‘Reinventing Government as a Friend of the People:
Common Law and Equity, Legislation, and the Constitution’

Dr Iutisone Salevao
(1) *Introduction*

For a platonic idealist government is the ideal expression of society; for a contemporary pessimist government is nothing more than an insatiable political monster feeding on the body politic. In the mind of the latter, government is an enemy of the people, a gigantic Leviathan that ought to be kept at arm’s length. Whereas in Marxist thought government is a manifestation of bourgeoisie rule, for a theocratic fanatic government is the manifestation of some divine will on earth and is therefore (quasi) divine. For a full-blown capitalist government should only be a night watchman with minimal intervention in the deregulated world of market forces, but for people with naturalist inclinations government is a servant of the people instituted by, through and with the consent of the governed to serve specified functions. So long as government is fulfilling the functions it was created to fulfill then it will always be a friend of the people.

Make of government what you will, the simple fact for us is that we too have a government, and it is our social and moral responsibility to make it better and worthy of our allegiance, trust, and confidence.

(2) *Purpose*

My purpose is not to disparage a vitally important institution (i.e. government). Rather, my specific interest is to contribute to the positive process of reinventing the government of Samoa as a friend of the people of Samoa through our program of public and private sector reform the success of which, I might add, is now widely acclaimed throughout the South Pacific region and which has made Samoa the ‘darling’ of aid donors and international organizations.

Adding to that great feat, I offer a broad grounding of the reform project in constitutional, legal, political, and ethical norms. My point of departure is the definition of law in Article 111 of the written Constitution of Samoa 1960:

> 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.¹

¹ After independence in 1962 common law and equity principles still apply unless they are inconsistent with the Constitution, Acts of Parliament or subsidiary laws, or are inappropriate to the circumstances of Samoa (section 349 of Samoa Act 1921 [NZ] and Articles 111 and 114 of the Constitution 1960).
Significantly, this definition of law embraces constitutional, legal, political, and inherent ethical principles (both expressed and implied) that are relevant to the project of reinventing the government of Samoa as a friend of the people. The following sections of the paper is a modest attempt to tease out and accentuate those principles.

(3) Government as a Trust – Common Law and Equity

Central to my argument is the notion that government is a trust for the governed. This notion is part of a body of ideas which originated in England, and which seems to have been consolidated by the seventeenth century. In broad brush, this body of ideas emphasises that government is a trust in favour of the governed, that government officials (both elected and appointed) are trustees for the people in the respect that they hold trusts for the public and are therefore accountable to the public for the holding of public offices and the exercise of public power.

History

The historical background to these claims of popular trusteeship included a widespread assertion of popular sovereignty, possibly as a reaction against the concentration of public power in the monarch and the concomitant alienation of the common people from the source of government powers. The intellectual climate included the philosophical assertion, popularized by naturalist philosophy, that public power is essentially fiduciary in nature and origin, and that those exercising public power have a trusteeship for the public.\(^\text{2}\) By the eighteenth and nineteenth centuries, it was commonly accepted that government is a trust, that public offices are offices of trust and confidence concerning the public, and that public officials are officers who discharge duties in which the public have a vested interest: \(R v\) *Whitaker* \([1914]\) 3 KB 1283, 1296.

The notion of government as a trust however has had an unhappy history. Within a few decades of its emergence into prominence, it faded into the background of legal and political thought, eclipsed by the notions of representative and responsible government, cabinet government and the convention of ministerial responsibility, and in some cases the enactment of comprehensive public service legislation.

The result of these developments was the rejection of the notion of government as a trust and the dismissal of the idea that parliament itself could be a trustee for the people as nothing more than “a ‘political metaphor’.”\(^\text{3}\) Protecting the supremacy of parliament,


legal positivist theorists sought to justify the rejection of the notion of government as a trust on the ground that it is incompatible with the sovereignty of parliament itself. And then shielding parliament against legal liability for its policy decisions, it was vigorously argued that parliament is not “in any legal sense a ‘trustee’ for the electors.”

But the balance of thought has changed again. In recent times, the notion of government as a trust has re-emerged as a very important category for defining the nature, end and functions of government. Notably, this shift of opinion has been spawned by a number of factors: the failings of representative democracy; the defects of oppositional politics; the exaltation of the executive government and the emergence of the rule of an elite group; the dysfunctioning of institutions like the separation of powers; the unenforceability of the convention of ministerial responsibility; and the development of modern governments into *de facto* corporations.

These problematic factors of contemporary political systems have raised in an acute manner the issue of the true nature and end of government, the proper nature and basis of the relationship between government and governed, the appropriate exercise and limits of public power, and the authority and legitimacy of government rule. In this context of political experimentation, the notion of government as a trust has re-emerged providing important answers to searching constitutional, legal, political, and public ethics questions.

**A Fiduciary Relationship between Government and Governed**

I need enter a caveat of caution prior to my discussion of the meaning of the notion of government as a trust. As noted above, there is a substantive issue regarding the precise nature of government as a trust. It is a moot point whether government as a trust should remain a mere political notion, or whether it should be given legal force. The issue turns on whether the notion should be extended to cover economic and proprietary interests, or whether it should be confined to non-proprietary matters only. One of the concerns here is that of opening up the floodgates. It would be an interesting scenario though to have everyone taking the government to court for alleged breaches of its trust duties.

