Powers of Fiji's Head of State: Some Considerations on the 50th Anniversary of Fiji's Independence*

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Abstract The Westminster model for parliamentary democracy has served as the template for one of the world's most widely used forms of responsible government. The model owes its popularity to its cultural adaptiveness, which stems largely from the original model's reliance on pragmatic conventions to resolve fundamental constitutional disputes. However, as Walter Bagehot noted 150 years ago, every replication can lead to 'copying errors'. Fiji's 2013 constitution was intended to restore Fiji to parliamentary democracy after the 2006 military coup. It has been controversial for many reasons including the significant changes it made to previous iterations of the Westminster model over the 50 years since Fiji's independence especially the 1997 constitution which was itself a consequence of a military coup. This article tests the relevance of Bagehot's concerns in contemporary Fiji as they appear in the 2013 Constitution, with a focus on Head of State-Parliament relations.

INTRODUCTION

On October 10 2020, Fiji celebrated the fiftieth anniversary of its independence, although regrettably the shadow of the Covid-19 pandemic muted the public celebration of this national milestone. Independence was itself necessary because 96 years earlier, a body of high-ranking Fijian chiefs under the leadership of Ratu Seru Epenisa Cakobau signed a deed ceding the archipelago to Queen Victoria, thus bringing it into the British Empire as a colony. Amongst the many influences imported into during the near century of colonial rule was the Westminster system of responsible government. This approach to democratic government has proved fairly durable, having survived three military and one civilian coups over the past 50 years.

This not to say that the democratic process and the Westminster were unscarred by these deep political and social upheavals. Nevertheless, as Fiji embarks on the next half century, the parliamentary system remains clearly Westminster in style. This article reviews some of the adaptations that have helped this introduced democratic form to survive through the lens of the changing relationship between the head of state and the Parliament.

Seven years before Cakobau signed the Deed of Cession, Walter Bagehot published his political classic, *The English Constitution*.[1] The work is significant as the first comprehensive political assessment of the Westminster parliamentary system and, as an analytical pathbreaker, helped to set public expectations for the last 150 years on how the Westminster model should operate. His work explained the strengths of Britain's constitutional monarchy in contrast with the American republican system. As a member of the Liberal Party, Bagehot supported the democratisation of Britain but with strong support for a Tory view of the evolutionary development of the state. He viewed the Westminster system through the lens of the unwritten conventions that served as the constitutional sinews linking the sovereign (head of state) with the executive and the legislative arms of government. Indeed, Bagehot argued that these conventions were so vital that he claimed 'hundreds of errors have been made in copying the English constitution' through not understanding their importance.[2]

The extent of the risks posed by adopting and adapting the Westminster parliamentary model without full regard for Bagehot's constitutional conventions can be debated. There are any number of historical, cultural and circumstantial reasons why the basic Westminster model has had to be modified to flower in foreign lands. Arguably, the success of the Westminster model as, perhaps, the most widely used parliamentary system across the globe is due to its flexibility and adaptiveness. A key analytic to test the validity of the translation of the Westminster conventions into black letter law (constitutional or statutory) is how well the codification preserves the objective of a convention or strengthens other equally important democratic aims. This paper tests the relevance of Bagehot's concerns today by reviewing the codification of his Westminster conventions in contemporary Fiji as they appear in

[1] Walter Bagehot, *The English Constitution*. New York: Dolphin Books, 1961 [1867].

[2] Bagehot, *The English Constitution*, p. 248.

the 2013 Constitution.[3] While this constitution is important as the precursor to enabling the 2014 election and return to parliamentary democracy, it sheds some useful light on Bagehot's 'copying errors' in the adaptation of the Westminster model to post-coup Fiji.

