to the scrupulous analysis of critical external perspectives.

### **Postmodernism, postcolonialism, and Pacific customary laws**

I note in this context the postmodern sensibilities of Pacific peoples as a species of the external perspective. In addition to problematising the internal/external distinction, postmodernism is generally critical of the law, its nature and function. For Michel Foucault, law includes codified laws and a system of disciplines (that is, institutions like prisons, courts, and so forth) that supplement the law, creating a new, repressive model of the legal system in which '[l]aw is neither the truth of power nor its

alibi. It is an instrument of power which is at once complex and partial' (Foucault 1980:141). This conception of the law directly impacts on governance or the problem of 'governmentality', as Foucault (1991) describes it. It challenges the political strategy of decentralising public power, and calls into question the traditional view of lawmaking as a function of sovereign power.

Foucault, adopting an external perspective, deconstructs established legal concepts by showing that their accepted usage masks hidden ideological interests. For example, from a postmodern Papua New Guinean perspective, the institution of individual property rights brings a particular history with its own contradictions and vested interests. In line with the Foucauldian perspective, for a Papua New Guinean living on customary land that is owned by his family subject to the control of his tribe, individual property is not a neutral medium for the negotiation of legal entitlements as it comes loaded with its own arrangement of power relations (that is, in favour of the propertied and the powerful), and that the incorporation of this institution into legal discourse (as in the proposed change of communal ownership of customary land into estates in fee simple that some donor agencies and uninformed cosmopolitan academics are advocating) actually masks its constructed nature and glorifies it as a natural element of the universe. The postmodern perspective, as the example above shows, thus urges and advances a genealogical questioning of how the legal order is constructed, legitimated and maintained; it seeks to expose established institutions and practices as sites of violent power struggles.

But, whereas the significance of the postmodern perspective as a stimulus for change is notable, its anti-foundational orientation is highly questionable (Mootz 1993; Hunt 1992). Taken to the extreme, postmodernism is liable to land law, politics, ethics, governance and other dimensions of the social order in chaos. And while the postmodernist attempt to free the law from its ideological baggage is commendable, its rejection of foundational notions like due process must be resisted on the ground that it unnecessarily deprives us of a normative vision of the law. Subject to that caveat of caution, postmodernism, properly appreciated and adopted within reasonable limits, remains an important stimulus for social change and is also valued for its contextual orientation.

The prevailing Pacific people's resistance to totalising systems of thought, values, procedures and processes suggests postmodern

sensibilities. Privileging difference, heterogeneity and the particularity of contexts and perspectives, postmodern metaphysics reject the notion of universal systems, ideologies and standards that are applicable at all times, at all places, for all peoples. Instead, systems, ideologies, and standards are seen as contingent, constructed and pluralistic. This makes tenuous, and in some cases subverts, the Western view of law, lawmaking authority, mechanisms of dispute resolution, and so on. For Pacific people the questions have always been: What is law? Which law? Whose law? This is not a naïve compulsion to be simplistically tribalistic. Rather, the issue goes to the heart of a jurisprudence that is relevant to the diverse situations of the Pacific peoples themselves. It is also, fundamentally, about the legal, moral and practical justification for the peoples' acquiescence in the law (as a manifestation of the state) as a fundamental question in jurisprudence.

Here the people's postmodern sensibilities overlap with their postcolonial sensitivities, questioning the credibility of the Western law now adopted as their own. The reason for this consternation is clear. Western law was often used in the former colonies as the fist of the colonial powers. Not surprisingly, Western law has been denounced as 'the cutting edge of colonialism' (Chanock 1985:4) and 'a sharp sword [used] by the powerful to conquer, and hold subject, the powerless' (Narokobi 1982:13). So, while the rule of law has been praised as the bedrock of Western civilisation, some former colonies see it quite differently, and not without good reason. Seen from their perspective and historical experience, Western law has been an oppressive force used by the colonial powers 'to destroy cultures, civilisations, religions and the entire moral fabric of a people' (Narokobi 1982:13). For example, Samoa was made a protectorate of the German government in February 1900 and Dr Wilhelm Solf of Germany became the governor of Samoa. The problem was that Solf's political aim was essentially paternalistic: to enhance his own political power and to abolish Samoan custom and cultural institutions, including part of the chiefly (*matai*) system (Davidson 1967). Similarly, New Zealander George Richardson (1923–28) undertook the administration of Samoa in the manner of a military chief, using the Samoan Offenders Ordinance 1922 to order the banishment of the natives and deprive chiefs (*matas*) of their customary titles.