At a general level of certainty, the central tenet of the notion of government as a trust is that the relationship between government and governed is essentially a fiduciary one. As Paul Finn has underlined, “the most fundamental fiduciary relationship in our society is manifestly that which exists between the community (the people) and the state, its

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5 There is evidence in overseas jurisdictions that the courts might be increasingly prepared to find fiduciary relationships even in cases where there is no proprietary interest affected: see for example *M(K) v M(H)*, (1993) 96 DLR (4th) 289, per La Forest J, 325. This is interesting if indeed the categories of fiduciary relationships are not closed: *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
agencies and officials." Here the word ‘trust’ is used here as a synonym for ‘fiduciary’, and the accent is on the idea that government powers are fiduciary powers which must be exercised within the framework and constraints of a fiduciary relationship that not only confers rights but defines corresponding duties as well.7

We find some assistance for the definition of the dynamics and the governing principles for this amorphous fiduciary relationship between government and governed in the private law of trusts and fiduciaries. Pertinent here is the principle that the fiduciary is a person entrusted with a most important obligation: to discharge faithfully and in good faith a duty of trust, confidence, care, and responsibility toward another. Examples of fiduciaries include trustees and beneficiaries, guardians and wards, lawyers and clients, doctors and patients, and corporate directors and corporations. The first party in each of the examples given above is a fiduciary with fiduciary duties arising from a fiduciary relationship where the fiduciary is obliged to exercise powers and rights for the benefit of the beneficiary (the beneficiary). The fiduciary in each of the examples above occupies a special position which, by its very nature, enables him/her to substantially affect (either beneficially or detrimentally) the beneficiary who is largely or entirely dependent upon the fiduciary’s special position.

Originating from within the Courts of Equity, the fiduciary concept was partly designed “to prevent those holding positions of power from abusing their authority.”8 This is in keeping with the overriding purpose of equity as a system of law designed to redress wrongs, provide justice rooted in conscience, and “to protect the vulnerable from abuse by persons with power over them.”9 Adopting the definition by Wilson J in the Canadian case of Frame v Smith [1987] 2 SCR 790, a fiduciary duty has three general characteristics: “The fiduciary has scope for the exercise of some discretion or power, the fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary’s legal or practical interests, and the beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.” The motifs of transfer of power from the beneficiary to the fiduciary, representation, the exercise of fiduciary power and the ever attendant danger of abuse of such power by the fiduciary, and the dependence (or vulnerability) of the beneficiary on the fiduciary critically inform the nature, basis and scope of fiduciary duties.


7 See for example Finn, ibid.


9 See D. Sweeney, ‘Broken Promises: Crown’s Fiduciary Duty to Aboriginal Peoples’, (1995) 3 Aboriginal Law Bulletin, 4, 7. On the emergence of equity to address the failings and mitigate the rigour of the common law see, for example, M. Evans, Outline of Equity and Trusts (2nd edn; 1993) Ch 1 on the ‘Nature of Equity’. 
Given then the special position of the fiduciary and the potential vulnerability of the beneficiary, equity requires from the latter a very high standard of conduct and duty of care. This includes the fiduciary’s duty of loyalty to the beneficiary, the so-called exclusive benefit rule in favour of the beneficiary, the duty of prudence (especially in the management and administration of property), the duty to act honestly and responsibly, the negative duty not to mislead the beneficiary and the positive duty to make full disclosure of all relevant information relating to the fiduciary relationship, including information about the exploitation of information available to the fiduciary as a result of his/her special position.

All these duties require the fiduciary to act in good faith and in the best interests of the beneficiary. When the fiduciary does not or fails to do so, he/she acts contrary to the terms of the trust reposed in him/her. When that happens, equity steps in and affords beguiled beneficiaries with probable causes of action in natural justice and equitable doctrines.

Now the notion of government as a trust is, to a large extent, informed by the principles of private law of trusts and fiduciaries canvassed above. That is to say, principles extrapolated from and extended beyond their application in the private law sphere are used to characterise, guide and govern the relationship between the government and the governed in the public arena (even without postulating the entanglement of economic and proprietary interests).

Central to this conceptual edifice is the idea (hitherto emphasised) that the relationship between the government and the governed is essentially a fiduciary one. Government powers are accordingly fiduciary powers given to it by the people (the motif of the transfer of power) pursuant to a fiduciary relationship. Furthermore, powers presuppose duties. Thus government and its agents are charged with fiduciary duties to the people. Ultimately as trustees, government officers and agencies are “the servants of the people.”

All this amounts to the people’s legitimate expectations (adopting a contract law category) of a high standard of conduct and care on the part of public officials exercising public power accruing from public office, a duty of loyalty to the people, a duty to act in the best interests of the people, a duty of prudence and good judgment (especially in the area of managing public monies and property), a duty to act honestly and responsibly in discharging public duties, a duty not to mislead but to disclose fully all information pertaining to the affairs of government. In short, public officials have a duty to act in good faith and in the best interests of the people.

This raises the issue of the requisite accountability of government and its agents to the people. Seen through the prism of public accountability, every public office is invested

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10 Finn, ibid, 11.
with the trust and confidence of the public. On the same basis, every public officer is accorded public trust and confidence. The people’s legitimate expectation is for public officials to act responsibly and honestly in the performance of their roles. Thus addressing the English parliament John Locke wrote:

For the legislative acts against the trust reposed in them when they endeavour to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people.\(^{11}\)

Related to the above is the people’s right of judgment; judging whether government is successfully performing its functions remains the prerogative of the people. In other words, the people reserve a fundamental right to know what is happening to their mortal creation, the state. With reference to the State of Samoa, Professor Davidson (in the Constitutional Convention 1959) urged that “[t]he Government of Samoa will be, of course, responsible to the citizens and it will be the citizens who bear the responsibility for seeing that Samoa has a good Government.”\(^{12}\)

From the premise of the people’s right of judgment accrues the people’s right to active resistance and to “resume their original liberty”\(^{13}\) when government is not performing the functions which it was instituted to fulfill. But this is, of course, a perfect recipe for disaster. No doubt, it will take the people back to the Lockean state of nature and the Hobbesian state of war of everyone against everyone else. It must be noted, however, that recent events in the Solomon Islands should be an important reminder that this possibility is not very remote.

