

Head of State – Parliament Relations in the Pacific:  
Echoes of Empire\*

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Having used Walter Bagehot's *The English Constitution* as a basic reference for understanding the Westminster model of responsible Government for more than three decades, I looked forward to some scholarly celebration of the sesquicentenary of this classic.<sup>1</sup> Sadly, outside of events in Bagehot's home town of Langport in Somerset, I have not found much to indicate that the anniversary is being noted much less celebrated. This paper will not redress this oversight but the research behind it has been motivated the anniversary. I have been intrigued, both by academic interest and by practical experience, in adaptation of Bagehot's approach to the role of the Queen-in-Parliament, in Australasia and the Pacific Island region where I have worked for most of my scholarly career.

Bagehot is relevant to the modern Pacific as the Westminster parliamentary model has been embraced by all Australasian polities as well as the majority of the independent states in the Pacific Islands region.<sup>2</sup> Historical connections provide the underlying reason for why this governmental model predominates across the post-independence Pacific. The British Empire coloured much of the region red either directly or indirectly through the Dominion cubs of the British lion in the antipodean Pacific – Australia and New Zealand. A relatively benign decolonisation process contributed significantly to friendly post-colonial relations and so helps to explain why currently all have maintained the Westminster connection as members of the Commonwealth of Nations. Queen Elizabeth II has been retained as head of state in all Australasian polities and nearly half of the Pacific Island states.<sup>3</sup>

Notwithstanding the significant connections and continuities in the political development of the Antipodean states, as would be expected, there were adaptive variations to localise the basic Westminster model in the progression through self-government to independence. The variations that have occurred over decades can be explained by a variety of factors. History has been a very significant factor. The earlier the process toward self-rule began, the more closely the conventions and practices of the Westminster model were followed subsequently. Also, the less ethnically Anglo-Saxon the colony, the greater the need to accommodate traditional structures or practices. A third significant factor has been the process of decolonisation itself or later events that compelled compromises to the Westminster constitutional relationships.

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<sup>1</sup> Barry K Winetrobe, Chair, of the Bagehot Memorial Fund has very helpfully identified the precise date of the publication in book form as being sometime between February 4 and February 20, 1867.

<sup>2</sup> Of the 14 regional Island states, 11 have Westminster parliament. These are: Cook Islands, Fiji, Kiribati, Papua New Guinea, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

<sup>3</sup> In addition to Australia and New Zealand, Elizabeth II is head of state for Papua New Guinea, Solomon Islands, Tuvalu, and through New Zealand, of the Cook Islands and Niue. She was also head of state for Fiji until 1987 (although for more than a quarter century afterwards her face and/or crown remained on the currency and uniforms of republican Fiji.)

This paper looks at the transplanting of Bagehot's image of the Westminster system to the Pacific through the lens of head of state-legislative relations. A particular concern in the paper is the dual roles of the head of state as a component of the Parliament and as titular head of the Executive arm of government. The political implications of some changes appear to be more significant for legislative-executive interactions than commonly appreciated. The reserve powers associated with the Queen-in-Parliament role of the head of state have been particularly affected when these conventions were put into written constitutional form. And, as Bagehot suggested 150 years ago ". . . hundreds of errors have been made in copying the English constitution from not understanding them [the conventions underlying the constitution]."<sup>4</sup>

The scope of this paper is limited to three Antipodean parliaments to illustrate the challenges faced in adapting the Westminster heritage. Tasmania serves as a useful benchmark example from a developed Pacific regional economy with a mature political history. Fiji and Samoa are the principal exemplars of historically more recent, more culturally remote and less economically developed Westminster systems. Additionally, the study will focus only on the role of the head of state and parliament at two important stages in Bagehot's analysis – the start of an administration (commissioning a Government drawn from the Parliament) and its end (the dissolution of a parliament).<sup>5</sup>

#### Queen-in-Parliament and Queen-in-Council

Westminster conventions were important to Bagehot because, although a member of the Liberal Party, he was closer to the Tories in his respect for the organic evolution of the Westminster system.<sup>6</sup> Unlike the American republican constitution which was drafted deliberately over less than four months, Westminster's unwritten constitution was heavily contextualised by centuries of temporisations accepted as politically binding. Significantly, many of the powers of the British Crown were transferred either to the Parliament or made responsible through their use to the Parliament. Today, in consequence, Queen Elizabeth II, as the British head of state, has inherited separate roles in the Parliament and the Executive. The conventions that have maintained the distinctiveness of the two roles seems moderately clear to the political actors in the United Kingdom even if not well understood publicly.