These historical facts inevitably bring to the fore the issue of why former colonies should continue to use Western law as part of their own postcolonial independent states. If modern Samoan/Pacific

jurisprudence is to be able to transform postcolonial scepticism of Western law into a more positive and trusting embrace of the rule of law as an essential human good, this issue must be faced honestly. To ignore it is to screen out history and its continuing effects, thereby risking the people's opposition to, or even outright rejection of, the rule of law, with dangerous ramifications for legitimate governance, law and order.

The recognition of Samoan custom as a source of law is therefore significant and necessary for a number of reasons.<sup>19</sup> The sovereignty of the people demands that their values and practices be reflected in state laws and the way the state of Samoa operates. From a postcolonial perspective, recognition of Samoan custom moderates the hegemony of the Western system of law and provides part of the legal, moral and practical justification for the people's acquiescence in the law.<sup>20</sup>

There are important implications of the recognition of custom as a source of law.

First, custom is a legitimate way of achieving legal validity, authority and normativity. Whereas legal positivism posits that the authority of the law derives from the authority of the lawmaker, customary law shows that there are other equally valid ways of establishing legal authority. Furthermore, developing Pacific laws in keeping with historical experience, social necessity and cultural contingency is not entirely revolutionary. After all, English common law and equity jurisdictions are themselves products of the history and development of England. Seen in this light, Pacific customary laws are not some deviant Pacific attempt to be tribalistic but are products of particular histories, expressions of community interests and reflections of the social conscience of the Pacific peoples themselves.

Second, Pacific customary laws contradict, to a significant degree, the structuralist legal anthropological thought that underlies most Western theories of law. For instance, whereas Western law is a command of a sovereign, imposed from above and backed by threats as in Austin's theory of law, customary law is a negotiated solution, achieved through the processes of consultation, negotiation and mediation amongst all members of the group. Customary lawmaking is not the sole prerogative of an armchair sovereign but a community enterprise; everyone's consent is essential and sought. This raises the issue that, oftentimes, the presupposition that non-Western societies do not have laws is, without reflection, converted into a conclusion and propagated as an absolute truth (see Salmond 1957; Hart 1961).

Even legal anthropologists of so-called primitive societies (including some with the best of intentions) do not escape the appeal of this one-dimensional view of the law. For instance, invoking Pound's definition of law as 'social control through the systematic application of force of a politically organised society', A.R. Radcliffe-Brown (1952:212) concluded that non-Western societies that do not satisfy the criterion of his study (that is, law presupposes political structures, specifically Western political structures) could only be classified as cultures without law.<sup>21</sup> Against such arbitrary judgment regarding what is and is not law, it is argued that custom should be a defining variable of a Samoan/Pacific theory of the rule of law. Proper recognition of this social fact has resulted (correctly, I might add) in a significant paradigm shift in Pacific legal systems—giving indigenous laws the status of valid conceptions of law, albeit in different voices and faces. There is also a need, first, not to impose Western definitions of law on non-Western societies since in doing so one 'is bound to overlook essential elements which only become apparent when the culture is considered as a whole' (Hogbin 1972:290) and, second, to take each non-Western culture as an independent phenomenon in its own right. To do this requires viewing customary law as the aggregate of rules, norms, institutions and so forth, which not only grow out of the life of a community but also govern the life of that community. Law, in other words, springs from the land and is rooted in the ways of life of the people. Its generation and maintenance occur in a cycle of consensus; it is not a top-down kind of thing.

