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Diluting parliamentary sovereignty and deprivatising Pacific executive paradises

This chapter extends the motif of the rule of law as an essential principle of legitimate governance. Providing the legal and moral warrant for government rule, the rule of law also mandates the strengthening of those bounds beyond which no free government ought ever go, and makes them limits beyond which no government whatsoever can ever legally go. We must make *ultra vires* all exorbitant acts of government to ensure that government is not only kept under control but in good order.

Doctrinal and institutional problems

The major focus of this chapter is on institutions that problematise the rule of law in Pacific jurisdictions. Of major concern is the doctrine of parliamentary sovereignty or supremacy that most Pacific jurisdictions are wont to follow. The problem is

[a] study of constitutionalism in the context of the common law appears to face an immediate problem if the United Kingdom is regarded as one of the relevant jurisdictions for analysis: its doctrine of parliamentary sovereignty is widely thought to make both rule of law and separation of powers subservient to the wishes of a majority of elected legislators (or even, in practice, the executive government that wields the majority party whip in the House of Commons) (Allan 2001:13).¹

Since most follow the Westminster system of government, it is little wonder that the institution of separated powers is underdeveloped, underutilised and even non-functional in many Pacific jurisdictions. When this institution is either ineffective or not functioning at all, it usually results in an ineffective system of checks and balances—a related tenet of constitutionalism.

It could be argued that the cumulative result of the interplay of these factors is the exaltation of Pacific executive governments—the modern manifestation of the English sovereign parliament and the self-fulfilling prophecy of Westminster’s craving for a strong executive government. This exaltation of executive power seems to be the most demanding problem in Pacific jurisdictions that have inherited the Westminster model—the ‘exaltation of executive power’² (Powles 1978); an ‘unrestrained cabinet government [that] is the distinguishing mark of the Westminster system’ (Mulgan 1995:268). The problem, in other words, is the creation of an ‘executive paradise’ (Palmer and Palmer 1997:10), a political heaven where members of the executive assume that they can do anything, unencumbered by constitutional limits and controls. Consequently, many modern executive governments have become ‘elective dictatorships’, an ‘unaccountable and self-serving political élite’ (Mulgan 1995:265, 269). Increasingly, the executive is seen as the political god of an élitist politics in which the same parliament empowers an executive with practically unfettered power. So much so that in the Pacific we can no longer legitimately speak of Pacific island paradises but of Pacific executive paradises. The problem, in short, is the privatisation of many Pacific states—captured, owned and exploited by an élite few.

The rule of law and parliamentary sovereignty

The issue is the romantic affair between Pacific jurisdictions and the Westminster doctrine of parliamentary sovereignty. This is evident in different ways. One is the judiciary’s refusal to interfere in parliament’s internal proceedings. I refer, for instance, to the Nauru Supreme Court case of *Harris v Adeang* [1998] NRSC 1; Civil Action No. 13 of 1997 (27 February 1998). The case related to a meeting of the parliament of Nauru on 12 June 1997, which the plaintiffs argued was held without the necessary quorum required by article 45 of the *Constitution of the Republic of Nauru 1968*. Pleading contravention of article 45, the plaintiffs sought from the court a declaration that the business transacted in parliament on the day in question was *ultra vires* and therefore null and void. The issue for the court was whether it had jurisdiction under the Constitution to inquire into parliament’s internal proceedings and, in the event of a finding of parliament’s non-compliance with article 45, could the court by order nullify the bills enacted on the day in question and which had been subsequently certified as law.

On the facts, Donne CJ held that it had no jurisdiction to do so, noting at 10, ‘it has been emphasised in many cases that Parliament is “the highest Court in the land”’, with the privilege to settle its internal disputes without judicial interference. According to Donne CJ at 2, the Nauru parliament inherited this common law privilege through its Constitution, which adopted ‘the Westminster model, [and] also conferred on the legislature the power to declare its own privileges and immunities’ by legislation, for example, section 21 of the *Parliamentary Privileges, Powers and Immunities Act 1986*. On that statutory basis, Donne CJ concluded at 4 that the ‘common law privilege of non-impeachment was thereby inherited as a privilege of Nauru’s parliament—there is nothing in the Constitution with which it is inconsistent’. And this, I need note, was permitted, despite the Nauru Constitution’s authority as supreme law. Granted, non-impeachment was permitted, ‘except any of such powers, privileges or immunities as are inconsistent with or repugnant to the Constitution or the express provisions of this act’. On Donne CJ’s reading, however, the principle of non-impeachment in the context of Nauru’s constitutional system would seem to be absolute.

The Tonga Privy Council Court of Appeal in *Sanft v Fotofili* [1987] TOPC 1; [1988] LRC (Const 110 (3 August 1987)) affirmed the principle of non-impeachment. The case related to irregular parliamentary procedures that, the appellants argued, rendered the *Bank of Tonga (Amendment) Act 1986* unlawful. Disavowing judicial interference in parliament’s internal proceedings, the court declined to grant a declaration of *ultra vires* and said at 5, ‘we are in the realm of “internal proceedings” of the house, and the court does not venture there’.

Likewise, the Court of Appeal of Samoa in *Sua Rimoni D. Ah Chong v The Legislative Assembly of Samoa & Others* [1996] CA 2/96 affirmed what the court at 13 described as ‘the principle of non-intervention’ in parliament’s internal procedures, that

the respective constitutional roles of the courts and parliament normally require the courts to refrain from intervening in parliamentary proceedings. Conflicts between the judicial and legislative organs of the state are to be avoided as far as possible.

The cases cited above reflect a broad approach by the Pacific courts.³ However, while the privilege of non-impeachment or non-intervention might be a settled common law principle, it leaves open a number of issues. The viability of the promulgated distinction between judicial examination of acts of parliament and judicial non-interference in

parliament's internal procedures is an issue. How viable is the distinction between what goes on in parliament and what comes out of it? If parliament can change the procedures whenever it suits the wishes of the majority in parliament, how secure, just, fair and reliable could the lawmaking process be? If what goes on within the walls of parliament is 'protected by the shield of parliamentary immunity' as the Court of Appeal in *Sua Rimoni v The Legislative Assembly of Samoa* observed at 16, the issue is that this shield could easily be turned into a parliamentary sword. And if non-compliance with procedure is acceptable, as some of these cases seem to suggest (for example, as Donne CJ in *Harris* at 7–8 put it, there 'is no enforceable duty owed by the parliament or its members to act constitutionally... The legislature cannot be restrained from passing an unconstitutional act'), the security and fairness of the lawmaking process comes into question.

The second issue concerns the doctrine of *stare decisis* which, as a critical mechanism of legal reasoning, requires the courts to follow precedents on the ground that this produces not only correct results but certainty, stability and continuity in the legal system. As we all know, some precedents are followed, others either distinguished or simply set aside. This raises a plethora of questions, for example, why do the courts follow some precedents and ignore others? In *Harris v Adeang*, Donne CJ followed the minority opinion of Casey J against the majority of the Court of Appeal in *Edward Huniehu v Attorney-General and the Speaker of the National Parliament of the Solomon Islands* (24 April 1997), who held that the court had jurisdiction to impugn and declare unconstitutional the failure of the Speaker of the Solomon Islands' parliament to adjourn the proceedings of the assembly when there was no quorum, as required by section 67 of the Solomon Islands Constitution.

In support of the proposition that the courts have no jurisdiction to review parliament's internal proceedings, Donne CJ cited quite extensively from the judgment of the Full Bench of the High Court of Australia in *Cormack v Cope* (1974) 131 CLR 432. The issue, in my view, is the accentuation of those parts of the Australian High Court's judgment that support the proposition to the detriment of those parts which either dilute or even undermine the proposition. An example is the following statement by Barwick CJ: 'it is not the case in Australia, as it is in the United Kingdom, that the judiciary will restrain itself from interference in any part of the lawmaking process of the parliament'. Qualifying that broad principle, Barwick CJ added the

concession that the court would not interfere with parliament's internal proceedings. That qualification, however, was then framed within the latter part of the broad principle, that is, 'there is no parliamentary privilege which can stand in the way of this court's right and duty to ensure that the constitutionally provided methods of lawmaking are observed'. If my reading of Barwick CJ's statement is correct, it means that the privilege of non-impeachment is secondary, not primary, and that the court reserves the right to intervene where and when appropriate. There is no blanket preclusion of the court's jurisdiction to review parliament's internal proceedings. Interestingly enough, the Supreme Court of Victoria in *McDonald v Cain* (1953) V.L.R. 411 ruled that it had jurisdiction to declare that it was contrary to law to present a bill for assent if it had not been passed by the required majority under the Victorian Constitution as Menzies J noted (and then distinguished) in *Cormack v Cope* at 465.

This raises the issue of the courts' use of precedents to construct an 'idealised model of the legal process' (Kairys 1982:11). In *Harris v Adeang*, the court had a choice of precedents, some in point or *in toto*, others related by analogy; some binding, others merely persuasive. The fact that the court had a choice and did in fact make that choice is important in the respect that the court could logically decide the issue by adopting one possible interpretation and ignoring viable alternatives. This highlights the point that sometimes *stare decisis* is such an open-ended doctrine that one can do almost anything with it. But then again the doctrine is necessary to create a picture of judges simply declaring and applying the law, faithfully following precedents and thereby restricting their domain to law. Of interest is the extent to which this picture is a fairytale no longer tenable in the modern world (Reid 1992). Nor do we need to go along with the full panoply of the critical legal studies genre to support the view that sometimes the law can be 'radically indeterminate, incoherent, and contradictory' (Kress 1989:283). In the final analysis, despite its usefulness, the doctrine of *stare decisis* is certainly not perfect. As Thomas J (1993:15) has argued, it makes the law 'introspective and backward-looking', and that the judiciary should be free from 'the shackles of the doctrine of precedent'. Perhaps the courts should adopt an approach based more on substantive principles than syllogistic reasoning.

