

Law, governance and civil society: revolution or evolution in the modernising Pacific?

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Introduction

The twin offspring of liberalism, democratic governance and market economics, have come to prominence in international development policy. While both have far reaching implications for countries in the Asia-Pacific, governance reform raises a number of particularly acute issues that influence effective political participation, which is something that lies at the heart of democratic values. This article looks at how the three key intersecting fields of law, governance and civil society are underpinned by liberal philosophy, and how liberalism delivers a set of formal power relationships in an established state structure.

The law in question is Western European. Although law reform is familiar in the Pacific because of the influence of colonialism, it is an imperfect art. Civil society is a relatively new phenomenon; it is interposed by development policy in the traditional political dynamic, and given a preferential mandate to operate in the interests of the people. Democratic governance is an acknowledged human right; but its viability as a model, particularly in the Pacific, can be queried because of questions over indigenous identity and self-determination.

Indeed, such questions may be major threshold issues for governance in the Pacific, where in several countries serious challenges have been made to democratic processes and the legitimacy of the state. By promoting democratic governance, development policy is effectively entrenching liberal thought, which is resulting in a 'globalisation of values'. The viability and effectiveness of state structures is of particular relevance at the moment to the Pacific, and the implications of, and lessons to be learned from, governance reform must be clearly understood if good governance is to be achieved.

Political traditions and political rights

The almost universal acceptance of democratic governance as the only viable state model has resulted essentially from the triumph of liberal values at the end of the twentieth century. The idea that the spread of liberalism is somehow inevitable can be found in Francis Fukuyama's proposition concerning the 'end of history'. Following the events of September 11, 2001, Fukuyama restated his view that democracy and markets will continue to be the dominant organising principles for much of the world, and that there is nothing else toward which we could be expected to evolve (Fukuyama 2001). Indeed, he uses the loaded expression 'modernity' interchangeably with liberal democracy. The

widespread embrace of liberalism is relatively modern, as the fall of communism provided the opportunity for it to flourish in international policy. However, this shorthand term refers to Western legal and political developments spanning several centuries. These developments, particularly liberal constitutionalism, define modern political authority and relationships.

These relationships originate in the rather confined concept of the imaginary social contract that has been used for centuries to explain, or justify, the relationship between the individual and the state (Simpson 1994:103). The individual is taken to consent to the authority of representative institutions that mediate competing demands in society. Liberal theory therefore suggests a fictitious social contract between citizen and state to underpin constitutional theory (Simpson 1994:113–14). This scheme describes a fairly coarse formula for political participation, and the basic assumption of individual consent has been invigorated by the theory of democratic liberalism.

Thomas Franck, in particular, identifies the emergence of a 'right to democratic governance' (Franck 1992). In short, he reaffirms the need for individual consent to legitimise state authority, but argues that this is enforced through a community expectation that states should be democratic (Simpson 1994:104). The theory has resonances for both domestic and international order in that it supposes that observance of democratic norms within states adds to their international legitimacy, giving rise to an 'international standard of internal governance' (Simpson 1994:118–19).

Roland Rich has recently documented the rise of democracy as a human right (Rich 2001). He notes that cold war politics precluded the inclusion of the term democracy in the United Nations Charter, but the concept found a home in international human rights with the Universal Declaration of Human Rights declaring that the 'will of the people' should be the foundation for government authority (Rich 2001:22, 23).

More recently the 1993 Vienna Declaration and Programme of Action asserted the interdependence of democracy, development and respect for human rights, and in 1999 the Commission on Human Rights adopted a resolution titled 'Promotion of the Right to Democracy' (Rich 2001:20, 24). The resolution affirms that democracy fosters the realisation of human rights and vice versa, and also speaks of the right to democratic governance. The fact that the resolution was adopted by 51 affirmative votes, with only China and Cuba abstaining (Rich 2001:24) is a clear indication of the almost overwhelming

acceptance—if not insistence—that the sovereignty of the people is a prerequisite for political legitimacy.

The arrival of civil society

Broadly speaking, the liberal tradition and the human rights framework presume a narrow range of participants in policy and decision making. Development policy, however, assumes the existence of civil society as a key ingredient for political legitimacy and effectiveness. Despite its prominence as a concept, the notion of civil society has been described as 'hazy' (Gai 1994:32), and commentators have found that there is a lack of clear agreement as to what it means (Lindsey 2002b:29). One indication as to its origins can be found in 'neo-liberal' development theory, which included attempts at imposing positivist, or rule making, systems on developing countries (Gillespie 1999:120–22).

John Gillespie suggests that a core assumption of neo-liberal theory was that society is comprised of three components: individuals, voluntary associations and the state (Gillespie 1999:121). The governance policy of the United Nations Development Program (UNDP) suggests the existence of four components: individuals, civil society, the private sector and the state (UNDP 1998: section 2.5). Here the UNDP effectively inserts *laissez faire* capitalism into liberalism and democratic theory by adding 'private sector' to the list of components of society. These approaches reflect the political and economic developments in the 1970s and 1980s, and the rethinking of the role of the state (UNDP 1998: section 1.1, see also Yergin and Stanislaw 1998). Not only has the state's role in the economy and production been reduced, but development policy now also proposes a modification of the relationship between the state and society.

