

3

Reinventing government: constitutional principles, ideals, realities and fictions

For a platonic idealist, government is the ideal expression of society. A contemporary pessimist, on the other hand, loathes government as nothing more than an insatiable political monster feeding on the body politic. For a classical Marxist, government is the manifestation of bourgeois rule. By contrast, a theocrat uproots government from its existential moorings and exalts it as the manifestation of some divine will on earth and, in some strange ontological sense, itself divine. Government, to the full-blown capitalist, is only a night watchman whose intervention in the deregulated world of market forces should be minimal.

This chapter instead argues that government is the government of the people. This is not mere pandering to the dictates of socialist thought; it is rather a reassertion of the proper status of the people in their mortal creation, the state, and a proper delineation of the often-nebulous connection between the government and the governed. In light of the problem of exalted Pacific executive governments, often manifested in the abuse of public power for private gain, my interest is in deprivatising Pacific governments and rehabilitating the people as the real locus of government authority. Warning of Papua New Guinea's decline into economic, political, and social chaos, Susan Windybank and Mike Manning (2003:1) write of the use of public monies to subsidise 'a small political élite' and how democracy has been 'hijacked by those responsible for and benefiting from the "systemic and systematic" corruption of public institutions'. As the authors of a report on security in Melanesia phrase the issue, the problem is the '[c]oncentration of political power in too few hands and for too long, with competition for

power provoking violence and unethical management' (Anere et al. 2001:6). In Tonga, the problem 'is that the present system of government benefits a minority only, and it supports the fortunes of a few. The struggle for change is about freeing Tonga from that rule which is beneficial for a minority, and to allow people to share in the good fortune' (*Taimi o Tonga*, February 1996). In the words of the *Eminent Persons' Group Review of the Pacific Islands Forum*,

[v]ariable standards of governance have produced at their worst instability, violence, corruption and a breakdown of the democratic process. These problems have exacerbated the generally slow pace of economic growth and, in some cases, led to economic decline. Poor governance has a direct impact on the lives of Pacific people. It affects not only their rights as individuals and as communities, but also the delivery of basic services such as health care, education and the management of scarce resources (Eminent Persons' Group 2004:n.p.).

The issue, for present purposes, is the alienation of the people from public power, influence, and physical resources in their own state, with the consequent loss of citizens' trust and confidence in government. Who owns the state? This is becoming an increasingly pressing question in the Pacific.

This chapter accordingly underlines the fundamental significance of the people, epitomised in the related principles of government as trustee for the governed, popular sovereignty, and government by consent which, taken together, provide a more basic and principled theory of government. These basic constitutional principles are underlined as the foundation and structure of the true relationship between government and governed, the proper basis of government, and the appropriate nature of government responsibility and accountability to the people. The implications of these principles are equally important: the structure and practice of government, lawmaking power, the phenomenon of political representation, government accountability in lieu of corruption, government protection of citizens' rights and liberties, judicial review of constitutional powers and roles, and judicial review of administrative decisions. I will address these issues throughout this chapter to expose the gap between theory and practice and gauge how much remains to be achieved.

Basic constitutional principles: ideals as benchmarks

The following discussion elaborates the overlapping principles of government as trustee for the governed, popular sovereignty, and

government by consent. Collectively, these provide a more basic and principled theory of government. Each attaches government responsibility and accountability to the governed more firmly to the legal, political, moral and ethical values that should underpin, guide and govern the conduct of government. This is absolutely vital to legitimate governance.

Government as trustee for the governed: fiduciary powers and legitimate expectations

The principle of government as trustee for the governed is part of a body of ideas that seems to have been consolidated by the seventeenth century.¹ Its generation and evolution lay in the complex politics of uneasy alliances and opportunist usurpation of power that marked the relationship between the English monarchy, parliament, and people. Thus, disputing the House of Commons' assertion of authority in opposition to the King, the royalist Sir John Spelman in 1642 declared that their 'trust is limited by the writ to advise with the *King*, not to make Acts or Ordinances in any case against him' (Morgan 1988:62). The controversy between the King and parliament aside, it appears that by 1642 the power to govern and make laws was already conceptualised in terms of trusteeship and that the abuse of such vested power was being reviled as a breach of trust.

Evidently, also, the principle of trusteeship was being identified with the whole apparatus of government, and the expectation that parliamentarians would faithfully adhere to that trust in favour of the entire body politic had become a national sentiment (Morgan 1988:51, 62–3). So, when criticised for its actions, the English Long Parliament (1640–53) blatantly refused to initiate the reforms the petitioners were calling for on the ground that 'its status as trustee for the whole kingdom did not permit it to accommodate a part of the kingdom (that is, the petitioners)' (Morgan 1988:65). The Levellers saw fit, at this time, to impose limits on parliament by declaring through 'An Agreement of the People' that 'Parliaments are to receive the extent of their power, and trust from those that betrust them' (Morgan 1988:73). In opposing the 'Agreement', parliament reasoned that a 'parliament claiming omnipotent authority from the people could not afford to admit the possibility of the people being embodied anywhere outside the walls of Westminster' (Morgan 1988:73). And so Westminster's sovereign parliament was born. Its sovereign power was to be mitigated only by

instruments such as the Magna Carta and the Petition of Right, and by basic constitutional principles such as the government acting as trustee for the governed.

The principle of popular trusteeship, of government as a trust, emerged from that complex politico-historical background. By 'the early 19th century a large body of law (criminal, tort and, to a lesser extent, equitable) was erected on this foundation governing the use and abuse of public office' (Finn 1995:11). The principle, however, has had an unhappy history. Within a few decades of its emergence into prominence, it faded into the background of legal and political thought, eclipsed by the notions of representative and responsible government, cabinet government, the convention of ministerial responsibility, and, in some cases, the enactment of comprehensive public service legislation. These developments—believed to allow a more robust (though limited) role for the people—led to the subversion of the principle of government as trustee and the dismissal of the idea that parliament itself could be a trustee for the people as nothing more than 'a "political metaphor"' (Maitland 1911:Vol. 3,403), that parliament is not 'in any legal sense a "trustee" for the electors' (Dicey 1959:75).

But the balance of thought has changed again. In recent times, the principle of popular trusteeship has re-emerged as a very important category for defining the nature, end, and functions of government. A number of factors have prompted this shift of opinion: the failings of representative democracy, the defects of oppositional politics, the exaltation of the executive and the emergence of élitist rule, the dysfunction of the institution of separation of powers and the related system of checks and balances, the unenforceability of the convention of ministerial responsibility, and the development of modern governments into *de facto* corporations (Finn 1995:12). These problems in contemporary political systems have critically raised the issues of the true nature and end of government, the proper nature of the relationship between government and governed, the appropriate exercise and limits of public power, and the basis and legitimacy of government rule. In this context of political experimentation, the principle of government as trustee has re-emerged, providing important answers to searching constitutional, legal, political and public ethics questions.

In keeping with that revived interest in the principle of government trusteeship, it should be emphasised that government is a trust; public offices are offices of trust and confidence concerning the public; and

public officials are officers who discharge duties in which the public has a vested interest.² Government powers belong to and are ultimately derived from the people. Public officials are simply ‘the trustees, the fiduciaries’ (Finn 1995:14) of those powers. Institutions, officers and agencies of government ‘exist for the people, to serve the interests of the people and, as such, are accountable to the people’ (Finn 1995:14).

The central tenet in this edifice is that the relationship between government and governed is essentially a fiduciary one that imposes a very high standard of care and responsibility on government officials. Paul D. Finn (1995:9) thus underlines, ‘the most fundamental fiduciary relationship in our society is manifestly that which exists between the community (the people) and the state, its agencies and officials’. Here the word trust is used as a synonym for fiduciary, and the accent is on the idea that government powers are the fiduciary powers conferred by the people (Finn 1995). The transfer of power is thus significant as the basis of a fiduciary relationship that not only confers rights but defines corresponding duties as well. Government institutions, officers and agents are charged with fiduciary duties to the people. As trustees, they are ‘the servants of the people’ (Finn 1995:11).

All this amounts to the people’s legitimate expectation of a high standard of conduct and practice on the part of public officials in the public arena—a duty of care, loyalty, honesty, responsibility, prudence and good judgment, and a responsibility to act in the best interests of the people and in good faith. This has a significant levelling effect on government and what it can do. Thus, Locke (1988:221) wrote, ‘the legislative acts against the trust reposed in them when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people’. This limitation on the exercise of government powers points to ‘the core idea of trusteeship—that government exists to serve the interests of the people and that this has a limiting effect on what is lawfully allowable to government’ (Finn 1995:13). Put differently, government cannot abrogate the citizens’ rights without legal and/or moral justification, take away their property by force or without adequate compensation, discriminate against minorities in society, deprive the judiciary of its inherent jurisdiction, assume powers not expressly given, or abuse powers given and thereby exercise unbridled rule. When government does any or all of the above, it acts contrary to the terms of its creation. It is, in a broad sense, a breach of trust.

This raises the point that trust, both institutional and inter-personal, is vital to the health of every democracy.³ It is a vital component of society's social capital and a powerful integrating force for civil society.⁴ A healthy social capital and a strong, robust civil society are essential to a good, wise and trustworthy government. Trust, understood in ethical and interpersonal terms, means that citizens have confidence in their rulers as honest, frank, open and responsive to their needs. It means, in simple terms, that one can trust one's member of parliament to act in one's best interests. Where ethical trust in politicians obtains, trust in government prevails. Where it is either low or even absent, trust in government declines and citizens view government institutions with an increasingly negative sense of apathy. This points up the important correlation between ethics and politics: ethical trust in government officials engenders political trust in government. Both involve a basic evaluative and cognitive view of whether government is functioning to meet the people's normative and legitimate expectations.