Third, law in Samoa's traditional jurisprudence is not the command of a King Rex, an absolute monarch sitting on a majestic throne, dishing out non-negotiable demands and wishes. Rather, it is the collective wisdom of the people (often embodied in the elderly) achieved through regular practice and defined through the social processes of consultation, negotiation, and mediation. Moreover, traditional law rather is the collective will of a people who approach and treat each other as equals, that is, over and above the façade of ceremonial postures and structures. In substance, customary law encompasses both the people's habits of the heart, their intellectual predispositions, and mundane rules which govern their everyday pre-theoretical lives. It is not atomistic; it does not treat reality as discrete segments. Rather, it deals with reality as a totality. The transcendent and the mundane, the spiritual and the physical and the psychosocial have equal value.



Traditional law is therefore holistic in approach and reach; its function is primarily restorative. Maintaining social harmony is everybody's imperative.

Fourth, the recognition of customary laws has given rise to legal pluralism, encapsulating a complex combination of different legal traditions. Negatively, this new legal creature may seem to be nothing more than a confusing aggregate of legal strands haphazardly thrown together. Or, positively, it could be seen as an amalgam of traditions that are congruent with the people's values, norms and expectations. Unique though it may be, this legal pluralism has created problems such as uncertainty in the law, instability of the legal order, and the pressing need for a more definitive legal and moral justification for the people's acquiescence in the law as force. These issues are particularly pertinent to Pacific jurisdictions. When clashes of different legal mindsets occur, questions of authority and legitimacy arise. When someone is murdered pursuant to an (alleged) customary duty to avenge the death of a family member (as in the Solomon Islands case of *Loumia v Director of Public Prosecutions* [1986] SBCA 1; [1985-1986] SLR 158, 24 February 1986), or, an (alleged) adulteress is murdered in line with native custom (as in the PNG case of *Public Prosecutor v Kerua* [1985] PNGLR 85), the disparity between the different legal mindsets becomes apparent and demands reconciliation. I will return to these issues in chapter five.

Finally, reconciling competing substantive principles and values is also necessary for a number of reasons. For instance, in recognising indigenous custom (with its own ideologies, procedures, processes and objectives), a dichotomy is revealed between liberal-individualism—a hallmark of Western law—and the conservative collectivism of Pacific societies. I will deal with the individual/collective dichotomy in chapter four. Suffice, at this juncture, to note the following.

In keeping with the ethos of libertarian rights and freedoms, part II of Samoa's Constitution appropriately guarantees fundamental rights and freedoms through an entrenched bill of rights (for example, life, liberty, religion, speech, assembly, association and property).<sup>22</sup> The Constitution as a bill of rights compels the state to protect the rights and freedoms of Samoan individuals and, at the same time, withholds from all state institutions the power to take these freedoms away. At a fundamental level, the Constitution is an expression of the natural right of every Samoan citizen to govern himself or herself, and to specify the

terms according to which he or she agrees to give up that right upon submitting to the rules of the state. The Constitution thus emphasises the fundamental importance of the Samoan individual in the creation and the ongoing life of the state. It affirms human dignity and individual liberty through an entrenched bill of rights. The Constitution, in other words, invests the individual with inalienable moral worth and primacy.

The individual citizen is indeed indispensable for the purpose of legitimate governance in every liberal democracy, pursued as it is through the framework of the rule of law. The rule of law assumes and, in fact, requires the consent of the governed, predicated on the belief that there is something sacred in every person. Some call it reason; others call it conscience. Either as reason or as conscience, this sacred entity is the essential attribute that defines humanity. This belief accounts for the voluntary character of all associations wherein humans are respected as morally responsible agents, capable of making decisions based on the exercise of their free will.

The state, too, could be seen as an association of individuals who voluntarily surrender certain personal rights in order to safeguard the inalienable rights of others. This provides an insight into the issue of the individual's acquiescence in the law as a manifestation of the state. The rule of law, Allan (2001:6) opines, constitutes 'an ideal of consent, wherein the law seeks the citizen's acceptance of its demands as morally justified: he is invited to acknowledge that obedience is the appropriate response in the light of his obligation to further the legitimate needs of the common good'. Without that consent, the rule of law loses its legal and moral legitimacy, and law, as a manifestation of the state, becomes mere barbaric force imposed on non-consenting subjects (So'o 2000; Malifa 1988).