A related inference seems clear. Government is liable to forfeit the powers it is given if they are improperly or arbitrarily wielded. This limitation on the exercise of government powers points to “the core idea of trusteeship – that government exists to serve the interests of the people and that this has a limiting effect on what is lawfully allowable to government.”\(^{14}\) This is fundamentally important. It means, in real terms, that government cannot abrogate the citizens’ rights without legal and moral justification, take away their property by force, impose taxes without an act of parliament, discriminate against minorities in society, deprive the judiciary of its inherent jurisdiction, assume powers not expressly given and abuse powers given, or, worst of all, exercise unbridled power and arbitrary rule. When government does any or all of the above, it acts contrary to the terms


\(^{13}\) Locke, ‘Second Treatise on Government’, 222.

of its creation. It is a breach of fiduciary duty (to use the language of trust and fiduciary law).

The Rule of Law as the Framework for the Fiduciary Relationship between Government and Governed

Important in this connection is the rule of law as the necessary framework of legal rules within which the trust relationship between the government and the governed must operate. Although the rule of law is a complex phenomenon combining different legal, ethical, and political principles which makes the task of defining the idea somewhat difficult, there are fundamental features which are broadly accepted.

Relevant for present purposes is the equation of the rule of law with a positive state of affairs wherein law and order prevails (as opposed to a state of anarchy and anomie). Despite reservations regarding the arguably simplistic nature of this equation, it seems certain that the term rule of law must mean, first and foremost, law and order. On this formulation, rule of law presupposes and in fact creates a state of affairs wherein both the government and the governed are equally subject to the law. The end-result is law and order. This dimension of the rule of law is therefore fundamental. In the words of Geoffrey de Q Walker, “[t]his [law and order] is the primary meaning and purpose of the rule of law.”

In addition to that general meaning, the term rule of law has other more specific frames of reference relevant for present purposes. For instance, rule of law means “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government.” On this reading, rule of law is the polar opposite, the antithesis, of arbitrary rule and the exercise of unbridled power by government or its officials. This limitation on government powers and discretion is vital

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15 See, for example, W. I. Jennings, *The Law and the Constitution* (5th edn, 1959) 60. Jennings questions the equation of the rule of law with law and order in the following terms: “If it is only a synonym for law and order, it is characteristic of all civilised states; and such order may be based on principles which no democrat would welcome and may be used, as recent examples have shown, to justify the conquest of one State by another. If it is not, it is apt to express the political views of the theorist and not to be an analysis of the practice of government. If analysis is attempted, it is found that the idea includes notions which are essentially imprecise…”


given the proclivity of (post)modern governments to increase their powers and increase their orbit.

Rule of law also means equality before the law or the equal subjection of all citizens (both private citizens and public officials) to the law of the land administered by the ordinary law courts. Same law, same offence, same punishment – this ensures equal justice and fairness for all. Rule of law in this sense, according to Dicey, 18 excludes any exemption for government officials or anybody else from the duty to obey the demands of the law, or from subjection to the jurisdiction of the ordinary courts in the event of a breach of a provision of the law. There is one system of law for everyone; one set of substantive laws to which all are equally subject and one set of procedural rules to which all are equally subject. Noting the cumulative significance of substantive and procedural rules T. R. S. Allan opines that “[t]he protection afforded to the citizen by the principle of equality, however, is reinforced by the companion principle of due process: together these principles constitute the primary substance of the rule of law.” 19 In short, the rule of law under the heading of equality means that there is no room for preferential treatment of an individual or group(s) of individuals.

Closely related to the above is another basic principle of the rule of law: government “must act in accordance with the law… in everything it does.” 20 The practical application of this principle ensures that the law binds not only the governed but also the government, and that government rule is rule through the law. Put somewhat bluntly, “no man is above the law.” 21 Unless the law also binds the rulers, the governors, the lawmakers, the rule of law has no binding moral or legal force. This subjection of government to the law extends the meaning of the term rule of law: government not only through law but by law. There is no room for unbridled power in this scheme. The assumption is that as long as the rulers, the governors, the lawmakers are subject to and limited by the rule of law, the citizens are safe from tyrannical or oppressive rule. Oppression, I might add, is not a term (neither expressed nor implied) of the trust relationship between the government and the governed.

In sum, the rule of law entails the presumptions that law and order is better than anarchy, that limited power is better than absolute power, that no one is above the law, and that the use of coercive government powers must be publicly explained, debated, justified, and defended on legal and moral grounds such as on the basis of a conception of the common good that is both publicly accepted and open to public debate and moral scrutiny. This is

18 Dicey, Law of the Constitution, 202-3; also Walker, The Rule of Law, 23: “The government must be bound by substantive law, not only by the constitution, but also as far as possible by the same laws as those which bind the individual.”


important in the respect that the rule of law requires government to justify its actions to those affected by them.

Reiterating the argument of this section, it must be said that it is not without good reason that the notion of government as a trust has re-emerged as a very important notion in legal and political discourse. Its increasing importance is encapsulated in a reference in the Report of the Royal Commission of Western Australia (Part II) to the trust principle as “the ‘architectural principle’ of our institutions and a measure of judgment of their practices and procedures.” Given the growing need to require accountability from government and its officials, the notion of government as a trust provides “a principled foundation for the new generation of ‘corruption laws’ now being imposed on public officials; and more generally, for the standards of conduct to be expected of public officials of all stations.”

(4) Government as a Trust and Administrative Law

The manifestations and conceptual associations of the notion of government as a trust need some teasing out. My interest in this section is in bodies of law that are fiduciary in character though not professing to be such in express terms. One such body of law is administrative law. According to Sir Anthony Mason of Australia, “modern administrative law... from its earliest days, has mirrored the way in which equity has regulated the exercise of fiduciary powers.”

The Correlation between Fiduciary Principles and Administrative Law Principles

The following is not a treatise on administrative law. The discussion is however instructive on the correlation between fiduciary principles and administrative law principles. The phrase ‘administrative decision’ refers, quite broadly, to a decision by a public official in the exercise of some public power associated with a public office. The term ‘decision’ includes not only decisions strictly understood in the sense of some final determination or adjudication but also all acts, omissions or conduct engaged in prior to the making of such a determination. The class of decision-makers covered by administrative law varies from jurisdiction to jurisdiction though.