The combined effect of these issues is a parliament, following the Westminster system, that is ultimately sovereign (arguably within its own walls) in the face of a written constitution as supreme law. 'The

sovereignty of Parliament is reinforced in the Constitution': *In re Article 36 of the Constitution and in re Bobby Eoe* (1988) 3 SPLR 225 at 228. The Pacific courts, deferring to settled common law practice or following precedents either treat internal parliamentary proceedings as, according to Donne CJ in *Harris v Adeang* at 8, 'sacrosanct and as such cannot be impeached,' or, otherwise intervene, as Gibbs J in *Cormack v Cope* counselled at 467, 'after the completion of the lawmaking process'. Such an approach, in my view, is tantamount to waiting for the concentration camps to stir the courts out of their acquiescence in the holy powers, privileges and immunities of Westminster parliaments.

The issue of the proper limits of parliament's lawmaking power arose in the Vanuatu Supreme Court case of *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980–94] VLR 691 (1 November 1992). The issue was the President of Vanuatu's constitutional power under article 16(4) to refer bills presented for his assent (in keeping with constitutional convention) to the Supreme Court for its opinion on whether a particular bill is inconsistent with the Constitution.⁴ The case revolved around the Business Licence (Amendment) Bill 1992, which, according to the president, 'purports to give the minister wide and far ranging powers to grant or revoke a business licence and at the same time seeks to prevent any challenge of such grant or revocation in any court'.

On the facts, Charles Vaudin d'Imecourt CJ held at 31 that section 8A(2) of that Bill was inconsistent with article 5(1)(d) of the Constitution, which guarantees equal protection under the law, and was therefore unconstitutional. Central to the court's decision was the ousting of the court's jurisdiction by section 8A(2). While noting Vanuatu's adherence to the Westminster common law tradition, that 'the Constitution of Vanuatu is a constitution on the Westminster model', d'Imercourt noted at 8 that 'unlike the English court' the powers of Vanuatu's Supreme Court are also derived from the provisions of Vanuatu's written Constitution—for example, article 2 on the Constitution as supreme law and article 16(4), which vests power in the Supreme Court to review bills referred to it by the president (as in this case). The latter clause, in fact, mandates that a 'bill shall not be promulgated if the Supreme Court considers it inconsistent with a provision of the constitution'. Whether or not a bill that has already been passed by parliament but has not received the royal assent is part of parliament's internal proceedings is a moot point. What seems certain from this case is that the court had taken the initiative in curbing the lawmaking power of parliament. As

d’Imecourt observed at 15, ‘[a]s far as I know, no other jurisdiction within the common law system is called upon to interpret the constitutionality of a bill as opposed to that of an act. Might this be the “French influence” within the Constitution of Vanuatu?’⁵

In theory, Pacific parliaments have limited lawmaking powers *vis-à-vis* entrenched constitutions as supreme law. In practice, there are problems, especially the unique authority wielded by bare majorities in Pacific parliaments. The issue is parliaments with lawmaking powers limited in theory but unlimited in practice. Making fundamental changes to the law shows how easy it is for Westminster parliaments to repeal old laws, enact new ones, and even change a nation’s fundamental law with relative ease. As long as the changes are made in accordance with legal procedures for constitutional amendments, they are legally valid and legitimate. This makes the rule of law less than secure, manifested in the uneasy relation between the rule of law and the doctrine of parliamentary sovereignty as twin features of Westminster.

Under the doctrine of parliamentary sovereignty, parliament ‘has supreme lawmaking powers’ (Palmer 1987:219) and ‘the lawmaker is supreme’ (Kelsey 1993:192). According to the Diceyan doctrine, parliament has the authority and right to make or unmake any law and English law does not recognise the authority or right of any person or body to override or set aside parliamentary legislation (Dicey 1959). Paraphrasing Dicey, Geoffrey Walker (1995:190) states, ‘[a]ccording to Professor Dicey’s theory of sovereignty, parliament had absolute power...Parliament...to use Leslie Stephen’s example [could even] command that all blue-eyed babies be killed’. But if parliament can change existing laws and enact new ones, however oppressive those laws might be, then ‘the rule of law is nothing more than a bad joke’ (Walker 1995:192). A bad joke indeed if a government with a parliamentary majority can initiate the most fundamental changes in the law, unhindered and unfettered. Most certainly a bad joke when those who wield the powers of government under the rubric of parliamentary sovereignty enact laws that deprive people of their citizenship, violate citizens’ rights and liberties, allow racial discrimination,⁷ political injustice, and economic deprivation.

The situation is not aided by a judiciary that is conservative in approach and is unlikely to exercise its inherent review jurisdiction to limit legislative and executive actions. At best, we find judicial pronouncements of caution. Thus, Donne CJ in *Harris v Adeang* at 8

offered a timid reminder that privilege 'does not mean that Parliament is able, with impunity, to act unlawfully'. Being no more than an *obiter dictum*, the reminder was nothing more than conservative. Much more forceful was Lord Cooke's statement of possibility in *Sua Rimoni v The Legislative Assembly of Samoa* at 14, that there are possible limitations on the principle of non-intervention, for example, 'a written constitution such as that of Western Samoa [which] may place upon the courts some duty of scrutinising parliamentary proceedings for alleged breaches of constitutional requirements'. Unfortunately, having toyed with the possibility, the court then withdrew behind the doctrine of separation of powers and refused to question what actually went on within the walls of parliament out of deference to the principle of non-intervention.

This raises important jurisprudential and constitutional law issues. As noted in chapter one, relying on procedural justice alone is perhaps not sufficient protection against tyranny. The propriety of the legal positivist conception of law is always an issue: the Westminster, and the Pacific's adopted, sovereign lawmaker is not an angel without self-interest, prejudice, or malice. Regarding parliamentary sovereignty, perhaps, analysis of this doctrine needs to focus more on 'its wisdom [instead of] on points of law' (Fuller 1969:115). Further, Pacific courts need to be more proactive. Sometimes their approach is nothing more than cosmetic surgery of the Westminster sovereign parliament—taking the Diceyan substance and dressing it in a different form. These matters necessitate reconstituting Dicey's sovereign parliament. I will return to this issue below.

The institution of separation of powers

The following statement by Wilson J in the Samoa Supreme Court case of *The Honorable Tuiatua Tupua Tamases Efi v The Attorney General of Samoa* (1 August 2000) at 51–2 is programmatic for this section and warrants quoting in full.

This court acknowledges the separate, independent and powerful roles of the parliament and the executive, and this court has no wish or intention, even in the slightest way, to challenge the notion of the separation of powers which is at the heart of Samoa's system of constitutional democratic government. But what this court can do, as the watchdog of the constitution, is do its best to do its duty 'without fear or favour, affection or ill-will' in the hope that right and justice will be done (and be seen to have been done). If, in addition, there are some benefits for constitutional government in some way, then well and good.

This section focuses on the institution of separated powers as an essential dimension of the rule of law, that is, the rule of law requires

the arrangement of the branches of government in such a way that the arbitrary use of government powers by any one branch of the state is firmly opposed and checked by the others. Separation of powers means that government powers are dispersed and divided among three branches: parliament, the executive and the judiciary. Parliament makes the law, the executive carries the law into effect, and the judiciary interprets and applies the law.⁸

A complete separation of powers, however, is impractical and incompatible with the realities of contemporary political systems. For pragmatic reasons, such as, administrative efficiency, only a partial separation of powers is possible. The dispersed powers must be integrated into a workable system of government to enable government to function and execute its legitimate roles. Thus, there is separation and also interdependence. The American Supreme Court rejected the notion of a complete separation of powers for this reason, dismissing it as an 'archaic view of the separation of powers requiring three airtight departments of government'.⁹ Nevertheless, the doctrine in its original form may serve as 'an ideal-type' (Vile 1967:10) used to measure changes, limitations or exaggerations made to the basic structure of government.

This dispersion of powers is essential for a whole range of reasons. Underlining its significance regarding absolute power, Madison (1961:322) warns,

[t]he accumulation of all powers, legislative, executive and judiciary, in the same hands whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.

Separation of powers is the antithesis of totalitarianism; it is 'a vital check against tyranny'.¹⁰ It guarantees not only limited government but stable government because power is not monopolised, thus preventing the decline into despotism. For citizens, separation of powers equates to the safeguarding of liberty; the absence of arbitrary rule. The idea behind separated powers also seeks to preserve basic democratic values—justice, fairness, equal protection under the law, and so on. Economically, people are most creative and productive when they are free to pursue economic goals and enterprises. Separation of powers enables economic freedom by obviating totalitarianism and state monopolisation of economic activities and the means of production. Finally, and of equal importance, separation of powers protects judicial independence, which is absolutely vital to the rule of law.

In all, separated powers guarantee the constitutional order against the risk of violation that is naturally inherent in every constituted body. Herein lies its significance. As M.J.C. Vile (1967:2) has pointed out,

[o]f the theories of government which have attempted to provide a solution to this dilemma, the doctrine of the separation of powers has, in modern times, been the most significant, both intellectually and in terms of its influence upon institutional structures.