I do not subscribe to the exaggerated notion of the individual as paramount, nor do I promote the sacrifice of the individual on the altar of the collective good. Rather, my position is at the middle point between the two extremes of atomistic individualism and claustrophobic collectivism. Negotiating a position in the middle, it may be argued that individualism and collectivism finally converge at the point of the individual citizen who is, after all, the final judge of what he or she wants, what is fair and just, relative to the legitimate interests and values of the community as a whole. But instead of promoting atomistic individualism, the existing rhetoric of individual rights in the Pacific would do well to seek to create a society in which individuals are

accorded moral authority, *are morally and socially responsible* in the exercise of their liberties, and are respected accordingly. In that way, rights discourse could function as a powerful source for a constructive critique of traditional social arrangements and as a robust basis for working out alternative institutional practices that are appropriate to Pacific socio-cultural contexts with their varying degrees of socialism.

## Rule of law and socioeconomic development

The urgent need for economic development in the Pacific is clear. The Eminent Persons' Group (2004:n.p.) aptly puts it in the following terms

Improvement in the material well-being of Pacific people and the opportunities available to them will depend on expanding opportunities for the generation of increased wealth from the region's natural and human resources. Sustaining economic growth implies both macro and micro-economic policies that facilitate the creation of businesses and jobs, and also the development of a trading environment that allows equitable access to export markets and lower cost imports.

The issue for present purposes is not economic development *per se* but the proper use of the law as a vehicle of socioeconomic development. This is a central concern in legal theorisation. The danger envisaged here is the degeneration into an unprincipled legal utilitarianism, that is, the use of the rule of law as an instrument for the achievement of government policies without any moral or ethical justification—a mere means of achieving state control. When that happens, law becomes nothing more than naked government force.

The issues include the way in which the rule of law, either as principles or as legal rules, is used as an engine of development; the legal and moral underpinning of such use; and the extent to which the law could be legitimately used as such within appropriate constitutional limits and controls. The following theoretical discussion frames the issue in jurisprudential terms and underlines the appropriate limits and constraints on utilitarianism.

The utilitarian theory of law, historically associated with Jeremy Bentham and in contemporary legal theory with the proponents of the law and economics movement,<sup>23</sup> shows that the law can be made to serve legitimate functions. The utility principle in Bentham's censorial jurisprudence is one that either approves or disapproves of a particular course of action, depending on whether it augments or diminishes the happiness of the individuals whose interests are in question

(Bentham 1967). In terms of lawmaking, promoting the happiness of those individuals who make up the community 'is the end and the sole end which the legislator ought to have in view' (Bentham 1967:Ch.3, para 1).

Bentham's theory raises a number of issues. First, since the theory seems to have been predicated on an individualist ethic, it is a moot point whether the notion of the greatest good of the greatest number is really a communal good since Bentham himself appears to have reduced the community to a fiction that simply incorporates all individuals in society (McCoubrey and White 1993:26).

Second, while the utilitarianist ideal of maximising individual interests has its merits, it could—if wedded to the interests of a dominant group in society—result in the exploitation, oppression and deprivation of people without influence. This is especially true of societies with social classes, such as Tonga. In such situations, it is hard to ignore the Marxist jurisprudential conclusion that, since the dominant group has overwhelming political and economic power to influence the substance of laws and the lawmaking process, the law not only lacks autonomy but is, in fact, an instrument of class domination. In the words of the Soviet theorist Evgeny Bronislavovich Pashukanis (1978:146), '[p]ower as the "collective will", as the "rule of law", is realised in bourgeois society to the extent that this society represents a market'. Criticism of the economic determinism of classical Marxist thought and the reductionist explanation of the law in terms of class domination are fairly well noted. Marxist explanations of law are, nevertheless, important in that they seek to expose the entwinement of law in economic and political power relations that are apparently unjust, unfair and non-equitable when they result in economic and political exploitation, oppression and deprivation.