THE WESTMINSTER MODEL

From independence in October 1970, Fiji has retained the core elements of the Westminster model of responsible government, including a dual executive. The Westminster model's basic features include a popularly elected Parliament to which the executive is responsible. This description actually covers all 'responsible Government' systems where the executive arm of government is responsible to a legislature that enjoys constitutional supremacy. What distinguishes the Westminster model from other forms of responsible Government, such as that of Norway, for example, is the relationship between the legislature and the executive. From the Glorious Revolution of 1688, the convention has been accepted, and followed, that Ministers of the Crown could only be drawn from the membership of the legislature (the House of Commons and House of Lords). In Norway, Ministers may be drawn from outside the membership of the *Storting* (Parliament), although they remain responsible to it both individually and collectively. Moreover, Article 62 of the Norwegian Constitution requires that any Minister drawn from the *Storting* must leave the chamber and not take part in its proceedings. The parliamentary vacancy thus created is filled by the next available candidate from the party list.

In the Westminster model, Ministers not only must be Members of the legislature but they retain their parliamentary places and their voting rights in the chamber. The importance of this convention cementing the close relationship between the legislative arm and the executive can be seen in its treatment outside the United Kingdom. In most Westminster jurisdictions, this convention is codified as a constitutional provision. So, for example, Article 64 of the Australian Constitution

[3] The half century of Fijian independence has been marked by coups and extra-constitutional abuses of power which are too complex to cover in brief. Without belittling these influences, this article is primary concerned with the transition from the 1997 Constitution, which was the main motivation institutionally for the changes that came through the 2013 document.

states that 'no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives'. Of course, for the brief period where a Minister is trying to find a seat in the Parliament, they cannot exercise any of the rights of a Member, such as speaking on the floor or voting.

This provision has been a feature of every constitution of Fiji since 1970. The 1970 Constitution followed the Australian formula at s 74(4), stating that a Minister 'not a member of either House of Parliament at the date of his appointment as a Minister, he shall vacate his office as a Minister on the expiration of three months'. Article 95(1) of the 2013 Constitution puts the same provision more directly, stating 'a Minister must be a member of Parliament'. Significantly, this drafting did not leave open the option of a non-Member for even a limited, interim period. The different wording between the 1970 and 2013 constitutions invites further attention to the parliamentary qualification for a ministerial position. Under the 1970 and 1997 Constitutions, it was possible for a Government to secure ministerial 'talent' through appointments to the Senate. The only path to a ministerial office, except possibly that of Attorney-General,[4] under the present Constitution is through the ballot box.

The supremacy of Parliament is critical to any responsible Government system including the Westminster model. Basically, this means that the executive arm of government is obliged to answer to the legislative arm for its actions, which has the capacity to impose sanctions for perceived breaches. The 2013 Constitution makes the connection explicit: 'Governments must have the confidence of Parliament' (s 90). Any Government that is not supported by the Parliament loses office. The general obligation of accountability clear at s 91(2), which asserts 'Cabinet members are accountable individually and collectively to Parliament, for the exercise of their powers and the performance of their functions'. This obligation appeared in the 1970 Constitution as 'the Cabinet shall be collectively responsible to Parliament' [s 75(2)]. The responsibility to report to the Parliament is clear but the capacity of the Parliament to impose sanctions for any executive failures is not as certain.

[4] Section 96(3) provides for the appointment of a non-Member as Attorney-General under some circumstances.

Accountability is not the same as responsibility. Responsibility demands that there should be consequences if the Parliament does not like the account it receives from the Minister or the Government. The 2013 Constitution departs to some extent from Westminster conventions by making the Government as a whole responsible to the Parliament collectively through the Prime Minister but failing to provide for individual ministerial responsibility. None of the three ways that the Constitution sets out in s 95(3) for a Minister to lose office includes a vote of no confidence in the Minister. This was a continuation of the absence of constitutionally mandated individual ministerial responsibility in the 1970 Constitution (s 74). In both Constitutions, the only available specified sanction (want of confidence) was against the Government as a whole. The same constitutional arrangement has applied, for example, in Samoa, which was the first Pacific Island state to draft a post-independence Westminster system. The 1960 Constitution provides that Ministers can only be removed by the Prime Minister and all are removed when the Prime Minister resigns or is removed [art 33(3)].