Pacific states exhibit a broad adherence to this institutional division of government into three branches: legislative, executive and judicial. While there are distinctive features and variations, the three-fold institutional division is followed very closely.¹¹ This three-fold division is enshrined in written constitutions and strictly adhered to. Parliament makes the law;¹² the executive carries the law into effect;¹³ and the judiciary interprets and applies the law. There is also a conscious commitment to keep the judiciary independent from the other branches of government through the special procedures for appointment, tenure, salaries, and removal of judges. So important is judicial independence for the Fiji Islands that section 118 of the Constitution Amendment Act 1997 of Fiji expressly provides that the 'judges of the State are independent of the legislative and executive branches of government'. Whether or not that promise of independence is realised in practice is another matter.

Judicial recognition of the institution of separated powers as a legal and constitutional principle also seems certain. For example, in *Kenilorea v Attorney General* [1984] SILR 179; [1986] LRC (Const) 126, the Court of Appeal of the Solomon Islands held that section 5(d) and (e) of the *Price Control (Retrospective Operation and Validation) Act 1983* was void on the ground that the enactment violated judicial independence, as guaranteed by the Constitution, and was therefore inconsistent with the provisions of the Constitution.¹⁴ The issue concerned an Act of Parliament that effectively required the court to dismiss all proceedings that challenged action taken to enforce certain price orders which had been made unlawfully, but which had been validated by that legislation.

The Samoan Court of Appeal took a similar approach in the case of *Attorney General v Saipaia Olomalu & Others* [1980–93] WSLR 41. While holding that the dual voting system then operating in Samoa (the *matai* franchise and universal suffrage) did not contravene the provisions of the Constitution (especially article 15 on equality under the law) and was therefore not void, the court expressed doubt about the justification

for excluding those who are not cultural chiefs (*matais*) from direct participation in the election. But, said the court, '[t]hese...are questions of social policy: questions which, on our interpretation of the Constitution, are to be decided by parliament, not by the courts'. With that, the court confined its role to interpreting and applying the law in keeping with the institution of separated powers, thus leaving the political arms of government to their own devices.

This highlights a gnawing problem in Pacific jurisdictions—the institution of separated powers is static and is therefore underdeveloped, underutilised and even non-functional. The Pacific's association with the Westminster system allows only a partial separation of powers, wherein an independent judiciary, oppositional politics, coalition governments and other institutions, such as chief auditors and ombudsmen, are supposed to prevent the accumulation and misuse of power. More often than not, however, the emphasis is on cooperation and coordination among the three branches of government, thus neglecting the need for institutional scrutiny. The result in many cases is, perhaps, an unintentional concentration of government powers in one organ of the state, usually the executive. The danger in this is the exaltation of the executive, the vesting of wide discretionary powers in government officials, enlarging executive power, which then becomes a potential threat to the rule of law. Such a threat is exacerbated by 'the grant to official agencies of substantial powers to act for very broadly defined public purposes, subject to limited judicial control' (Allan 2001:16). Arbitrariness thus remains 'the distinguishing feature' of executive action; the operation of the executive 'carries an intrinsic danger of arbitrary treatment...Discretionary executive action in the interest of the public good as a whole must, then, be accepted as a necessary evil' (Allan 2001:14).

This evil is manifested in more ways than one. The more power one acquires, the more likely it is that one will abuse that power. Human nature remains humankind's own worst enemy. The issue of corruption in the Pacific could be explained, at least in part, along these lines. The effect of an exalted executive on the lawmaking process is equally adverse. The executive, given its domination of parliament, has the numerical power to even enact acts of attainder, *ad hominem* statutes, and *ex post facto* laws. In some cases, the executive deliberately extends its orbit and increases its reach through a wide range of special tribunals with quasi-judicial powers but which are ultimately subservient to the

executive and are no more than vehicles of the executive will. And if oppositional politics is dysfunctional, if coalition government is nothing more than just a way of capturing executive power,¹⁵ and if other checks and balances are not really effective, then curbing the increasing power of an exalted executive becomes an extremely difficult task.

Given the inherent dangers of executive power, it is therefore absolutely essential to subject the executive to 'the supervision of independent courts, bound to act on grounds of the general principles of common law, or constitutional law, that supplement the general rules laid down in legislation' (Allan 2001:15). Such legislation must stipulate the limits and the general purposes for which a grant of power is made. The judiciary, through its construction of the law, must ensure that executive action comes within the ambit of legislation and that it is consistent with constitutional principles. Going beyond those stipulated limits and purposes must attract judicial censure by way of judicial review of executive action and, in appropriate cases, a declaration of *ultra vires*.

Judicial control of the executive, nevertheless, is only possible if the judiciary is truly independent from the executive and also from parliament. This is essential if the courts are to be able to properly fulfil their role 'as servants of the constitutional order as a whole rather than merely as instruments of a majority of elected members of the legislative assembly' (Allan 2001:3). Taken in its totality, the control of the executive by the judiciary is vital to legitimate governance, to ensure that the use of public power by the executive is in keeping with 'a scheme of justice' (Allan 2001:32) wherein all citizens are treated equally, accorded moral dignity, and their rights and liberties protected. While it is conceded that executive actions can be carried out to attain public objectives, such actions must always be subjected to strict judicial scrutiny to ensure that the executive operates within the constraints of a community's 'scheme of justice' as democratically negotiated and publicly avowed.

The argument for a powerful executive has been made thus: a strong executive government is an essential component of a strong state; national development pivots on it; further, administrative efficiency justifies concentrating public power in the executive. Granted, the argument for a strong executive government has some credence; but it must be said that strong government does not necessarily equate to the rule of a minority with absolute power. The pressing challenge therefore is reining in the executive. This raises the issue: how effective are the legislature and the judiciary as checks on executive power?

Given the domination of parliament by a majority party, legislatures in many Pacific jurisdictions are being forced to acquiesce in this executive fiasco. Furthermore, in the name of strong government, legislatures cannot but favour executive decisions in order to facilitate the attainment of government goals. Yet, there is always the danger that the legislature and the executive are meshing into an undifferentiated super-executive body, 'an organised majority committed to a coherent plan of action' (Hayek 1979:23). The danger is that, when the legislature becomes the executive, there is no longer any separation of powers, which could have serious ramifications. The prospect of legislative control of the executive is therefore very slim, placing an onerous burden on the judiciary. That the judiciary itself could lose or sell its independence and become nothing more than an instrument of political power with which to grant legal legitimacy to executive interests is equally dangerous.

The theory of checks and balances

Related to, but not synonymous with, the institution of separation of powers is the system of checks and balances. The checks and balances theory holds that one branch of government should be able 'to prevent abuse of governmental process by another' (Harris 1985:50).¹⁶ The pertinent principle here is that the stability of government and the successful achievement of its objectives 'are best accomplished by a delicate equipoise between equal powers, by mutual jealousies' (Pargellis 1968:47). This institutional checking amongst the organs of government seeks to protect the state against the arbitrary use of government powers by any one organ, or even by a public official or group of officials with sufficient influence to hold the state to ransom. However, the practical application of the theory could be problematic in jurisdictions with parliamentary executives where cabinet ministers are members of both the executive and parliament, as in most Pacific nations. The danger of power being concentrated in a few with a dominating influence in both parliament and the executive is real and immediate. Given that, it is imperative that effective checks and balances be set in place to curb possible abuses of power.

On balance, Pacific states have reasonable systems of checks and balances embodied in written constitutions and set up by statutes. The problem is that in most Pacific nations checks and balances have been dramatically eroded and are in danger of being dysfunctional. I refer,

for instance, to the controller and chief auditor as a cornerstone of Samoa's system of checks and balances, a parliamentary watchdog acting as 'an important check against financial corruption and inefficiency' (Palmer 1987:18) in government. Established under Articles 97–99 of the Constitution and the *Audit Office Ordinance 1961*, the chief auditor, pursuant to a repealed clause (3), was to hold office 'until he reaches the age of sixty years', with the proviso that parliament could extend his term of office by resolution. The objective was to protect the independence of the chief auditor by security of tenure. His removal from office by a resolution of parliament carried by a two-thirds majority under a repealed clause (4) was likewise designed to place him under the jurisdiction of parliament. The prohibition under article 98 (still in force) against diminishing his salary during his time in office (unless such reduction is part of a general reduction of salaries) is also designed to secure his independence by placing him under the protective mantle of parliament. In the performance of his duties under article 99 he must 'feel completely free' (Constitutional Convention of Western Samoa 1960:Vol II, 667) to undertake his reporting role to parliament, drawing attention to any irregularities 'regardless of where they have occurred and of how unpopular he may become in some circles' (Constitutional Convention of Western Samoa 1960:Vol II, 667) for doing so is his 'duty, and his right, to inform the legislative assembly as soon as possible of these irregularities and not wait until the time arrives for his annual report' (Constitutional Convention of Western Samoa 1960:Vol II, 667).¹⁷

These constitutional provisions collectively make the chief auditor parliament's watchdog, overseeing the use of public funds and property, and promptly reporting—without fear of repercussions—on any irregularities wherever they may occur. In undertaking this constitutional role in an independent and impartial manner, the chief auditor constitutes a check against executive actions. Lord Cooke in *Sua Rimoni v The Legislative Assembly of Western Samoa* affirmed at 16, '[c]ertainly the intention of the constitution is that the chief auditor shall be independent and able to investigate and report freely within his proper sphere'.