The important point is not the statement that civil society exists; this 'political face of society' including trade unions, professional groups, academic and research organisations and voluntary or non-government organisations did not just appear in the late twentieth century (UNDP 1998: section 6.1, Lindsey 2002b:29–30). What is significant is that its emergence in developing societies is being actively fostered, and that it has been designated a formal role in ensuring effective political participation in developing and transitional countries. Although the changing role of the state has had an influence on public policy and economic planning in both developed and developing countries, civil society is seen as having a role in developing countries because of a decline, or failure, of state power (UNDP 1998: chapter 6). The UNDP takes this further by suggesting a partnership between civil society and government, which necessarily implies a reduction in government control over policy and decision making (UNDP 1998: chapter 6), or at least over policy formulation and thus, implicitly, over decision making.

These policy prescriptions are made with sound intent: the creation of equitable outcomes for the people, the development of consensus, and building state legitimacy in the eyes of the people (and so reinforcing state authority) (UNDP 1998: preface).

Interposing civil society in the classic governance equation is also only a part of a broader approach to good governance that includes numerous interrelated efforts across the public and private sector, including the enhancement of the capacity of governing institutions.

However, some words of caution have been sounded. Yash Gai describes civil society's role as 'problematic' and sees it as having become a *deus ex machina* (or invisible hand) in the prescriptions for rights and democracy (Gai 1994:32). He also expresses concern at the proliferation of NGOs receiving foreign donor encouragement. Not only should such organisations be able to access governments and international organisations, they really should be able to demonstrate the ability to substantively influence decision making (Lindsey 2002b:34). This may not be an easy task. Tim Lindsey looks at NGO involvement in the difficult area of anti-corruption efforts in Indonesia. He reflects upon the difficulties of effecting lasting change to political and legal patterns of behaviour, and the danger that reformers are open to criticism for being allied to the West (Lindsey 2002b:59–63).

Civil society in developed countries contributes to a vigorous and transparent policy debate, and this should be the aim of governance developments in other nations. However, the stimulus for civil society's role is the feeling that people in countries that have emerged from socialist, repressive or dysfunctional political systems must have a voice. This is reasonable inasmuch as democratic processes take time to develop, and transparency in decision making may take even longer. Nonetheless, civil society has emerged almost simultaneously with liberal 'small government' politics, and so the state sector in developing countries faces a double governance burden: doing more with less, and doing it with greater transparency and coordination than ever before.

The limitations of liberalism

Ultimately, the effect of the advancement of democratic governance is to entrench the globalisation of a common domestic architecture through the 'convergence of domestic structures of governance' (Jayasuriya 2002:28). This convergence is taking place in no small measure as a result of the aid programs of multilateral and bilateral donors. Rich points out that there has been a shift in aid practice through the growing use of 'democratic conditionality', particularly by the European Union (Rich 2001:29). Governance reforms have also been motivated by the awareness that improvements were needed in accountability and transparency (particularly following the Asian economic crisis), and also the need to respond to reform movements active in recipient countries (Lindsey 2002a:8).

Legal reform is frequently in the vanguard of this convergence process because of the need to establish new institutions, laws and processes. Yet here again the shadow of Western tradition falls over the discussion. Western-style liberal constitutions have been adopted in many countries over the past ten years bringing parliamentary and judicial reform, and multilateral agencies have been strong promoters of market-oriented law reform. Contemporary law reformers have even been described as the

'juridic midwives of capitalism' (Lindsey 2002a:8), which only serves to reinforce the sense that Fukuyama has outlined an inevitable development equation: 'modernity' = markets + democracy.

Is there a downside to the worldwide adoption of a single political and legal framework? One of the principle concerns is the difficulty of effectively transplanting the legal and institutional building blocks from Western tradition. Just as assumed cultural superiority has been a theme in international relations, so 'legocentrism', or in the case of Asian law reform, 'legal Orientalism', has been identified more recently as a problem in legal development policy and practice (Lindsey 2002a:2). While there would appear to be little chance of a reversal in the promotion of Western legal models, this analysis of law reform underlines the need for a more thorough understanding of what it takes for new laws and institutions to take root in host countries. Legal interventions in pursuit of governance reform are inherently political, and so local political support is crucial.

More importantly, however, the ultimate aim is to deliver cultural change—both legal and political—and legal reform is only a tool in this process, not the entire task (Lindsey 2002a:8). The process of introducing democratic governance is also a complex proposition. According to Gai, the issues that form part of governance are diverse, and not as monolithic as they may seem at first (Gai 1994:30). Civil rights, the rule of law and a liberal culture, democratic reforms and transparent governance do not bundle up into a discrete package: they have different dynamics and certainly did not all emerge simultaneously in the West. The fact that this is being attempted in the developing world only makes a difficult task even more so (Gai 1994:30), although this is not to re-open the 'Asian values' debate, nor to devalue governance reform.

