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The Pacific crisis of state legitimacy: courteous enemies, fragile alliances and uneasy bed-fellows

‘A government is not legitimate merely because it exists’, wrote Jeane J. Kirkpatrick, former United States Ambassador to the United Nations. This aptly expresses the crux of the issue: there is more to state legitimacy than mere empirical existence.

This chapter addresses the crisis of state legitimacy in Pacific nations, manifested in public disorder, coups, the collapse of law and order, corruption, state capture, violation of human rights, and so forth. A central part of the problem is that Pacific states are underpinned by modes of legitimacy (embodied in constitutions and statutes) that are, at times, mutually reinforcing and, at other times, violently at odds and mutually exclusive. When the latter case obtains, the issue of state legitimacy forces itself to the foreground and demands a serious hearing.¹ The characterisations failing state, collapsed state, and failed state—though intellectually nondescript—do say something about state legitimacy in the Pacific.

This analysis proceeds on the following premises. First, Pacific states exhibit a pluralist situation of multiform conflicts that either produce the impasse of irreconcilable contradictions or, more positively, negotiated (albeit uneasy) alliances amongst social institutions: legal liberalism, custom and traditions, modern politics, extra-legal cultural politics, religion, state institutions, civil society organisations, and so forth (Durutalo 2003). This institutional diversity reflects the increasing differentiation of interests, values and institutions in Pacific societies.

In a positive sense, pluralism means that a single centre of legitimate authority is replaced by several centres which have to achieve a

minimum balance through continuous effort, and in relation to which individuals are required to define themselves and make their own decisions. The result is an extraordinary liberation resulting from the dispersion of interests, power, and control. The plurality of centres is, therefore, a kind of balancing mechanism which prevents a single centre from acquiring absolute power and control. However, pluralism sometimes breeds disorder and destroys unity. The state is but one expression of that unity: one state, one Constitution, one system of law, a common system of values tempering the (potentially) divisiveness of conflicting systems, one with a common modality shared by everyone. Part of the end-result of pluralism is that the state, with its promise of national unity under one government and one rule of law to which all citizens are equally subject, is often dismissed into the realm of lost illusions. When this happens, state legitimacy becomes an issue.

Second, the major principle for present purposes is that legitimacy presupposes, requires, and should mean government under the rule of law. In true constitutional democracies, the rule of law accords government formal, moral and practical legitimacy. When government is not government under the law, government rule becomes rule through arbitrary power and naked force. Whenever this happens, we find government operating on a trumped-up legitimacy that is carefully masked by the façade of democratic institutions.

The loss of legitimacy is due to a whole range of reasons, such as when lawmakers sit above the law and act outside the law. On this point, Windybank and Manning's (2003:1) assessment of the situation in Papua New Guinea warrants quoting in full

Aid agencies talk about the need for 'good governance', 'institution strengthening' and 'capacity building', but PNG's dysfunctional institutions suffer from a lack of legitimacy as much as they do a lack of capacity or resources. The popular view is that there are two sets of laws—one for those with power and influence, who rort the formal system and get away with it, and another for the 'grassroots' or ordinary people. At issue is not the absence of laws or regulations, such as sanctions against the misappropriation of public funds, but a glaring lack of enforcement. Raskols mimic political leaders' corrupt behaviour at the street level, enriching themselves through theft. Law enforcement has not matched the escalation in crime so that gangs operate with relative impunity. When criminals and corrupt politicians go unpunished, people lose respect for state laws and the authority of central government collapses.

Whether or not this assessment is completely accurate is a matter of opinion. What it does show is that government legitimacy could be forfeited in any number of ways. The specific focus of this chapter is on tensions in Pacific legal systems engendered by competing assumptions

about the law (its nature, quality, and function), tensions which often manifest themselves in uncertainty in the law and, in some cases, in the undermining of the authority and legitimacy of the rule of law itself. While seeking a resolution of those tensions, it must be emphasised that politics, religion, custom and traditions (and how those are differently represented) must ultimately yield to the demands of the rule of law as the overarching principle of legitimate governance.

Third, legitimation is an ongoing issue. Whenever the equilibrium of society is disturbed, the need for legitimation arises. And since 'no society is absolutely static or ever fully integrated, this equilibrium should be conceived of as dynamic or moving and always as only partial' (Chinoy 1968:186). This challenges the utopian view that society is (and should be) in a state of eternal equilibrium, a view spawned by the functionalist axiom predicated on the assumption that society is a persistent, stable, well-integrated structure of elements which contribute to the maintenance of society as an integrated system. Supposedly held together by an unbroken consensus, such a society is seen as always in a state of equilibrium and solidarity (Durkheim 1938; Merton 1957; Parsons 1951). Because of its focus on stability and equilibrium, functionalism is therefore uneasy about change, change that often results from conflicts and their resolution. We need, therefore, to take seriously tensions in the community, susceptible, as it should be, to multiform conflicts and their positive functions. For instance, conflict creates the need to define the identity of the community more clearly, strengthens the community's internal structures and organisation, and requires re-adjustment of the community's objectives and priorities (Simmel 1955; Coser 1956; Rex 1981).

Taken together, while functionalism appropriately focuses on integration, this should be counterbalanced by the conflict model's treatment of society as a conglomerate of diverse and competing interests. A one-sided focus on either integration or conflict produces a lopsided view of society as either a community without disagreements or a community in a perpetual state of warfare. Neither is a true reflection of the empirical situation.

Finally, in the Pacific, conflicts are cross-cutting in the sense that an ally in one conflict becomes an adversary in a different one. Sometimes religion huddles together with custom against legal liberalism; at other times, it is religion and legal liberalism against custom. In a positive sense, this prevents conflicts from falling along a single axis and unavoidably dividing society along dichotomous lines. Negatively, this makes

legitimation—the aggregate of ways a particular social order is explained and justified to its members—a complex and difficult enterprise.

Ultimately, legitimation is about the construction and maintenance of a plausibility structure that is meaningful, relevant, authoritative and legitimate for the participants in a particular social world. Peter Berger (1967:45) defines a plausibility structure in the following terms,

worlds are socially constructed and socially maintained. Their continuing reality, both objective (as common, taken-for-granted facticity) and subjective (as facticity imposing itself on individual consciousness), depends upon specific processes, namely, those processes that ongoingly reconstruct and maintain the particular worlds in question. Conversely, the interruption of these social processes threatens the (objective and subjective) reality of the worlds in question. Thus each world requires a social 'base' for its continuing existence as a world that is real to actual human beings. This 'base' may be called its 'plausibility structure'.

State legitimacy: sources, dimensions and manifestations

State legitimacy is variously conceptualised from different standpoints, with different interests, for different purposes, and with different results. It means different things to different people, depending on one's perspective, discipline, social context, needs, and interests.

Constitutionally, legitimacy lies in the consent of the governed and their acquiescence in the rule of a few, predicated on their acceptance of the justification (legal, constitutional, political, moral, ethical, and cultural) of the rule of a few over the many, something that no truly democratic government can do without. This is important in the respect that government rule is coercion, and such coercion must be publicly debated, defended, and comprehensively explained and justified. Normatively, legitimacy means state power is judged worthy of acceptance in accordance with a coherent set of standards such as justice and fairness. Normative legitimacy creates and underpins a normative relationship between the government and the governed. Procedurally, legitimacy means compliance with the requirements for certainty in, generality of, and equality under the law. These elements of positive law go to the issue of procedural justice in keeping with the democratic process of lawmaking which rather restrictively, for Jürgen Habermas (1996:448), 'forms the only... source of legitimacy' in the post-metaphysical age. Functionally, legitimacy is judged on the successful performance of those functions which government was instituted to serve—for example, the protection of citizens' rights, persons, property,

peace and security. This performance-based legitimacy means that when government performs acts unrelated or even contrary to the functions it was instituted to serve, it loses the trust of the citizens and undermines or even loses its legitimacy.