Under the Westminster model of responsible Government, the Queen exercising her executive powers as Queen-in-Council acts on directive advice since the Executive must be accountable and responsible to the Parliament. However, on the other hand, the Queen-in-Parliament must have some discretion in the advice she accepts to preserve some independence for the institution of Parliament. This independent discretion is commonly known as her reserve powers since these cannot be subordinated to Executive direction. Australia's former High Court Chief Justice, Sir Harry Gibbs has argued that these powers

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<sup>4</sup> Walter Bagehot, *The English Constitution*, Dolphin Books, New York, [1867], p. 248.

<sup>5</sup> Arguably the most contentious of the reserve powers is the power to assent or refuse assent to bills. This issue is part of the broader study but is still in progress at the time of this conference.

<sup>6</sup> David Clinton, *Tocqueville, Lieber, and Bagehot: Liberalism Confronts the World* (New York: Springer, 2003), p.13.

have democratic importance. He asserted that the reserve powers play an important role in preserving the institutional distinction between the legislative and executive arms of government in the Westminster system:

The 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament."<sup>7</sup>

As Bagehot noted, these Westminster conventions have often lost clarity and political force as they have travelled abroad due to the efflux of time and attempts to incorporate them into law through constitutional drafting. In all three cases in this review, the concept of the Queen-in-Parliament has been formally incorporated into post-independence constitutions. Tasmania's Constitution Act 1934 defines the Parliament at section 10: "The Governor and the Legislative Council and House of Assembly shall together constitute the Parliament of Tasmania". Samoa's Head of State (*Le Ao o le Malo*) is also constitutionally recognised as a constituent element of the Parliament. Sec 42 states "There shall be a Parliament of Samoa, which shall consist of the Head of State and the Legislative Assembly". Despite being the third draft of a republican constitutive instrument, even Fiji's 2013 constitution [Sec 46 (1)] states that "Parliament consist(s) of the members of Parliament and the President".<sup>8</sup>

### **Parliament as an electoral chamber**

Even without the benefit of the recent Donald Trump dysfunction, Walter Bagehot prophetically railed in his writing against the US Electoral College as an undistinguished mechanism for electing the nation's head of government. In his view, it was a mere cypher made up of unknowns who lacked a deliberative capacity. It was not so much that the Electoral College was a rubber stamp for the voters, it was that its members had no subsequent responsibility for their selection – they vote "and they go home".<sup>9</sup> By contrast, Bagehot asserted that "the House of Commons is an electoral chamber; it is the assembly which chooses our president."<sup>10</sup> Thus, by remaining in office, as it were, the House of Commons does more than decide on a Ministry; it takes continuing responsibility for the choices it has made.

The idea that the Commons elected the Prime Minister was not psephologically accurate even in Bagehot's day. And, the imagery it suggested has become less connected with reality both in terms of popular perceptions and in political practice with the passage of time. In the past century, the party mandate view of elections has dominated public expectations so thoroughly that any deliberative role for the lower house in selecting a Ministry has been all but lost completely. Even in the rare cases of a "hung parliament",

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<sup>7</sup> The Rt Hon. Sir Harry Gibbs; Reserve Powers of the Governor-General and the Provisions for Dismissal, 20 August 1995. Published on the Australians for Constitutional Monarchy website, norepublic.com.au. Accessed: 16 May 2017.

<sup>8</sup> This apparent tautological definition of Parliament is one of the confusing aspects of Fiji's 2013 Constitution. Unlike earlier constitutions, the 2013 version has lost any word for the legislative component of the Parliament which excludes the head of state. Yet, it has three other usages which do implicitly exclude the President.

<sup>9</sup> Walter Bagehot, *The English Constitution*, Dolphin Books, New York, [1867], p. 172.

<sup>10</sup> Walter Bagehot, *The English Constitution*, Dolphin Books, New York, [1867], p. 171.

the public expects the parties to sort out the issue of who forms a Government rather than to see some sort of vote on the floor of the chamber. Consequently, Bagehot's view of the Commons as a Westminster surrogate for the US Electoral College may be closer today to the American model than he might have liked with parties making these decisions behind a political veil.