Also of interest is the 'law jobs' theory of the legal realist Karl Llewellyn, based on the premise that law is a legitimate means of achieving social objectives (for example, reordering society, maintaining law and order and facilitating the exercise of legal authority), and that law must be responsive to the changing needs of society (Llewellyn 1941). Llewellyn appropriately affirms the positive influence that law can bring to bear on society. Negatively, in addition to the arbitrary nature of Llewellyn's list of law jobs, legal pragmatism can be taken only so far. Reiterating Dworkin's criticism noted above, legal pragmatism does not take rights seriously. This points to an important constitutional constraint on the use of the law as a vehicle of

socioeconomic change: individual and minority rights as a defence of the citizens against the fist of the state.

Whereas Dworkin's rights thesis appropriately underlines the significance of rights as a bulwark against arbitrary rule, and while he correctly opposes the arbitrary use of the law as simply an instrument for the achievement of political or economic goals, other important questions go unanswered. For instance, how viable is the judiciary as the protector of rights in a context where Dworkin's mythical judge, Hercules, does not exist (Dworkin 1977), and where the judiciary is not only conservative and timid but is at the mercy of an omnipotent parliament dominated by an exalted executive government (as in most Pacific nations)? To some extent, Dworkin addresses these issues with his doctrines of integrity in practice and community morality—an institutional morality embodied in the community's political culture that underpins the community's constitutional framework (Dworkin 1986b:214). The latter, interestingly enough, subverts the positivist distinction between law and morals, and extends the justification for the citizens' acquiescence in the law beyond rules to include the community's political morality as well. Thus Dworkin, in a very significant way, has underlined another constitutional constraint on the use of the law as an engine of socioeconomic change: the normative values and political morality of the community whose interests stand to be directly affected by the rule of law.

Morality as a constraint on the social practice of law is also a central plank in John M. Finnis' full-blown naturalist theory of basic human goods—life and the development of personal potential, knowledge, play, aesthetic experience, sociability or friendship, practical reasonableness (entailing the capacity to order and regulate life according to some rational scheme), and religion, which presupposes human awareness of a power beyond the normal run of things (Finnis 1980:86–9).

Evaluating Finnis' postulates positively, we find that morality and ethics constitute legitimate constraints on the utilitarian use of the rule of law. On a negative note, Finnis' list of goods is perhaps arbitrary. In common parlance, one person's treasure is another's trash, not only at the level of personal preferences but at the broader cultural level of multifarious community values. What is of ultimate concern to a Palestinian in the Middle East is not necessarily of the same value for a Tongan or a Fijian in the Pacific. Furthermore, since Finnis' basic goods are equally fundamental, this begs the question as to which goods

should take precedence over others in cases where some of these goods are in competition or even incompatible. Finnis (1980:103–26) solves this paradox, to some extent, through his proposed tests of practical reasonableness, some of which are relevant for present purposes.

First, excluding arbitrary preferences regarding the pursuit of goods, individuals should not blindly pursue their interests to the exclusion or detriment of others, but should defer to the common good—the right to pursue one’s personal preferences is not absolute. Put bluntly, utilitarianism is (and should be) subject to legitimate limits. Second, given Finnis’ naturalist interests, his emphasis on the exercise of one’s conscience is not unexpected. This is important in many respects; for example, citizens’ have the moral right to judge the conduct of government, something that citizens can ill-afford to surrender to the state, and should exercise that right. Third, efficiency in terms of the pursuit of basic goods should be circumscribed by moral considerations, such as the good of others—efficiency should not be pursued as an end in itself. This legitimate concern is epitomised in the overriding principle of the inherent dignity of humans, a principle that precludes the reduction of people to mere functions of the system—legal, political, economic or cultural. This principle underpins Finnis’ (1980:225) conception of natural rights as constitutional constraints on the use of the law as an engine of socioeconomic change.