In sum, legitimacy encompasses a whole range of interests: the source of government; normative principles; moral and practical acquiescence of the governed; citizens' trust in the governors; constitutional legitimacy based on the adherence to constitutional rules; and legal legitimacy when government is conducted according to the law. The diversity notwithstanding, it could be argued that the different facets of legitimacy ultimately converge at a single point, namely, government's authority to rule on behalf of the governed. This assumes the 'acceptance by the population at large of the place and the functions of established institutions' (Hughes 2003). That said, it must be noted that an *a priori* equation of acceptance with legitimacy may mask important issues (for example, injustice) which need to be exposed and addressed. We need, therefore, to question established assumptions and approaches, subjecting them to scrutiny and asking whether or not an established form of legitimacy actually masks the protection of the privileged status and interests of one segment of society at the expense of the rest of the body politic.

Relevant to the Pacific situation are Max Weber's theorems of legitimacy.

- 1 The dominant form and basis of legitimate authority in the modern world is rational-legal authority based on rational grounds and embodied in rules (constitutions, statutes, and regulations) that have been legally enacted and established.
- 2 Traditional authority, particularly in what Weber described as pre-modern societies, is based on the custom and traditions of a community, embodied in the people's way of life and transmitted through cultural traditions.
- 3 Charismatic authority is based on the personal charisma of a leader, manifested in ethical, heroic, or religious acts (Weber 1946).

Concerned primarily with modern Western societies, Weber's overriding interest was in the emergence of a goal-oriented rationality in virtually all spheres of life—political, economic, legal, aesthetic, and erotic. This new rationality, Weber claimed, has come to dominate social action formerly defined by tradition and religion.²

While confirming the fundamental significance of the law, Weber's theorisation holds interesting implications that need to be made explicit and explored. Weber's project was, in the first instance, an intellectualisation and rationalisation of all areas of life. But this has also condemned some important dimensions of life, somewhat arbitrarily perceived to be either totally irrational or not rational enough, to the realm of lost illusions. That is, they are no longer viable in the modern world.

Postulating an inevitable conflict between religion and the rational sphere of modern economics and the state, Weber (1946:357) wrote

[i]n the midst of a culture that is rationally organised for a vocational workaday life, there is hardly any room for the cultivation of world-denying brotherliness. Under the technical and social conditions of rational culture, an imitation of the life of Buddha, Jesus, or Francis seems condemned to failure for purely external reasons.

Privileging economic rationalism, Weber dismissed the religious ethic of love of one's neighbour.

The more the world of the modern capitalist economy follows its own immanent laws, the less accessible it is to any imaginable relationship with a religious ethic of brotherliness. The more rational, and thus impersonal, capitalism becomes, the more this is the case' (Weber 1946:331).

Postulating the incompatibility of religious ethics and political rationalism, Weber called for the elimination of ethics from the public arena of political reasoning. Since the state is based on power and serves the interest of power, any attempt to justify state coercion with ethical arguments generally and religious ethics in particular is hypocrisy as far as Weber was concerned. 'In the face of this,' he wrote 'the cleaner and only honest way may appear to be the complete elimination of ethics from political reasoning' (Weber 1946:334).

The incongruity of some of Weber's propositions with the self-understanding of Pacific societies will be noted where appropriate. Suffice to note at this juncture that Weber's theorems carry the danger of depersonalising human relationships in the worship of *laissez-faire* capitalism. It seems certain also that we can rationalise life from fundamentally different perspectives and in very different directions. Rationalism, after all, is a historical concept that covers a whole range of different things and assumptions, and our task is to find the pedigree of the intellectual child that we have adopted. 'What is this Reason that we use? What are its limits and what are its dangers?' (Foucault 1984:249).

Finally, a point often ignored is that Weber's theorems of legitimacy are really ideal types and that, in the real world, all three modes of authority legitimisation may be adopted in a given empirical situation. To illustrate, Hitler's authority might have been due, to some extent, to charisma. But that was fortified by the rational-legal authority of German enacted laws and the emotion generated by the *Volksgeist*, a central tenet of the National Socialist Party ideology. Questioning the rationality of the holocaust that the Third Reich created, Jean-Francois Lyotard (1988:179) observes, 'Auschwitz refutes speculative doctrine. This crime at least, which is real, is not rational'. Sometimes rationality or reason is not really as liberating as Weber would have us believe.

Divine authorisation: the conservative alliance between religion, law and politics in the Pacific

The metaphysical, religious theory of legitimacy sources government in the will of God; government legitimacy accrues from divine authority. This is a fundamental refrain in the Pacific understanding of government and its legitimacy. We thus find in the preambles of Pacific constitutions declarations about the Christian God as the 'foundation' of a 'united and free Republic' (Vanuatu), 'the guiding hand' of the state (Solomon Islands), 'the Almighty Father in whom we put our trust' (Kiribati), the 'God who has always watched over [the Fiji Islands]', 'the Almighty and Everlasting Lord' (Tuvalu), 'the almighty and everlasting Lord and the giver of all good things' (Nauru), and 'the Almighty, the Ever Loving' and 'Omnipresent' God with 'sovereignty over the Universe' and whose commandments prescribe the limits within which state authority is to be exercised by the government on behalf of the people (Samoa). It seems obvious that religion is still a very strong (if not the strongest) legitimating force in the Pacific region. This is, of course, not novel, as Peter Berger (1967:32) has noted

[R]eligion has been the historically most widespread and effective instrumentality of legitimation. All legitimation maintains socially defined reality. Religion legitimates so effectively because it relates the precarious reality constructions of empirical societies with ultimate reality...Religion legitimates social institutions by bestowing upon them an ultimately valid ontological status, that is, by locating them within a sacred and cosmic frame of reference.

Whereas the Enlightenment separated religion (private) from law and politics (public), and whereas the Enlightenment Project³ invoked reason and science as the only ways of grounding legal theory and

political vision, Pacific societies will not sever the umbilical chord between religion, law and politics, preferring to ground their states (in part) in religious belief and conviction. As the second guiding principle of the Constitution of Tuvalu 1978 has it, '[t]he right of the people of Tuvalu, both present and future, to a full, free and happy life, and to moral, spiritual, personal and material welfare, is affirmed as one given to them by God'.

This religious grounding challenges the epistemological view of the Enlightenment as the point of emancipation of humanity from superstition and tradition, an emancipation predicated on 'the notion of a scientific culture, in which everything was grounded in scientific doctrine or method, or committed to the flames as sophistry and illusion, as Hume put it' (Hollinger 1985:x). The problem is that rationality has not brought the world any closer to peace and justice. Weber's dismissal of ethics from the public arena is similarly arbitrary. Disputing Weber's dismissal of the ethic of brotherliness as misguided, Habermas (1984) notes that the ethic of human rights is itself derived from the ethic of brotherliness, but in a different form. Decrying the fracturing of human relationships that occurs when Weber's rational capitalism creates a rich élite and a poor mass, Habermas (1987:153–97) calls for the ethics of solidarity and social justice to mitigate the ruthlessness of profit seeking and power maximisation. Likewise, Weber's dismissal of salvation religion into the realm of lost illusions is flatly contradicted by the continuing validity of religion and the ongoing influence of religious ethics. Interestingly enough, the entire world of modernity has not been deserted by the gods; at least, the gods still live on in some quarters of the enlightened world.

Subject to qualifications and caveats set out below, religion remains a legitimate dimension of human existence and accords legitimacy to the politico-legal order, perhaps more so in the Pacific than in any other region of the (post)modern world. It needs to be noted, however, that the religious legitimisation of power relations and patterns of authority raises important methodological and substantive issues which need to be addressed. Adopting Michel Foucault's (1982:231) sceptical approach, I dare say that '[m]y point is not that everything is bad, but that everything is dangerous'.

First, religious legitimisation is partly a species of functionalism which, as a sociological approach, emerged in Europe in the nineteenth century mainly as a response to what was perceived as a crisis of social order

precipitated by the emergence of a new industrialised society resulting in the loss of community. As a conservative type of sociology, functionalism focuses on the need for social order and integration. In this focus, religion is seen as a source of solidarity and integration. Whereas the importance of solidarity and integration should not be belittled, the issue, as noted in the previous chapter, is that a one-sided emphasis on the collective produces the worship of society: society deified, God as the deification of society, and religion as the sacralisation of society's requirements for human behaviour. The result, in many cases, is the suppression of the individual. This necessitates liberalisation of the collective to give the individual space to act, exercise her rights and liberties, and pursue her interests. This is an important challenge for most Pacific societies.