Central to administrative law is ‘judicial review’ which refers to the inherent powers of the superior courts to review the decisions of public officials in the administration of

government and to grant appropriate orders. The decisive influence of (equitable and public ethical) principles such as accountability, honesty, responsibility, reasonableness, fairness, and justice on the nature of the following prerogative orders in common law and remedies in equity seems evident.

For instance, a certiorari writ is issued to quash or set aside an invalid decision. The underlying principle is that the decision-maker does not have an unfettered discretion. Related to that is the writ of prohibition granted on application to prevent an invalid decision being carried out or enforced. The reasoning is clear: the power of the decision-maker is limited by the law. The order of mandamus, issued to compel a public official to perform a public duty, is a clear message that public officials are servants of the people, not masters of the world. The writ of habeas corpus requires the release of a person unlawfully detained while the writ of quo warranto compels the surrender of a public office unlawfully held. Both orders address the issue of public power. One is about the unlawful exercise of public power; the other is about the unlawful acquisition of power. The equitable remedies of injunction and declaration similarly deal with the unlawful exercise of public power.

The same commitment to justice, fairness, reasonableness, and legality in government’s dealings with the citizens informs the grounds of judicial review which, of course, attract the orders discussed above. For instance, the refusal by a public official to perform a public duty breaches the trust relationship between government and governed. When a decision-maker makes a decision based on an improper purpose (e.g., personal gain) which, by definition, is not the purpose contemplated by the empowering statute, and in making that decision he/she rejects relevant matters and takes into consideration irrelevant ones, then the decision is clearly wrong in law since it is made without jurisdiction (i.e. ultra vires).

Central to administrative law is the notion of fairness or natural justice usually construed in procedural terms. Lord Cooke in the case of Daganayasi v Minister of Immigration [1980] 2 NZLR 130 (at 140) framed the principle of natural justice as follows: “[N]atural justice is but fairness writ large and juridically, fair play in action.” Obviously, there is hardly any natural justice when (for example) a commission of inquiry does not give the person against whom charges or allegations have been made the right to be heard (the ‘hear the other side’ rule). Nor is there natural justice when the same commission of

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23 Originating from the royal common law courts in England, most of these review powers (or writs) were issued to control the administration of government and were commonly called ‘prerogative orders’ since they were originally made available to the sovereign. In addition to the prerogative orders above, the Court of Chancery issued the remedy of injunction (the order not to do something unlawful) and the remedy of declaration (a formal statement of legal rights and obligations). In 1873 the jurisdiction of the common law Court of the King’s Bench and the Court of Chancery in equity were transferred to the High Court of England which now exercises the inherent jurisdiction of judicial review.
inquiry has a pre-determined agenda and its decision is, from the very beginning, slanted in favour of a particular outcome.

Importantly, administrative law thus imposes a celebrated duty on government officials and bodies to act fairly in their dealings with the public. Where there is potential or a real likelihood that adverse findings against a person or body may have adverse consequences on that person or body, then the duty to act fairly may require, for example, giving prior notice of the adverse findings, disclosing the relevant information upon which the findings are based, and giving the other party reasonable time to prepare their defense. Where a person’s interests are in fact affected, the duty to act fairly requires, for example, disclosing the reasons for the decision and the opportunity for those affected by the decision to make oral or written submissions in respect of their interests.

The reasonableness of an administrative decision is similarly essential. For the decision to be reasonable, the decision-maker must act in a reasonable manner and the declaration must rely on some reasonable basis. An unreasonable decision is therefore one which no sensible decision-maker, acting with due appreciation of his/her responsibilities, would have arrived at. Stated in terms of the following dictum of Lord Greene MR in Associated Provincial Picture Houses, Ltd v Wednesbury Corporation [1948] 1 KB 223 at 229:

[A] person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting ‘unreasonably’.

Going back to the case of our commission of inquiry noted above, it is most patently unreasonable when, faced with overwhelming evidence that a public official had in fact committed some fraudulent act, the commission reaches a conclusion totally opposite to the weight of the evidence. And when it does, the commission of inquiry not only betrays itself but undermines public trust and confidence in the administration of government and the conduct of its affairs.

Given the frequent occurrence of government suicidal acts such as those referred to above, administrative law is therefore vital to compel accountability from public officials and recapture public trust and confidence in government officials and bodies. In this context, the purpose of judicial review of administrative action is to define and uphold the principles which underpin and govern the administration and operation of government, and to protect the individual citizens against illegal or unreasonable action by government and its officials.
I applaud the government of Samoa for enacting legislation that subjects public bodies to public law accountability mechanisms and requires community service obligations from those bodies. The preamble of the Public Bodies (Performance and Accountability) Act 2001 thus provides that this is:

AN ACT to promote improved performance and accountability in respect of Public Bodies and, to this end, to
(a) Specify principles governing the provision of the operation of Public bodies; and
(b) Specify the principles and procedure for the appointment of Directors of Public Bodies; and
(c) Establish requirements concerning accountability for Public Bodies; and
(d) Provide support for Directors of Public Bodies.

Section 4 provides that:

The purpose of this Act is to enhance the performance and accountability of Public Bodies so that they provide the best possible service for the people of Samoa and as a result contribute to Samoa’s social, cultural, economic and commercial development.

Extending the social responsibility of public bodies section 8 (b) and (d) of the Act 2001 provides that, in addition to operating as a successful business (section 8 (1)(a)), a public trading body (established under Part I of the Act 2001) must also ‘[m]eet any community service obligations established under Part III of the Act’ and ‘[b]e an organization that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates’.24 Section 10 vests a discretion in ministers of Cabinet (the ‘Responsible Minister’) to ‘direct a Public Trading Body to provide a Community Service Obligation if the performance of the obligation is necessary to ensure:

(a) That there is universal access to a necessary good or service; or
(b) The promotion of a policy vital to the national interest as declared by the Head of State acting on the advice of Cabinet; or
(c) That there is a proper and timely response to a local, regional, national or international emergency; or
(d) The correction of an injustice as declared by the Ombudsman.