The revolving door to the Australian prime ministership over the past decade has exposed how "presidential" the office has become in the voters' mind. Many voters expressed open outrage, as indeed did at least two of the deposed PMs, when an internal party spill changed what they perceived as the electoral result without an election.<sup>11</sup> This reaction revealed clearly that many electors thought they were voting more or less directly for the PM via constituency proxies albeit without reference to Bagehot's Electoral College imagery. Perhaps less visibly but of greater importance, the three changes had nothing to do with votes on the floor of the chamber. The changes were made in the parliamentary party rooms and the executive baton was handed over in Government House on the advice of the outgoing PM.

In reality, since 1688, the role of a Westminster lower house has been negative rather than positive in the formation of a new Government. It can only refuse to support to the Crown's nominee for the premiership (by a want of confidence motion or denying supply) if it disapproves of the choice. Generally, the negative sanction is rarely necessary after an election, for several reasons. Unlike parliamentary seats, ministerial commissions do not normally lapse with the dissolution of Parliament. Further, to avoid forcing uncertainty and potential embarrassment on the Crown, typically a defeated governing party holds on to its ministerial commissions in a caretaker capacity until there is a safe pair of hands into which to relay the executive baton. However, "typical" is not always typical across all Westminster parliaments or across all circumstances.

#### Exceptions to the Electoral Chamber Rule: Tasmania

Curiously for a Westminster polity with a proportional electoral system that regularly produces non-majority results from its general elections, Tasmania's 1934 Constitution Act almost seems designed to mandate the vice regal use of the Crown's reserve powers.<sup>12</sup> Section 8B(3) of the Tasmanian Constitution Act (1934) provides that a Minister "may continue in the office of Minister of the Crown until the expiration of the period of 7 days following the day of the return of the writs for the ensuing general election." The only circumstance in Australia close to the Tasmanian constitutional limits on ministerial tenure is to be found in the Northern Territory. Section 37(d) of its Self-Government Act (1978) provides that ministerial commissions terminate when: "the Legislative Assembly first meets after a general election of the Legislative Assembly" unless filled sooner.

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<sup>11</sup> Kevin Rudd, for example, explicitly used the claim of the removal of a prime minister "elected by the people" to fuel public anger at the party caucus decision to replace him with Julia Gillard as leader. Dennis Shanahan, "How Julia Gillard's ambition destroyed Kevin Rudd and ALP", *The Australian*, November 16, 2013. Accessed 21 May 2017.

<sup>12</sup> The Hare-Clark system of proportional representation used for Tasmania's House of Assembly elections has returned non-majority results for nearly a third of elections since introduced in 1907.

Tasmania's statutory limit on ministerial commissions has forced two recent celebrated political controversies on Government House requiring some use of the Governor's reserve powers. The 1989 general election took away the governing Liberal Party's parliamentary majority when it returned 17 Liberals, 13 Labor and 5 "independent" Greens. Before the end of the 7-days period following the return of the writs, the Governor, General Sir Phillip Bennett, was faced with a Premier, Robin Gray, who believed that a new election would restore his majority. The Premier also disparaged the capacity of the Labor Party to enjoy enough support from the Greens as a group since each one had stood formally as an independent. The Governor was unwilling to call new elections immediately and yet aware of the possible embarrassment of commissioning a new Premier who failed at the first hurdle when the new Parliament met. Sir Phillip recommissioned Gray before the end of the week following the return of the writs and awaited the judgment of the House of Assembly. Losing a want of confidence vote on the first meeting of House, forced the change of Government that Labor and the Greens wanted.<sup>13</sup>

The next minority result occurred following the 1996 general election but this one did not create any serious vice regal angst or the use of the reserve powers.<sup>14</sup> Again, a governing Liberal Party, now under Premier Ray Groom, lost its majority but, on this occasion, the Labor Party refused to contest for the Treasury benches. Opposition leader Michael Field blamed his party's worst ever electoral defeat in the 1992 election on Labor's 1989 accord with the Greens to form a minority Government. Field refused to have anything to do with the Green Party following the election. Thus, there was no viable alternative Government waiting in the wings. Groom had campaigned on a promise not to lead a minority Government. The Governor simply accepted Groom's resignation and his advice that the new Liberal leader, Tony Rundle, be commissioned in his stead. Greens' support from the cross benches had been pledged publicly and the Governor did not feel the need to test this support as had been required in 1989 since Rundle was confident of Green support in this circumstance.