Second, reified belief systems sometimes function to construct, reproduce, maintain, reinforce, and legitimate systems of domination. That is, they mediate, moralise and divinise existing social relations, and even mystify the powerless into submission to the powerful. Married to the interests of the powerful in society, religion presents the social order as neutral, fair, and compassionate; it is not capricious or unjust. Injustices, inequalities, and vertical distances in the social order are carefully masked or explained away as being the will of God. That is, the existing pattern of power is divinely sanctioned as the normal order of things, not a human construction, and is therefore beyond questioning. The privileging of some individuals and groups, and the exploitation of others, is similarly not subject to debate. The arbitrary use of power by some to serve their own interests and to legitimate the domination of others are not amenable to discussion or criticism. It is the will of God (so it is claimed) that things are and should be the way they are. Behold, religion as opiate for the masses!

Interrogating the Pacific's religious heritage, I note the heinous manner in which religion has been used to justify unholy feats. The crusades, racism, patriarchy, and other social ills all claim religious legitimisation, albeit a spurious one. We would do well therefore to heed the informed reminder that the Bible is not only about life, love and other noble virtues; the Bible 'of all books, is [also] the most dangerous one, the one that has been endowed with the power to kill' (Bal 1991:19).

We also need to change the basic terms of theological discourse in the Pacific to a positive affirmation of the individual, away from humanity as hopelessly depraved to a more positive affirmation of

humans' ability to understand and plan their world. This requires a reinterpretation of, among other things, the Augustinian view of the fall as vitiation of both the moral and the intellectual capacities of humans. It could be argued (adopting the humanistic perspective of the Renaissance) that, morally, Adam fell down, but, intellectually, he fell up when he ate of the tree of knowledge and his eyes were opened to the wonders of the world of Copernicus and Newton. This positive view of humanity is itself rooted in a God who is not irrational, vindictive, or totalitarian. Rather, God is 'as beneficent as he is wise' (Cragg 1970:158). He created the world on a rational plan and has the foresight to endow humans with a spark of the divine reason which enables them to discover to their advantage the laws of nature and the purpose of human existence.

Third, religious legitimization inadvertently results in the exaltation, reification and deification of the state. This issue was discussed in chapter two and it does not require any labouring here. I need briefly note the following matters. There is, for example, something nationally sanctifying in viewing the state of Samoa as something divine, an eternally ordained metaphysical reality. Central to that metamorphosis of the state is Samoa's national motto, '*E fa'avae i le Atua Samoa*' (Samoa is founded or based on God), which, for most people, is an article of democratic faith. From it, they distil the notion of the state as a divine reality with God as its source and foundation. In the popular mindset, the state of Samoa is (if anything) the unfolding of the divine purpose on earth and exists by divine decree.

In a positive sense, this sourcing of the state in divine authority gives state rule authority and legitimacy. Unfortunately, that construction—taken to the extreme—takes the state out of its earthly moorings, away from the people, and converts it into a supra-mundane entity imposed from above. But deifying the state has serious ramifications. Deified, the state becomes a government of angels (whose powers are wielded by an élite few), which Madison correctly opposed. Needing no external or internal controls, those wielding the power of the state rule as they please. Not only that, in this peculiar scheme, there is no need for the consent or the continuing concurrence of the governed as the proper basis of government. This is because (following the deification rationale of power) the state first came into being by divine authorisation; it rules by divine right, and its authority is sacrosanct. When this happens, the democratic state is not really different from the totalitarian German

state which Hegel 'praise[d] as a god, and Marx ... curse[d] as a devil' (Kelsen 2000:172)—an omnipotent, all-embracing entity, 'an absolute end in itself' (Hegel 1952:80), deified as the 'march of God in the world [or even more aggressively as] this actual God' (Hegel 1952:141). Taken to its logical conclusion, a deified state, undergirded by the doctrine of the power state and the Nietzschean will-to-power, is defined by power and is justified in increasing power. Ultimately, the state becomes the embodied will to power.

The issue here is not freedom of belief. To see in the complex skein of historical causality the working out of some higher plan, and the emergence of the state of Samoa as the culmination of that plan, remains the responsible opinion of the believers. That notwithstanding, a deified state has very dangerous ramifications. There is, therefore, a need to disentangle the web of reinforcing factors (religious, cultural, philosophical, ideological, and historical) which created and continues to maintain the deification of the state.

Fourth, as noted in chapter one, most Pacific jurisdictions adopt a species of natural law (based on the law of God and Christian principles) in addition to legal positivism. For instance, the introduction and first recital of the preamble of the Constitution of Samoa 1960 affirm the sovereignty and omnipresence of God, and declare that the authority of the State of Samoa is limited by and subject to God's commandments, the divine law. Accordingly, God is the supreme lawmaker and his law is supreme; the law of God not only binds the state, it also governs and limits the state.

In theological discourse, the sovereignty of God and the supremacy of his law is not a problem; it is the apex of biblical truth. The problem is that in Samoa these declarations are much more than a declaration of the religious faith of the people, a theological declaration that has no legal force, as Professor Davidson was at pains to point out in the Constitutional Convention 1960 (Constitutional Convention of Western Samoa 1960:Vol. II, 886). Furthermore, in constitutional interpretation generally, constitutional preambles are usually treated as nothing more than a form of introduction, a constitutional ornament without legal force.

Whereas that might be true in a strictly positivist legal sense, it is not so for most Samoans who treat these constitutional affirmations as the most important and authoritative part of the Constitution.⁴ This raises the issue of conflicting conceptions of the nature of the law. The internal actors in the social practice of law (lawyers, judges, and lawmakers) and outsiders (the citizens) understand and approach the law differently. The end-result is usually legal and moral confusion.

Positing the law of God as a permanent limit on state rule constitutes an appropriate check against the abuse of state power; the substance of state laws should be limited by normative principles. The 'indisputable truth that the command of an earthly superior which violated the law of God or Natural Reason,' enjoined Lord Radcliffe, 'not only owned title to no obedience but might even involve the positive duty of resistance' (Radcliffe 1961:6). Aquinas (1948:649) was just as blunt: 'an unjust law is not a genuine law'. In contrast to Austin's claim that the empirical existence of a legal rule is something independent from its merit or demerit, law—as the ordinary Samoan understands it—means just and fair promulgated laws that are compatible with the law of God. State lawmakers, on this view, do not have legal or moral authority to legislate the murder of blue-eyed babies, acts of blind hatred, the violation of rights, or some other unholy objective. Herein lies the major contribution of natural law: it generates the basic framework for the just state, organised in a way that respects justice, equity, and freedom. And as I categorically stated in chapter one, legitimate governance demands the rejection of legal positivism. As Allan (2001:218) has pointedly underlined,

[T]he familiar distinctions between legal and moral authority and legal and moral obligation, though convenient for the purposes of descriptive legal theory, prove too crude for constitutional analysis. When rigidly applied, they confuse and distort practical reasoning, divorcing the interpretation of law too sharply from the requirements of justice and separating legal practice too stringently from the political ideals that underlie it...When the law demands obedience, it asserts that the relevant obligation is morally justified, consistent with the common good, and therefore entitled to the citizen's assent. Questions of legality and legitimacy cannot be separated: the identification of any measure as 'law', imposing genuine obligations, is always ultimately a matter of individual conscience. In making state demands subject to a moral test, the rule of law sanctions conscientious rejection—or radical interpretation—of rules whose (potential) injustice is sufficiently grave, notwithstanding that they meet formal conditions of validity.

In the final analysis, the citizens' moral assent is indispensable. For what use is the law if people do not obey it? And, clearly, it serves no useful purpose, relevant to the matter of practical governance, to attribute legal validity to a law that completely lacks any moral legitimacy and may, therefore, so far as possible, have to be resisted. Indeed, there is always the nagging danger that 'the natural tendency of such a doctrine [natural law] is to impel a man, by force of conscience, to rise up in arms against any law whatever that he happens not to like' (Bentham 1967:30). This danger could be averted, it may be argued, if the lawmakers themselves refrain from enacting laws that are morally

and ethically repugnant according to the normal canons of right and justice. Citizens, too, should not abdicate their moral judgment to the lawmakers. Both sides of the equation are therefore indispensable and should be reciprocally regulating.