For public beneficial bodies under Part IV of the Act 2001 section 14 (1) provides: ‘The principal objective of every Public Beneficial Body shall be to provide excellent service to its users and to this end:

24 Section 9 defines the term community service obligation in broad terms, including the ‘provision of a good or service by a Public Trading Body to a consumer or user on any terms other than normal commercial terms applying from time to time’ according to sub-section (1) (a).
(a) Meet the purposes and objectives of its governing legislation; and
(b) Operate in as efficient and effective manner as comparable organizations that are not owned by the State; and
(c) Act as a good employer; and
(d) Be an organization that exhibits a sense of social responsibility by having regard to the interests of the community in which it operates.

These statutory provisions are very important in the respect that public bodies operating as business enterprises are charged with social responsibilities and community service obligations, thus giving them a human face in this era of compelling economic rationalism. It remains to be seen, however, how the courts will construe our public sector reform legislation, whether the courts will exercise some degree of judicial activism or whether they will be more restrained in their interpretive approach out of deference to (among other things) the doctrine of parliamentary sovereignty.

I offer a few observations. The distinction between private law and public law is becoming increasingly problematic given the accelerating corporatization and privatization of bodies and functions traditionally regarded as ‘public’. Hence the intersection between corporate law and administrative law is becoming a potentially controversial legal minefield.

It is also possible that given the blurring of the private law/public law distinction, the issues of accountability and responsibility of public bodies (especially public trading bodies) may eventually arise in Samoa. For instance, to what extent should public law accountability mechanisms be imposed on those bodies without defeating their principal objective as required by section 8 (1) (a) of the Public Bodies Act 2001 which provides:

Principal objective to be a successful business – (1) Subject to the Companies Act 2001 the principal objective of every Public Trading Body shall be to operate as a successful business and, to this end, to:

(a) Be as profitable and efficient as comparable businesses that are not owned by the State…

The situation would be even more complicated if the public trading body is competing with a private sector provider of similar services which is therefore not subject to public law accountability mechanisms. No doubt, such a situation will raise questions about the accountability, cost structure, profitability, and viability of the community service obligations of the public trading body in a situation of competition.

My final observation relates to the requirement for community service obligations from public trading bodies (sections 9-13 of the Public Bodies Act 2001). While this is highly appropriate to mitigate the vigour of profit seeking, there may be issues that need attention. For instance, in Yarmirr v Australian Telecommunications Corporation (1996) ALR 739, the Federal Court of Australia held that a legislated community service obligation required of Telecom (now Telstra) to provide standard telephone services to all citizens of Australia on an equitable basis did not entitle the complainant (who resided in a remote area of Australia) to compel Telecom to provide any service at all. And why?
Because, according to the court, the object of the empowering statute was expressed in very general terms and there was no legislative intention to confer any private legal rights on individuals such as the complainant.

Cases such as the above no doubt raise a number of questions. Will our public law accountability mechanisms and social responsibility laws effectively protect the public interest they are supposed to protect? What is public and what is private? When should commercial interests yield to community service obligations and vice versa? As stated above, it remains to be seen how the courts will approach our new public law legislation.

(5) **Government as a Trust and Constitutional Principles**

In addition to administrative law, other manifestations and associations of the notion of government as a trust include the constitutional principle that governments are constitutionally required to act in the public interest and the principle of the sovereignty of the people or popular sovereignty. In line with the latter principle, I promulgate the proposition that reinventing government as a friend means reinventing the people as the creators and owners and beneficiaries of government. This privileged status of the people is at the heart of the notion of the popular sovereignty as a legal and constitutional principle.

As noted in the previous section, the historical connection between the notions of government as a trust and popular sovereignty lies in a popular reaction against the concentration of public power in the English monarch and the resultant alienation of the common people from the source of public power. Conceptually, one presupposes the other; popular sovereignty forms “the core idea of trusteeship” while government as a trust constitutes “the inexorable logic of popular sovereignty.”

The basic rationale here is that since the powers of government belong to and are ultimately derived from the people, public officials (as the donees of those powers pursuant to a transfer of power) are therefore none other than “the trustees, the fiduciaries” of those powers for the people. It means also that institutions and agencies of government “exist for the people, to serve the interests of the people and, as such, are accountable to the people.” This is the motif that government is a servant of the people.


26 Finn ibid

27 Finn ibid

28 Finn ibid (citing the Pennsylvania Declaration of Rights (1776) as follows: “all power being… derived from the people; therefore all officers of government, whether legislative or executive, are their trustees and servants, and at all times accountable to them…”
hitherto underlined as a vital dimension of the notion that government is a trust in favour of the governed.

**The Constitutional Declaration ‘We the People of Samoa’: Popular Sovereignty as First Principle**

Central to the sovereignty of the Samoan people is the written Constitution of Samoa 1960 itself as an act of the people, “an act of popular self-government,”\(^{29}\) an expression of popular sovereignty. And critical to the sovereignty of the people is the final recital of the Preamble of the Constitution which reads:

> NOW THEREFORE, we the people of Samoa in our Constitutional Convention, this twenty-eighth day of October 1960, do hereby adopt, enact, and give to ourselves this Constitution.

That declaration is obviously much more than a pedantic shout that the Constitution emanates from the people. It is rather more fundamentally an assertive claim of popular sovereignty; a declaration of the people’s authority to create the government of Samoa, define its form, and specify its powers and the limits of those powers. It is, in short, a public declaration of the people’s legal title to rule. Or as the Americans have it, it is government of the people, by the people, for the people.

The incorporation of the principle of popular sovereignty in our written Constitution is therefore important. At common law, the sovereignty of the people is regarded as simply a political notion. Albert V. Dicey’s distinction between legal sovereignty (vested in parliament) and political sovereignty (vested in the people) saw to that. In the case of our constitutional system of government, legal sovereignty and political sovereignty have (arguably) coalesced in the Constitution, thus making the common law distinction superfluous and converting the notion of popular sovereignty into a legal and constitutional principle enshrined and embodies in a written text. Consequently, the declaration ‘We the people of Samoa’ is much more than mere political rhetoric. It is a public declaration of the people’s right to rule.