DUAL EXECUTIVE—THE CROWN-IN-COUNCIL AND THE CROWN-IN-PARLIAMENT

All responsible Government systems separate the office of the head of state from that of the head of government. In the Westminster model, this distinction arose from the Parliament's gradual taking over the exercise of the sovereign's executive powers. As the monarch lost a capacity to exercise autonomous authority, the Parliament had to organise itself to carry out effectively and competently the responsibilities it took over from the crown. Conventions converged around a principal Minister, who, having the support of a majority of the Parliament, was able to deliver the finances to enable the sovereign to provide for the administration of the state. Thus, in the evolution of the Westminster system, two centres of executive authority became apparent—one that represented the permanence of the state and another that implemented the policies of the Government of the day. In order for this dual leadership arrangement to work, the sovereign as head of state was reduced to a largely ceremonial public role while the head of Government took on the practical day-to-day responsibilities of making and implementing policy. As Bagehot pointed out, the ceremonial and efficient distribution of authority in Westminster's dual executive contrasted significantly with systems such the United States where the two are combined in the single office of an executive head of state.

It is often overlooked that the evolution of parliamentary democracy in Great Britain by retaining a constitutionally limited monarch created a sovereign with two not-

always distinct crowns. In legal terms, the head of state has a role as the 'Sovereign-in-Parliament' as well as the more familiar role as the 'Sovereign-in-Council'.[5] The modern Westminster head of state's role as titular head of the executive arm of government (that is, as the Crown-in-Council) is today relative unproblematic politically. The executive powers of the head of state are exercised solely on advice. The advice in-Council is directive and formally comes from or through an institution headed by the Prime Minister usually called Executive Council. The Sovereign-In-Parliament, by contrast, involves the sovereign's separate role in passing legislation. Related to this is the area of discretion regarding the Parliament that the sovereign has retained under the prerogative powers of the Crown. Classically, these are located in what are commonly known as the sovereign's 'reserve powers'. Yet, despite the rarity of use in modern times, the reserve powers have proved contentious both in theory and in practice. Contemporary democratic theory struggles with the use of unaccountable public power. Indeed, translating these conventions into black letter constitutional provisions has proved particularly challenging for this reason.

Nevertheless, the existence of some independent discretion is a logical consequence of the separation of the two roles. If the reserve powers did not embody some discretion by the head of state, they would be subject to direction indistinguishable from in-Council advice. Australia's former High Court Chief Justice, Sir Harry Gibbs, has presented a simple and democratic case for why the reserve powers cannot be subordinated to Executive direction. He asserts 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 of responsible Government, writing:

> The 'reserve powers', are designed to ensure that the powers of the Parliament and the Executive are operated in accordance with the

[5] The precise terms will depend on the particular jurisdiction so may be identified as Queen-in-Parliament, President-in-Parliament, Governor-in-Parliament, etc. as appropriate. Basically, all are variations of the concepts of the Sovereign-in-Parliament and Sovereign-in-Council.

principles of responsible government and representative democracy, or in other words to ensure that the Ministry is responsible to Parliament.[6]

THE SOVEREIGN-IN-PARLIAMENT

Fundamental to Gibbs' argument is that the head of state retains some independent responsibilities for Parliament that should not be captured entirely by direction from the head of Government (the executive). The first point is fairly easy to establish for Fiji. The British sovereign's conventional role has been codified constitutionally in the definition of the Parliament. Section 30 of the 1970 Constitution stated that: 'There shall be a Parliament for Fiji which shall consist of Her Majesty, a House of Representatives and a Senate'. The 1997 Constitution's definition (s 45) was similar, allowing for the republican change, **'**The power to make laws for the State vests in a Parliament consisting of the President, the House of Representatives and the Senate'. The wording in s 46(1) of the 2013 Constitution for this relationship is couched in slightly different terms, 'The authority and power to make laws for the State is vested in Parliament consisting of the members of Parliament and the President'. The changed wording may not be significant in terms of the Westminster convention on the composition of 'the Parliament' but it presents something of a challenge for constitutional interpretation.