Advocating moral and ethical principles is, after all, not rationally naïve or objectively primitive, and, contrary to Weber's assertions, there is nothing rationally or objectively repugnant in being a 'Buddha, Jesus, or Francis'.

A number of theoretical and practical problems remain though. Theoretically, constitutionalism does not normally limit a secular sovereign (be it an individual or group of individuals) by imposing a super-sovereign on it. In principle, only God could rightfully claim that status and function. The problem is that humans are adept at appropriating God's sovereignty and exploiting it in the service of human interests, playing sovereign 'gods' to others. The secularisation of the notion of sovereignty was in fact spawned by the ignoble acts of Christians themselves. Enmity among Christians with rival claims to truth divided people and nations alike. Religious wars and persecution in God's name undermined the Christian principles of love and a common humanity. Consequently, since the eighteenth century, there has been an increasing secularisation of the doctrine of sovereignty. Furthermore, God, the super-sovereign in Pacific systems of government, is usually without a job. In the popular mindset, when God's commandments are flouted, the enforcement of his judgment is deferred until the culprit gets to heaven. On earth, our sovereign God is silent and idle, and his subjects can do whatever they want. And, in many cases, the refusal to be bound by state laws but only by the law of God is a convenient excuse for abdicating legal and moral obligations on earth. Anarchy is the result.

To avert such problems, constitutionalism to date privileges the secular concept of sovereignty—a sovereign bound by law; the lawmaker is himself bound by his rules. Ensuring every citizen's compliance with his legal and moral obligations on earth, including lawmakers, constitutionalism posits the equal subjection of all citizens to the rule of law. Preempting the exaltation of rulers or the state itself into some kind of deified entity, constitutionalism avoids the vertical structure of power and arranges power on a horizontal axis. In this non-hierarchical order, government powers are dispersed and divided into different functions which are distributed amongst the three branches of government. This structuring of government powers on a

horizontal axis creates a system of careful coordination of specified powers and produces a web of mutual dependence amongst the three branches of government. Each subjects the others to continuing scrutiny in a self-regulating structure of separated powers, checked and balanced by a system of mutual jealousies.

It may be noted that, within this frame of qualifications and caveats, one of the negligent appropriations of God's sovereignty is the paradoxical violation of freedom of religion in the name of God, a biting issue in Samoa. In *Tariu Tuivaiti v Sila Faamalaga & Others* (1980–93) WSLR 17, St John CJ held that the plaintiff—banished from his village by the village council for not attending church on Sundays—was guaranteed freedom of thought, conscience and religion by article 11(1) of the Constitution, and that that right includes the right not to have any religion at all.⁵ In *Mau Sefo & Others v The Land and Titles Court & Others* (SC, 1999), Wilson J held that the village council of Saipipi had no authority under the Constitution to prohibit the plaintiffs (members of a new denomination) from having bible classes or services in their own village. The village council's actions were, as Wilson J put it at 22, a form of 'religious intolerance', 'discrimination', 'religious persecution' and 'coercion' that was inconsistent with the spirit of the Constitution. Clearly, the problem was not God or religion *per se*, but misconstructions predicated on the misguided craving to have a monopoly on religious truth. The danger, oftentimes, is also the commercialisation of religion for personal interests and gain.

In defence of a very important freedom, I note the following matters. Underlining the fundamental significance of freedom of religion, Mason ACJ of the High Court of Australia in *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* (1982–83) 154 CLR 120 affirmed at 130–1 that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society'. Protection of this freedom is 'accorded to preserve the dignity and freedom of each man so that he may adhere to any religion of his choosing or to none'. Religion belongs to the conviction and conscience of every person. It is directed only by choice, never by coercion or violence. As Dickson J put it in *R v Big M Drug Mart Ltd* (1985) 18 DLR (4th) 321 at 354, '[i]f a person is compelled by the State or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free'.

For some people, the issue is religious truth. But whatever one's truth is, in law, we do not have any right to beat the drums of our

religious rituals and the heads of our religious others. For others, the issue is the decision of the majority which, they argue, is both numerically and morally right. But Dickson J in *R v Big M Drug Ltd* (1985) has offered a trenchant reminder at 354, '[w]hat may appear good and true to a majoritarian religious group, or the State acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view'. To do so means indulging the tyranny of the religious majority.

Fortunately, the Samoan courts have taken a firm stand in protecting freedom of religion. Whenever they are asked to sanction the violation of this freedom, the response has been constant: this is the domain of liberty, in which the courts should not intervene other than to ensure that liberty is guaranteed and protected. This is in keeping with the legal principle enunciated by Murphy J in *Church of the New Faith v Commissioner of Pay-roll Tax (Victoria)* at 150, '[r]eligious discrimination by officials or by the courts is unacceptable in a free society...In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privilege for its members'. In a sense, the courts are, in a challenging way, taking the initiative in erecting a wall of separation between state and church.

Indigenous custom and traditions: state legitimacy, the Pacific way

Rejecting Weber's dismissal of tradition as a viable mode of legitimacy in the enlightened world of modernity, I advocate the view that indigenous custom and traditions remain a viable source of legitimacy in some quarters of the enlightened world of modernity. The Pacific is a clear example.

In addition to what I said in chapter one, I believe that the recognition of custom is required for a number of reasons, for example, the sovereignty of the people, which demands that their practices and values are reflected in state laws and conduct of the state. A clear illustration is the recognition of community elders or chiefs as part of the apparatus of the state, as in Samoa's Head of State, Samoa's *matai*-only parliamentary candidacy, and the Great Council of Chiefs in Fiji. Grounding government in traditional values, the third, fourth and fifth guiding principles of the Constitution of Tuvalu 1978 mandate the adoption of Tuvaluan values in the conduct of government and public affairs. These include forms of community life; family life; 'agreement,

courtesy, and the search for consensus, in accordance with traditional Tuvaluan procedures, rather than alien ideas of confrontation and divisiveness'; and mutual respect and cooperation.

The recognition of custom as a source of law also goes to the heart of a jurisprudence that is relevant to Pacific universes of meaning. It partly resolves the issue of the legal, moral, and practical justification for the peoples' acquiescence in the law as a manifestation of the state, a root question in jurisprudence. It is about constructing a jurisprudence of Pacific values. This is reminiscent of Montesquieu's enjoinder that the laws of a given state must be appropriate to the values, manners, and way of life of the people who stand to be affected by those laws.

In short, custom and traditions constitute a valid way of achieving state authority, validity, and legitimacy. Broadly understood, custom refers not only to a people's so-called habits of the heart, but also observable acts experienced as facts, intangible ideas that make up society's stock of knowledge, and moral precepts, values and objectives that guide community action. Dismissing it as having no relevance or force for lawmaking purposes is like turning an Eskimo's legal-social consciousness into that of an extra-terrestrial being in the *Star Trek* series.

My specific focus in this section is to highlight the issues arising out of the grounding of state legitimacy in custom and traditions.

Pacific legal systems share the common characteristic of legal pluralism—the problematic collision of legal liberalism and custom as sources of law. For instance, article 111(1) of the Constitution of Samoa defines law in the following terms

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.⁶

Much has been written on this topic. Part of the challenge is a definitive delineation of the substance, procedures, and structures of Pacific customary laws, systems of ethics which underpin those laws, and modes of governance which they employ. My own interest is in a socio-theoretical resolution of the two legal mindsets that is in keeping with the overall objective of this study: legitimate governance premised on the rule of law as its guiding and unifying principle.