I take the view that resurrecting this assertion of popular sovereignty is vital to the process of reinventing government as a friend of the people. It is about giving back to the people what rightly belongs to them and the people taking back what they truly own. It is about reinventing the people as the creators and owners and beneficiaries of the government. It is about the people participating in the affairs of government and the decision-making processes.

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This is especially appropriate in the context of most (post)modern governments (especially those based on the Westminster system) characterized by the rule of an elite few, the exaltation of the executive, and the domination of parliament by an executive government with a majority in the house of representatives. The result, in most cases, is that the people are alienated from government powers and the decision-making processes. Reaffirming the sovereignty of the people and reinventing them as the ultimate rulers of government will therefore go a long way towards reversing the distressing process of alienation.

The People’s Legal Title to Rule and Government by Consent

Related to the authority of the people to rule is another critical concept inherent in the notion of popular sovereignty: the consent of the governed and hence government by consent popularized in naturalist formulations of government. The function of government in this scheme is to protect the persons, property, rights and freedoms of the citizens. In the philosophy of John Locke, finding life in the state of nature unsatisfying, people eventually come to an agreement to resign certain rights proper to them in their natural state “to join or unite into a community for their comfortable, safe and peaceable living one amongst another.” The objective is to acquire security of person and property against internal and external disorders. In return for that security, “every man by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority.” Even the right of making laws and enforcing penalties is enforced to preserve the citizens’ persons and property, with the ultimate goal being the attainment of the public good.

We find the same motifs of government by consent and government functions in the philosophy of Thomas Hobbes. Since life in the state of war is literally hopeless, humans as rational creatures eventually come to understand that the first fundamental law of nature is “to seek peace, and follow it.” From this is derived the second law of nature: that humans must be willing to renounce their natural rights to govern themselves (as in the state of war); to covenant or contract with one another to surrender their natural rights to a sovereign power; and by that contract, the said sovereign power, vested in either one person or an assembly of persons, is instituted for the purpose of securing the peace and defense of all.


31 Locke, ibid, 97.

In any case, the reasoning is that in undertaking those functions (security of persons and property, security of peace and the public good) government fulfills its first and ultimate duty: serving the people. Put bluntly, government is the servant of the people. This is an essential term on which government was originally created. And on this basis, government has been credited with the important role of trustee for the governed. In the final analysis, government rule by the consent of the governed and the title of the people to require from their government the successful performance of the functions which it was instituted to fulfill are rooted in and express the sovereignty of the people.

In the case of Samoa, popular sovereignty is anchored in the people’s declaration ‘We the People of Samoa’ as an essential term of the constitutional agreement of the people to constitute a government and in what Bruce Ackerman calls important “constitutional moments” expressing popular will and voice, culminating in the “commanding voice of the People,” the supreme and original will of the people. This will not only authorizes the creation of the government of Samoa but also legitimizes and maintains its existence and rule. Accordingly, the declaration ‘We the people of Samoa’ is really an affirmation of popular rights which the people have consented to surrender by submitting to the rules of civil government with the understanding that only by surrendering their rights to govern and defend themselves could there be peace and, with peace, security for their property and persons.

All this highlights the fundamental importance of the people not only in their priority over the government of Samoa but in their status as the creators and therefore owners and beneficiaries of the government which, by definition, is not a creation ex nihilo imposed on the people from above, but a mortal creation of, by, from, for the people. As creators and owners and beneficiaries of government, the people are therefore sovereign and sovereignty ultimately resides in the people. It is the people who sustain the authority and legitimacy of the government of Samoa.

The Constitution as Supreme Law

The idea of the written Constitution as supreme law according to Article 2 (1), buttressed by the inconsistency provision of Article 1 (2), has very important ramifications. In addition to a very broad review jurisdiction Article 2 confers on the courts to declare void ‘[a]ny existing law and any law passed after the date of coming into force of [the] Constitution which is inconsistent with [the] Constitution’ (to the extent of the inconsistency), the Constitution as supreme law is important in other equally significant respects.


34 Ackerman, ibid, 185.
It means, for instance, that the Constitution together with the rule of law it enjoins take priority over every institution of government and even over the democratic will of the people itself. That is to say, the people’s interests, aspirations, achievements, failures, disappointments, and even fears shall always be subject to the Constitution and the rule of law. It means also that parliament, the executive, and the judiciary of Samoa are creatures of the Constitution - created by the Constitution, governed by the Constitution, subject to the authority and control of the Constitution as supreme law. This, it must be noted, is not the mere supremacy of abstract legal principles or a written document over the government and the governed. Supreme law necessarily means that (a) law is not the arbitrary will of the rulers and lawmakers which usually founders on caprice and self-interest, and (b) the Constitution as supreme law binds both government and governed. This is the rule of law at its strongest reach and pull - subjecting, limiting, and controlling all powers of the state.

The subjection of all institutions of government to the Constitution as supreme law also defines the nature of the accountability of the Samoan government and its agents to the Samoan public. Since the Constitution is an act of the people, accountability of government and its officials is therefore demanded and justified by the sovereign status of the people as the creators and owners and beneficiaries of government. This is, of course, a fundamental tenet of every truly democratic system of government.

Associated with the principle of accountability is the integrity principle. This is about exacting standards both of practice and of conduct in the administration of government, and ensuring that those standards are in keeping with the principle that government exists for the people to serve the interests of the people which is an important facet of the notion of popular sovereignty. The integrity principle thus extends the requirement for accountability and imposes a code of ethics which guides the conduct of government and its officials. One very important consequence is the development and modernisation of anti-corruption laws.