And while parliament might not be a trustee for the electors in a strictly legal sense, government is. This is variously manifested. The public trust doctrine makes government responsible for public land and other resources as trustee for the people as beneficial owners. In Samoa, for example, the state is made a trustee of customary or native land.⁵ In some jurisdictions, the state is guardian of indigenous estates, as in the case of the American Indians.⁶ There is also evidence that the courts might be increasingly prepared to impose fiduciary duties on government, even in cases where no proprietary interest is affected and where the state acts as guardian of the interests of a section of the people. Anthony Mason (1994) observes that interests protected by fiduciary principles could be extended beyond narrow legal and economic ones to include fundamental human and personal interests as well (also Batley 1996; Sweeney 1995; Bartlett 1995). The idea that categories of fiduciary relationships are not closed is an interesting one.⁷

In the Pacific, trust in most politicians and governments is at very low levels and in some cases non-existent. Corruption, mismanagement of public resources, deficit financing, poor fiscal planning, economic waste, institutional failure, political instability manifested in the failure to provide basic public services, the neglect of government infrastructure, and the inability to maintain law and order—these are some of the hallmarks of poor governance in many Pacific nations. This has had a debilitating effect on the people who, placed in an amorphous

fiduciary relationship of trust with their rulers, feel betrayed and misled when their rulers do not act within the terms of the trust relationship. Not surprisingly, trust (understood in both ethical and political terms) is sadly lacking.

In most cases, apathy ensues, and citizens become indifferent to the affairs of government. Viewing politics as a game of the worse-than-mediocre, unworthy of the idealist intellectual or the principled moralist, the governed indiscriminately surrender their state to the governors and, more and more, politics becomes a monopoly of self-seeking politicians who, as a result, are left unchecked to exploit public office to further their private interests. Herein lies a familiar problem, a very real and gnawing one in the Pacific: the real danger in any democracy is internal decay spawned by the indifference of citizens in matters affecting their government. When citizens are indifferent, democracy quickly degenerates into any of its polar totalitarian opposites. It can become an odious autocracy or rapacious oligarchy overnight, and both can maintain the façade of democratic institutions. Indifference, in short, means the end of democracy, which signifies more than just the death of a principle.

The principle of government as trustee presupposes, requires and constructs, active political subjects, citizens who are rational enough to either trust or distrust their own government, citizens with an active and vested interest in what happens to their government. This is a powerful combatant against apathy. It is the citizens who make or unmake governments, give them fettered powers, hold them accountable, reform or remove them when they are not responsible, accountable and responsive. This prerogative lies in the sovereignty of the people.

Popular sovereignty: 'We the People'

The principles of government as trustee and popular sovereignty are integrally related. Popular sovereignty forms 'the core idea of trusteeship'; government as trustee constitutes 'the inexorable logic of popular sovereignty' (Finn 1995:15). The accent is on the fundamental significance of the people, epitomised in the notion of popular sovereignty as an 'emerging legal and constitutional principle' (Finn 1995:5) that underlines the priority of the people over the state. Before there was a state, there were people who, by and with their consent, brought the state into existence. Since the people created the state to serve their interests, the state is therefore a means to an end, not an end in itself. It is the servant of the people.

But what is this amorphous category called 'the people'? Is it a mere fictional entity, 'existing as a people only in the actions of the Parliament that claimed to act for them', as Edmund S. Morgan (1988:49) describes it? Ultimately, the existence of this body—the people—is vital to the credibility of the principle of popular sovereignty itself: the people cannot conceivably possess or exercise sovereignty if it does not exist in fact. And how should we view and treat the people? A rude, useless, unwieldy agglomeration of ignorant, irrational and deluded souls who need to be ruled because they do not know how to rule themselves and should not therefore be entrusted with their own welfare—a condescending, élitist view that some Pacific parliamentarians and rulers continue to negligently entertain?⁸ If this is the case, then there is a fundamental flaw in the principle of popular sovereignty—namely, the people's inability to rule.

Moving on from such crude perceptions, it must be said that, if the principle of popular sovereignty has taught us anything, it is that 'the people' is not an abstract notion but one that has real, tangible effects. If we take Samoa as an example, we are able to look at the politico-historical antecedents of the formulation 'We the people', as presented in the written Constitution of 1960, to chart the emergence of 'the people' as a political force. From 1900 to 1914, Samoa was a German protectorate. Its administration was then handed to New Zealand, first as a mandate of the League of Nations and subsequently as a trust territory of the Trusteeship Council of the United Nations. In 1961, the United Nations dissolved the Trusteeship Agreement for the Territory of Western Samoa 1946 and New Zealand enacted the *Western Samoa Act 1961*, section 3 of which provides, 'It is hereby declared that on and after Independence Day [1 January 1962] Her Majesty in right of New Zealand shall have no jurisdiction over the Independent State of Western Samoa'. And so, on 1 January 1962, Samoa became the first independent nation in the South Pacific.

At the centre of Samoa's legal-political order stands the Constitution of 1960. Marking a decisive rupture with the colonial past and the birth of an independent nation, the Constitution serves as the linguistic expression of the compact 'of the people with each other, to produce and constitute a government' (Paine 1979:209), a compact antecedent to the state. Behind the Constitution's enigmatic words, terse clauses, crisp imperatives, succinct injunctions and noble intent stand the constitutional framers of the 1960 Constitutional Convention, all but a few of whom were Samoans by birth. In the final recital of the preamble,

the framers declared: 'NOW, THEREFORE, we the people of Samoa in our Constitutional Convention, this twenty-eighth day of October 1960, do hereby adopt, enact, and give to ourselves this Constitution'. On 9 May 1961, in a plebiscite conducted under the supervision of a UN plebiscite commissioner, the Samoan people voted overwhelmingly in favour of independence.

It seems certain that the historical emergence of 'we the Samoan people' occurred in important paradigmatic stages. As a process, the political evolution of Samoa involved a social contract among the people themselves to form a government. The 1960 Constitutional Convention, the adoption of the Constitution pursuant to the final recital of the preamble of the Constitution 1960, and the plebiscite of 1961 are very important in this regard. Cast in terms of Thomas Hobbes' version of the social contract theory, by that contract 'the multitude so united in one person, is called a COMMONWEALTH' (Hobbes 1960:Chapter 18; also Hampton 1986; Goldsmith 1980). The basis of the sovereignty of the people thus lies in the will of the people themselves, in keeping with article 21(3) of the Universal Declaration of Human Rights 1948, which was one of the major defining documents in the Constitutional Convention 1960. Important in this vein is the notion of a written Constitution as an act of the people, 'an act of popular self-government' (Rubenfeld 1998:210). Central to that act of the people is the constitutional declaration: 'We the people of Samoa'. This is obviously much more than a pedantic shout that the Constitution emanates from the people. It is instead more fundamentally an assertive claim of popular sovereignty; a declaration of the people's authority to create the government of Samoa and 'to specify the forms and limits of government powers' (Kay 1998:30).

The incorporation of the principle of popular sovereignty in Samoa's written Constitution is important. In common law, the sovereignty of the people is regarded as simply a political notion. Dicey's distinction between legal sovereignty and political sovereignty saw to that.⁹ In the case of Samoa, it could be argued that legal sovereignty and political sovereignty have coalesced in a written Constitution, thus making the common law distinction superfluous and converting the notion of popular sovereignty into a legal and constitutional principle, enshrined and embodied in a written text. Consequently, the declaration 'We the people of Samoa' is much more than mere political rhetoric. It is, in fact, a public declaration of the people's right to rule. This has important ramifications for the structure and practice of government. In the words of Finn,

[b]y sourcing the power of government in the people, by acknowledging its devolution in a general scheme of government on to institutions that exist for the people to serve the interests of the people, they give an importance to the general scheme in which, and the purpose for which, power is entrusted to government...the people, not the parliament, are sovereign (Finn 1995:20).

That said, there is always the gnawing problem of how the people could exercise 'effective control over a government that pretended to speak for them—a form of tyranny that popular sovereignty continues to bring to peoples all over the world' (Morgan 1988:83). The root cause of the problem is the contradiction inherent in the status of the people as both governors and governed at the same time. When parliament becomes the people (in a sense, the self-fulfilling prophecy of the principle of popular sovereignty itself), when opposing parliament is seen to be not merely destructive but wicked since parliament can do no wrong, and when parliament is in fact oppressive, who protects the people? Herein lies the irony of popular sovereignty.

It has been said that, when there are serious issues affecting government, the rights and entitlements of citizens in England, the people look to parliament for solutions. In a sense, popular sovereignty yields to parliamentary sovereignty. In France, the people look to themselves for solutions and the general will prevails. In the United States, citizens look to the Supreme Court and the exercise of its review jurisdiction. In Samoa (and, I might add, most Pacific states), a case could be made that citizens should look to the judiciary, notwithstanding the Pacific's love affair with Westminster. This is demanded by the Constitution as supreme law, interpreted and applied by the courts with a very wide review jurisdiction under article 2.

Furthermore, as hitherto argued, democracy does not simply mean majority rule, but majority rule subject to the rule of law. Democracy, argues Allan (2001:261), 'is erroneously equated with majority rule; and the corresponding idea of popular sovereignty should be understood to embody the claim of every citizen to equal respect'. On that basis, a majority decision that permits the torture of a citizen, denies an aggrieved citizen access to the courts, or deprives him of his constitutional rights, 'is not to be understood as an exercise of popular sovereignty, however great the majority or passionate its specious claim of legitimacy' (Allan 2001:261).