Even Hart, despite his formalist sympathies, accepts that social values must influence the social practice of law. In keeping with his ‘minimum content of natural law’ as discussed above, Hart offered five truisms which are supposed to underlie and constitute the viability of a system of law. For example, there should be a condition of approximate equality which, taking into consideration the different capabilities of the members of any given society, ensures that no individual citizen will possess absolute and dominating power. This necessitates a ‘system of mutual forbearance and compromise which is the basis of both legal and moral obligation’ (Hart 1961:191). This system moderates extreme self-interest and engenders a state of limited altruism as a governing principle of social life. ‘If the system is fair and caters genuinely for the vital interests of all those from whom it demands obedience,’ Hart (1961:197) warned, ‘it may...retain [their] allegiance...for most of the time, and will accordingly be stable. [Otherwise] a narrow and exclusive system run in the interests of the dominant group...may be made continually more repressive and unstable with the latent threat of upheaval’. The issue, extrapolating from Hart’s postulates, is social and economic justice.

Certain aspects of John Rawls' theory of justice as fairness are also pertinent to present purposes. First, each person must be given equal rights within a system of equal basic liberties. Second, inequalities in social and economic status must be arranged in such a way that they are beneficial to the maximum extent possible to the least advantaged in society, but in a way that is consistent with the principle of just savings (Rawls 1973:302).<sup>24</sup> Rawls' propositions clearly impact on law and economic reform, that is, reform subject to community values and moral principles. As the critical legal studies advocate Roberto M. Unger (1984) has noted, the rule of law, wedded to capitalism, may become nothing more than the rule of the rich and the powerful.

Finally, two important matters deserve mention here. First, economic development must always be circumscribed by the proper protection of the environment in the interests of sustainable development. The Eminent Persons' Group (2004:n.p.) appropriately underlines the need for sustainable development in the Pacific as follows

The greatest risk attached to economic development is that of destroying what one seeks to protect. The Pacific's natural resources are bountiful but fragile. Traditional subsistence approaches to farming and fishing have generally supported sustainability, but pressure from resource use has become intense. Non-sustainable resource use threatens not only the natural resources of the region, but also the livelihoods and traditional way of life of many Pacific people.

Second, in keeping with my interest in the relationship of legitimate governance to economic development, a case could be made for a position between the extreme left's centralised planning, which ultimately cripples economic growth, and the extreme right's unadulterated free-market capitalism, which exposes people alone to the cruel power of market forces. Advocating a leftist-leaning socialism that is left of centre and decisively to the right of full-blown socialism, Richard Rorty (1987:565) writes

[n]obody so far has invented an economic setup that satisfactorily balances decency and efficiency, but at the moment the most helpful alternative seems to be governmentally controlled capitalism plus welfare-statism (Holland, Sweden, Ireland). There is nothing sacred about either the free market or about central planning; the proper balance between the two is a matter of experimental tinkering.

My point is that economic development in the Pacific must beware of extreme approaches. Getting rich at the expense of other human values should not be promoted. When the poor feed on crumbs of bread from the rich men's tables while the rich men's dogs have steak and milk for lunch, then there is clearly something wrong with society.

Perhaps this society has been reduced to nothing more than a market wherein human beings have become faceless cogs in a capitalist system that operates, without a conscience, according to the latent functional laws of market forces. An extreme-right capitalism is likely to create a rich few and a poor mass; we will merely change the face of poverty; and the poor usually become faceless. Fracturing social harmony is morally irresponsible, and the restoration of socioeconomic equilibrium is more economically expensive than sharing what you have with the have-nots. The revolutionary change of property rights from collective ownership into estates in fee simple, passionately promoted by some armchair academics, is theoretically intriguing but practically naïve. Some Pacific nations (like Samoa) do not need civil wars caused by unnecessary land disputes; the equal distribution of rent money from the lease of customary land remains a potentially divisive issue. Less government and more markets is indeed a desirable goal. But, first, government must be government for the people, not a private company of the élite. The legal, democratic, moral and ethical underpinning of the transformation of Pacific states into *de facto* corporations remains to be more clearly articulated and more convincingly debated as a public issue.