The second significant post-election public imbroglio created by Sec 8B(3) occurred in 2010. The Labor Premier, David Bartlett, lost his majority in an election where both major parties committed lèse-majesté of a sort by making Government House central to their campaigns. Each claimed it would be unwilling to accept minority Government daring the other side to make explicit the advice it would give the Governor in the event of a hung parliament. The Liberal strategy from Opposition was that if it could maneuver the governing Labor Party into refusing Government with Green support, it would be able to accept Government without a "deal" with the Greens by exploiting the Greens' campaign promise that they would support either side to promote stable Government. The tactic failed when the Labor Party and the Greens worked out an arrangement after the Governor's decision to recommission Bartlett in the interim. Although Governor Peter Underwood's decision took

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<sup>13</sup> Richard A. Herr, "Reducing parliament and minority governments in Tasmania: strange bedfellows make politics – badly", *Australasian Parliamentary Review*, Vol. 20, No. 2, Spring 2005: 130-143

<sup>14</sup> I have looked at this period in some detail in my "Reducing parliament and minority governments in Tasmania: strange bedfellows make politics – badly", *Australasian Parliamentary Review*, Vol. 20, No. 2, Spring 2005: 130-143

virtually the same approach as Bennett in 1989,<sup>15</sup> the campaign rhetoric made it such a source of public interest that Government House published the reasons for the decision on the Government House website.<sup>16</sup>

### Exceptions to the Electoral Chamber Rule: Samoa

Western Samoa re-asserted its sovereignty with independence in 1962 after more than six decades of foreign rule; having been variously a German colony, an occupied war prize seized by New Zealand, a League of Nations mandate territory and a United Nations Trusteeship both under New Zealand administration.<sup>17</sup> The 1960 Constitution which provided for independence was a blend of traditional Samoan custom (*fa'a Samoa*) and Westminster political norms transferred through the decades of New Zealand control. The Trusteeship Council distrusted the constitutional entrenchment of chiefly political dominance and required a referendum based on universal adult suffrage to test public support for this constitution which limited the franchise and eligibility to run for office to *matai* (chiefs). The referendum passed overwhelmingly.<sup>18</sup>

Samoa's unicameral Legislative Assembly appeared embedded in a fairly standard Westminster system regarding the head of state and the commissioning of a Government. The Samoan Constitution [Art 32(2)(a)] provided that "The Head of State shall appoint as Prime Minister to preside over Cabinet a Member of Parliament who commands the confidence of a majority of the Members of Parliament." Implementing this provision, however, encountered two initial challenges – the role of custom and the absence of formal political parties. The first was settled before even the Constitution came into effect. There are four *tama aiga* titles in Samoa; three of which were politically active in framing the transition to independence.<sup>19</sup> A compromise was reached to share the honour of being the Head of State (*Le Ao o le Malo*) between the two most senior incumbents (Tamasese and Malietoa) with the third (Mata'afa) being guaranteed the Prime Minister's office.

While custom produced the compromise amongst the *matai* as to who should have the parliamentary support to be the nation's first Prime Minister, the longer-term problem of how to manage the selection of the PM after the next election remained. How was the Head of State to know who had the support of the Legislative Assembly without organised political parties to identify a leader who had such support? The Legislative Assembly's Standing Orders provided the mechanism to address the constitution's silence on an

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<sup>15</sup> Governor Bennett made a report to Parliament on his reasons and approach to the commissioning of the 1989 minority Government. See: Tasmania, "Summary of Constitutional Events involving His Excellency the Governor of Tasmania", Parl Paper 21 (1990).

<sup>16</sup> Office of the Governor of Tasmania; The reasons of the Governor of Tasmania, the Honourable Peter Underwood AC, for the commissioning of the Honourable David Bartlett to form a government following the 2010 House of Assembly election. Published online by Government House, Hobart, 2010. Accessed: 4 July 2017.

<sup>17</sup> The 1899 Treaty of Berlin divided Samoa between Germany and the United States reversing the 1889 Treaty which had given formal international recognition to Samoan sovereignty. Western Samoa (*Samoa i Sisifo*) changed its name formally to Samoa in 1997.

<sup>18</sup> For the background on Samoan independence including the constitutional debates and the 1991 referendum see: James W. Davidson *Samoa mo Samoa* (Melbourne: Oxford University Press, 1967).