The issue is, how effective could the present chief auditor, under the firm control of the executive, be as a parliamentary watchdog? The independence and effectiveness of Samoa's chief auditor is now an issue. The Constitution Amendment Act 1997 stipulates 'new conditions' for the chief auditor under a new article 97. Clause 2 of the new article stipulates a term of three years (though he may be reappointed) and is

in marked contrast to the chief auditor's security of tenure under clause 3 of the repealed article 97, vital to the independence of the chief auditor. As Lord Cooke in *Sua Rimoni v The Legislative Assembly of Western Samoa* put it at 2, 'in the interest of the people of Western Samoa he [the chief auditor] is given security of tenure'. Nor is the chief auditor aided by clause 5 of the new article which provides for his suspension or removal from office by the Head of State on the advice of the prime minister, who is required by clause 6 to provide parliament with 'a full statement of the grounds' for his suspension or removal. Again, this procedure is in marked contrast to clause 4 of the repealed article 97 on the removal of the chief auditor on 'like grounds' and in 'like manner as a judge of the Supreme Court' (stated misbehaviour, or infirmity of body or mind) by the Head of State on an address by parliament carried by not less than two-thirds of the house requesting the chief auditor's removal on the aforementioned grounds. It may not be true anymore that, as Lord Cooke in *Sua Rimoni v The Legislative Assembly of Western Samoa* at 3 emphasised, 'in the performance of his [the chief auditor's] lawful functions he is not subject to any control by the government'. In theory, the chief auditor is parliament's watchdog; but a neutralised watchdog neither barks nor bites, and it is not surprising that no complaint is issued by the executive when the watchdog is silent.

The Constitution of Samoa embodies other equally important checks and balances which, if observed and properly utilised, could afford adequate protection against arbitrary power. Article 32(1) requires the executive to be collectively responsible to parliament.¹⁸ The convention of collective ministerial responsibility means *inter alia* that parliament has power to pass a vote of no confidence in the executive's administration of government. Article 33(3)(b) provides for individual ministerial responsibility whereby cabinet ministers are held responsible not only for their own actions but for those of public officials in his department.¹⁹ Such responsibility is predicated on the notion of employees as the minister's agents: 'everything they do, they do in his name. In the eyes of the law, the permanent official is an anonymous instrument of the minister' (Palmer 1987:47). The problem is that this convention is not legally enforceable and, as a consequence, could be casually ignored.²⁰

The three interrelated aspects of ministerial responsibility—unanimity, confidence and confidentiality—also have the potential to produce 'strong executive control over parliament' (Palmer 1987:69). Unanimity, as 'the quintessential ingredient of the adversary system of

politics generated by the Westminster system' (Palmer and Palmer 1997:70), can mask any disunity in cabinet from public scrutiny. Similarly, while unanimity can be used to inspire public confidence, it can also be used to obscure details and foster a culture of ignorance about government dealings. This is consolidated by the requirement for confidentiality in cabinet matters—the no-leaks rule. Ministerial responsibility, given its imperfections, cannot be seriously seen as a magic formula for executive accountability.

The ombudsman, established by the *Komesina o Sulufaiga (Ombudsman) Act 1988*, is appointed for a term of three years by the Head of State on the recommendation of parliament.²¹ The placement of the ombudsman under the jurisdiction of parliament means that he is parliament's officer; the ombudsman owes 'no allegiance to the executive government, whose activities [he is] primarily involved in investigating' (Palmer and Palmer 1997:224); the ombudsman is 'a check on the power of the executive' (Palmer and Palmer 1997:224). Vested with wide discretionary powers of investigation, the ombudsman has jurisdiction to investigate acts or omissions by government departments and public officials. If the course of action recommended by the ombudsman is not heeded by the body or person under review, he has discretion under section 19 to report the matter to the prime minister or, as a final resort, parliament. The importance of this office is predicated on 'the right of every member of the public who is aggrieved by an act or decision of a government body...to have that grievance investigated by an ombudsman' (Kelsey 1993:175). It must be noted, however, that at present the ombudsman is only a statutory officer. It is unlikely that parliament will repeal this office in the future. But should parliament decide to do so, it needs only a simple majority to do that. Further to that, the ombudsman has no power of prosecution; he can only investigate, report and recommend. Whether or not that makes for an effective watchdog is a matter of opinion. My concern is that a watchdog with no teeth may find it convenient to consort with wolves and, in concert, slaughter the sheep he is supposed to guard.

General elections remain the major check on the abuse of government power, constituting the 'most important barometer of public opinion' (Palmer and Palmer 1997:14). But if elections are less than honest, the use of public opinion as a constitutional check is hardly of any value, being nothing more than 'a blunt instrument' (Government of New Zealand 1985:27). In some Pacific contexts, political indifference prevails. This involves viewing politics as a game of the less-than-mediocre, a

profession unworthy of the idealist intellectual or the principled moralist. The effect is that politics has become the arena of self-seeking politicians who are left unchecked to exploit public office for private gain.

Going beyond constitutional and statutory checks and balances, the media, 'the fourth estate of government' (Palmer and Palmer 1997:16), and civil society organisations like non-government organisations, churches, civil liberties societies and so on have an equally important influence. The effectiveness of these civil society organisations as checks and balances ought to be gauged against their ability to foment positive change. The problem in the Pacific is that the media and civil society organisations are mute and therefore ineffective as checks and balances against the misuse of public power.

Further, facets of the international community—international bodies and organisations—have a vested interest in encouraging honest and peaceful political and economic change around the world without resorting to military power. But, by the same token, international bodies and organisations are too preoccupied with their own politico-economic agendas and bureaucracy. Where and when they do intervene in Pacific affairs, their interests are usually skewed in favour of achieving their own pre-determined objectives.

The issues canvassed above finally amount to the question: what sort of integrity do the systems of checks and balances actually have in Pacific jurisdictions? It has been demonstrated that they have been eroded to such an extent that a radical physical rebuilding is needed.

The reification of Pacific states

Taken to its logical conclusion, the exaltation of Pacific executive government ultimately manifests itself in the privatisation of the peoples' states—captured, owned and exploited by an élite few. Another cause behind the increasing privatisation of Pacific states is the complex interplay of cultural exaggerations, religious or theological engineering, historical miscalculations, philosophical blunders and misleading ideologies that are part of the Pacific mythmaking. These traditions are tenaciously transmitted through the communities, dogmatically perpetuated and jealously promoted for different reasons, resulting in the concentration of state powers either in one person or an élite few.

A clear example of the deification of leaders and their rule is the Kingdom of Tonga. Clause 41 of the *Constitution of Tonga 1875* sanctifies the person of the King ('the person of the King is sacred') and, by logical

extension, his rule. Thus, Tonga has a sovereign King exercising divine rule in the manner of the Stuart Kings. This may be explained on a number of grounds. The Constitution of Tonga was drafted by a Reverend S.W. Baker (a Wesleyan missionary from England) at the request of King Tupou I. The resulting theological colouring of the Constitution is therefore not surprising. Furthermore, the move to formally deify the King suggests that the *volksgeist*, or 'spirit of the community', was conflated with state interests and embodied in the King. From the perspective of constitutionalism, the gnawing issue is the alarming extent of the King's power under the Constitution.

I refer also to the exaltation and reification of the State of Samoa (together with those who wield the powers of the state). There is something nationally sanctifying in viewing the state itself as something divine, an eternally ordained metaphysical reality. Central to that conception is Samoa's national motto, '*E fa'avae i le Atua Samoa*' (Samoa is founded or based on God), which, for most people, is an article of democratic faith. In the popular mindset, the state is, if anything, the unfolding of divine purpose on earth; the state exists by divine decree.

This concept of the state is perpetuated to serve different interests; for example, to legitimise state rule and justify the submission of the citizens to that rule. For ordinary Samoans, by contrast, the national motto is a valid truth espoused in good faith. Accepted *en masse* as a fundamental tenet of Samoa's jurisprudence, the motto constitutes the real (though *de facto*) 'constitution' of Samoa; it is more important than the national Constitution of 1960. Unfortunately—and this is pertinent to present purposes—this national declaration of democratic faith takes the state out of its earthly, existential moorings, away from the people, and converts it into a supra-mundane entity imposed from above. The question here is not the people's freedom of belief. The issue, rather, is that exalting, reifying or even deifying the state has serious ramifications.

A reified/deified state (wherever it may be) purportedly imposed from above is, by definition, not a mortal creation of, by, from and for the people. This is a frontal attack on basic constitutional principles: the people as creators, beneficiaries and owners of the state; the state as a servant of the people; and the sovereignty of the people as a legal and constitutional principle. Reified and deified, the state becomes a government of angels, needing no external or internal controls. Furthermore, in this schema, there is no need for the consent or the continuing concurrence of the governed as the proper basis of government. This is because (according to the deification rationale of

power) the state first came into being by divine authorisation, it rules by divine right, and its authority is sacrosanct. When this happens, the democratic state is not really different from the totalitarian German state which Friedrich Hegel 'praise[d] as a god, and Marx curse[d] as a devil' (Kelsen 2000:172). The corollary of reifying/deifying the state is that citizens are reduced to cogs in a political machine; individual rights and liberties are not important, state interests take priority. A deified and therefore all-powerful state, an expression of 'the divine will' (Hegel 1952:85) with 'absolute authority' (Hegel 1952:81), is the polar opposite of a constitutional democracy with limited powers.