## Conclusion

The rule of law is, and must remain, an essential human good. In using this notion as a mobilising theme, I do not follow the academic stream that slickly exploits the myth of inherent human lawlessness and presents a hopelessly fatalistic view of human nature with reference to Pacific peoples. My own interest is grounded in historical facts: past and present. When rulers flagrantly flout the principles of responsible and accountable government, when government haphazardly violates the rights of the citizens, and when the people's legitimate expectations of government continue to be frustrated, the most appropriate resort for the citizens is the rule of law—not the rule of the gun and the sword, as has been the case in some Pacific nations. The rule of law is absolutely essential to avert the relapse of the social order into the Lockean state of nature and the Hobbesian state of war. It must, therefore, be carefully safeguarded against the unwarranted exercise of executive discretion or the arbitrary caprice of parliamentary legislation. At stake is law and order, which must be maintained at all costs. While it might be simplistic to equate the rule of law with law and order (Jennings 1972),



it seems certain that law and order is 'the primary meaning and purpose of the rule of law' (Walker 1988:23).

Also at stake is the construction and maintenance of 'an acceptable order of justice' (Allan 2001:15), especially in the arena of public power. While the attainment of government objectives is warranted, this must be subject to constitutional constraints 'that limit the pursuit of such objectives in the interests of individual autonomy and security' (Allan 2001:12). Although Allan's theory is primarily concerned with the protection of individual interests, his expressed recognition of contextual specificities in the sense of regarding a given polity 'as an integrated constitutional scheme' (Allan 2001:41) seems to underline the idea that justice exists (and is actualised) in the concrete context of a given society and intersects with community values, and hence is most effective when it takes these into account.<sup>25</sup> Either from the perspective of the individual or the standpoint of the community as a whole, justice is absolutely essential. For the purpose of legitimate governance, justice, putting it simply, requires hanging a bridle on capricious government action.

## Notes

- <sup>1</sup> Apart from Tonga, which is a constitutional monarchy, all other Pacific nations are constitutional democracies pursuant to written constitutional mandates and hence the significance of 'writtenness' as a feature of Pacific constitutional making. Underlining the significance of the written Constitution of the United States, Chief Justice Marshall in *Marbury v Madison* 5 US (1 Cranch.) 137 (1803) at 178 referred to 'the greatest improvement on political institutions, a written constitution'. On written constitutions as products of an evolutionary political process see Lord Diplock's observation in *Hinds v The Queen* [1977] AC 195 at 212 regarding constitutions following the Westminster model of government.
- <sup>2</sup> This is also a common feature of Pacific constitutions, for example, the *Fiji Islands Constitution Amendment Act 1997*, chapter 1, section 2 and the *Constitution of Tuvalu 1978*, section 3. See also Austin's view of legal limitations on the sovereign as 'a flat contradiction in terms' (1955:254).
- <sup>3</sup> See, for example, Bickel (1962); also Elster and Slagstad (1988).
- <sup>4</sup> Note, for example, AusAID's (2000:3) definition

the competent management of a country's resources and affairs in a manner that is open, transparent, accountable, equitable and responsive to people's needs.

Good governance apparently entails 'the primacy of the rule of law, maintained through an impartial and effective legal system' (AusAID 2000:3). The UNDP (1997:2–3) definition of good governance refers to

the exercise of economic, political and administrative authority to manage a country's affairs at all levels. It comprises mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences.

On the diverse, even competing, definitions of the term note, for example, Hyden and Olowu (2000:6)

[g]overnance was never allowed to become a conceptual straight-jacket but was expected to function as a rather loose framework within which each researcher could creatively explore political issues of significance. The problem that we encounter, therefore, is not the limitations stemming from the imposition of a confining concept, but rather the opposite. The challenge of making sense of the wide range of interpretations of governance that the authors bring to the agenda.