<sup>19</sup> These were the Malietoa, Tamasese and Mata'afa titles

appropriate source of advice to the Head of State. In a manner that was almost a literal implementation of Bagehot, Standing Orders set out a procedure for election by the Assembly. The Prime Minister was to be elected by secret ballot of Members on the first day of the meeting of a new Parliament.<sup>20</sup>

The Constitution changed the relationships within the Ministry as well as between the Prime Minister and the Legislative Assembly. It formalised the role of the Prime Minister and gave it almost presidential status by eliminating the concept of *primus inter pares*. There is no provision for individual ministerial responsibility to the parliament. Ministers can only be removed by the Prime Minister and all are removed when the Prime Minister resigns or is removed [Art 33(3)]. Thus, whereas in practice Ministers have increasingly become political subordinates of the PM in virtually all Westminster systems, the constitutional equality still exists in many to allow Ministers to challenge for the premiership regardless of the electoral cycle. Samoan Ministers are constitutionally subordinates of the Prime Minister and serve at his pleasure.

Despite the apparent constitutional lack of discretion in commissioning a Prime Minister, sometimes necessity intervenes even in Samoa. There have been two occasions when the Head of State has appeared to use reserve powers to make an appointment without seeking parliamentary instruction.<sup>21</sup> Prime Minister Mataafa died suddenly in 1975 and the Head of State, Malietoa Tanumafili II, appointed Tamasese Lealofi IV as Prime Minister without having consulted the Legislative Assembly. Tamasese Lealofi IV seemed an appropriate candidate on two counts. He had inherited the Tamasese *tama aiga* title from his uncle who had been one of the joint Heads of State until his passing in 1963. Further, Tamasese Lealofi IV had experience having been PM previously from 1970 to 1973. Although Members of Parliament expressed concern that the Head of State's decision had been unconstitutional, they accepted the decision out of respect for the Head of State. According to the former Clerk of the Legislative Assembly, this was the first instance of the Head of State exercising reserve powers to appoint a Prime Minister. A second occasion occurred in 1982. The Head of State appointed Tupuola Efi as Prime Minister when Va'ai Kolone who had been elected PM after the election that year lost his seat in the court of disputed returns. Tupuola Efi was the son of the late joint Head of State, Tamasese Mea'ole, and had also had previous experience at the helm of the Samoan ship of state. This was itself significant since Tupuola had the distinction of being Samoa's first non-*tama aiga* PM.<sup>22</sup> Tupuola's controversial second term, in replacing Va'ai Kolone, proved infelicitous for both him and the Head of State. It only lasted a matter of three months until the by-election returned Va'ai Kolone to the Assembly.

#### Exceptions to the Electoral Chamber Rule: Fiji

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<sup>20</sup> A review of Standing Orders in 2000 changed the direct vote to one where the "Clerk (is) to determine and report the member who commands the confidence of the majority of members to the Head of State". See: F.T. Alama, "Legislative Assembly of Samoa – Review of Standing Orders" Paper presented to 35th Presiding Officers & Clerks Conference, Melbourne, Australia, 3 – 10 July 2004, p.4.

<sup>21</sup> I am grateful to former Clerk, Fepuleai Attila M. Ropati, for his help and advice on this and other relationships between the *Le Ao o le Malo* and the Legislative Assembly.

<sup>22</sup> Efi's cousin Tamasese Lealofi IV held the *tama aiga* title during the time Efi was PM from 1976 to the 1982 election. Efi later acquired the Tamasese title when Tamasese Lealofi IV died. He became Head of State in 2007 as Tupua Tamasese Tupuola Efi when Malietoa died.

Fiji might have preceded Samoa in ending colonial rule but for its difficulty in negotiating the transition back to full sovereignty. Plantation culture, which became the mainstay of the colony after Ratu Seru Cakobau ceded the country to Queen Victoria in 1874, required more labour than the Colonial Sugar Refining Company was able to source locally. From 1879 to 1916, indentured labourers were recruited from the Indian sub-continent and by the end of the 96 years of colonial rule in October 1970 the Indo-Fijian population had become the majority ethnic group on the archipelago. The need to protect the traditional interests of indigenous Fijians (now known as *iTaukei*) from a minority position while promoting a democratic outcome that did not deny the Indo-Fijians their majority status produced an intricate balancing act over some difficult and protracted negotiations.<sup>23</sup>

Fiji retained the Queen Elizabeth II as head of state at independence but became a republic in 1987 after the two military coups in that year. Nonetheless, there was a high degree of Westminster continuity in the relationship between the head of state and the Parliament from the 1970 constitution through the 1990 and 1997 constitutions. The 2013 Fijian Constitution made some radical changes in the institutional structures which significantly elevated the power of the Executive with regard to the Parliament while diminishing the relationship between the head of state and the Parliament. The 2013 Constitution eliminated the Senate, Fiji's upper house, and the Great Council of Chiefs, a quasi-parliamentary chamber that provided *iTaukei* advice and input into several levels of governance.