It is also arguable that Pacific misconceptions of the state are partly a debt bequeathed by colonialism. The fact that all Pacific countries were former colonies is critical here. It is not inconceivable that the peoples' colonial experience included viewing the state (whether under or from the colonial powers) as something imposed on them. This experience of something imposed from above—that is, according to the precepts of the time and space world of colonialism—is underscored by legitimating ideologies. An example of this is the idea that new forms of political organisation are superior to traditional forms; this idea spawned the mindset that the state does not really belong to the people and is beyond their influence or authority to control. The concomitant of such an estranged mindset—and the self-imposed alienation of the people it has engendered—is the exalted status of the state, above the people and beyond the normal run of things.

From a philosophical perspective, it may be argued that state reification/deification is reminiscent of the Hegelian conception of the state as a kind of spiritual entity—an omnipotent, all-embracing, all-powerful institution, 'an absolute end in itself' (Hegel 1952:80), deified as the 'march of God in the world [or even more aggressively as] this actual God' (Hegel 1952:141). This political god has 'supreme right against the individual, whose supreme duty is to be a member of the state' (Hegel 1952:80), wherein the citizen finds 'objectivity, genuine individuality, and an ethical life' (Hegel 1952:80). Taken to its logical conclusion, the deified state, undergirded by the doctrines of the power state and the Nietzschean 'will to power', is defined by power and is justified in increasing power. It is arrogant, cruel and brutish, as history has shown. It stands above civil society and deals with its own citizens in a condescending manner, as cogs, mere parts of a grand political machine (Lloyd 1915:630). Ultimately, the state becomes the embodied will to power.

Hegel was not a Samoan, nor did he ever set foot in Samoa. But his countryman, Governor Solf, spent significant time in Samoa. According to the records (Davidson 1967), Solf not only went out of his way to exalt himself as the paramount King of Samoa, he also exercised autocratic rule over the Samoan people. Not surprisingly, German rule in Samoa alienated the Samoan people in their own land. The people's experience of what government is could not therefore be described as gratifying or rewarding, and Solf's own condescending paternalistic attitude pushed the government over and beyond the people's influence and reach. The government, in other words, became an entity other than the people—an exalted, deified entity, something akin to Hegel's 'actual God'.

Misconceptions of what a state is (such as the above) are being reinforced and perpetuated by a Pacific postcolonial national bourgeoisie, an emerging *de facto* kind of ruling, upper/middle class (Ray 2003). This unorganised bourgeoisie speedily filled up the political vacuum left by the departed colonists, and they continue to advance colonialist ideologies. Central to such ideologies is the misconception of the state as the rule of an élite few and the assumption that people need strict rule because they are not enlightened enough to know how to rule themselves.

Most, if not all, Pacific governments must honestly face this alienation of the masses within their own states. From the standpoint of constitutionalism, constitutional democracy has degenerated into an oligarchy wherein power is monopolised by a few; constitutionalism has surrendered to totalitarianism. Embodied in the élite few who wield its power, the state is no longer an abstraction but an incarnate political monster feeding on the people over whom it has absolute power. Not surprisingly, the question 'who owns the state?' is forcing itself into public discourse and interest.

Reviving the rule of law: reconstitution, reconstruction and resurrection

To counter the danger of arbitrary rule by mortally-constructed states that are always seeking to exalt themselves over and above their mortal creators, we need to return to basic principles of government. And to reverse the theft of whole nations by an élite few, we need stronger basic institutions and principles that curb power aggrandisement.

Reconstituting Dicey's sovereign parliament

The detrimental effects of Dicey's notion of parliamentary sovereignty on the rule of law and the institution of separated powers necessitates a reconstitution of this doctrine. One way of resolving this doctrinal hiccup is to provide an alternative reading of parliamentary sovereignty, taking into consideration the sovereignty of parliament and the corresponding sovereignty of the judiciary as twin features with equal status in England's system of government. Lord Bridge of Harwich in *X Ltd v Morgan-Grampian (Publishers) Ltd* [1991] 1 AC 1 at 48 succinctly underlined this point in the following terms,

In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in parliament in making the law and the sovereignty of the Queen's courts in interpreting and applying the law.

In the light of Lord Harwich's pronouncement, Allan (2001:13) insists 'on a more plausible reading of Dicey' (also Goldsworthy 1999)²² that takes into equal consideration Dicey's sovereign parliament and supreme rule of law as possessing equal status. One does not subjugate the other or render the other superfluous; most certainly, the rule of law is not rendered insignificant or impotent in comparison to parliamentary power.

It is possible that Dicey himself was aware of government coercion and the need to keep it to a minimum—that 'trust in a democratic parliament alone was a recipe for political disorder' (Mason 1995:118). It could be argued that Dicey accordingly sought to bolster the authority of the common law courts through his conception of the supreme rule of law. The principle that a person can be punished or lawfully made to suffer in body or goods only for a distinct breach of the law excludes punishment merely for disagreeing with the legislator. This is fortified by the principles that the rule of law excludes wide and arbitrary powers of constraint and that government powers conferred or sanctioned by statute are never really unlimited, for they are confined by the words of the statute itself and by the interpretation put upon the statute by the courts. In positing the law as a bridle on arbitrary power, Dicey thus accorded the courts the special role of protector of the rule of law. Through the interpretation of statutes and the construction of common law principles, the courts could thereby impose control on the power of the legislature. On balance, therefore, the sovereign parliament of the Westminster system is ultimately limited by law, and the Westminster judiciary is not at all powerless before an omnipotent legislature.

The alternative reconstitution of Dicey's sovereign parliament is through the more radical position advocated by Sir Edward Coke and, to some extent, Lord Cooke of Thorndon (former president of Samoa's Court of Appeal). I refer, for instance, to Sir Coke's 'judicial adventure' (Hodge 1995:97) and his 'most celebrated dictum' (Caldwell 1984:358) relating to *Dr Bonham's case* (1610) 8 Co Rep 114 at 118 which, perhaps, aptly expresses the power of the common law.

And it appears in our books that in many cases, the common law will control acts of parliament, and sometimes adjudge them to be utterly void; for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.²³

In the Pacific, we find the *obiter dicta* of Lord Cooke (in a number of New Zealand cases) described as lying squarely 'in the tradition of and remarkably so of *Dr Bonham's case* and common right and reason' (Hodge 1995:109) as enunciated by Sir Coke. In *L v M* [1979] 2 NZLR 519, Lord Cooke at 527 noted '[t]hat there is even room for doubt whether it is self-evident that Parliament could constitutionally' confer on a public body (in this case, the Accident Compensation Commission) other than the courts, jurisdiction to decide whether or not a court action is barred. In *Brader v Ministry of Transport* [1981] 1 NZLR 73, Lord Cooke at 78 questioned the authority of Parliament to abandon the 'entire field of the economy to the executive'. In *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394, Lord Cooke at 398 affirmed that '[s]ome common law rights (freedom from torture) presumably lie so deep that even parliament could not override them'. Then in *Fraser v State Services Commission* [1984] 1 NZLR 116, Lord Cooke at 121 was much more direct in curbing the power of the New Zealand Parliament to act, noting that some common law rights (right to justice) 'may go so deep that even parliament cannot be accepted by the courts to have destroyed them'.

While confirming the 'constitutional role' (Cooke 1988:158) of the courts to give effect to the intention of legislative enactments, Lord Cooke also referred to legitimate limits to legislative power, for example, an act of parliament that purports to strip Jewish people of both their citizenship and property rights is contrary to common right and reason, morally repugnant, and should therefore be struck down by the courts. Ultimately, constitutional democracy demands fetters on the power of parliament and that 'one can no longer talk about "some vague unspecified law of natural justice" or resort to similar anodynes. One

may have to accept that working out truly fundamental rights and duties is ultimately an inescapable judicial responsibility' (Cooke 1988:164).

For some people, this judicial activism is nothing more than 'judicial adventure' or even 'judicial glasnost' (Kelsey 1993:194). However it may be described, it does represent an informed judicial caution that, in 'taking Dicey undiluted' (Cooke 1988:164), an unlimited sovereign parliament may assume unbridled power and exercise arbitrary rule. This is not a lack of faith in the institution of responsible government and parliament's deference to that principle. It is, rather, a realistic assessment of the dangers a supreme parliament with unlimited powers poses to the citizens. When the citizens' rights and freedoms are infringed by legislative and executive action, the judiciary has a constitutional role to act according to the law.

From the point of view of Pacific constitutional systems, the position canvassed above is not a mere gloss on the principle of parliamentary sovereignty. It is, rather, constitutional law orthodoxy at its highest. In fact, when the Samoan judiciary declares void, in accordance with article 2, acts of parliament or executive actions that are inconsistent with the provisions of the Constitution of Samoa, it is certainly not judicial usurpation of the authority of parliament or a heretical assertion of judicial sovereignty. Such a declaration is, in fact, both constitutional, in the sense that it is in keeping with constitutional mandates as enunciated by the constitutional framers, and lawful, in the respect that it is within the powers and authority of the Constitution. Armed with article 2 and an open-ended Constitution that can be invoked to justify greater judicial activism, the courts can and should use them. After all, it is their constitutional role to ensure that government does not exceed its constitutional limits. Similarly, it is of note that, under the provisions of most Pacific constitutions, other Pacific courts, like the Samoan judiciary, are not impotent.

It is a moot point whether Pacific courts have been less adventurous than their constitutional position legitimately allows, or whether they have been less assertive than is allowed by the permissive juridical philosophy on which they are supposed to operate. If and when they are, judicial authority risks becoming a mere legal fiction, and the temper of members of the Pacific judiciary becomes an issue.