There remains the issue of the people's seemingly momentary sovereignty, that the people are sovereign only at the moment of adopting their written Constitution and declaring themselves 'We the

people'. Thereafter, they are no longer sovereign, at least, not until the next major constitutional moment, when the people will again declare themselves the creators of the state. The people, in other words, are sovereign only at certain constitutional moments, and the exercise of popular sovereignty is only periodic and fairly rare. By implication, for long periods of normal politics the people lie dormant, mostly passive, largely manipulable, and thoroughly at the mercy of their rulers.

This is a major issue in the Pacific. Parliaments not only pretend to 'speak' for the people, politicians and public officials have also hijacked the sovereignty of the people. An élite few own and treat government monies as if they were private property as, for example, in the case of Papua New Guinea (Windybank and Manning 2003). In some cases, rulers and their cohorts have a monopoly over the ownership of both private and public lands; citizens without power or political influence have been reduced to squatters in emerging Pacific ghettos outside city precincts, as in Suva. In other cases, governments (sometimes in the form of one or two persons) in concert with multinational firms have a monopoly over public resources, for example, the telecommunications sector.

Increasingly, these monopolistic arrangements are joint ventures between governments and private sector partners. Moreover, the governments have been induced to sign exclusivity agreements with the private sector partner that lock those arrangements in place for many years (Duncan 2004:130).

The result is socioeconomic alienation of the people, especially when ownership of resources is vested in a few people. In the arena of political representation, politicians are elected on promises that the people accept in good faith. Yet it is usually the case that, once elected, politicians readily forget their promises and rule as they please. Thus, representation in the Pacific remains a predominantly beautiful fiction. Between elections, the sovereignty of the people is captured, owned and manipulated by an élite few.

History has shown, however, that the people will not eternally abandon their right to rule to a dictator or tyrant. What happened in the Solomon Islands and the current situation in Tonga provide clear examples of this. Quite appropriately, the *Eminent Persons' Group Review of the Pacific Islands Forum* (Eminent Persons' Group 2004) strongly encourages forms of governance and development that focus on the people, who are government's own greatest asset, in every society with right-minded rulers.

Government by consent: the people's legal title to rule

Inherent in the principles of government as trustee and popular sovereignty is the related principle of the consent of the governed and hence government by consent. 'Put another way', observes Morgan (1988:13), 'all government rests on the consent, however obtained, of the governed'. I concede that the historicity of this consent is an issue. In the absence of conclusive evidence regarding such matters as the unanimity of the consent and the weight given to opposing views, the notion of consent is, at best, a graphic way of expressing the values of trust and popular sovereignty. At the risk of repetition, I note the following matters given their pertinence to the interests of this chapter.

The consent of the governed provides the explanation and justification of popular government. 'Self-government, as we almost invariably understand it', writes Jed Rubenfeld (1998:211) 'consists ideally of government by the will or consent of the governed. This holds for the most cynical as well as the most romantic depiction of self-government'. Abjuring brutal force as a way of securing the consent of the governed to the rule of governors, consent should be obtained by the power of ideas. 'Human beings, if only to maintain a semblance of self-respect, have to be persuaded. Their consent must be sustained by opinions' (Morgan 1988:13). Whether or not such opinions are true and honest is another matter. What seems certain is that the principle of government by and with the consent of the governed is commonly adopted as a viable explanation of how the many are governed by the few.

In the case of Samoa, government by consent is anchored in the people's declaration 'We the people of Samoa' as an essential term of the constitutional agreement of the people to constitute a government. It is also rooted in what Bruce Ackerman (1991:51) calls important 'constitutional moments' expressing popular will and voice, culminating in the 'commanding voice of the People', the 'supreme and original will' of the people, as CJ Marshall in *Marbury v Madison* 5 US (1 Cranch) 137 (1803) put it at 176. This consent not only authorises the creation of the state but also legitimises and maintains its existence and rule. 'What creates that legitimacy in a regime founded on the consent of "the people"', says Richard S. Kay (1998:35), 'is the agreement of a sufficient number of people whose representative capacity makes their joint will an acceptable surrogate for "the people" itself'. Accordingly, the declaration 'We the people of Samoa' is really an affirmation of popular

rights, which the people have surrendered upon submitting to the rules of civil government with the understanding that only by surrendering their rights to govern and defend themselves can there be peace and security for their property and persons. However the consent of the governed is understood—whether as popular will, or popular voice, or ‘popular authorship’ (Rubinfeld 1998:214)—it seems certain that the consent of the governed must and does constitute the basis, authority and legitimacy of government and constitutional rules.

The temporal reach of that consent is a matter of debate though. Consent could be construed as continuous, inferred from the people’s acquiescence both in major constitutional moments and in ordinary politics. Alternatively, we could treat the original framers of a written Constitution as rational and responsible agents acting with care and foresight such that their decision could be deemed to be acceptable over a long period of time, even though that acceptance can never be permanent. Rubinfeld (1998:211) gives an apt summation, arguing

[w]hether we understand the will of the governed through a hyperdisintegrative lens such as public choice or through a hyperintegrative lens such as fascism, in either case, and in all the intermediate cases, we begin by understanding self-government as, ideally, government by the will of the governed *here and now*.

The importance of government by consent is also axiomatic. Absent the consent of the governed and we have a body politic of slaves who are at the mercy of self-appointed rulers and who have to be moved by naked force at the rulers’ behest. Without the consent of the governed, the state loses not only its right to govern but also its authority as the state of the people. The consent of the governed is therefore indispensable as the proper basis of government rule.

The function of government in this scheme is to protect the persons, property, rights and freedoms of the citizens. In the philosophy of John Locke, finding life in the state of nature unsatisfying, people eventually come to an agreement to resign certain rights proper to them in their natural state ‘to join or unite into a community for their comfortable, safe and peaceable living one amongst another’ (Locke 1988: Ch. 8, 95). The objective is to acquire security of person and property against internal and external threats. In return for that security, ‘every man by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority’ (Locke 1988: Ch. 8, 97). We find the same motifs in the philosophy of Thomas Hobbes. Since life in the state of war is literally hopeless, humans eventually come to understand

that the first fundamental law of nature is 'to seek peace, and follow it' (Hobbes 1960:Ch.13). From this is derived the second law of nature: that humans must be willing to renounce their natural rights to govern themselves (as in the state of war); to covenant or contract with one another to surrender their natural rights to a sovereign power; and by that contract, the said sovereign power, vested in either one person or an assembly of persons, is instituted for the purpose of securing the peace and defence of all.

All this highlights the fundamental importance of the people not only in their priority over the state but in their status as the creators and therefore owners of the state. As creators, the people are therefore sovereign. '[I]t seems safe to say', argues Kay (1998:35), 'that we as we actually are do not recognise the title of anyone save the people of a country to rule it. Democratic sovereignty is the only sovereignty we accredit'. The people, according to Finn (1995:1), sustain the 'authority and legitimacy' of the state. Popular sovereignty means that the people 'are constituted the owners, not merely the beneficiaries' (Finn 1995:5) of government.

In addition, as rational and responsible subjects, the people have the moral authority and the intellectual ability to choose, insist upon, and enjoy the form of government they want. 'The principle of popular sovereignty', says Jeremy Waldron (1998:272), '—basic to liberal thought—requires that the people should have whatever constitution, whatever form of government they want'. It could be argued also that the people did not create just any government but a particular form of government, that

in constituting the very possibility of "the will of the people", the members of a society intend to commit themselves not just to any old form of majoritarianism but to a particular form of majority decision, namely the sovereignty of a popular will formed in vigorous and wide-open debate (Waldron 1998:293).

The principle of government by consent fundamentally challenges what some Pacific public officials have been doing to the peoples' states. Corruption, with its multifarious manifestations and detrimental effects, sums up a very bad situation in some quarters of the Pacific. Corruption, in the words of the *Eminent Persons' Group Review of the Pacific Islands*, is

[the polar opposite of] a style of governance that is respected for its inclusiveness, effectiveness and freedom from corruption...[It is] people-centred and democratic in spirit. It needs to reach into communities and address the issues that are important to them. These include poverty in all its forms, the position of women and youth in society, education, 'lifestyle diseases', and the growing threat of HIV/AIDS. The Pacific Way [the Forum's proposed guiding philosophy]

should deal openly, honestly yet respectfully with problems including failures of governance and corruption (Eminent Persons Group 2004:n.p.).

Corruption, the use of public power to exploit public office for private gain, violates citizens' trust reposed in government officials. It is a frontal attack on the people's entitlement as owners of government monies, property and resources. It is also worth noting—to set the record straight—that the corruption of some public officials is not a mandate from the people. Equating corruption with a whole nation, as is the wont of some irritable academics, is therefore absurd and repugnant, logically fallacious and empirically barren.

Constitutional principles: ideals, realities and fictions

The question is whether the constitutional principles articulated above have normative value in practice in the Pacific. The issue is the discrepancy between theory and praxis, with the difference between ideal and reality being, at best, an optimistic fiction denoting what remains to be achieved. This issue is further examined by reference to the following matters: lawmaking power; electoral representation; freedom of thought and expression; the accountability of government; judicial review of constitutional powers and roles, and judicial review of administrative decisions. The Lockean formula noted above provides a broad test

the legislature acts against the trust reposed in them when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people (Locke 1988:221).