The 2013 constitution removes any discretion by the President in the appointment of a Prime Minister and provides for the Parliament to elect the Prime Minister in some circumstances of legislative uncertainty. Article 93(2) asserts that, "the leader of one political party which has won more than 50% of the total number of seats in Parliament assumes office as the Prime Minister." The President of Fiji has no discretion but is constitutionally obligated to administer the oath of office to this Member. However, if the Art 93(2) condition is not met, then Art 93(3) provides that "at the first sitting of Parliament, the Speaker must call for nominations from members of Parliament". If there is only one nomination, no election is needed. Otherwise, the Members are balloted to see if any Member can secure "more than 50%" support. There is a limit to the number of ballots that can be held. If no one can claim majority support after three votes, "the Speaker shall notify the President . . . and the President shall, within 24 hours of the notification, dissolve Parliament and issue the writ for a general election".

Like Samoa, Fijian Ministers are subordinates of the PM, not equals. This has been the case from the 1970 constitution and so is not new to post-2006 Fiji. Rather curiously, the Constitution makes a point explicitly of Ministers' individual accountability to Parliament while eschewing individual responsibility. The Parliament does not have the power under the Constitution to remove an individual minister by a want of confidence motion [Art 95 (3)]. Significantly, unlike the 1970 Constitution where the Governor-General appointed Ministers [Art 73 (3)], the 2013 Constitution empowers the Prime Minister to appoint

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<sup>23</sup> For a knowledgeable commentary on this process and its consequences in two (1990 and 1997) subsequent constitutions see: Yash Ghai, Jill Cottrell, "A tale of three constitutions: Ethnicity and politics in Fiji" *International Journal of Constitutional Law*, Vol 5 (4) 2007, 639-669.



Ministers [Art 92 (3) a]. Thus, unlike Samoa, the Fijian President does not commission Ministers; his role is restricted to merely administering the oath of office.

### **Power of Prorogation and Dissolution**

The use of the head of state's reserve powers has been no less controversial at the other end of a Westminster administration's life on occasions. Generally, this aspect of the Queen-in-Parliament has suffered from a public and political confusion over the status of the advice the head of state receives from the Government. While the Government's advice to the Queen-in-Council is directive, advice regarding the operation of the Parliament is advisory and subject to the head of state's considered discretion. There are prudential reasons why this advice is frequently accepted but, equally, there solid reasons why discretion should be reserved for the head of state. As Sir Harry Gibbs argued, if Government advice to the Queen-in-Parliament becomes directive, the Parliament cannot be the higher authority to which the Government is responsible.

Governments have long exploited their access to the head of state to choose the timing of the parliament's dissolution to suit their electoral advantage. The public cynicism over the practice has led to demands in recent years for reform to curtail the inherent unfairness in the practice. Most commonly, reform has revolved around setting fixed terms for parliaments by a constitutional or statutory requirement that elections for the lower house be set for a specified date or length of time. This reform is intended both to deny Governments an unfair electoral advantage while promoting both economic and public confidence in predictable stability.<sup>24</sup> Commonly, such arrangements have acknowledged the Westminster principle of collective responsibility by incorporating specific provisions to deal a Government losing a vote of confidence. In some proposals, an Executive political prerogative has been recognised by allowing flexibility in the last year or few months of the fixed term. In some cases, there are provisions for "special circumstances" that would allow the head of state to accept justifying an early election. As we have witnessed recently, the United Kingdom's fixed term arrangement permits the House of Commons itself to truncate its term by a supermajority vote.