Without slighting the seriousness of the clash between legal liberalism and customary laws, I take the view that too often (and not

without good reason) conceptualisations disproportionately accentuate the notion of conflict. Accordingly, the relationship has been described as 'the inevitable conflict' (Davidson 1967:368; Stroupe 1996) between two 'competing legal systems' (Sapolu 1988:61). Jonathan Aleck aptly sums up the issue as follows: 'There is already a considerable scholarly literature built upon the assumption that the nature and dynamics of law and custom are so contraposed to one another as to be essentially incompatible' (Aleck 1995:3). Reducing Papua New Guinea's governance woes to a very simple formula, Windybank and Manning (2003:4) opine that 'the conflict between traditional tribal customs and the institutions of modern government lies at the heart of that nation's problems'.

On the conflict reading, the relationship, to use an analogy, is like that of out-marrying African tribes who, every morning, look over to their potential spouses in the neighbouring tribes and cry, they are our enemies, we marry them! True, the clash is much more than just a matter of mental disposition. From the point of view of custom, the struggle is against the hegemony of legal liberalism; from the perspective of legal liberalism, the struggle is against the imperialism of some customary rules which thwart the development of Pacific societies as modern democracies. Each order operates from an established infrastructure which defines its own norms; each propagates and defends a distinctive ideology which endows its respective order with meaning and purpose; each idealises its own value system, claiming to be an all-embracing order that leaves nothing outside its conceptual scope; and each prides itself on being self-sufficient and sustained by the power of its own logic. And, usually, one is bent on resisting or subjugating the other, on gaining dominance and control in the realm of social interaction. More often than not, this throws the social order into legal and moral confusion.

Be that as it may, the term conflict, while appropriate to some degree, presupposes an irreconcilable contradiction and invokes legitimating mechanisms that are exclusivist and nihilatory in the extreme since, on the conflict model, legal liberalism and custom confront each other as entities with greatly, even totally, different histories. To achieve a position of dominance in what is seen as an eternal power struggle, each must meet the other with 'the best possible reasons for [its] superiority' (Berger and Luckmann 1967:126) and dismiss the other as 'ignorant, mad or downright evil' (Berger and Luckmann 1967:125). But this is nihilation, the conceptual liquidation of the other, neutralising the other by reducing it to 'an inferior ontological status, and a not-to-

be-taken-seriously cognitive status' (Berger and Luckmann 1967:132). Clearly, also, the conceptual cognates of the term conflict are violently uncompromising. Superiority engenders condescension, invites subordination, and justifies marginalisation. The term primitive is similarly perjorative; it smacks of (neo)colonial oppression.

This necessitates a reconceptualisation of the relationship not as a conflict between a good system and an evil one, but as competing conceptions of the good. If either mindset is allowed to exclude the other fully, important values will be lost as a result. It is imperative, therefore, to move legal discourse beyond the usual category of conflict, with its concomitant presupposition that one is intent on liquidating the other. We need to change the terms in which the relationship between the two legal mindsets is conceptualised.

There are practical problems as well. Legitimation requires and uses power; power means force; and force is applied by any number of means. Legitimation, according to Berger and Luckmann (1967:127), uses a stick, and 'he who has the bigger stick has the better chance of imposing his definitions of reality'. Accordingly, while some militantly privilege legal liberalism, others reactively privilege custom, and all use sticks to beat their legal definitions into the others' senses.⁷ In Samoa, for example, the battle of sticks between legal liberalism and custom keeps occurring at critical points of the body politic—in parliament, the executive, the courts, villages, churches and families.

Attempting a legal fusion of the centre and the periphery, parliament enacted Samoa's Village Fono Act 1990 (the Act). The purpose of the Act is 'to validate and empower the exercise of power and authority by the Village Fono [council of matais] in accordance with the custom and usage of their villages and to confirm or grant certain powers; and to provide for incidental matters'. The Act may be praised for giving formal recognition to the authority of village councils, customary law, and traditional modes of governance. The Act also enables the delegation of powers and functions from central government to village councils for the administration and enforcement of law and order in accordance with customary law, and creates a cooperative venture between modern government institutions and customary structures.

Merits aside, the Act has created a range of issues. For instance, the extent and limits on the powers of village councils has been a continuing gnawing issue. Section 6 of the Act authorises councils to enforce village rules and impose punishment for non-compliance. But if the legislators thought that the councils would confine themselves to punishment such

as monetary fines, fine mats, and foodstuffs, they were clearly wrong. Given formal statutory recognition, some village councils have punished as they wish, sometimes pursuant to the doctrine of implied powers. In popular opinion, the Act 'gave every village council the power to punish in whichever way it likes any person who refuses to obey its dictates' (*Samoa Observer*, February 1993). Abuse of the power to punish saw people being unnecessarily banished from villages. The case of *Italia Taamale* is a case in point. Perhaps the problem is not the Act itself but misconstructions of it. In any case, village councils' abuse of their statutory powers highlights thorny issues regarding the marriage of convenience between legal liberalism and custom in the Act. We thus find village councils using the law (the Act) to defeat the law (part II of the Constitution which guarantees and protects rights and liberties).

Giving village councils a role in the administration of justice is warranted for a whole range of reasons—for example, they can perform law and order functions in rural villages where there are no police officers to enforce state laws. But their incorporation into the formal structure of government has made every village council a into a kind of tribunal exercising quasi-judicial and executive functions. Arguably, this makes them subject to the rules and procedures of natural justice and brings them within the courts' review jurisdiction of administrative action. My misgiving is that a village council minded to abuse its statutory powers will always find the Act sufficient warrant to do that. It is no consolation either that the Act is subject to the provisions of the Constitution.

The problem is that for many *matais* the Act is now their political bible, a constitution in itself, one that overrides the provisions of the national Constitution. Hence the discrepancy between ideal (what the Act was intended to accomplish) and reality (what the Act has been made to accomplish) is not only marked but threatening. When a person is unnecessarily banished by order of the village council, the Act can always be cited as authority and justification—it is banishment according to the law. Quite frankly, whenever that happens, the Act is unavoidably unconstitutional.

Seeking a solution to our battle of sticks, I promulgate the view that we should abandon the partisan promulgation of two different types of law, the indigenous and the 'imported law' (Donne 1988:4), sometimes with ideological blindness. In keeping with the selective recognition of custom, the ultimate test is justice and fairness, whether or not a particular custom is contrary to the principles of justice and

fairness relative to shared meanings. I cite in support of this proposition a statement of the Supreme Court of Papua New Guinea in *Public Prosecutor v Kerua* [1985] PNGLR 85. The issue was the legality of the native custom of murdering an adulteress. Kidu CJ, Bredmeyer J, and McDermott J held at 89,

Custom can be taken into account in sentencing by virtue of the *Customs Recognition Act* (Ch 19), s 4 (e), but that section is subject to two important limitations. By s 3 of that Act customs cannot be recognised or enforced...if that is not in the public interest...The second limitation is in the Constitution. Schedule 2.1 provides that custom does not apply if it is repugnant to the general principles of humanity.

Outside extreme cases such as the above, custom may be taken into account in mitigation of sentence or as alternative means of dispute resolution. This would also shift the focus away from arbitration and the litigation neurosis which sometimes haunts Pacific courts, often resulting in the backlog of court cases.

Perhaps, also, the issue must not turn on the size of one's stick but on using the right stick in the right season and for the right reasons. Thus referring to the timely change from Samoa's *matai*-only suffrage (which deprived non-matais of the political right to vote for many years) to universal suffrage pursuant to the *Electoral Amendment Act 1990*, the Court of Appeal in *Le Tagaloa Pita & Others v Attorney General* (CA. 3/95) observed at 44, '[i]f we may borrow the imagery, the new generation, thinking hard and long about the matter and drawing on the wisdom and experience of earlier generations, has taken a fresh stick'. This underlines certain important matters. Democracy is a process; it is not a once-and-for-all event. Genuine democratic change can be very slow, but given time and grounded in the conviction of the people, change—if not unduly rushed or coercively imposed—will most certainly come. And change necessarily means liberalisation, not destruction.