Lawmaking power: when the law becomes a sham

Lawmaking power is sometimes arbitrary. Unlimited, it becomes menacing and oppressive. In some Pacific jurisdictions, lawmaking power is characterised by an inherent tendency towards totalitarianism, engendered by the political ideologies of corporate states. Central to the political setup of a corporate state is the principle of leadership that places the leader at the top of a hierarchy of authoritarian structures that organise all dimensions of national life. The nation is accordingly organised in such a way that each level in the hierarchy is controlled by the next level above it, with the whole edifice being controlled by a single leader. The logic here is that the leader not only represents the people, the leader is the people; the will of the leader naturally becomes

the will of the people who are, in many cases, no more than a mere object of leadership. Perhaps people could still vote in elections, exercise their rights, and sometimes criticise politicians, but those things do not make them a political factor with any significant influence—their opinions and actions will not change, let alone influence, anything. Ultimately, the leader is functionally all-powerful.

Herein lies the problem of lawmaking in corporate states. Because the will of the leader is the will of the people, the will of the leader is therefore law. Parliament, the executive and the judiciary are all subservient to that law. This usually leads to the danger of synchronising parliamentary enactments, executive decisions and even judicial judgments with the wishes of the leader. This synchronising process (subtle in many cases) is usually predicated on the fabricated notion that the will of the leader is always right and should therefore be law. When the leader's will meets with resistance of already enacted laws, the substance of the laws can always be changed at any time and in any direction, often on the absurd ground that it is the role of the leader to protect the law. This is undergirded by the constructed appearance that the rule of the leader is just and merciful. This ideological transformation of the law entails adverse ramifications. For example, it effectively cancels out the judicial function of interpreting and applying the law in an independent, impartial manner. Parliament keeps producing legislation; the courts continue to sit; but the law and its operation are, at all times, manipulated, sometimes grossly, in order to serve the ruler and his cohorts' interests.

To what extent the lawmaking process in some Pacific states, especially Tonga, fits into this model is a moot point. Ideally, the principle of leadership of the crown is democratised in practice through conventions, such as representative government, which require the crown to follow the decisions of the elected representatives of the people. The problem remains that, in some Pacific cases, democracy still means the arbitrary rule of either a single individual or an élite few. But then, again, all forms of government are inherently totalitarian. Some assume a totalitarian posture simply because they are bastard imitations of outdated feudal orders. Others evolve into totalitarianism through a gradual usurpation of powers. That aside, the adverse effects of a corporate model of government cannot, and should not, be explained away. I refer, for instance, to the effect on land ownership, the institution of property rights and the progress of under-privileged classes. The choice of this rubric is based on the ground that the corporate political

order is ultimately grounded in property rights and the regime of land ownership, with all land being made the property of the leader.¹⁰

In such scenarios, control over land and the prerogative to grant or withhold estates lies with the leader. Given that there are always some people whom the leader favours more than others, the possibility of the others getting little or nothing is not remote. And more often than not, the others deprived of estates in land are usually those at the bottom of the pecking order. This either creates an under-privileged class or reinforces the plight of an already entrenched under-privileged class. Either way, the institution of estates (and the grant or withholding thereof) is an uncanny way of maintaining the dominance of a monopolising and élitist group.

This raises serious questions about the lawmaking power of a state organised on the corporate model. The alliance between law and class power is a very real concern. Likewise law's imbrication in unfair property relations, legitimated by the law itself, raises serious concerns about the law being nothing more than a façade masking shams and inequities, as nothing more than an instrument of class ideology.

In light of the above, I offer the following observations predicated on the principle of government as trustee and measured against the Lockean test noted above. First, law is deeply embedded in the productive arrangement, forces and relations existing in every society. In a political order arranged on the corporate model and governed by social classes, as in Tonga, lawmaking power is particularly amenable to manipulation by dominant groups. Adopting a critical legal studies perspective, the danger is the possible reduction of the law to a mere 'instrument of the *de facto* ruling class: it both defines and defends these rulers' claims upon resources and labour-power...Hence the rule of law is only another mask for the rule of a class' (Thompson 1975:259).

Second, while it may be an exaggeration to claim that the law is nothing more than an instrument of the dominant groups in those types of societies, it is certainly true that the law mediates and legitimises existing class relations, accords rights and entitlements based on social status, determines and defines peoples' perceptions of the social order and their place in it, and maintains the status quo. Whenever that happens, the law's rhetoric of justice and equity is empty; its forms and procedures actually hide ulterior injustices and inequities. Put bluntly, the rule of law becomes a sham.

Finally, even in jurisdictions where lawmaking power is exercised by a duly elected parliament, there is always the danger of unjust

deprivation when the state takes land, either without adequate or any compensation, or in violation of the property rights of an individual or a section of the body politic. This was the issue in the Samoa Supreme Court case of *Western Samoa Trust Estates Corporation v Tuionoula* [1987]. The court held that the taking of customary land for a national airport was in accordance with an agreement concluded between the Crown and the owners of that land in 1942. However, the issue remains—was the level of compensation adequate? Article 14 of the Constitution 1960 provides for rights regarding property and, under clause 1, prohibits the compulsory taking of land except by law subject to ‘the payment within a reasonable time of adequate compensation’. The issue still stands unresolved.

Paraphrasing the Lockean test, rulers and lawmakers (both totalitarian despots and democratically constituted parliaments) violate the trust reposed in them when they deprive citizens of the right to property, or acquire land without adequate compensation or, in a mighty act of naked state compulsion, without any compensation at all. Such acts contravene the constitutional principle of government as trustee broadly construed in legal, ethical and political terms. Sometimes, the principle of identification of rulers and ruled is a trick used by dictators to justify the rule of a few over the many.

Political rights and the power of representation: the few and the many

This section addresses political rights and political representation as central tenets of the constitutional principles of government as trustee, popular sovereignty and government by consent. To what extent is representation in the Pacific nothing more than ‘a make-believe...a fiction’ (Morgan 1988:13) designed to make possible and justify the rule of a few? And to what extent has representation been converted into a self-evident truth, which, as such, is insulated against scrutiny or criticism since challenging the so-called self-evident truths might rend the fabric of society? The following analysis exposes the gap between ideal and reality, and broaches the issue of rulers acting as ‘the masters or arbitrary disposers’ of the civil liberties of the ruled.

‘Many of the small island democracies of the South Pacific’, comments Benjamin Reilly (2004:n.p.), ‘are natural laboratories for constitutional and electoral experimentation’. Experimentation is a risky business; it could be productive, sometimes; but more often than not, it is fraught with disaster. Problems range from ‘a wave of relief at the removal of a government, and a rush of optimism after each new

government is formed' in Papua New Guinea (Standish 2004) to adopting indigenous-friendly electoral systems in the Pacific generally. The alternative voting system in Fiji continues to cough up problems of its own. The Solomon Islands electoral system of first-past-the-post has provided 'a major link in the chain contributing to the "social unrest" period the country suffered during its 1998–2003 years' (Roughan 2004).

In most Pacific states, bribes and electoral fraud mar general elections. Politicians bribe other politicians to acquire a majority in coalition governments—perceived as 'tactics of survival' in Papua New Guinea (Okole 2004). The system of coalition government is being hijacked and reduced to a means of capturing executive power. Politicians are playing the part of political gods. In Fiji, the promise of the alternative voting system is yet to be realised. The evidence, thus far, shows that 'there are clear limits to electoral engineering for managing conflict in divided societies' (Stockwell 2004). Voters now expect that their elected representatives will return favours. Politicians, in turn, expect the government to pay 'for electors' rising expectations from them', as in the Cook Islands (Crocombe and Jonassen 2004). This scenario, commonly explained by attributing blame to Pacific custom, has an alternative explanation. The electors are not drunk or stupid. They know very well that, after the elections, the political world reverts back to its usual psychology: their elected representatives benefit from government resources at the expense of the masses. The trick, therefore, is to get a share of the politicians' fortunes before they become masters of the world.

Samoa's system of parliamentary representation presents its own interesting issues, for example, the considerably long life of parliament (Salevao 2004). In November 1991, parliament amended the Constitution and by article 63(4) extended the life of parliament from three to five years. The propriety of such an arrangement is questionable. The rationale is political stability and that the longer term will enable the government to pursue more responsible policies. That may be true. Still, the longer parliamentary term is an élitist solution that creates an élitist democracy. Lacking faith in the capacity of the common citizen to make a positive political contribution, politicians deem it their noble duty to remain in power for as long as they possibly can. Yet, in truth, the longer the term, the longer the political élite holds citizens to ransom. Thus, the adoption of élitist solutions could be construed as an attempt to avoid 'the restraints imposed by constitutional checks and balances

and by the pressures of almost constant electioneering' (Walker 1995:185). While the five-year life of Samoa's parliament is nothing compared to England's Long Parliament of 1640 to 1653, the fact that Samoa has only two general elections in a whole decade is somewhat disturbing.

Another issue of importance concerns parliament's imposition of disqualifications in respect of parliamentary candidature. In the Samoa Court of Appeal case of *In re the Constitution, Mulitalo v Attorney-General of Samoa* [2001] WSCA 8 (20 December 2001), the appellants challenged the lawmaking authority of parliament (pursuant to article 45 of the Constitution 1960 and the *Electoral Act 1963*) to change constantly the disqualifications—twice in the same year—with the effect of excluding the appellants from seeking parliamentary election in 2001. On the facts, the court held that the changes were validly enacted by the *Electoral Amendment Act 2000* and that they were correct under the Constitution. However, the court's approach is troubling in light of the following *obiter* statement by the court at 10.