Tasmania is now the only Australian state not to have legislated for fixed parliamentary terms. Nevertheless, it has had experience where Executive manipulation of prorogation has been interdicted without legislative fiat. The prevalence of minority Governments has created a number of opportunities to illustrate the value of the reserve power in protecting the Parliament. Don Morris has analysed two recent occasions.<sup>25</sup> In November 1981, a Labor Party Government lost its majority when the party room deposed Premier Doug Lowe as leader.<sup>26</sup> Lowe and a loyal colleague then resigned the party to sit as independents on

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<sup>24</sup> See, for example, Jamie Fellows assessment of these arguments in *The Conservation*. <http://theconversation.com/the-states-have-gone-that-way-but-fixed-four-year-federal-terms-are-unlikely-56674> [Accessed 16 June 2017].

<sup>25</sup> Don Morris, "The Perils of Defining the Reserve Powers of the Crown", a paper presented at The Twenty Eighth Conference of The Samuel Griffith Society 12th - 14th August, 2016 Adelaide, South Australia.

<sup>26</sup> Given that the Lowe was deposed in the party room, it was up to him as Premier to advise the Governor on his resignation and recommend his replacement. Despite some unfounded fears that he might recommend a new election, Lowe did recommend the Parliamentary Labor Party's nominee, Harry Holgate but had his revenge four months later on the floor of the House.

the cross benches. The new Premier, Harry Holgate, sought to extend the opportunities to win back support for his minority by seeking a lengthy prorogation. Governor Sir Stanley Burbury declined and asked Holgate to offer more acceptable advice. The minority Premier obliged. When the Parliament resumed after a three-month prorogation, Holgate was promptly defeated on a want of confidence motion. The second occasion, noted above, occurred in 1989 before the controversial commissioning of Michael Field as Premier of a minority Government. However, before resigning his commission after the 1989 election, Premier Gray considered offering advice to dissolve the Legislative Assembly in order to hold new elections that might prevent a minority Government. Governor Bennett let it be known informally that he would be disinclined to hear such advice given that an alternative Government seemed possible and that he hoped for advice he could accept.

The issue of reserve powers for the Samoan Head of State was significantly influenced by *fa'a Samoa* and the political circumstances of pre-Independence Western Samoa. Such was the concern for the potential political influence of the *tama aiga* title holders that the Constitution was drafted to insure they could not exercise power independently of the Government and/or the Parliament. Art 26 (1) specified that “. . . the Head of State in the performance of his functions shall act on the advice of Cabinet, the Prime Minister or the appropriate Minister” except as otherwise provided. The circumstances “otherwise provided” were primarily a consequence of the absence of a formal political party system at independence. In the case of Article 60 dealing with the assent to bills, the Constitutional Convention was encouraged to add the words ‘*acting on the advice of the Prime Minister*’ to strengthen the Executive over the Parliament. Constitutional advisor J.W. Davidson was concerned that the Parliament might pass legislation that the Prime Minister could not support.<sup>27</sup> Davidson argued that the PM would have to explain in the Legislative Assembly his reasons for asking the Head of State not to assent to a Bill which has been passed by the representatives of the people. Of course, the Parliament might make a vote on such an explanation as a matter of confidence in the Government but the cultural and political prestige of the Samoan Prime Minister would tend to discourage this.

The absence of political parties was a principal reason which the Head of State’s discretionary powers over prorogation and dissolution were also incorporated into the Constitution. Article 63 (3) states:

“The Head of State may at any time, by notice published in the *Samoa Gazette*, dissolve the Legislative Assembly, if he is advised by the Prime Minister to do so, but shall not be obliged to act in this respect in accordance with the advice of the Prime Minister unless he is satisfied, acting in his discretion, that, in tendering that advice, the Prime Minister commands the confidence of a majority of the Members of Parliament.”

Samoa is only one of a very few Pacific Island parliaments that allow head of state discretion on prorogation or dissolution. Samoa’s Head of State used this constitutionally mandated power for the first time in 1985 and then he used it twice in that one year – the only two

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<sup>27</sup> Fepuleai Attila M. Ropati in an unpublished paper in author’s possession attributes Davidson views to Western Samoa, *Constitutional Convention Debates*, Vol 2.

occasions on which it has been used.<sup>28</sup> The unusual circumstances were a consequence of the early transition to a formal party system. In July 1985, Head of State Malietoa rejected from Prime Minister Tofilau Eti Alesana to dissolve Parliament and call an election so he might avoid the crisis of a split in his ruling party. However, Malietoa appeared to regard the adjourned Assembly as unable to provide an alternative Government while adjourned. However, the Assembly met in December to pass a budget and Prime Minister Tofilau had to resign following the budget's defeat. Again, Tofilau asked for a fresh election with his resignation but the split in Tofilau's party gave the numbers for a possible alternative Government. Malietoa therefore refused the request to dissolve the Assembly. The Assembly then elected Va'ai Kolone to be Prime Minister. Strengthening of the party system and statutory restrictions on "party-hopping" have made the exercise of such discretion by the Head of State very unlikely in the 30 years since.

