

RULE OF LAW,
LEGITIMATE
GOVERNANCE
& DEVELOPMENT
IN THE PACIFIC

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Iutisone
SALEVAO



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If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed, and in the next place oblige it to control itself.

James Madison

The better the society, 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.

Grant Gilmore

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Abbreviations

APSEG	Asia Pacific School of Economics and Government
AusAID	Australian Agency for International Development
CJ	Chief Justice
CSCE	Commission for Security and Cooperation in Europe
PNG	Papua New Guinea
UNDP	United Nations Development Programme
US	United States

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I dedicate this book to my wife, children and grandchildren.

Introduction

The focus of this study is the idea and social practice of law in the Pacific. The notion that the rule of law embodies or guarantees all the essential requirements for a perfectly just society is, unfortunately, extravagant and naïve. That said, it is certainly the case that the rule of law remains an essential human good whose usefulness the world has yet to outgrow.

Promulgating the rule of law as mobilising theme, this study emphasises that the demands of the rule of law—the equality of all citizens, fairness in the way government treats its citizens, the absence of arbitrary rule, responsibility and accountability of government to the governed, equity, respect for human dignity, the protection of rights and liberties—provide some guarantee that government will be conducted justly, fairly, honestly, and openly for the benefit of all citizens of the state.

While the main interest of the study is in Polynesian nations (especially Samoa and Tonga), I will attempt, as far as possible, to draw comparisons with other Pacific jurisdictions, teasing out both common modalities and differences among the diverse legal, socio-political contexts of the Pacific. Similarities provide a legal and political unity for the different jurisdictions, thus enabling us to draw parallels and identify common characteristics at a fundamental level, while guarding against ignoring distinctions and disparities produced by the divergent legal and political histories of the different Pacific nations.

In terms of methodology, even though this study is primarily a legal analysis, important factors demand the utilisation of a multidisciplinary perspective. One such factor is the essential interface between the rule of law, on the one hand, and the good governance and development agendas, on the other, which this study seeks to explore. The latter inevitably move this discourse into areas such as political science, development economics, and public ethics. The multifaceted nature of the societies under examination likewise necessitates taking into account the cultural, postcolonial, and postmodern understanding of Pacific peoples. Critical theory informs my analysis of these legitimate interests and extends its parameters beyond the confines of syllogistic legal reasoning.

The extensive scope and complex nature of the subject-matter demand the adoption of a topical approach. And while the issues chosen for analysis cannot conceivably capture the topic in its entirety, the chosen issues will, hopefully, shed some light on what has been happening and why, and how they could be addressed and resolved.

Ultimately, my objectives are to inform, resolve ideological conflicts, facilitate development and change, and provoke informed critique—always the warp and woof of progress. Abjuring brutal force as a source of change, we are thrown back to honest and frank criticism as a way of fomenting positive change. After all, the major advances in civilisation have been events, processes, and movements which transformed—in a peaceful manner—the societies in which they occurred.

Where and when this study is critical of Western theories of law, good governance, and development, my aims are, first, to expose how Western theories, institutions and structures themselves are, to some extent, the cause of our Pacific problems; and, second, to problematise established assumptions, structures and institutions from the perspective of the Pacific peoples' own values, ideologies, social structures, and forms of practice. The challenge is making Western theories relevant to the concrete and normative contexts of the Pacific peoples, and to accommodate Pacific values, ideologies, structures, and practices within modern discourses on law, good governance, and development.

To my Pacific colleagues, I cannot emphasise enough that change is inevitable. Our Pacific conservatives need to accept this simple fact. We have to retain what should not be changed; we need to change what needs to be changed. Prostrating without reserve before the tribal deities of nationalism and conservatism is to court the sin of neurotic narcissism, and to allow ourselves to become trapped in our own parochialism. In the long run, such mental myopia will result in the loss of much more than a place in the global socioeconomic village of modernity. We need, therefore, to transcend our own prejudices and self-imposed limitations.

This study is, more fundamentally, a call for justice, admittedly a term with multiple meanings and nuances. For present purposes, justice is examined in the context of good (read legitimate) governance, and is accordingly defined in terms of government's just and fair treatment of its citizens, the exercise of government powers in ways that are just and are seen to be just, honest fulfilment of the functions which government was instituted to perform, reasonable gratification of

citizens' legitimate expectations, equitable allocation of government resources, and protection of rights and liberties. Justice, on this broad reading, means equality, fairness, and equity in the relationship between government and governed.

Finally, should this study contribute in some significant way to the ongoing struggle for justice in the Pacific, it will have served its purpose. But, first, injustices must be studied, remembered, lamented, condemned, and then redressed.