Essentially, this was a case about the appellants' sense of grievance that parliament had changed the qualifications to be a member of parliament with the result that some people who had lived overseas [as the appellants] and who would have been eligible to stand under the previous legislation could no longer do so. *Whether that is unfair is not a matter for the courts to judge.* If what parliament did was within the powers vested in it by the Constitution, there is no basis for court intervention [emphasis added].

In my view, either the court had abdicated its constitutional role of protecting rights and liberties out of deference to the institution of separated powers, or it had taken the doctrine of parliamentary sovereignty undiluted in apparent contradiction of the Constitution as supreme law and the court's power of review of constitutional roles and powers under article 2. Once again, the Samoan judiciary is faced with the problem of reconciling Westminster, Washington, Paris and Samoa as noted in chapter two above.

In Tonga, political representation is clearly an issue. Clause 17 empowers the King to govern on behalf of all 'his people'. The use of the possessive pronoun 'his' is remarkable in its connotation of ownership. The people belong to the King, perhaps in the limited, mythical sense of the King as the father of the nation (Koloamatangi 2004; Campbell 2004), but even that patriarchal reading does not take away the compelling sense of the people's subjection to the rule of the King. The qualification in the second half of clause 17, that the King will not rule 'to enrich or benefit any one man or any one class but

without partiality for the good of all people of his Kingdom', must descend to the level of empirical reality.

Clause 41 is central to the whole constructed edifice of the King's rule. In addition to deifying the person of the King, the clause also expressly vests sovereign power in the King: 'The King is the sovereign of all chiefs and all the people'. The King, not the people, is sovereign. This is hardly surprising since the Constitution of Tonga 1875 was granted by the King to the people; it did not emanate from the people. There is, therefore, no assertion of popular sovereignty in the Tongan Constitution. The King created the government of Tonga, not the people.

Clause 51 vests extensive powers of appointment and dismissal in the King. The King appoints the cabinet or ministers of the King (including the prime minister, minister of foreign affairs, minister of lands, minister of police and any other minister) whom the King 'may be pleased to appoint' (the King's prerogative) and who hold office 'during the King's pleasure' or for the duration of their commissions.

Clause 38 extends the power of the King over the Tongan parliament. The King has power to convoke the legislative assembly 'at any time' and prorogue it 'at his pleasure', and then command the election of new representatives of the nobles and the commoners. Clause 61 vests power in the King to appoint the speaker of parliament, thus extending his power over parliament. There is also the issue of the domination of parliament by the privy council (appointed by the King), cabinet ministers (appointed by the King and sitting as nobles and members of the privy council), the prime minister and speaker of the assembly (both appointed by the King), and representatives of the nobles. This is because under clauses 59 and 60, the assembly shall consist of members of the privy council, cabinet members, nine nobles as representatives of the nobles and nine representatives of the commoners elected on universal suffrage under clause 64. The dominance of the King, privy council, cabinet, and nobles is much more than a matter of statistics.

A further restriction on the political rights of the nine representatives of the commoners is imposed by clause 67 which provides that: 'It shall be lawful for only the nobles of the legislative assembly to discuss or vote upon laws relating to the King or the royal family or the titles and inheritances of the nobles...'. Clause 71 further provides that

[s]hould any representative of the nobles be guilty of conduct unbecoming his position whether during the session of the legislative assembly or not he may be tried and deprived of his office by the nobles of the legislative assembly but the representatives of the people shall not take part in his trial.

These restrictions inevitably split parliament in half, alienating not only the representatives of the commoners but the commoners themselves, seriously compromise the effectiveness of parliament as a check on the power of the executive, and function to undermine the constitutional order.

In light of the Tongan situation, I note with interest Morgan's observations about fiction-making in England. First, monarchy 'has always required close ties with divinity'. Second, the alliance between Christian/Jewish theology and Christian/English politics 'created a theomorphic king'. Finally, '[t]he divine right of kings had never been more than a fiction, and as used by the Commons it led toward the fiction that replaced it, the sovereignty of the people' (Morgan 1988:17). Quite frankly, some Pacific nations may well need to re-examine how their fictions came about and to reorganise their legal, political and moral priorities.

Freedom of thought and expression: 'I think, I speak, therefore, I exist'

Freedom of thought and expression is an issue everywhere. The Pacific is no exception. Again the test is government's trust duty to guarantee and protect that freedom (subject to reasonable limits), even if the exercise of that freedom involves criticism of government and its policies. Put simply, government or the ruling political party in government has no trust to act as the master or arbitrary disposer of 'the lives, liberties or fortunes of the people'.

Freedom of speech and expression is the cornerstone of human liberty and the condition for nearly every other freedom. Without it, other rights are liable to die and wither away. This is embodied in Mill's dictum that the act of silencing the expression of an opinion is tantamount to robbery. It is robbery not only of the truth produced through the subtraction of error but robbery of important values vital to a free society which freedom of speech entails. 'Historically, we have viewed freedom of speech as indispensable to a free society and its government'.¹¹ Truth, self-fulfilment (when citizens are able to realise their full potential as humans if they are not deprived of the right to express what they think, praise or even criticise their government) and the advancement of knowledge—these values are indispensable and must be protected at all costs.

Freedom of the media is critical to the realisation of freedom of thought and expression.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved.¹²

There is a political environment that is optimal for freely distributing information. Factors that are conducive to this environment include the government performing its work in public, and a media sector capable of publicising this work. Since information is the life-blood of the political process, freedom of the media is absolutely vital.

Absent such freedom of communication, representative government would fail to achieve its purpose, namely, government by the people through their elected representatives; government would cease to be responsive to the needs and wishes of the people and, in that sense, would cease to be truly representative.¹³

I need emphasise that an informed and enlightened citizenry is much more productive in government affairs than a dull and uninformed one. Unless, of course, the government is bent toward tyrannical rule—tyrannies thrive on mass ignorance.

An environment that allows for freedom of expression inevitably enables the publication of critical views on political issues. This is important for the government. Informed of what citizens think, the government would then respond accordingly. Ideally, unfair criticisms are corrected; criticisms with substance are heeded. Other than that, those who wield the powers of government must be open to public criticism. 'In a free democratic society it is almost too obvious to need stating that those who hold office in government and who are responsible for public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind'.¹⁴

While freedom of thought, expression and the media is guaranteed under Pacific constitutions,¹⁵ there is a marked discrepancy between the constitutional ideal and what occurs in practice. In Tonga, the struggle for freedom of expression and the media goes on. As the author of the Tongan newspaper *Taimi* understands it, 'the role of the media in Tonga is the same role that the media perform in other countries... There is a watchdog role and a responsibility to provide people with information' (Koloamatangi 2004:n.p.). The issues, in his view, include the bias of other Tongan media outlets towards the government.¹⁶

The Samoa Supreme Court case of *The Honourable Tuiatua Tupua Tamasese Efi v The Attorney General of Samoa* (S.Ct., 1 August 2000) provides another illustration and is used here to tease out the pertinent

issues and principles. The plaintiff, a former leader of Samoa's opposition party, sued the attorney-general on behalf of the former prime minister, the present prime minister, the board of directors of Televis Samoa Corporation, the Broadcasting Department and others. He alleged that the ruling party (the Human Rights Protection Party, HRPP), since coming into power in 1989, had pursued or permitted a policy of denying him (as leader of the opposition) fair access to the government-controlled media; that the policy in question was a reaction against his political views and was designed to interfere with the performance of his constitutional duties as a parliamentarian and leader of the opposition; and that that policy violated of article 13(1)(a) of the Constitution which guarantees freedom of speech and expression,¹⁷ and article 15(2) on freedom from discriminatory legislation.

On the facts, Wilson J held that the former prime minister, by his conduct and words, placed a restriction on the plaintiff's access to the media. Such restriction created a fetter on the plaintiff's freedom of expression and was, in effect, an infringement of the plaintiff's rights under articles 13 and 15. Further, Wilson J held that under the current administration, the present prime minister, Tuilaepa Malielegaoi, publicly announced on 4 March 1999 that no restraint on the access of the plaintiff or his party to the media 'is now in existence'. Wilson J thus held at 54 that 'nothing in the conduct of the Tuilaepa Administration since late 1998, which has been reviewed in these proceedings, violates either of those guarantees' under articles 13 and 15.

This case raises important constitutional questions relating to the practice of prior restraint and the courts' role of declaring void such restraints.¹⁸ On a functional theory of the press, the public has the right to be informed of government actions, and freedom of the press serves that right. Upholding the legal prohibition against prior restraint, Wilson J at 52 noted that the policy under the former prime minister amounted to 'a pattern of exclusion' and was, in fact, 'a ban'. It seems certain from the facts that the former prime minister was of the opinion that it was in the public interest to deny the plaintiff access to the media, that the plaintiff's conduct threatened to incite public disorder and cause division, and that such conduct justified denying him access to the media.

Part of the problem is that notions such as public order and public interest are subjective concepts, representing a subjective assessment of the danger speech or conduct is likely to create. But as Mason CJ

observed in *Australian Capital Television Pty Ltd v The Commonwealth* (1992) at 145, the history of freedom of expression is characterised by attempts to restrict that freedom 'in the name of some imagined necessity'. Adopting the test in *Schenck v United States* 249 US 47, 39 Sup. Ct. 247, 63 L. Ed. 470 (1919) at 52, it should be said that, on the facts, the plaintiff did not shout 'fire' in a theatre and cause panic, and his words did not create 'a clear and present danger' that might have justified banning him from the media.