In conclusion, a valid case for judicial activism in the Pacific could be advanced. This argument is fortified by the common law position of the courts surveyed above, the role of Pacific written constitutions as supreme law, and the broad review jurisdiction of the courts to declare

void legislative and executive actions that are inconsistent with constitutional provisions. There are, of course, issues and concerns. The question 'who guards the guard?' seems to follow inevitably. The notion of judicial sovereignty is not without its own ghosts. Indeed, there is always the possibility that the judiciary may itself become the greatest threat to the rule of law if judges assume and exercise unbridled power. These legitimate concerns warn against extreme judicial activism and call for a counterpoising measure of restraint on the part of the judiciary.

In the final analysis, however, neither judicial restraint nor judicial activism is of lasting importance *per se*. The really important matter is doing justice according to the law. The rule of law neither requires nor rejects judicial restraint or judicial activism; it simply requires justice according to law. This fundamental requirement needs to be undergirded by peace, welfare and good order issuing from the operation of the rule of law as a principle of legitimate governance. As Sir Laurence Street CJ has counselled,

I prefer to look to the constitutional constraints of 'peace, welfare, and good government' as the source of power in the courts to exercise an ultimate authority to protect our parliamentary democracy, not only against tyrannous excesses on the part of a legislature that may have fallen under extremist control, but also in a general sense as limiting the power of parliament (Sir Laurence Street CJ 7 NSWLR:405).²⁴

Reconstructing the institution of separation of powers

At the heart of the institution of separation of powers is the conviction that it 'enables the law to serve as a bulwark between governors and governed, excluding the exercise of arbitrary powers' (Allan 2001:3). The rule of law requires the arrangement of the branches of government in such a way that the arbitrary use of state power by any one branch of the state is firmly opposed and checked by the other two. The combined exertion of the rule of law and the separation of powers counteracts the sort of tyranny that portends the very probable collapse of the politico-legal order. This is not inconceivable when, in the absence of a separation of powers, there is one branch of government with absolute power to do as it wishes—legislate, execute and judge. This concentration of power, said Baron Montesquieu, 'would be an end of every thing, were the same man, or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals' (Montesquieu 1748:Book XI, Ch VI).

The exaltation of Pacific executive governments urgently demands the resuscitation of the institution of separation of powers. Making this institution work necessitates cutting a sovereign parliament down to size and making the judiciary more proactive as discussed in the previous section. In some contexts, Tonga for example, there is an urgent need for constitutional change and a radical overhaul of the political order, including a thorough deconstruction of the ideologies that underpin the existing order.

A complete separation of powers is impractical, especially in jurisdictions with parliamentary executives where government ministers are members of both parliament and the executive. This overlap of personnel and functions is permitted on the ground that, despite the overlap, there are structures, processes and procedures (for example, professional ethics and the development of specialised interests along institutional lines) that provide some form of check against an unauthorised assumption of power. It must be noted, however, that there is always a real danger of one branch of government assuming powers not expressly granted, or usurping powers traditionally reserved to another branch, thus causing a major disruption to the balance of governmental powers, with serious consequences. The relevant test is whether a given law transfers a specific power from one branch to another, the extent of the power being transferred (whether substantial or not), and whether such transfer of power is accompanied by sufficient protections against concentrating too much power in one branch to the detriment of the other two.

The need for strong government is again acknowledged. Sometimes strong government requires and justifies some measure of concentration of effective public power in the executive. Be that as it may, the common concern—and a very pronounced one in some Pacific nations—nowadays is that the notion of strong government might be (and has, in fact, been) used as an excuse or justification by the executive to acquire freedom to rule, unfettered by a parliament that has been reduced to a rubberstamp and a judiciary that is too courteous to even complain. While conceding the need for the three branches of government to work cooperatively for the common good, the danger is that the balance tends to tip too far and too often towards cooperation and coordination. This is, of course, a question of degree. One thing seems certain though: interdependence must not be sought at the expense of separated powers and institutional checking. Responsibility for the public good, the efficient conduct of public affairs, public order and national security—

these idioms are usually part of an exaggerated rhetoric often used by the executive to drive the executive's own conception of the public good and to exalt itself as ruler of the social order, often at the expense of countervailing interests.

Strengthening the judiciary is therefore an imperative. In addition to the case for judicial activism mounted above, it is further argued that the courts must be firm in requiring accountability from parliament and especially the executive through the exercise of the courts' review jurisdiction, analysing every executive decision with cautious scepticism, ensuring that the executive acts according to the law. Important in this connection are the judicial functions of defining the content of legal rules and declaring what the law is. The use of legal precedents, despite its imperfections, is nonetheless important in that it gives judicial decisions legitimacy, certainty, predictability and stability. Judicial transparency through public scrutiny of judicial decisions is equally important. In addition, the mechanics of the court process are, on the whole, egalitarian, giving all parties in a case an equal footing and equal opportunity to present their cases. The presumption of innocence and the presumption against retrospective operation similarly ensure that justice according to the law is done and is seen to be done. In concert, these rules operate to subject both legislative and executive powers to legal limits, and to prevent the abuse of court processes.

The concentration of state power in the executive means the balance of power is disturbed, and the state increasingly inclines towards absolutism as a result. Restoring the balance and stability of government is therefore a political and moral imperative. The courts have a pivotal role to play in this process. When reliance on the ideological commitment of the rulers to justice, fairness and equality proves to have been a misplaced trust, when parliament is reduced to nothing more than a rubberstamp for the will of the executive, when the executive is so consumed by its own interests that those who wield executive power can no longer distinguish between personal ambition and public good, and when the people themselves are so politically apathetic that acquiescence in the status quo has become the norm, the judiciary is the last bastion of resistance against the certain decline of the social order into totalitarianism.

A pressing issue of concern is the diminishing influence of parliament in some Pacific states. Strengthening parliament (albeit as a limited sovereign) is therefore an urgent matter as well, an important means of

counterbalancing the power of the executive government. Worthy of note are such practical strategies as the two-tier parliament and the multi-party cabinet structures adopted, for example, in the Fiji Islands. The passage of proposed bills through the two houses of parliament ensures, at least, open debate and scrutiny of those bills before they become law. Opposing views are expressed, heard and assessed in open debate, and the substance of proposed legislation is subjected to scrupulous analysis and critique in keeping with the interests of true deliberative democracy. Opposing views in both houses of parliament and in a multi-party cabinet are vital in checking, enhancing and enriching the lawmaking power of the executive by imposing constraints on that power. The system of coalition government, if it is not exploited as a ploy for capturing executive power, is an important way of keeping the executive under control.

The fundamental significance of the institution of separated powers is again emphasised. Law is a bridle on power; separation of powers reinforces the law's control of unbridled power. Pertinent to the limiting role of the rule of law and the separation of powers are basic democratic values such as justice and fairness, responsible and accountable government, equal subjection to the law, and the protection of citizens' rights and liberties against the tyranny of the state. Without the separation of powers 'there can be no public liberty' (Blackstone 1966:Vol.1, 142); with the separation of powers there is no minority rule and this is some 'guarantee of public freedom' (Hegel 1952:272). Separation of powers, in short, is 'essential for the establishment and maintenance of political liberty' (Vile 1967:1). These values are not self-executing. The rule of law, in concert with the separation of powers, provides an important means of realising those democratic values in practice.

Also at stake is the credibility and even survival of the political and legal order itself. In the absence of a separation of powers 'the destruction of the state is forthwith a *fait accompli*' (Hegel 1952:272). Usually there is fragmentation of the state from within when rulers self-destruct either when their power is spent or, as is more likely, when the citizens rise up in a violent revolution. Either way, the destruction of the state is a matter of course. Some Pacific states, particularly Papua New Guinea, the Solomon Islands, and Fiji, continue to straddle this fine line between the right to govern and the duty to govern in justice. The situation in Tonga (at the time of writing) is a clear illustration that the people will not put up with arbitrary rule for ever.

Resurrecting the system of checks and balances

The need to resurrect Pacific systems of checks and balances is demonstrable. General elections remain an important check and balance; the challenge lies in the reform of electoral systems and laws. Public referenda and other forms of direct democracy are also important on issues of major constitutional importance.

Strengthening parliament's watchdogs is an urgent imperative. Chief auditors are always a very important force for checking the power of the executive government. Critical to the effectiveness of a chief auditor is the independence of the office from the power of the executive government. This independence may be achieved through a number of means, such as the appointment and/or reappointment of office-holders being made by a unanimous decision of parliament, and removal from office being decided by more than two-thirds of parliament and based on limited grounds, such as those prescribed for the removal of judges of the Supreme Court. The reporting rights and fiscal position of the chief auditor also need to be strengthened and more precisely defined. Ombudsmen, too, could be an effective check on the power of the executive. The powers of this office may need to be extended and the constitutional position of the ombudsman more firmly grounded. A major problem with Pacific ombudsmen is financial. Their financial strength affects the scope and effectiveness of the work they do (Ombudsman of Western Samoa 2001).

Strengthening parliament clearly demands strengthening parliament's own watchdogs. One would like to think that the fortification of these offices and their investigative and reporting rights would buttress the authority and power of parliament vis-à-vis the executive. While making allowance for the achievement of legitimate public objectives, parliament must, at the same time, seek to guard the constitutional order against frivolous executive policy interests and departures from legal procedures in the quest for speedy solutions or ill-conceived strategies to frustrate and ultimately liquidate political opposition.