While reforms are taking place in developing countries, it is also interesting to question what is taking place in the West: is convergence as comprehensive among the countries that are donating their legacies? The answer would seem to be 'yes', although the major European traditions in fact developed similar institutions quite independently. For example, the 'rule of law' in England, the concept of *Rechtsstaat* in Germany and *Etat de droit* in France carry a common moral theme about the exercise of state power, but bear distinct characteristics reflecting political and legal conditions in their home countries (Grote 1999:1).

Further, these concepts are relatively recent and are 'subject to permanent debate and have to be constantly redefined to meet the needs of an ever changing political and legal environment' (Grote 1999:1). While the overall liberal framework may not be a contested concept, implementation or maintenance of the system therefore can be. Australia's experience also throws up examples of issues or disputes that demonstrate the sometimes fragile nature of democratic governance: is it appropriate for the Executive to criticise the High Court? does government abuse parliamentary procedure by delaying the tabling of responses to committee reports? should judges be appointed by a discretionary 'behind-closed-doors' process?

In addition, law reform is a continuing exercise that requires the vigilance of all participants. A high degree of tolerance and a relatively sophisticated understanding of the core concepts, such as the rule of law, are required to ensure that democratic governance operates fairly and effectively, and time and patience are key ingredients in reaching this end.

Another significant legal issue that is particularly important for the theme of political participation is self-determination. The right of people within a state to exercise their sovereignty is one thing, and the right of 'peoples' quite another. Self-determination is so significant a concept that it has a place at the commencement of the International Covenant on Civil and Political Rights, article 1(1) proclaiming the rights of peoples to 'freely determine their political status'.

Gerry Simpson concludes—having examined liberal traditions and Franck's proposition about the right to democratic governance—that the consent of the governed in the liberal democratic model remains 'imaginary' rather than genuinely realised. This is partly because significant limitations exist to the enjoyment of self-determination (Simpson 1994:125–27). He sees the concept as having been interpreted conservatively rather than creatively, which only serves to support existing state structures, and also at times as being misused, for example in the pursuit of independence by the Bosnian Serbs (Simpson 1994:125–27).

These concerns are reinforced by recent work in comparative law in which H Patrick Glenn identifies a 'chthonic' (living on or close to the earth) legal tradition. This is found in diverse indigenous oral legal traditions that were dominated by Western expansion (Glenn 2000:56–58). Peoples with a chthonic tradition can be found among the indigenous populations of Asia, Africa and the Pacific, among whom claims are being made for alternative constitutional frameworks that recognise a form of self-government. The strength of this movement has led to the questioning of 'eighteenth- and nineteenth-century notions of an indivisible sovereignty' in the hope that more ancient forms of constitutionalism may receive recognition (Glenn 2000:80–81).

Glenn points out that 'the constitutional debate on the legal position of chthonic peoples is intense, since it is in the nature of western constitutionalism to formally define all relations of power and authority within the state' (Glenn 2000:80). The result not only raises questions about the relationship between these indigenous traditions and the state, but 'inevitably puts into question the state structures themselves' (Glenn 2000:80). It is just such structures that are being reinforced by democratic governance. It would seem that governance policies have little to say directly about such potentially significant challenges, although respect for human rights, internationally and domestically, may be a partial answer. The experience of the Pacific region of constitutional crises in Fiji, and civil war in Bougainville and the Solomons, certainly suggests that there may be far more work to be done to reconcile traditional claims with the prevailing legal and political institutional models.

Conclusion

The active promotion of democratic governance by multilateral agencies and in bilateral funding by Western governments has significant implications for the pursuit of effective political participation. While the spread of democratic governance has occurred with support from 'civil society' in recipient countries and the international human rights framework, the triumph of the liberal philosophy carries some important consequences. It tends to reinforce a particular model of society and analysis of behaviour between components of society, including the newly discovered civil society. The somewhat artificial model of society's core components reflects liberalism, capitalism and Western European traditions, and appears to leave little scope for alternative or less formal notions of society.

Furthermore, it is essential that civil society's mandate to act in the interest of the people is exercised faithfully, and actually enhances popular sovereignty as expressed in democratic elections. The promotion of governance is also significant for peoples of the Pacific because of the continuing uncertainty arising from the power politics of indigenous cultures, which inherently raises questions about the suitability of constitutional arrangements.

Unrest in the Pacific carries particular challenges for reformers, but modern participatory politics is built on notions of state legitimacy and popular sovereignty. The aim of modern democratic governance theory and practice is therefore to ensure that the consent of individuals is real, not imagined, and that political participation is thereby empowering. However, there should be no illusion that what is being achieved is the globalisation of political values and of domestic legal and political institutions. The foundations for current developments evolved over time in the West, and were not prescribed by international policy. Governance programs are attempting social change on a large scale and must overcome entrenched coalitions who are unwilling to surrender the benefits of previously dysfunctional systems (Jayasuriya 2002:35). It is difficult to deny the attractiveness of an effective model of government, but donors must maintain patience and be prepared, if necessary, to explain the failure of such a compelling social revolution.

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