Following the more stringent test in *Jacob Abrams v United States* 250 US 616, 40 Sup. Ct. 17, 63 L. Ed. 1173 (1919) at 627, the plaintiff's words neither produced nor were 'intended to produce a clear and imminent danger' of bringing about any substantive evils. Unlike Schenck's attempted insubordination of the US military when the United States was at war with Germany, and unlike Abram's publication of leaflets which were accused of, among other things, encouraging resistance to the US war with Germany, the plaintiff's criticism of Samoa's executive government was made in time of peace and was directed at the government's lack of accountability. His allegations might have had some substance, or they could have been baseless, but he was certainly entitled to express them.

Measured against the test in *Brandenburg v Ohio* 395 US 444 (1969) at 447 where the court held that the constitutional guarantees of free speech and free press do not permit a state 'to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action', the plaintiff's criticism of the Samoan executive was not in the mode of Brandenburg's advocacy of crime, sabotage, violence and terrorism. Criticising government cannot be reasonably equated with incitement to acts of rebellion. And, unlike Brandenburg, who was a Ku Klux Klan leader, the plaintiff was the recognised leader of Samoa's opposition party in parliament.

In the final analysis, banning the plaintiff was, in effect, silencing opposing political views simply as a matter of personal predilection on the part of the former prime minister. When he denied the plaintiff access to the government-controlled media, he excised from public discourse what he saw as unacceptable speech. This was based on the theory that such speech was inherently likely to cause division, and the facile assumption that it was the executive government's role to act as guardian of the social order. This assumption is often employed as a guise for banning opposing, unpleasant political views.

Perhaps the plaintiff's speech was culturally repugnant to members of the executive government. In the realm of politics, however, the plaintiff's criticism was uttered as part of his role as leader of the opposition. Within 'reasonable restrictions', freedom of speech is vital in the face of executive governments so keen to extend their orbit and increase their powers. Freedom of speech, since it is not absolute, must therefore be carefully guarded against official depredations. When executive governments assume the power to decide who can speak, where, when and what they say, freedom of speech is flagrantly violated. We may disagree with what a member of the opposition says; it is our moral right to disagree. But, pursuant to articles 13(1)(a) and 15(2), we also have a constitutional duty to defend his right to say what he or she has to say—however ill-informed that might be in our view.

Government accountability: parliament, the executive and the judiciary are servants of the people

The constitutional principles enunciated above ultimately define the nature and scope of the accountability of all institutions and officials of government, and provide the overarching legal and constitutional framework within which government should be conducted. As noted above, the re-emergence of principles such as government as trustee has been prompted by the failings of representative and responsible government, the uncertain force of conventions like ministerial responsibility, the exaltation of the executive, and the development of modern states into *de facto* corporations. These factors have posed the need to hold government more strictly accountable, reassess the capacity of the principle of representative and responsible government to hold government to account, and reappraise our basic constitutional principles. With reference to the Australian situation, Finn (1995:13) observes, '[f]or so long as we remain committed to the system of responsible government, Westminster principles will continue to provide an integral part of our theory and practice of government. But they are second order principles, not the basal principles of our system of government'.

To what extent this applies to other Pacific jurisdictions is a moot point. In the case of Samoa, it may be reiterated that parliament, the executive and the judiciary are creatures of an entrenched Constitution—created by the Constitution, governed by the Constitution, and subject to the authority and control of the Constitution as supreme law. And since the Constitution is an act of the people, the

accountability of government is therefore demanded and justified by the sovereign status of the people as the creators, owners and beneficiaries of government in keeping with the principles of government as trustee, popular sovereignty and government by consent.

Parliament, naturally, belongs to the people—elected and owned by the people, accountable to the people. Part of its fiduciary obligations is to adhere faithfully to the terms upon which the people have entrusted their powers of government to it. Similarly, the executive belongs to the people and is ultimately accountable to the people. While entrusted with the important role of administration and the efficient conduct of government affairs, there is no term (whether expressed or implied) in the people's transfer of power to the executive that the executive should exalt itself as the protector of the social order at the expense of countervailing interests, including the exercise of rights to criticise and organise opposition to government policy. Like parliament and the executive, the judiciary too belongs to the people; judges should exercise judicial power for the people (Mason 1993a). Underpinning the exercise of judicial power is the citizen's right not only to invoke the jurisdiction of the courts, but to insist on the exercise of the courts' jurisdiction. That jurisdiction, and the requisite power to exercise it, is fortified by the presumption against depriving the courts of their inherent powers and preventing an unauthorised assumption of jurisdiction.

The review jurisdiction of the Samoan judiciary deserves further mention in this connection. Samoa's constitutional arrangement places an onerous burden on the jurisdiction of the courts to review legislative and executive actions pursuant to article 2(2) of the Constitution 1960 as supreme law by virtue of article 2(1). Underlining the significance and force of article 2, Davidson in Samoa's Constitutional Convention 1960 explained, 'clause 2 makes it clear that because this is the supreme law no other laws may be made that contradict anything that is set out in the constitution itself' (Constitutional Convention of Western Samoa 1960: Vol. I, 67). Whereas article 2 might not have been intended to create judicial supremacy, it does permit judicial review of constitutional powers and roles. This, in itself, raises a host of issues as US constitutional jurisprudence has found out since *Marbury v Madison* (Alfange 1993; Corwin 1963). I offer the following comments in addition to the analysis of this issue in chapter two above.

First, judicial review points up the significance of a written Constitution like that of Samoa and is related to constitutionalism as

the imposition of fixed limits on the powers of government. This engenders a measure of trust in the way government is conducted. Obviously, the trust that men repose goes beyond trust in a mere written text designed 'to keep a government in order' (Hamilton 1931:255). It is, more basically, trust in the power of the rule of law to constrain the conduct of both government and governed within prescribed limits and controls, that both rulers and ruled would and should act according to the law.

Second, constitutional constraints, like judicial review, are a form of the people's own precommitment to be bound by and within constitutional limits. They are the people's own necessary precautions against hasty and irrational acts of self-destruction.¹⁹ Such precommitment may be characterised as an act of popular sovereignty in the sense that the people have the right to decide on their own form of government, that is, without necessarily condoning dictatorships even if democratically elected. Samuel Freeman (1990:353) describes this as 'a kind of rational and shared precommitment among free and equal sovereign citizens at the level of constitutional choice'. It is the electorate's collective decision 'to bind itself in advance to resist the siren charms of rights violations', to protect and prevent themselves from shipwreck (Waldron 1998:275). The decision of Samoa's constitutional framers to arm the Samoan judiciary with review powers is very important in this respect.

Third it is possible to reconcile judicial review and democracy. For instance, judicial review may be viewed in terms of popular choice in keeping with popular sovereignty. Furthermore, the 'counter-majoritarian difficulty' (Bickel 1962:16) could be overcome by reference to the courts' constitutional duty of protecting the rights of minorities and individuals. This is important given the danger of arbitrary rule that is always inherent in majority power. In addition to the democratic justification of judicial review based on normative or fundamental values (Dworkin 1977), it could also be argued that, in most cases, judges are more principled, reasonable and reliable than most legislators. Taken together, these arguments carry the cumulative effect of removing the democratic objection to judicial review.

Fourth, judicial review demands a strong, independent and impartial judiciary. The judiciary in a truly constitutional system is thus 'the primary keeper of the rule of law' (Mason 1995:119) and judges themselves the 'guardians of the rule of law' (Mason 1995:116). Being the 'least dangerous branch' of government, because it has no influence

over either the government's sword or the government's purse, the judiciary is most likely to diligently execute its constitutional role without fear, favour or ill-will (Hodge 1995).

In jurisdictions following the Westminster system, the judiciary has a critical significance in the face of the exalted executive governments that now dominate most parliaments and the general tendency towards super-executive bodies. Indeed, the institution of separated powers presupposes that two, or even all three, branches of government will not cooperate to circumvent legal rules to achieve illegal objectives through a system of trade-offs. Be that as it may, there is always the risk of the three branches acting in concert to monstrous, illegal effect. This poses the real need for a branch of government with no incentive to make deals to enhance its own authority, one that could be trusted to restrict political departments to their constitutionally defined powers and enforce the substantive constitutional limits on the exercise of those powers. This is the special constitutional role of the courts: to declare, elaborate and enforce constitutional limits and controls. In this manner, the judiciary is and should be 'the primary keeper of the rule of law' (Mason 1995:116).

But the judiciary, too, is subject to constitutional limits and controls. First and foremost is the subjection of the judiciary to the control of a written Constitution. Furthermore, when judges do not comply with the rules of their profession there will be consequences. Removal from office in cases of serious misconduct is available as a last resort. The less formal censure of public and professional criticism is also available to keep judges on the side of the law. When judges refuse to exercise the courts' jurisdiction—even though that jurisdiction is clearly authorised by law, and a citizen has invoked and insists on the exercise of that jurisdiction—they unconstitutionally abdicate their judicial responsibility to the people. When that happens, judges themselves are subject to legal and political sanctions.²⁰

I refer also to the courts' review of administrative actions jurisdiction, that is, the inherent powers of the superior courts to review the decisions of public officials in the administration of government and to grant appropriate orders. First, there is a central conceptual connection between administrative law and the principle of government as trustee. Administrative law is, in fact, one of those bodies of law that are fiduciary in character though not professing to be such in express terms. '[M]odern administrative law...from its earliest days,' writes Mason (1993a:3) 'has mirrored the way in which equity has regulated the

exercise of fiduciary powers'. The correlation between equity and administrative law is encapsulated in the principle of government trusteeship defined as

the 'architectural principle' of our [Australia's] institutions and a measure of judgment of their practices and procedures [and] a principled foundation for the new generation of 'corruption laws' now being imposed on public officials; and more generally, for the standards of conduct to be expected of public officials of all stations (Finn 1995:15).