In summary, the imagery of a perfect marriage between legal liberalism and custom—a 'unique amalgam' (Powles and Pulea 1988:xii)—is too nice. The marriage is an arranged one. As such, it is fraught with problems and challenges. Total exclusion of custom from the legal system would be disastrous; important values will be lost and it will always be counter-productive. Separating the systems and consigning one (usually custom) to a small corner of the legal universe is also problematic. The geometrical applications of laws, predicated on the notion of separated systems, will result in the institutionalisation of a divided legal order and the evil of fragmentation. It would also have adverse consequences for law and order. For example, for some

people, the application of separate systems means the license to ignore one set of rules in favour of the other. Recasting the marriage metaphor, separation means the marriage is well on the way to dissolution. At the other end of the spectrum is the model of assimilation, which means, in effect, the absorption of custom into formal law. Custom, to put it bluntly, gets swallowed up. But this is just as untenable.

That leaves us with integration as the most viable option. The ideal is the creation of a porous national legal system that incorporates different legal mindsets and which does not exclude any. The emphasis here is on the interpenetration and intermeshing of the different legal mindsets, creating a porous legal system. Each mindset is taken on its merits. All mindsets are normative, with no one mindset being especially privileged. Furthermore, the differences between the legal mindsets, while sharp and sometimes very deep, are manageable and capable of resolution. The end result, hopefully, is a national legal system of discrete yet overlapping legal mindsets. The system must be fluid enough to adapt and self-adjust. It must be firm enough to ensure that fundamental values are not sacrificed or lost. And it must be robust enough to command from the people a broad consensus on its legitimacy.

I therefore urge a continuing search to find an optimal point where the different mindsets, in combination, achieve a result which best captures the aspirations of the Pacific peoples. Finding this elusive point is always a daunting task, and maintaining the line of compromise is likely to be subject to constant change. Perhaps this is warranted since the law must be responsive to the changing interests and needs of the people.

Dismantling the imagery of two fiercely opposed mindsets also requires a substantial revision of some of the main tenets of legal liberalism. Pursuing a genealogical questioning of the law and its foundational tenets, my purpose is to problematise the whole legal edifice by showing that things could be other than the way there are. Reiterating Foucault's skepticism, '[m]y point is not that everything is bad, but that everything is dangerous'.

A central feature of legal liberalism is rationality predicated on reason. For Aquinas, natural law is rooted in the divine will, discoverable through God-given reason: 'All law proceeds from the reason and will of the lawgiver; the divine and natural law from the reasonable will of God; the human law from the will of men, regulated by reason' (Henle 1993:63). In the Enlightenment philosophy of modernism, reason is seen as a universal faculty of humans which makes possible a rational life separated from contingent and distorting

forces such as tradition, superstition, and emotion. For Immanuel Kant, '[r]eason proceeds by eternal and unalterable laws' (Kant 1965:9). Praising reason as a 'faculty of judgment...received from God', Rene Descartes (1979:35) confessed that, since God 'has not wished to deceive me, he certainly has not given me a faculty such that, when I use it properly, I could ever make a mistake'.

Allied to the dogmatic belief in reason is the Enlightenment belief in progress, that reason has emancipated humanity from superstition and traditions, and moves us toward an increasingly rational and just world. Thus Descartes (1931:5) spoke of reason as the 'method for finding out the truth...By method I mean certain and simple rules, such that if a man observes them accurately, he shall never assume what is false to be true, but will always gradually increase his knowledge and arrive at a true understanding of all that does not exceed his powers'.

Since the Enlightenment, reason has been consistently praised as the faculty with the power to liberate humanity from the bondage of misguided beliefs and practices based on superstition and blind tradition. In legal theory, the law is seen, even idealised, to be based on foundational, universal notions like reason and its intellectual offsprings of rationality and objectivity. Referring to the American legal fraternity, Roscoe Pound wrote, '[t]he American lawyer, as a rule, still believes that the principles of law are absolute, eternal, and of universal validity' (Frank 1970:59).

While taking those foundational notions as givens, it could be argued that the rationality of modern liberalism is often improperly contrasted with custom and traditions seen as subjective, emotionally-loaded and therefore (for some strange reason) irrational. Severing the umbilical chord between mind and heart, liberalism truncates the human self to a mere mental construct without feeling or affection, a mind without a body. This is in contrast to Pacific people's holistic world view, which understands the human self as a totality of ideas, emotions, flesh and blood, moral values, ethical convictions, and human associations, and also seeks to maintain the balance between mind and heart, subject to the dictates of one's conscience.

Then there are the painful facts of modern history: Auschwitz; ethnic cleansing; September 11 and the ongoing war in Afghanistan; the controversial war in Iraq with its socio-economic implications and the senseless killing of so many innocent people, including defenceless women and children; the scandals of Abu Ghraib prison and Guantanamo Bay; the ever-present danger of a nuclear war; global

warming and the threat of a global environmental disaster; corporate fraud and the exploitation of workers in developing countries by multinational corporations; sexism, neurosis and other social ills. These and many other facts of history inevitably question in a fundamental way the proclaimed virtues of rationality, that is, reason's power and ability to bring about a just and fair world.

Condemning Auschwitz and disputing racism and fascism as rational solutions to political problems, Foucault (1982:210) notes, '[t]his was, of course, an irrationality, but an irrationality that was at the same time, after all, a certain type of rationality'. Thus, we must be suspicious of claims based on reason. Perhaps, the problem is the non-use of reason in public affairs, especially when individuals or groups take out their blind hatreds on innocent victims. But, in a real sense, the problem is also the misuse of reason, especially where the powerful exploit the powerless. As Foucault (1982:210) has noted, '[t]he relationship between rationalisation and excess political power is evident. And we should not need wait for the concentration camps to recognise the existence of such relations'.

Objectivity, another central feature of liberalism, is also amenable to serious questioning. That is to say, the notion of total objectivity cannot be tenable since it is impossible for anyone to approach facts, issues, conflicts and situations in a manner completely independent of one's perspective or with a mind free of bias. In fact, the questions one brings to an issue, and even the way questions are put, all presuppose a relativity of interest. Objectivity is therefore often a myth, necessary to construct and maintain an ideology.

Sometimes the avowed objectivity of reason is nothing more than a tranquiliser of the human senses, or just another word for indifference. This constitutes the Pacific epistemological challenge to the (sometimes) depersonalising objectivity of liberalism that treats people as if their minds are unconnected with their individual and corporate bodies within concrete social contexts.

Universality, too, needs to be tempered by contingency, by the customary laws and modes of governance that are rooted in a given community's normative universe of meaning, social practice, and discourse. This also applies to notions and practice of justice. Noting the embeddedness of justice, Michael Walzer (1983:312–3) explains, '[j]ustice is relative to social meanings...A given society is just if its substantive life is lived in a certain way—that is, in a way that is faithful to the shared understanding of its members'.

In Samoa's normative worldview, for instance, justice is primarily relational, rooted in personal relationships. Justice means, first and foremost, treating the other person with love and respect, affirming rather than dislocating him. It is governed by the ethic of respect and caring for one's human kin—parents, relatives, the elderly, those in authority, and neighbours. Justice, in Samoa's cosmology, also extends to the relationship between people and their physical environment. It means treating the earth as a kin worthy of respect and care. And there is God, the unseen partner in Samoan affairs, the author and final court of justice in Samoa's religious universe of meaning. Samoan justice thus moves on various planes at once. It is much more than a matter of procedure. Given the embeddedness of meanings, notions and practices, '[w]e must start from where we are', as Richard Rorty (1989:198) has urged.

My purpose has been to problematise some of the central notions of legal liberalism, not subvert or reject them. Rationality is of course essential, but narrowly construed as something of the intellect only, it becomes one-dimensional, masochistic, cold, and impersonal. Furthermore, rationality, if not subjected to critical analysis, can harbour irrational tendencies and promote inhuman objectives. And while reason's promise of bringing about a better and more just world remains a source of hope, the history of the modern world is a matter of concern. As Foucault (1984:85) has argued,

Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity instills each of its violences in a system of rules and thus proceeds from domination to domination.

Questioning the proclaimed merits of the Enlightenment, Max Horkheimer and Theodor Adorno (1991:3, xi) wrote,

[t]he Enlightenment has always aimed at liberating men from fear and establishing their sovereignty. Yet the fully enlightened earth radiates disasters triumphant...[M]ankind, instead of entering into a truly human condition, is sinking into a new kind of barbarism.