In the Pacific, strengthening parliament needs to be reinforced by strong party systems. Ideology espoused by political parties needs to be more clearly defined and more fervently encouraged. This would shift the focus away from self-interest and personal affiliations (cultural, religious, economic) towards strong ideological commitment and the perception of social issues as the basis of party politics. It would also

shift the focus away from an interest-based democracy to deliberative democracy as the guiding norm. Of special interest is the category of a multi-party executive adopted in the Fiji Islands, as noted above. Although the Qarase government is at the time of writing seriously considering the abolition of that structure, there is no reason why the arrangement cannot work successfully if there is sufficient political will and resilience on the part of politicians to make a good structure work.²⁵

Select committees in Pacific states also need support and strengthening. As a forum for members of the public to express views on proposed legislation, select committees are important barometers for gauging public opinion on issues that ultimately affect the lives of the citizens. But in order for select committees to become productive as public forums, we need to stir the people out of political apathy as is prevalent in most Pacific nations.

The convention of ministerial responsibility is arguably not legally enforceable or justiciable. The situation in Samoa and other Pacific jurisdictions is different: the convention is enshrined in written constitutions as the supreme and fundamental laws of these nations. Thus incorporated, this convention is therefore legally enforceable as part of the laws of these countries. Taken seriously and honestly (which, unfortunately, is not the case on many occasions) both collective and individual responsibility could ensure the accountability of public officials to the people. Failing that, ministerial responsibility is likely to remain a mere 'political axiom' (Palmer and Palmer 1997:46) or a fiction, an unworkable system whereby the minister is, 'in theory, accountable for everything and in practice accountable for nothing' (Palmer and Palmer 1997:81).

Then there is the media, which, when it is not preoccupied with sensationalism, has been and will continue to be the voice of conscience through honest and critical reporting of facts and situations that are genuinely in the public interest. The media's dissemination of information could also pique the interest of pressure groups like human rights organisations, churches and other non-government organisations. They too can bring pressure to bear on parliaments and executives on issues and situations involving arbitrary rule. The international community must also have a keen interest in what happens around the world, especially now with globalisation and internationalisation. Such interest should privilege peace and progress. And, I might add, in Samoa and the entire Pacific for that matter, we do not have any need for some president's militant ego to change the world.

Deprivatising and dereifying Pacific states

As noted above, the concentration of state power in an élite few ultimately results in the privatisation of the state. The need to deprivatise the state naturally flows on from the course of my argument. In light of this, I offer the following observations.

At the level of conceptualisation, myths are important for the social construction of reality. That also applies to the myths of reification and deification of rulers, their rule and states. However, beyond their constructive value and seductive appeal, their negative effects must be exposed, resisted and subverted. Against the notion of a deified state (with deified rulers), it must be emphasised that the state is a historical product: a mortal creation by mortal creators; a creation of, by, from and for the people. As such, it must continue to find its justification in the growing conviction of the people, its creators. Such justification must be sought in the value and usefulness of the state—through government institutions and personnel—to the development of the people's individual and corporate life, in the successful performance of those functions for which it was instituted—to secure the persons, property, rights, freedoms, defence and peace of the citizens.²⁶

The state is really part of the superstructure of society, part of the citizens' experience of needs, interests and fears. It is, at worst, only an artificial construct. As Karl Marx (1975:85) put it, '[t]he state is an abstraction. Only the people is a concrete reality'. Bentham similarly emphasised the significance of the people over and above a political community which is only a fictitious body (Bentham 1970). The accent is clearly on real people, not 'straw men'. This motif clearly needs to regain currency in the current political climate.

These countervailing considerations are fortified by the notions of popular sovereignty, government by consent, and government as a trust for the governed. I will deal with these principles in detail in chapter three below. Suffice to note the following matters in this context. Deprivatising the state means rehabilitating the people as the creators, beneficiaries and owners of the state. It means giving back to the people what rightfully belongs to them: the state as a mortal creation of, by, from and for the people. This points to the fundamental significance of the people in constitutional systems of government, epitomised in the notion of popular sovereignty or the sovereignty of the people, including the people's legal title to rule.

The increasing privatisation of many Pacific states is contrary to, even a violation of, the sovereignty of the people, and the violation of

this fundamental tenet of constitutional democracy is, in effect, a contravention of the people's right to rule. Hypothetically, if the present trend toward privatisation continues, Pacific states' dealings with arbitrary rule will soon no longer be playful experimentation. But then again, when states shoot into totalitarianism, citizens always have the 'liberty to disobey' (Hobbes 1960:ch 21) and to 'resume their original liberty' (Locke 1988:222). This is, of course, a perfect recipe for disaster. Pacific rulers and government officials would therefore do well to consider this alarming possibility. Sometimes the silence of the people can be very dangerous, as the events in Tonga (at the time of writing) clearly demonstrate.

Recourse to cultural institutions and protocols

When parliament and the judiciary fail to rein in an almighty executive, when the media, non-government organisations and churches are mute, introverted and therefore dysfunctional as public checks on government powers, and when the conventional means of protection are no longer working or effective, it is worth exploring the value of Pacific indigenous institutions, protocols, structures and values as limits and controls on state power and the exercise thereof.

By way of illustration, in the Samoan traditional universe of meaning, social practice and political organisation, the threat of absolute power and arbitrary rule is counteracted through the levelling effect of a whole range of cultural protocols—a complex network of overlapping institutions, beliefs, structures and reciprocal ties. The institution of the extended family imposes moral and psychological limits on the ambitious assumption of absolute power by a single individual through the threat of disinheritance (from the family titles and property) and social alienation. In the context of the village, the control of individuals and families is pursued within the framework of the council of chiefs and elders as a decision-making political body. An ambitious assumption of absolute power in the village readily attracts collective censure in the form of social control mechanisms such as fines, alienation, ostracism and, in the worst case scenario, banishment from the village. At the national level, an ambitious assumption of absolute power by an individual or group is controlled through the force of a collective socialism that resists and subverts every atomistic pretension to absolute power. This collective socialism is epitomised in and expressed through the *matai* (traditional chiefs) system, a ubiquitous

feature of Samoan society, which guides, checks and controls the power (and the craving for more power) of individuals, families, groups and even villages.

In concert with those institutions, social structures like patronage and kinship (if they are not exploited in the service of sectional interests), cultural protocols like social civility and deferring to the wisdom and judgment of the elders, and cross-cutting ties based on historical, political, and economic alliances, all work to level out individual ambition and group excesses. In conjunction with, and undergirding the use of, those indigenous elements, traditional normative principles and rules need also be resurrected, strengthened and invoked as part of society's moral protection against the threat of arbitrary rule. The Samoan trait of being orientated strongly towards others, a trait manifested in the moral priority of the 'other' and their interests, is especially relevant in this connection. I will return to this matter in chapter four below. Suffice to note that these traditional traits and values, no doubt, would go a long way towards diffusing the current syndrome of extreme self-interest that seems to drive politics and guide democracy in the Pacific.

Worthy of note is the importance of public opinion as a court of reputation in the traditional Samoan worldview. This constitutes a powerful value judgment that can make a person into either a king or a friendless pauper virtually overnight. Consequently, anxiety about public opinion, ridicule and the negative estimate of one's fellows is a strong force of social control. Construed positively and used constructively, this traditional drive to avoid falling into disgrace has the moral and psychological force to check the degeneration of politics into a morally-neutral monopoly of self-seeking, exclusively self-interested, isolated monads. Resurrecting, strengthening and invoking public opinion as a check would help deconstruct the modern *laissez-faire* mindset that now afflicts Samoan and other Pacific politicians. As part of an honour/shame culture, the force of public opinion applauds, venerates, and confirms the honourable reputation of worthy people on the one hand, and decries, condemns, and rebuffs the unprincipled acts of ignoble people on the other.

These principles hang together in the construction of society where community power, politics, economics, laws, roles, objectives, interests and other institutions revolve around the principles of interdependence and interconnectedness. These inform, guide and govern interpersonal

relationships. This accounts for a complex web of interlocking human relationships based on descent, sociopolitical alliances, economic associations and other cross-cutting ties. Out of those interrelationships emerge systems of duties and reciprocal obligations that bind together individuals and groups in lasting sociopolitical interdependent relationships which (couched in a metaphysical, even spiritual framework) could be epitomised in the term 'kin' and embodied in the institution of kinship.

In Samoa, interdependence and interconnectedness are moral and political imperatives. This is in line with the sociocultural emphasis on the collective good, maintaining the equilibrium of society and affirming the other instead of negating or dislocating him. Indeed maintaining and protecting social harmony is a first-order principle of social organisation and practice in Samoa, and is a major objective of traditional mechanisms of social control. This is reinforced by other equally important traditional protocols such as the requirement for civility and a compelling sense of respect for others, in both word and deed, subject to the following caveat of caution.

Negatively, in the context of modern cut-throat politics, speaking with respect makes political criticism somewhat difficult. Sometimes seen as discursive, even rebellious if the criticism is from the bottom upwards, criticism is seen as disruptive of social harmony within the group. This privileging of harmony at the expense of critical opinion is integrally related to consensual thinking. But when dissent from the consensus opinion is treated like treason, and seeking and achieving consensus is pursued to the exclusion of countervailing views and opposing interests, social harmony becomes a form of coercion and courteous speech becomes a method to maintain the status quo. Positively, the traditional protocol of speaking with respect for others resists the practice, again in the context of modern politics, of pedantic displays of arrogance in word and deed. Likewise privileging social harmony subverts the practice of causing public disorder to gratify idiosyncratic notions of political correctness.