Critical to the maintenance of the accountability and integrity of government is the important institution of separated powers which defines the structure of government and the related system of checks and balances, including the political convention of ministerial responsibility which, though not legally enforceable, is nonetheless important as a potential fetter on the potentially unfettered power of the executive government. As a public law accountability mechanism, separation of powers procures the accountability of government through the institutional checking amongst government branches. Through the equipoise of mutual jealousies, it ensures that the three branches of government are confined to their own areas of operation and the exercise of their powers is not only done according to the law but is subject to the scrutiny of each other.\footnote{Note however that a complete separation of power is impractical. The notion of three branches of government, each with a different power (and function) exclusive to it and without any overlap of personnel, is apparently impractical and is in fact incompatible with the realities of contemporary political systems. Hence the rejection of what the American Supreme Court has described as the “archaic view of the separation of powers requiring three airtight departments of government”: Nixon v Administrator of General Services, 433 U.S. 425, 433 (1977). Nevertheless, the doctrine in its original form may serve as}
of powers ensures that each branch of government should not abuse its power and, thereby, should account to the people for official action.\textsuperscript{36}

Equally importantly, separation of powers is vital to the rule of law which requires the arrangement of the branches of government in such a way that the arbitrary use of government powers by any one branch is firmly opposed, censored, and checked by the other two branches. Separation of powers thus preempts unbridled power and tyranny by dispersing government powers and thus reinforces the law’s control of power. Separation of powers is therefore indispensable in the respect that the dispersion of powers guarantees not only limited government but stable government (i.e. stable because power is not monopolized and the decline into despotism is prevented). In a very real sense, the institution of separated powers guarantees the constitutional order against the risk of violation which is naturally inherent in every constituted body. Within the broader context of government practice and the exercise of government powers, separation of powers is part of the solution to the problem of how government powers are properly exercised to realise democratic values and to achieve public objectives for the public good but, at the same time, subject to constitutional limits and controls lest government itself destroys the values it was created to protect.

\textbf{A Doctrinal Hiccup: Government as a Trust versus Parliamentary Supremacy}

As indicated above, the eclipse of the notion of government as a trust was occasioned in part by the ascendancy of notions such as the supremacy of parliament as a basic tenet of the Westminster system of government which, interestingly enough, is part of our (post)colonial heritage. Herein lies a potential doctrinal hiccup in our system of government. I am referring to the uneasy relationship between, on the one hand, the rule of law (as the Samoan people’s choice of the most appropriate framework for the trust relationship between the government and the governed) epitomized by the Constitution as supreme law and, on the other, the doctrine of parliamentary supremacy.

The issue, in a nutshell, is this: if the Samoan parliament is indeed supreme, not the Constitution, then there are no legal or constitutional limits to what parliament can do (save the parliamentarians’ own ideological commitment to justice, fairness, reasonableness, accountability, responsibility, and integrity which are the governing principles of the trust relationship between government and governed as a basal notion of our system of government in my view). That is because pursuant to the doctrine of the

supremacy of parliament as literally construed, parliament “has supreme law-making powers,”37 and “the lawmaker is supreme.”38 Dicey’s formulation of the doctrine gives parliament “the right to make or unmake any law whatever, and further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament.”39 Parliament can even legislate (to use what is now a common metaphor) that all blue-eyed babies be killed.

But if parliament can change existing laws and enact new ones, however oppressive those laws might be, then “the rule of law is nothing more than a bad joke.”40 A bad joke, indeed, if a government with a parliamentary majority can initiate the most fundamental changes in the law, unhindered and virtually overnight. A bad joke, indeed, when those who wield the powers of government under the rubric of parliamentary supremacy enact laws that are oppressive and in contravention of government’s fiduciary duties to the people. A bad joke for sure when, repeating Locke’s assertion noted above, “the legislative acts against the trust reposed in them [by] endeavour[ing] to invade the property of the subject, and to make themselves, or any part of the community, masters or arbitrary disposers of the lives, liberties, or fortunes of the people.”

I offer the following observations towards resolving our doctrinal hiccup and resurrecting the notion of government as a trust for the people. First, Samoa’s constitutional framers deliberately subjected parliament’s lawmaking power to the control of the Constitution as supreme law. In this way, Dicey’s supreme parliament has been significantly diluted in Samoa.

Secondly, our constitutional arrangement places an onerous burden on the jurisdiction of the courts to review legislative enactments pursuant to Article 2 (2) of the Constitution. Obviously, this demands a strong, independent and impartial judiciary. Herein lies the central role of the judiciary in our constitutional system as “the primary keeper of the rule of law”41 and judges themselves as “guardians of the rule of law.”42 Being the “least

37 Palmer, Unbridled Power, 219.


42 Mason, ibid, 116.
dangerous branch” of government (because it has no influence over either the government’s sword or the government’s purse), the judiciary is most likely to diligently execute its constitutional role without fear, favour, or ill-will. Critical to the judicial role of upholding the rule of law is the independence of the judiciary. “An independent judiciary is an indispensable requirement of the rule of law,” says Geoffrey de Q. Walker “indeed of all known methods of controlling power.” When the judiciary is not independent but partisan, the impartial administration of justice suffers and the rule of law is perverted, even denied.

Thirdly, judicial control of legislative acts is rooted in the ultimate accountability of the legislature to the people based on the doctrine of the people as creators and owners and beneficiaries of government. Faithfully performing this constitutional role is also demanded by other fundamental constitutional principles. Like parliament and the executive, the judiciary too belongs to the people as the creators and owners and beneficiaries of government. As Sir Anthony Mason puts it, even “the judges exercise their powers for the people.” Underpinning the exercise of judicial power is the citizen’s right not only to invoke the jurisdiction of the courts, but to insist upon the exercise of the courts’ jurisdiction. That jurisdiction and the requisite power to exercise it are fortified by the presumption against depriving the courts of power to prevent an unauthorized assumption of jurisdiction and the presumption against depriving the courts of their inherent powers.

Finally, an important reminder for the uncompromising sympathisers and proponents of the so-called Diceyan orthodoxy. There is evidence of a possible misreading of the notion of the supremacy of parliament, an erroneous reading that entails an overt emphasis on the supremacy of parliament to the detriment of the corresponding notion of the rule of law as twin features with equal status in England’s system of government.