This raises the point that the good life really requires not only an enlightened intellect, but an educated heart governed and guided by moral and ethical principles. This is necessary not only in private life, but more especially in the public arena of law, politics, economics, governance, and development. Notably, in the Pacific, the private/public distinction is not nearly as rigid as in modern liberalism's structuring of the social order. Moral imperatives and ethical values (religious or otherwise), predominantly confined to the private sphere

in liberalism's world view, are just as public as clean air, public land, and other participatory goods in the Pacific.

A sociotheoretical resolution of the legitimacy problem

A potentially fruitful way of juxtaposing the different modes of state legitimacy in the Pacific, and conceptualising their relationship not as conflicts between good and evil but as competing yet mutually reinforcing conceptions of the common good, is the sociological category of the symbolic universe, employed as a heuristic construct. Within this sociological scheme, every institution has its place in a complex system of overlapping spheres of interest and influence.

More importantly, within the framework of the symbolic universe, the rule of law could be construed both as a tool for the construction and maintenance of a social world, and as the frame within which institutional contradictions are negotiated and resolved. In that sense, the rule of law provides the overarching legitimacy system of a social world, broadly understood in the sense of both the environment which a group of people inhabit and the world as they perceive it and to which they give form and significance through their special language and other meaningful actions.

Legitimation, according to Berger and Luckmann, refers in the widest sense to socially objectivated knowledge that serves to explain and justify a social order. At the level of objectivity, legitimation makes society's institutions (law, politics, religion, extended family, kinship, property rights, customary land, and so forth) objectively available to the members of society, as in the traditions instructing members about the nature and function of those institutions. At the level of subjectivity, legitimation makes those institutions subjectively plausible by telling the members of society why things are what they are and that they should act on this knowledge, here presented as right knowledge. It may be noted, in this connection, that legitimation's interrelated objective and subjective orientation problematises modernity's one-sided emphasis on objectivity, often to the detriment of what people accept as real and meaningful in their everyday subjective lives.

This is also in line with the operation of legitimation at multiple levels: from the initial use of meaningful vocabulary or a system of signs (*tama*, *teine*, *fa'afafine*) to explanatory theoretical statements (proverbs, maxims), explicit theories advanced and transmitted by experts, and, finally at the highest level, symbolic universes defined as

'bodies of theoretical tradition that integrate different provinces of meaning and encompass the institutional order in a symbolic totality' (Berger and Luckmann 1967:113). Knowledge, in Berger and Luckmann's view, includes both specialised intellectual systems and what people accept as real in their everyday pre-theoretical lives. The latter entails the certainty that phenomena are real, that we cannot wish them away, and that they possess certain characteristics. People take this ordinary world for granted and it is this knowledge that keeps them in society: 'It is precisely this "knowledge" that constitutes the fabric of meanings without which no society could exist' (Berger and Luckmann 1967:27). While knowledge, in the sense of intellectual systems and ideologies, is not rejected or its significance discounted, legitimation, properly understood and applied, must take into account this everyday, ordinary, pre-theoretical knowledge as a valid dimension of social reality. This challenges the legitimation systems of modernity predicated on complex rational systems of thought and practice to the exclusion of equally valid realities, seen as logically simplistic.

At all levels (including the pre-theoretical level epitomised by community myths), all forms of legitimation serve as machineries for the maintenance of the symbolic universe. The more clearly defined machineries include institutionalised, esoteric systems of philosophy, science, law, politics and theology managed by specialised elites. Legitimation thus has a very wide order of reference; it includes society's myths (stories, parables, allegories, and other cultural traditions) as well as specialised systems of knowledge (law, politics, philosophy). All are equally important means of legitimating and maintaining society's symbolic universe. Again, the recognition of custom and cultural traditions as valid means of legitimation and universe maintenance challenges modernity's rational systems of legitimation to the exclusion of other equally valid systems.

That brings me to certain functions of a symbolic universe and their significance for present purposes. First, the symbolic universe provides an integrating, all-embracing frame of reference; it encompasses the entire society and its diverse institutions, roles, processes and meanings. Whereas a high degree of integration of diverse social institutions may have been reached at the preceding level of explicit theories, it is only at the level of the symbolic universe that all sectors of society are integrated in an 'all-embracing frame of reference, which now constitutes a universe in the literal sense of the word, because all human experience can now be conceived of as taking place within it' (Berger

and Luckmann 1967:113-4). At last, the entire society, notwithstanding its diverse institutional composition, now makes sense and 'a whole world is created' (Berger and Luckmann 1967:114).

In practical terms, custom and traditions, law, politics, religion, morality and ethics all have their legitimate places and functions in an inevitably (and understandably) strained relationship of coexistence within the framework of society's symbolic universe. Where and when two or more of them are in open conflict, and that conflict threatens to land the social order in anarchy, the challenge is not condemning one or all of them to oblivion, but renegotiating the balance of influence amongst them and thereby moving the social order to a new equilibrium. Thus, in this respect, the symbolic universe ultimately 'puts everything in its right place' (Berger and Luckmann 1967:116).

Second, the symbolic universe orders history. For the individual, the symbolic universe orders the different phases of his biography in a meaningful totality (including past, present and future) that transcends the individual's finite existence. For the institutional order, the symbolic universe orders its history by locating all collective events in a cohesive historical unity and engendering a sense of continuity by being linked with the past (the group's predecessors) and the future (its successors), a sense of belonging to a meaningful world that was there before they were born and will be there after they die.

This is important in a number of respects. We cannot screen out the past, at least not without becoming historically dislocated in the present. Institutions such as custom and traditions embody important memories of the past. These institutions cannot be discarded without destroying a people's identity, who they are and where they are going. The challenge, however, is not submersion in the past but allowing the past to inform the present while moving forward into the future. Where and when the past (interests, needs, practices, and objectives) becomes an unnecessary haunting concern in the present, it has to be reorganised and its irrelevant aspects discarded—that is, without destroying the past in its entirety.

Third, the ideal scenario is that, once the symbolic universe has been constructed and has satisfactorily explained and justified the institutional order, it will normally be inhabited—other things being equal—with a taken-for-granted attitude. The problem is that all things are seldom equal and that some members of society will always inhabit the symbolic universe with less conviction than others. For those particular members, the symbolic universe will be, to a greater or lesser

extent, problematic. Cases such as these highlight the fact that every symbolic universe is 'incipiently problematic' (Berger and Luckmann 1967:123). It is threatened either by internal revolutions (for example, heretical versions of reality and social deviance) or by attacks from external forces (for example, a competing society with a greatly different history which 'views one's definitions of reality as ignorant, mad or downright evil'). Either way, the reality status of the symbolic universe is at stake, and this calls for legitimacy mechanisms that could be sophisticated and extreme.

Applying the foregoing propositions to the relationship between legal liberalism and Pacific custom, the problem is that some members of Pacific societies inhabit their legal (postcolonial, post-independent) universe, which combines legal liberalism and custom with less conviction than others. For those particular members, the legal universe will always be problematic. This requires, among other things, questioning why things are not equal as well as the continuing socialisation of those members into the procedures, practices and principles of the new legal order. This takes time and effort, but it must be done if all members of society were to be fully absorbed into the new legal order.

A more critical problem is (as already noted above) the disproportionate accentuation of the conflict and conceptualising the said conflict as one between a foreign system of law and an indigenous one. These premises inevitably set in motion a peculiar way of resolving the tension, namely, nihilation. This entails the use of theoretical arguments and forms of practice 'to liquidate conceptually' everything outside and therefore alien to one's universe of meaning (Berger and Luckmann 1967:132). This usually involves the denial of the reality status of external phenomena by giving them a negative, 'inferior ontological status, and thereby a not-to-be-taken-seriously cognitive status' (Berger and Luckmann 1967:132). In other words, the other is ontologically and cognitively liquidated.

My point is that what is often forgotten in the euphoric rush to polarise the issue is that the tensions between legal liberalism and custom occur within a single entity in the form of a national state wherein the architecture of governance, and the rules governing that architecture, are generally accepted. And central to that architecture of governance is the rule of law which, interestingly enough, includes among other things English common law and equity as well as custom and traditions as article 111(1) of Samoa's Constitution mandates. In light of that, it may be argued that a more appropriate way of

conceptualising the tensions that the coexistence of different legal mindsets keeps coughing up is in terms of internal contradictions within the legal universe of meaning itself.