- <sup>5</sup> See, for example, Tucker (1978) for this view of the rule of law in the *Communist Manifesto*.
- <sup>6</sup> This proposition raises a whole range of questions about rule-following, for example, the authority, determinacy or indeterminacy and interpretation of rules, the correlation between rules and action, and the net effect of rules on action, whether direct or indirect. See, for example, Alexander and Sherwin (1994).
- <sup>7</sup> See also rule scepticism in the US version of legal realism and the critical legal studies movement. See, for example, Frank (1949:130); Hart (1961:144).
- <sup>8</sup> See, for example, Tyler (1990).
- <sup>9</sup> This seems to be another common feature of the jurisprudence of Pacific island nations. See, for example, the preamble, principle 2, of the *Constitution of Tuvalu 1978*; the preamble of the *Constitution of the Republic of Vanuatu 1980*; and the preamble of the *Constitution of Nauru 1968*.
- <sup>10</sup> See also Allan (2001) for an analysis of Hayek's theory of law.
- <sup>11</sup> It seems certain that there are cases where the use of coercive state powers is necessary, for instance, to accomplish legitimate public objectives. One example is the use by police of discretionary powers of arrest and search especially in cases where national security is at stake. Be that as it may, there is always a real danger of a breakdown in the rule of law and the emergence of the rule of force and a police state.
- <sup>12</sup> Legal positivism is generally favoured in formal theorisation, especially in Kelsen's proposed pure theory of law. See Kelsen (1934:474), who notes '[t]he pure theory of law is a theory of positive law. As a theory it is exclusively concerned with the accurate definition of its subject-matter. It endeavours to answer the question, What is the law? but not the question, What ought it to be? It is a science and not a politics of law'.
- <sup>13</sup> See also Allan (2001), whose liberal theory of the rule of law builds on Fuller (1969).
- <sup>14</sup> See also Allan's (2001) utilisation of Dworkin's notion of law as integrity.
- <sup>15</sup> See also note 9 above. Note further the preamble of the *Constitution of Kiribati 1979* which states: 'In implementing this Constitution, we declare that...[t]he principles of equality and justice shall be upheld'.
- <sup>16</sup> *Tariu Tuivaiti v Sila Faamalaga and Others* (1980–93) WSLR 17.
- <sup>17</sup> See also Hart (1963:7) on Hart's opposition to 'judicial moralism', citing Lord Mansfield in *Jones v Randall* (1774), Lofft (at 385), and *Shaw v Director of Public Prosecutions* [1962] AC 220 as authorities for his opposition to populist morality before which the unpopular minority in a given society would always be in danger.
- <sup>18</sup> On the internal/external perspective dichotomy in the social sciences see, for example, Winch (1958) and Dallmayr and McCarthy (1977).

- <sup>19</sup> The recognition of custom is required, for example, by the second recital of the preamble of the *Constitution of Samoa 1960*; Articles 100, 101, 103, 111(1); section 34(2) of the *Land and Titles Act 1981* (as amended by the *Land and Titles Act 1992*); and the *Village Fono (Council) Act 1990*.
- <sup>20</sup> The same requirement is found in most Pacific island constitutions. The recognition of custom as a source of law is therefore a common and fundamental dimension of Pacific jurisprudence. Consider, for example, schedule 2.1 of the *Constitution of Papua New Guinea 1975*. A notable exception is Tonga, where there is no recognition of an unwritten customary law. This is partly because of the precedence given to English common law and equity, and also because of the codification of Tongan traditions and custom over the years. Note, however, that the King and his so-called nobles are creatures of Tongan custom and tradition.
- <sup>21</sup> For a comprehensive analysis of this issue see Vaai (1999).
- <sup>22</sup> The security and protection of rights and liberties is a common feature of Pacific constitutions, for example, part II of the *Constitution of Nauru 1968*; chapter 4 of the *Fiji Islands Constitution Amendment Act 1997*; and chapter 2 of the *Constitution of the Solomon Islands*.
- <sup>23</sup> See especially Posner (1998). Concerning the divorce between constitutional analysis and economics, Posner (1998:675) notes, 'despite the fixation of American lawyers, and especially law students and professors, on the Constitution, there is relatively little economic writing on the subject. And this is not for want of topics that economic analysis might illuminate'.
- <sup>24</sup> See also Nozick's just entitlement theory in his *Anarchy, State and Utopia* (1974).
- <sup>25</sup> See, for example, chapter 5 of the *Fiji Islands Constitution Amendment Act 1997* which mandates social justice and affirmative action 'to achieve for all groups or categories of persons who are disadvantaged effective equality of access to: (a) education and training; (b) land and housing; and (c) participation in commerce and in all levels and branches of service of the State'. This is perfectly congruent with Fiji's multi-ethnic, pluralist society.