46 See for example Allan, ‘Legislative Supremacy and the Rule of Law — Democracy and Constitutionalism’, 44. Allan calls this one-sided emphasis an exaggeration which “concentrates on the ultimate supremacy of the legislature and ignores the constitutional role of the courts, as though the rule of law, considered as a juristic principle, fades into ion at the first indication of statutory authority.” Allan (correctly in my view) enjoins equal consideration of Dicey’s supreme parliament and supreme rule of law as possessing equal status. One does not subjugate the other or render the other superfluous. More specifically, the rule of law does not fade into oblivion at the mention of statutory power. Underlining the equal status of the English parliament and the English judiciary Lord Bridge of Harwich declared: “In our society the rule of law rests upon twin foundations: the sovereignty of the Queen in Parliament in making the law and the sovereignty of the Queen’s courts in interpreting and applying the law”: X Ltd v Morgan-Grampian (Publishers) Ltd [1991] 1 AC 1 at 48.
It is clearly possible that Dicey himself was aware of government coercion and the need to keep that to a minimum, that “trust in a democratic parliament alone was a recipe for political disorder.” He thus sought to bolster the authority of the common law courts. This may be evident from Dicey’s own conceptions of the rule of law. For instance, the principle that a person must be punished, or lawfully made to suffer in body or goods, only for the breach of a distinct legal rule excludes punishment merely for disagreeing with the legislator. This is confirmed by the Diceyan explanation that the rule of law, in this sense, should be contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint. In positing the law as a bridle on arbitrary power, Dicey thus provided the common law courts with a principle which would at once consolidate and legitimize the equal (if not superior) position of the courts and the common law in the face of governments that might seek to challenge them.

On balance, therefore, the supreme parliament of the Westminster system is ultimately limited by law and the Westminster judiciary is not at all powerless before an omnipotent legislature after all. In fact, at common law, the rule of law ensures that even lawmakers act according to the law. Sir Edward Coke’s “judicial adventure” encapsulated in his most celebrated dictum in *Dr Bonham’s case* (1610) 8 Co Rep 114 (at 118) aptly expresses the power of the common law:

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

Some call this judicial activism, judicial adventure, or even “judicial glasnost.” Howsoever it may be described, it does represent an informed judicial caution that, “taking Dicey undiluted,” a supreme parliament may assume unbridled power and

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49 In the Pacific we find the orbiter dicta of Lord Cooke of Thorndon described as lying squarely in the tradition of and remarkably so of *Dr Bonham’s case* and common right and reason as enunciated by Sir Coke. Thus in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 (at 398) Lord Cooke (then Sir Cooke) affirmed that some common law rights (e.g., freedom from torture) “presumably lie so deep that even [the New Zealand] Parliament could not override them.” Then in *Fraser v State Services Commission* [1984] 1 NZLR 116 (at 121) Lord Cooke was much more direct in curbing the power of the New Zealand Parliament to act, noting that some common law rights (e.g., right to justice) “may go so deep that even Parliament cannot be accepted by the Courts to have destroyed them.”

50 See Kelsey, *Rolling Back the State*, 194.

exercise arbitrary rule. This is not a lack of faith in the institution of accountable and responsible government, and parliament’s own deference to that principle. It is rather a realistic assessment of the dangers a supreme parliament with unlimited power poses to the citizens. Consequently, when the citizens’ rights and freedoms are infringed by legislative and/or executive action the judiciary has a constitutional role to act according to the law.

There are, of course, issues and concerns. The question ‘who guards the guard?’ seems inevitable. The notion of judicial supremacy (as the Americans have it) is not without its own ghosts. Indeed there is always the gnawing possibility that the judiciary, under the guise of guarding and upholding the rule of law, may itself become the greatest threat to the rule of law when judges themselves assume and exercise unbridled power. These legitimate concerns warn against overt judicial activism and call for a counterpoising measure of restraint on the part of the judiciary. In the final analysis, however, neither judicial restraint nor judicial activism is important per se. The really important matter is doing justice according to the law. In other words, the rule of law does not really require judicial restraint or judicial activism; it simply requires justice according to law.

Conclusion

As proposed at the beginning of this paper, it is our social and moral responsibility as citizens of Samoa to continually improve our system of government and make it worthy of our allegiance, trust and confidence. A shared commitment from both the government and the governed is apparently called for.

Essential to the reinvention of government of Samoa as a friend of the people of Samoa is the resurrection of the notion and practice of government as a trust for the governed and related principles such as popular sovereignty. This would go a long way towards obviating self-interest as a driving force of politics and the exercise of public power.

As indicated above, the notion of government as a trust is not a matter of peripheral significance but a basal concept of our system of government. In a real sense, it is part of our own pre-commitment and collective decision to be bound by a particular form of government (a government instituted by the people themselves to govern on their behalf and in their best interests, a government, moreover, that is subject to legal limits and constitutional constraints such as judicial review), a decision made (one would like to think) in a lucid moment of calm and careful thought by rational people in full possession of their mental faculties.

52 But then again even the judiciary is subject to legal limits and constitutional controls. And when judges do not fulfill their sworn duty or comply with the rules of their office, there must be consequences such as impeachment and removal from office in cases of serious misconduct. The less formal censure of public opinion and professional criticism are also effective in keeping judges on the side of the law.
Also essential is the need to strengthen our social practice of the rule of law, public law accountability mechanisms, administrative law and the courts’ review jurisdiction, institutions like the judiciary and separation of powers, and our system of checks and balances involving parliamentary watchdogs (the Chief Auditor and Ombudsman) and civil society organizations like NGOs and churches.

The combined effect of all these developments is (hopefully) a good and wise government. A good and wise government is likely to conduct good governance. And good governance is indeed vital to maintaining the legitimacy of our government not only in the eyes of the governed but in the eyes of aid donors, international organizations, and the entire international community.