This is important. The recognition of government's fiduciary relationship with the governed underlines the role equity plays in the rule of law. It is an essential principle of legitimate governance, in terms of the exercise of fiduciary powers.²¹ Originating from the Courts of Equity, the fiduciary concept was partly designed 'to prevent those holding positions of power from abusing their authority' (Owen 1996). This is in keeping with the overriding purpose of equity as a system of law designed to redress wrongs, provide justice rooted in conscience, and to protect the vulnerable from abuse by persons with power over them. Since 'the inflexible procedures surrounding the common law writs made justice an elusive goal' (Evans 1993:1), equity as developed by the Court of Chancery sought 'to correct defects in the law' (Evans 1993:2) and to provide an additional avenue of recourse for aggrieved citizens whose actions did not satisfy one of the common law causes of action.

Second, public sector reform in the Pacific, the 'fourth institution' (Larmour 2004:107; also Teuea 2004; Ives 2004), now involves the corporatisation and privatisation of public sector bodies and the enactment of corporate legislation governing those bodies. The economic arguments for corporatising and privatising public enterprises are fairly well-known.²² For public sector reform to deliver its desired results, its economic benefits and effects must be carefully balanced, especially where, for example, reform involves downsizing the public service. Aggravating the unemployment situation is a real possibility, especially in developing countries where the private sector may not be large or strong enough to absorb public servants put out of work in the downsizing process (Mellor 2004), as in the Pacific. Public sector reform also requires 'a major change in "public expectations" to generate the motivation for reform' (Ives 2004:90). In the Pacific, it is not clear that public expectations are high enough to absorb the shock of change given the lack of trust in government policies and conduct in most jurisdictions.

My specific interest is in the legal issues which public sector reform has raised, particularly the increasing importance of administrative law

in the Pacific, especially in light of ‘the enlargement of executive power as a potential threat to the rule of law’ (Allan 2001:16). Dicey’s concern with ‘the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government’ (Dicey 1959:202) is still with us. For instance, Samoa now has legislation creating government-owned corporate public bodies that provide goods and services in the manner of private sector companies but which operate at arms length from government. These public bodies now have boards of directors with chief executive officers, corporate structures, a measure of autonomy, clear operating objectives, and are charged with statutory duties—to provide full financial statements and earn a commercial rate of return, be subject to any relevant regulation, have performance targets, and comply with community service obligations. The overall objective is to improve the focus, efficiency, service performance, operating flexibility, financial returns, accountability and transparency of public bodies.

The *Samoa Public Bodies (Performance and Accountability) Act 2001* was enacted to ‘promote improved performance and accountability in respect of public bodies’ and, to this end, (a) specify principles governing the provision of the operation of public bodies; (b) specify the principles and procedure for appointing directors to public bodies; (c) establish requirements concerning public bodies’ accountability; and (d) provide support for directors of public bodies. Section 4 provides that ‘[t]he purpose of this act is to enhance the performance and accountability of public bodies so that they provide the best possible service for the people of Samoa and as a result contribute to Samoa’s social, cultural, economic and commercial development’.

In the first instance, this new breed of legislation, combining aspects of public and private law, is a significant step in improving the accountability, integrity and efficiency of public bodies and officials. Its aim is to exact strict standards of practice and conduct in the exercise of public power; it is founded on the principle that government was created to serve the interests of the people. This kind of legislation also forms part of the push to recapture public trust in government institutions and officials. These measures are in keeping with the principles of government as trustee, popular sovereignty and government by consent which, taken together, provide a more basic and principled theory of government.

It remains to be seen, however, how the courts will construe Samoa’s public bodies legislation. It is nonetheless important to refer, albeit hypothetically, to the broad implications of such legislation. First and

foremost is the issue of accountability. Section 6 of the Act 2001 sets out a chain of accountability.

(5) The shareholding ministers shall be responsible to parliament for the performance of public bodies under this act. (6) The Board [of directors] of a public trading body shall be accountable to the shareholding minister. (7) The Board [of directors] of a public beneficial body shall be accountable to the responsible minister.

Interestingly enough, section 25 of the Act 2001 mandates the responsible minister to dismiss a director who has failed to perform his or her duties. There is no statutory provision under the act requiring the dismissal of a responsible minister who fails to perform his or her own duties. The issue of an accountability deficit needs to be addressed not only in the context of this act, but in the broader context of the unenforceability of the convention of ministerial responsibility.

The viability of the accountability arrangement is also an issue in the sense that accountability models for commercial entities fundamentally differ from those that apply in the public/administrative law arena. For instance, to what extent should public law accountability mechanisms be imposed on public bodies without defeating their principal objective as required by section 8(1)(a) of the Act 2001 which states that the principal objective of a public trading body is to be 'as profitable and efficient as comparable businesses that are not owned by the state'.

The situation, no doubt, will be complicated if the public trading body is competing with a private sector provider of similar services not subject to public law accountability mechanisms.²³ Even if the competitive neutrality principle applies in this instance, the issue of the operation of a public body as a revenue-generating entity remains.

In addition, section 8(1)(b) and sections 9–13 of the Act 2001 require community service obligations from public trading bodies. Section 9 defines 'community service obligation' in broad terms, including the 'provision of a good or service by a public trading body to a consumer or user on any terms other than normal commercial terms applying from time to time'. Section 10 vests a discretion in the responsible minister to direct a public trading body to provide a community service obligation if the performance of the obligation is necessary to ensure any of the following

- universal access to a necessary good or service
- the promotion of a policy vital to the national interest as declared by the head of state, acting on the advice of cabinet

- proper and timely response to a local, regional, national or international emergency
- correction of an injustice as declared by the ombudsman.

This is important in the respect that public bodies operating as business enterprises are charged with social responsibilities and community service obligations, thus giving a human face to the pursuit of commercial interests.

This new type of legislation will, however, put increasing strain on the courts' review of administrative decisions jurisdiction.²⁴ The purpose of judicial review in this particular area of law was aptly stated by Lord Chancellor in *Chief Constable of North Wales v Evans* [1982] 3 All ER 141 at 144

The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court.

But new questions are bound to arise.

The class of decision-makers may become an issue given the corporate structure of public bodies and the legitimate expectations for public trading bodies to operate as successful businesses at arm's length from government.²⁵ In the event of a breach of fiduciary duties, apart from the dismissal of a director who has failed in the performance of his duties, it is a moot point whether the existing common law writs (*certiorari*, prohibition, *mandamus*, *habeas corpus* and *quo warranto*) and equitable remedies (injunction and declaration) are sufficient to provide redress to aggrieved citizens.

The appropriate grounds of review may also become an issue given the increasing blurring of the distinction between public/administrative law and private/corporate law. For instance, a board of directors' decision that privileges profit over community service obligations is likely to throw the *vires*²⁶ and bias²⁷ tests into confusion. Natural justice, framed by Lord Cooke in *Daganayasi v Minister of Immigration* [1980] 2 NZLR 130 at 140 as 'fairness writ large and juridically, fair play in action', would be very hard to find given the ambiguous distinction between business profit and providing 'universal access to a necessary good or service'.²⁸

The reasonableness test as Lord Greene MR in *Associated Provincial Picture Houses, Ltd v Wednesbury Corporation* [1948] 1 KB 223 put it at 229 requires the decision-maker to 'call his own attention to the matters which he is bound to consider. He must exclude from his consideration

matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. But which is more reasonable? Profit or social responsibility? After all, the Act 2001 mandates both as having (seemingly) equal value.

In the final analysis, the increasing development of modern governments (including Pacific nations) into *de facto* corporations, as well as the growing trend toward a managerial form of governance, call for a more stringent application of the courts’ judicial review of administrative decisions jurisdiction. This is of particular importance if the rule of law is not to degenerate into the rule of men. The danger envisaged here is unfettered administrative discretion²⁹ and the reductionist use of the law as nothing more than an instrument of executive government policies. Indeed, the tendency towards arbitrary rule is always an attendant threat of the exercise of government powers, and the sacrifice of justice and equity on the altar of economic progress is always an easy option, especially in developing economies. While the rule of law retains its character as the governance of rules, it is a rule of law at the service of policy interests.

Conclusion

In conclusion, I need briefly reiterate what was said in chapter one. The rule of law as an engine of socioeconomic development brings its own challenges. The extent to which the law can be so used without compromising the law’s own authority and legitimacy is of concern, the danger being that law may be subsumed by politics or economics. There is always the lurking danger that the law so used would harbour distortions and subtle forms of ‘coercion in the guise of passive acceptance of the existing world within the framework of capitalism’ (Russell 1986:19). While the utilitarian theory of law legitimately allows for the use of the law as a vehicle of development, there is always the substantive concern that ‘[p]ower as the “collective will”, as the “rule of law”, is realised in bourgeois society to the extent that this society represents a market’ (Pashukanis 1978:146).

This calls for the following enjoinder. First, the Madisonian reminder must always be taken seriously—we must first empower the government to govern and, in the next place, ‘oblige it to control itself’ (Madison 1961:322). The challenge is having a democratic government and keeping the same government under control and in order.