Fiji's 2013 Constitution has all but eliminated any discretion by the President of Fiji over the sittings of the Parliament. Article 58 (2) and (3) states that the President may, "acting on the advice of the Prime Minister . . . prorogue or dissolve Parliament by proclamation". However, there is a limit on the Prime Minister's power to request a dissolution. He may request a dissolution "only after a lapse of 3 years and 6 months from the date of its first meeting after a general election of the members of Parliament" [Art 58 (3)]. There is an exception to this restraint but it is mandatory rather than discretionary for Fiji's head of state. Article 62(1) asserts that "the President must declare Parliament dissolved early if Parliament has adopted a resolution to dissolve early, supported by at least two-thirds of the members of Parliament." There is one slightly curious aspect of the way the President's discretion has been circumscribed in Fiji's 2013 Constitution. It seems unusual that, in a constitution which has so centralised power in the hands of the Prime Minister, the Opposition may have the power to recall a Parliament into session. Article 67 (4) nonetheless provides that, when the Parliament is not in session, if "the President receives a request in writing from not less than one-third of the members of Parliament requesting that Parliament be summoned", the President must summon the Parliament to meet.

## Conclusions

Bagehot certainly had grounds for his assessment that errors could be made in copying the Westminster constitution without understanding the unwritten conventions that underlay this model. Whether they are regarded as "errors" by the countries that have adopted and adapted the parliamentary model or extended into the "hundreds" might be debated. Perhaps more relevantly today, codifying the Westminster conventions regarding the traditional reserve powers of the Queen-in-Parliament has proved difficult in the localisation of the Westminster model. Attempts to put some of the conventions regarding the Queen-in-Parliament into constitutional or statutory black letter law have created challenges in the operation of the Westminster systems reviewed in this paper.

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<sup>28</sup> Yash Ghai and Jill Cottrell, "South-West Pacific" in David Butler and D.A. Low, *Sovereigns and Surrogates* (London: Macmillan, 1991), pp263-4. Former Legislative Clerk, Fepulea'i Attila M. Ropati, has indicated that there have been no further instances of a refusal to dissolve the Assembly.

While proponents of republicanism in Australia, for example, target the reserve powers for special concern, the instances reviewed in this paper would suggest the problem may lie more with the characterisation of the head of state/head of Government dichotomy as a “dual executive”. This attitude overlooks the important non-executive role of the head of state-in-parliament that Sir Harry Gibbs argued was needed to maintain a democratic balance between the legislature and the executive in the Westminster model. These challenges have generally favoured the Executive arm of government over the Parliament. In consequence, public expectations have been fostered (especially by political leaders) that the head of state is essentially an executive office which democracy requires to be a mere ceremonial cypher acting only under the direction the Government of the day.

Unfortunately, as rare as the occasions might be where the Queen-in-Parliament has to protect the supremacy of Parliament has become, failing to maintain it contributes to cynicism regarding independence of the Parliament. In the case of Tasmania, it has generally preserved a system of reserved powers that would be familiar to Bagehot but with a statutory twist that seems to routinely make the head of state a more than ceremonial position. There is a strong case for amending Section 8B (3) of its Constitution Act to bring the commissioning of Ministers into line with the practice throughout Australasia to save Government House the embarrassment of being regularly drawn into partisan electoral battles. Samoa on the other hand has demonstrated an almost complete reversal of concern for the powers of the Head of State. Initially, there was a fear that an undisciplined Legislative Assembly would be able to use the Head of State against the Executive and so required the Head of State to act on the ministerial advice. And, until the advent of well-structured political parties, circumstances occasionally arose that allowed the Head of State to exercise discretion against the Parliament. Today, party discipline is so entrenched politically that the Legislative Assembly has virtually no protection through the Head of State against Executive domination. Fiji’s new constitution has not had sufficient time to test its nearly complete marginalisation of the head of state. However, it was drafted to eliminate virtually all the reserve powers of the head of state (Governor-General at independence and, after 1987, President). Thus, if it operates as written, Fiji’s head of state will be a completely ceremonial rubber stamp to a very efficient executive.