On this reading, the danger is not an external threat but an internal one, an internal problem in the form of legal deviance, the departure from established procedures and principles. Construed in this way, the appropriate response would be therapy, not nihilation. Therapy involves the application of theoretical resources and practices 'to ensure that actual or potential deviants stay within the institutionalised definitions of reality, or, in other words, to prevent the inhabitants of a given universe from emigrating' (Berger and Luckmann 1967:130). As a mechanism of dispute resolution, therapy develops a diagnosis of the deviation, how it could be resolved, and how deviants could thereby be re-socialised back into the reality status of the social order. This is a less radical way of conceptualising the relationship between legal liberalism and custom, and could also produce a more congenial relationship.

Indeed, deviance challenges the reality status of the community's plausibility structure and is no less dangerous. Nevertheless, deviance is, at best, not always a property inherent in some forms of behaviour but something conferred on such behaviour by a social audience and is, at worst, 'microsociological sabotage' (Berger 1976:151). Treated as a dimension of the continuing power struggle between competing versions seeking to transform the legal order in different directions, deviance should be accepted as the community's own problem, not someone else's. Owning the problem fosters a sense of responsibility in respect of solving that problem and avoids projectionist theories of blame.

Conceptualising the issue as an internal power struggle has other advantages. For one thing, it draws attention to the fact that the legal paradigm can and does change, shift, and self-adjust. For another, it exposes power as a legitimate consideration in any assessment of the construction of reality, including the construction of the legal order. Sometimes legal politics is reified, thus raising the issue of the legal majority pursuing their goals of actions to the exclusion of the interests of the legal minority. Finally, acknowledging the power struggle among competing versions of the legal order points up the ability of individuals or groups of individuals to change, transform, or even sabotage their legal world. Stated more positively, the issue is human agency or the

'ingenuity human beings are capable of in circumventing and subverting even the most elaborate control system' (Berger 1976:155), that is, the human capacity 'for innovation and [even] deviation' (Chinoy 1968:129). And, given the diversity of interests in any given society, the potential for internal power struggles is high.

While allowing for the plurality of interests, the Rawlsian 'fact of reasonable pluralism' (Rawls 1993:36–7), those diverse interests must ultimately yield to the procedural and normative dictates of the rule of law. Custom, traditions, legal liberalism, religion, politics (both traditional and modern) and every other social institution are all subject to the rule of law—publicly negotiated, consonant with the community's moral and ethical convictions, and democratically established. In the context of society's unity-in-diversity, the rule of law commands the equal compliance of all citizens with constitutional and legal rules, thus thwarting the decline of the social order into disorder and confusion spawned by pluralism. When sectional interests vie, or even destroy each other, for the control of the social order, the rule of law adjudicates on the basis of a single standard ('according to the law') equally applicable to all. In this respect, the rule of law functions to integrate society's diverse institutions and discrete processes, interests, and objectives. It negotiates and resolves contradictions, diffuses tensions and overcomes forms of aggression issuing from those tensions, on the basis of a single standard.

This is partly the critical role of the law which Habermas promotes for the resolution of class, economic, and political conflicts which, if not resolved, may lead to either a legitimisation crisis and the consequent loss of citizens' faith in public institutions or a motivational crisis. Underlining the critical role of the law in the resolution of these conflicts Habermas (1996:429) explains,

[t]he lifeworld forms, as a whole, a network made of communicative actions. Under the aspect of action coordination, its society component consists of the totality of legitimately ordered interpersonal relationships. It also encompasses collectives, associations, and organisations specialised for specific functions. Some of these functionally specialised action systems become independent vis-à-vis socially integrated spheres of action, i.e. spheres integrated through values, norms and mutual understanding. Such systems develop their own codes—as the economy does with money and the administration with power. Through the legal institutionalisation of steering media, however, these systems remain anchored in the society component of the lifeworld. The language of law brings lifeworld communication from the public and private spheres and puts it into a form in which these messages can also be received by the special codes of self-steered action systems—and vice versa.

On this view, integration—‘the typical purpose motivating the legitimators’ (Berger and Luckmann 1967:110) and the ultimate objective of legitimation—takes the social system as a totality and gives each element of that totality—both public and private, central and peripheral, modern and traditional, objectives, acts and subjective meanings, personal values and shared norms—equal standing. It does not rule out of court individual intentions, plans, interests, and needs but rather affirms individuals as acting subjects. Nor does it ignore collectivities such as associations and organisations with their respective specialised functions. The law gives each of them ‘legal institutionalisation’ and thereby creates an integrated legal order.

Conclusion

I reiterate the basic proposition promulgated in this chapter: the rule of law accords government rule formal, substantive and practical legitimacy; all other modes of state legitimacy operate within the framework of the rule of law. Legitimacy entails the right to rule only within the framework of a normative relationship between government and governed based on shared norms and values, the observance of which is mandatory for both government and governed. The right to rule entails the authority to claim submission from the governed as well as the recognition that the right to rule could be justified, must be satisfied, and is in fact justified.

And so the rule of law is an essential human good, as this study has hopefully demonstrated. That said, I might add that it would be pretentious to entertain any extravagant notion that the rule of law embodies or guarantees all the essential requirements for a perfectly just society. In the ideal world, a common humanity, respect for the integrity of others, and the goodwill of all members of society will certainly render the need for rules superfluous in a world of spontaneous ordering. But as we all know, we do not live in an ideal world; we are not perfect and our neighbours are not perfect. We would love to have all the love, compassion, and goodwill the human heart can muster. But, perhaps, only the gods can achieve that, and we are not gods.

In the final analysis, we cannot help but resort to the governance of rules to ensure some hope for peace and some degree of protection for our persons and property, as well as the persons and property of our neighbours. And this is why the rule of law is indispensable, even in

this postmodern twenty-first century and beyond. 'The better the society,' writes Grant Gilmore (1977:111) 'the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb...In Hell there will be nothing but law, and due process will be meticulously observed'.

Notes

- ¹ This is reminiscent of the problem of legitimization crisis addressed by Habermas (1975).
- ² In this new rationality, the individual takes centre stage. This compelling interest in the individual governs Weber's theory of social action in his *The Theory of Social Action and Economic Organization* (1947). Action, according to Weber (1947), may be rational in relation to a goal (*zweckrational* action) or rational in relation to a value (*wertrational* action). Both types of action start from the point of view of the actor as an intending, acting subject.
- ³ See Horkheimer and Adorno (1991).
- ⁴ Meleisea (1987:212), who states that '[t]he most publicised section of the Constitution [in 1962] was part of the preamble which declared that "Western Samoa should be an Independent State based on Christian principles and Samoan custom and traditions". For the Samoans who had not seen the Constitution or who were not fully aware of the contents and functions of a Constitution in a modern state—and this constituted the vast majority—the fact that Samoa was founded on God and their own customs and traditions gave them pride and was sufficient reason to celebrate'. I need add that this is still the case in 2005.
- ⁵ Article 11(2) imposes limits on the right to freedom of religion as reasonable restrictions 'in the interests of national security or of public order, health or morals, or for protecting the rights and freedom of others, including their rights and freedom to observe and practice their religion without the unsolicited interference of members of other religions'.
- ⁶ On the rules of recognition of custom in the different Pacific jurisdictions, see especially Ntumu (1993).
- ⁷ In favour of English common law over against custom see, for example, *Teitinnong v Ariong* [1987] LRC (Const) 517; also *Siemens v Continental Airlines* 2 FSM Intrm. (Pn. 1985). Cf. St John CJ in *Saipaa Olomalu* at 36: 'They [the constitutional framers] left Samoan culture where it had always been, on the land and in the family organisation, but they super-imposed on that culture a national government framework, selecting from many modern constitutions what they thought was the best available to satisfy the aspirations of nationhood and the preservation of such part of their culture compatible with nationhood'. A rather radical and arbitrary way of putting it.