Conclusion

The Pacific legal pendulum oscillates from Westminster to Washington to Paris and back again in a kind of self-confirming circularity, resulting in Pacific legal systems that are, at best, combinations of the best of many worlds and, at worst, hybrid constructs suffering from a split

personality syndrome. In the final analysis, however, whatever lead the Pacific courts follow, the final test is this: the courts must uphold the rule of law; it is their sworn and holy duty to do so.

This necessitates reconstituting Westminster's sovereign parliament and thereby unleashing the full potential of the institution of separated powers and the related system of checks and balances as potent forces for constraining Pacific governments within constitutional limits and controls. These constraining forces constitute a bulwark against tyranny, totalitarianism and unbridled human ambition,²⁷ even serving to counteract 'the hydraulic pressure inherent within each of the separate branches to exceed the outer limits of its power'.²⁸ Allan aptly sums up this essential concerted opposition to government arbitrary rule in the following terms.

At the heart of the ideal of the rule of law lies a traditional conception of 'law', implicit in the original understanding of the doctrine of the separation of powers. Arbitrary and capricious modes of government are excluded when the law consists mainly of general rules that are binding on all, including public officials and also members of the legislature in their private capacities (Allan 2001:32).

Notes

- ¹ Most Pacific jurisdictions follow the Westminster system of government—for example, Fiji, Nauru, Vanuatu, Cook Islands and Tuvalu—by virtue of their historical association with England, New Zealand and Australia during the colonial period. Hence the adoption of common law and equity principles and practices in Pacific legal systems. In the case of Samoa, the adoption of a parliamentary form of government was 'the result of circumstance, rather than of conscious decision' (Davidson 1967:370). Tonga, of course, is more an imitation of the English feudal system under the Stuart Kings.
- ² The comment was made with reference to the New Zealand government. In my view, the problem of the exaltation of executive power now afflicts many more countries following the Westminster system of government.
- ³ See further *The Honorable Tupua Tamasese Efi v The Attorney-General of Samoa* (Supreme Court, 1 August 2000); *Siale v Fotofili and Others* [1987] LRC (Const) 240; *Shaw v Commissioner of Inland Revenue* [1999] 3 NZLR 154. Most of these cases follow *British Railways Board v Pickin* [1974] AC 765, [1974] 2 WLR 208, [1974] 1 All ER 609, HL; also *Namoi Shire Council v Attorney-General for New South Wales* [1980] 2 NSWLR 639.
- ⁴ This is a common constitutional arrangement in Pacific jurisdictions. See, for example, article 73 of the Constitution of Samoa on the original, appellate, and revisional jurisdiction of the Supreme Court of Samoa; section 83 of the Constitution of Solomon Islands; section 88 of the Constitution of Kiribati; and section 123 of the Constitution Amendment Act of Fiji.
- ⁵ See also *Sope v Attorney-General No. 1* [1988] VUSC 11; [1980–94] VanLR 356 (2 August 1988). An interesting *obiter dictum* by G. Ward CJ amounted to the same effect. At 5, the learned justice noted as follows, 'I accept that these rules [on parliamentary privilege] were made under the doctrine of legislative supremacy

whereby the English courts cannot hold an act of parliament to be invalid or unconstitutional. Where, as here, there is a written Constitution entrusting the court with the interpretation of the Constitution and the determination of infringements, the situation is different. Thus, if it is shown to the court that any proceeding was in breach of a provision of the Constitution, it may make any order it considers appropriate to remedy the breach. That may include declaring any parliamentary business, including acts, to be invalid’.

⁷ *Oppenheimer v Cattermole* [1976] AC 249.

⁸ *M v Home Office* [1994] 1 AC 377.

⁹ *Nixon v Administrator of General Services*, 433 US 425, 433 (1977).

¹⁰ *Buckley v Valeo*, 424 US. 1, 121 (1976).

¹¹ For a summary of these variations see Paterson (1999).

¹² The most notable feature is the provision for a two-tier Fijian parliament under section 45 of the Constitution Amendment Act 1997, which vests lawmaking power in a parliament comprising the president, the House of (elected) Representatives (sections 50–63), and an appointed Senate (sections 64–66).

¹³ Notable variations for present purposes include the mandatory requirement for ‘a multi-party cabinet’ government for Fiji under section 99 of the Constitution Amendment Act 1997. In Kiribati and Nauru, ministers are appointed and dismissed by a president, not a prime minister as is usually the case in other Westminster systems of government. In both countries, however, the president must be a member of the legislature and is, thus, more like a prime minister than an executive head in the mode of the US president. Tonga is an extreme case. The Tongan executive is partly a parliamentary executive and partly a non-parliamentary one. Under clause 51 of Tonga’s Constitution, the prime minister and cabinet ministers are appointed by the King from either inside or outside parliament.

¹⁴ See also the Solomon Islands Court of Appeal case of *Gerea and Others v DPP* [1984] SILR 161; *In re the Constitution, Timakata v Attorney-General* [1992] VUSC 9; [1980–94] VanLR 691 (1 November 1992); *Sope v Attorney-General No. 1* [1988] VUSC 11; [1980–94] VanLR 356 (2 August 1988).

¹⁵ See, for example, Windybank and Manning (2003) for an analysis of what the authors describe as the ‘inherent instability’ of Papua New Guinea coalition government, which has resulted in frequent changes in government through parliamentary no-confidence motions.

¹⁶ For a detailed account of the different checks and balances see especially Palmer (1987); also Palmer and Palmer (1997).

¹⁷ There are, of course, variations across Pacific jurisdictions in respect of the establishment and other matters relating to this office. For example, the auditor general of the Solomon Islands is appointed by the Governor-General on the advice of the Public Service Commission under section 108 of the Solomon Islands Constitution. In Kiribati, the director of audits is appointed by the Public Service Commission under section 100(2) of the Constitution of Kiribati. In Fiji, under section 167 of the Constitution Amendment Act 1997, the auditor general is appointed by the Constitutional Offices Commission in consultation with the standing committee of parliament. Differences aside, there seems to be a common interest in making the office of auditor general independent. For example, section 114(3) of the *Constitution of Kiribati* provides as follows: ‘In the exercise of his functions under this section, the Director of Audit shall not be subject to the direction or control of any other person or authority’.

- ¹⁸ See also section 45 of the Constitution of Kiribati, section 97, on the constitutional requirement for responsible government, and section 102, on both collective and individual ministerial responsibility in the Constitution Amendment Act 1997 of Fiji, and article 17(2) of the Constitution of Nauru.
- ¹⁹ Section 102(2) of the Constitution Amendment Act 1997 of Fiji is more explicit and carries more weight in its demand: 'A minister is individually responsible to the House of Representatives for all things done by or under the authority of the minister in the execution of his or her office'.
- ²⁰ See, for example, *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 in which recognition and enforcement of a convention was sought but declined; also *Re Amendment of Constitution of Canada* (1982) 125 DLR (3d) 1, where it was argued that conventions do crystallise into law and are therefore legally enforceable, an argument that was roundly rejected. In the final analysis, however, the distinction between laws and conventions is not really of fundamental importance. Conventions may not be really different from laws.
- ²¹ On the office of the ombudsman in other Pacific jurisdictions, see, for example, sections 157–65 of the Constitution Amendment Act of Fiji and sections 96–99 of the Constitution of Solomon Islands. The establishment of the ombudsman's office under the Constitution in the case of Fiji and the Solomon Islands contrasts with the establishment by statute of Samoa's ombudsman.
- ²² See also Allan's (2001) analysis of Goldsworthy's argument.
- ²³ Understandably, Sir Coke's position has invited both criticism (that he either misquoted or misunderstood the authorities on which he relied and that, whatever merits his view had, it suffered an untimely death as a result of the constitutional changes brought about by the *Bill of Rights 1688* and the *Act of Settlement 1700*) and support. Thus, Allan (2001:204–5), notes that '[t]he nature of Coke's commitment to the "transcendental and absolute" jurisdiction of parliament has been much debated; but it is clear that he well understood the ability of judicial interpretation to tame potential excesses and abuses of legislative power'.
- ²⁴ Similar requirements are found in Pacific constitutions. For example, article 28(1) of the *Constitution of Niue* (to be read with the *Niue Constitution Act 1974*); article 16(1) of the *Constitution of the Republic of Vanuatu*; article 27 of the Constitution of Nauru; section 59(1) of the Constitution of Solomon Islands; section 66(1) of the Constitution of Kiribati; and section 44 (on social justice and affirmative action) of the Constitution Amendment Act 1997 of Fiji seem to encapsulate the requirement for good government.
- ²⁵ Radio New Zealand International, 12 June 2003; as reported in the *Pacific Islands Report* (12 June 2003) under the heading 'Fiji 'Talanoa' to address multi-party controversy'.
- ²⁶ On the functions of the state see Locke (1988); also Hobbes (1960).
- ²⁷ Note also Bailyn: 'No one set of ideas was more deeply embedded in the British and the British-American mind than the notion, whose genealogy could be traced back to Polybius, that liberty could survive in a world of innate ambitious...men only where a balance of the contending forces was so institutionalised that no one contestant could monopolise the power of the state without effective opposition' (1990:76).
- ²⁸ *INS v Chadha*, 462 US 919, 951 (1983).