Justice and equity are essential to legitimate governance.

Second, government must adhere to the normative demands of the rule of law. This demands and justifies a cautious adoption of legal pragmatism,

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

Third, legitimate governance demands and justifies the rejection of legal positivism. The rule of law, from a normative perspective, entails significant substantive demands. For example, the use of coercive government powers must be publicly explained, debated, justified and defended on legal and moral grounds, such as on the basis of a conception of the common good that is both publicly accepted and open to public debate and moral scrutiny. The crude positivist notion that the law is whatever the sovereign lawmaking power lays down as law, while important for descriptive analysis, is hardly of any use for the purpose of legitimate governance.

Fourth, executive discretionary action is

a necessary evil...[T]he inherent dangers of unfair treatment must be acknowledged and contained; and the executive is rightly made subject 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).

The challenge is finding the balance between a strong executive government and curbing executive excesses. Maintaining the line of compromise between those two legitimate aims is a matter of democratic debate and judgment based on the common good. The issue of an accountability deficit is an ongoing concern.

Finally, in respect of the corporatisation of modern governments, I reiterate my preference for a position between the extreme left's centralised planning which ultimately cripples economic growth and the extreme right's unadulterated free-market capitalism which exposes people, unprotected, to the cruel power of the market forces. Rorty (1987:565) describes it in the following terms,

Nobody so far has invented an economic setup that satisfactorily balances decency and efficiency, but at the moment the most helpful alternative seems to be governmentally controlled capitalism plus welfare-statism (Holland, Sweden,

Ireland). There is nothing sacred about either the free market or about central planning; the proper balance between the two is a matter of experimental tinkering.

The enjoinder I am promulgating is inherent in the rule of law which presupposes 'an acceptable order of justice' and mandates that government must adhere to 'a general scheme of just governance' (Allan 2001:41). Here, justice, as an external standard of evaluation, is understood from the perspective of legitimate governance and is accordingly defined in broad terms—government's just treatment of its citizens; just and fair promulgated laws; the proper exercise of government powers within prescribed limits and controls; honest performance of the functions for which government was instituted and in keeping with the terms on which the people have entrusted their power of government to it; reasonable gratification of the citizens' legitimate expectations; and the secure protection of the rights and liberties of citizens.

Notes

- ¹ '[B]y the middle of the 17th century...the trust concept had become an established mode of thought' (Gough 1950:161).
- ² *R v Whitaker* [1914] 3 KB 1283, 1296.
- ³ On trust as a necessary condition of social integration see, for example, Arrow (1972); also Barber (1983); Braithwaite and Levi (1998); Woolcock (1999).
- ⁴ On civil society (that is, the intermediate realm situated between the state and the household, occupied by organised groups or associations separate from the state and enjoying some autonomy from the state, and are formed voluntarily by citizens to protect or extend their interests) see, for example, Salamon and Anheier (1998).
- ⁵ *Western Samoa Trust Estates Corporation v Tuionoula* [1987] WSSC 1; [1987] SPLR 437 (19 January 1987).
- ⁶ *United States v Mitchell*, 445 US 535, 100 S. Ct. 1349 (1980); *United States v Mitchell*, 463 US 206, 103 S.Ct. 2961 (1983).
- ⁷ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
- ⁸ See, for example, Morgan (1988) for some politicians' interesting pejorative characterisations of the English people.
- ⁹ With reference to the effect of the Diceyan distinction on Australia, see Finn (1995:2–3), who notes that 'the troubling distinction drawn by Dicey between "sovereignty" in its legal and in its political senses (a distinction unknown to the jurisprudence of a republican United States) produced the fissure which was to divorce the legal and political identities of the Australian people for much of this century. And...it gave a prominent place, though not primacy, to British constitutional thought, in the Australian legal consciousness'.
- ¹⁰ See also clause 104 of the Constitution of Tonga 1875. The first part of the clause provides that 'all land is the property of the King and he may grant to the nobles and titular chiefs or matabules one or more estates to become their hereditary estates'.

- ¹¹ Rehnquist J in *Smith v Daily Mail Publishing Co* (1979) 443 US 97 at 106.
¹² Black J in *Martin v City of Struthers* 319 US 141 (1942) at 146.
¹³ Mason CJ in *Australia Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 138.
¹⁴ Lord Bridge of Harwich in *Hector v Attorney General of Antigua and Barbuda* (1990) 2 All ER 103 at 106.
¹⁵ See, for example, section 30 of the Constitution Amendment Act 1997 of the Fiji Islands; section 12 of the Constitution of Solomon Islands 1978; and, section 24 of the *Constitution of Tuvalu* 1978.
¹⁶ Clause 7 of the Constitution of Tonga is something of an anomaly and therefore deserves to be set out in full.

It shall be lawful for all people to speak write and print their opinions and no law shall ever be enacted to restrict this liberty. There shall be freedom of speech and of the press for ever but nothing in this clause shall be held to outweigh the law of defamation, official secrets or the laws for the protection of the King and the royal family.

See further the Tonga Court of Appeal case of *Utoikamanu v Lali Media Group Ltd* [2003] TOCA 6; CA 04 & 10 2003 (25 July 2003) where clause 7 was the main legal issue.

- ¹⁷ Clause 2 of article 13 authorises the imposition (by law) of 'reasonable restrictions' on freedom of speech and expression: national security, friendly relations with other nations, public order or morals, protecting the privileges of parliament, preventing the disclosure of information received in confidence, preventing contempt of court, defamation, and inciting offence.
¹⁸ *The New York Times Co v United States* 403 US 713 (1971).
¹⁹ See, for example, Waldron (1998), which is really a critique of the notion of constitutional constraints as a form of precommitment.
²⁰ Note, for example, the significance of the English *Habeus Corpus Act 1679* designed to make judges personally liable when they refuse to exercise certain powers expressly allowed by law. Thus Sharpe (1989:19–20) notes that 'the legislators had learned that the judges could not always be trusted to act according to the law'.
²¹ For example, article 111 of the Constitution of Samoa defines law as follows

Law means any law for the time being in force in Samoa; and includes this Constitution, any Act of Parliament and any proclamation, regulation, order, by law or other act of authority made thereunder, the English common law and equity for the time being in so far as they are not excluded by any other law in force in Samoa, and any custom or usage which has acquired the force of law in Samoa or any part thereof under the provisions of any Act or under a judgment of a court of competent jurisdiction.

After independence in 1962 common law and equity principles still apply unless they are inconsistent with the Constitution, acts of parliament or subsidiary laws, or are inappropriate to the circumstances of Samoa (section 349 of *Samoa Act 1921* and articles 111 and 114 of the Constitution).

- ²² Supporting arguments include allowing market forces to facilitate better consumption decisions, better production decisions, and hence a more efficient economy. This is part and parcel of the commercialisation of government's provision of goods and services usually pursued through competitive tendering and contracting out, and based on principles such as value for money, and improving the quantity and quality of goods and services. The proclaimed benefits include giving consumers more control over how much of the good or

service they need given the price, better matching of products to the needs of users, and thereby minimising costs and increasing production efficiency gains. Where privatisation is allowed, the delivery of products or services is transferred from the public sector to the private sector, sometimes involving the sale of government-owned businesses, outsourcing of the functions of public agencies, and private financing of public infrastructure. The stated benefits include efficiency gains, removing constraints of public ownership, freedom to explore new markets and products, and enabling commercial strategic alliances which are more difficult for government-owned enterprises.

- ²³ For an analysis of this issue in the Australian context, see Mulgan (1997).
- ²⁴ See, for example, *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223; also Royal Commission on Thomas Case [1982] 1 NZLR 252.
- ²⁵ But see *R v Panel on Takeovers and Mergers ex p Datafin* [1987] QB 815; also *Council of Civil Service Unions v Minister of State for the Civil Service* [1985] AC 374.
- ²⁶ See *Animistic Ltd v Foreign Compensation Commission* (1969) 2 AC 147, as per Lord Reid at 171; *Racal Communications Ltd* (1980) 2 ALL ER, as per Lord Diplock at 637.
- ²⁷ But see, for example, the reasonable and real danger or possibility of bias test (in cases of apparent bias relating to the exercise of the powers of a tribunal) adopted by Lord Goff of the House of Lords in *R v Gough* [1993] AC 646, at 670; followed by the New Zealand Court of Appeal in *Auckland Casino Ltd v Casino Control Authority* [1995] 1 NZLR 142. On bias by predetermination, especially involving a pecuniary interest, see, for example, *CREEDNZ Inc v Governor-General* [1981] 1 NZLR 172; at 192, Richardson J noted 'The general principle captured in the Latin *nemo iudex sua causa* is that no one should be judge in his own cause'.
- ²⁸ For instance, in *Yarmirr v Australian Telecommunications Corporation* (1990) 96 ALR 739, the High Court of Australia held that a legislated community service obligation required of Telecom (now Telstra) to provide standard telephone services to all citizens of Australia on an equitable basis did not entitle the complainant (who resided in a remote area of Australia) to compel Telecom to provide any service at all on the ground that the object of the empowering statute was expressed in very general terms and that there was no legislative intention to confer any private legal rights on individuals such as the complainant.
- ²⁹ See Schauer (1991) for the view that discretion is nothing more than a mask for bureaucratic control and the pursuit of policy interests. See also Allan (2001:128), who notes that

[a]dministrative discretion is not [and must not be] merely a tool of efficient government...but a crucial resource for reconciling the attainment of public purposes with the fair treatment of individuals.