A few examples from Fiji's Westminster neighbours can help to illustrate the issue. Samoa's Constitution (art 42) states 'Parliament of Samoa, which shall consist of the Head of State and the Legislative Assembly'. Australia's constitutional definition (s 1) is 'the legislative power of the Commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives, and which is hereinafter called *The Parliament*'. New Zealand's s 14(1) is almost identical with allowance for having a unicameral legislature defining the 'Parliament of New Zealand, which shall consist of the Sovereign in right of New Zealand and the House of Representatives'. The problem with Fiji's 2013 wording,

[6] The Rt Hon. Sir Harry Gibbs, 'Reserve Powers of the Governor-General and the Provisions for Dismissal'. Australians for Constitutional Monarchy, 20 August 1995. Accessed at https://norepublic.com.au/reserve-powers-of-the-governor-general-and-the-provisions-for-dismissal-2/.

which may have been the result of some casual drafting, is that it includes a definitional circularity.

At first glance, the law-making power being vested in 'Parliament consisting of the members of Parliament and the President' may not give cause for pausing. However, as the former Clerk of the New Zealand, David McGee, has written with regard to the New Zealand Parliament:

> The Parliament of New Zealand has only one function, and that is to make laws. Whenever 'Parliament' acts, its act has the force of law—as an Act of Parliament. There are communications between the Governor-General and the House of Representatives on other matters than laws, but the two constituents act together as Parliament only to make laws.[7]

The 2013 Constitution has no word anywhere in the document to describe the institution that exists when the President is not part of the Parliament; that is the set of institutions normally referred to as the legislature. All the definitions in the constitutions noted above have some such descriptors including the Fijian constitutions of 1970 and 1997. The significance of this drafting oversight is explained by McGee as follows: 'The functions of the Parliament and of the House are not identical. Each constituent part of the legislature has a different role from the other'.[8] And, in fact, these other functions, which Bagehot identified as the Parliament's 'non-legislative' functions,[9] are what most people believe the Parliament does, such as providing and supporting a Government, holding the Government to account, representing public opinion and informing the nation's debate on key issues. While the public is scarcely aware of the distinction that McGee makes, it is important that the legislature have an institutional appreciation of its own identity separate from the one it has including the head of state.

[7] David McGee (edited by Mary Harris and David Wilson, *Parliamentary Practice in New Zealand* (4th ed.). Auckland: Oratia Books, 2017, p. 2.

[8] McGee, *Parliamentary Practice in New Zealand*, p. 2.

[9] Bagehot, *The English Constitution*, pp. 171-5.

THE RESERVE POWERS AND THE SOVEREIGN-IN-PARLIAMENT

McGee's point about the House of Representatives not being the entirety of the New Zealand Parliament also applies to the head of state in its role as a component of the Parliament. Regrettably, public awareness of the role of the head of state has been captured by the historical struggle to democratise the monarchy, so that any continuation of real power tends to be portrayed as 'unfinished business'. The political puppetry of the Sovereign-in-Council serves as the model for expectations of the Sovereign-in-Parliament. Unsurprisingly therefore, in modern Westminster systems it can be difficult to switch perspectives to argue, as Sir Harry Gibbs does, and regard the Sovereign-in-Parliament as a protector for the legislative body against the executive. Yet the areas of discretion still owned by the head of state can be seen in precisely this light.

In the United Kingdom, the principal recognised reserve powers include 1) the appointment of a Prime Minister; 2) prorogation and summoning of Parliament; and 3) assent to legislation.[10] While the use of these powers is supported as convention in the United Kingdom, the same powers are generally constitutionally codified elsewhere. However, the use of these powers and the circumstances where they might be used by the head of state are subject to much the same conventions as in the United Kingdom. The 2013 Constitution also provides for the codification of these powers but the question that then needs to be addressed is the discretion available to the President for their use.

APPOINTMENT OF THE PRIME MINISTER

This role is not a power for the President under the 2013 Constitution, although it was in the 1970 and 1997 documents. Section 72(2) of the 1970 Constitution both codified the power and identified its use as discretionary, stating that:

> The Governor-General, acting in his own deliberate judgment, shall appoint as Prime Minister the member of the House of Representatives

[10] Gail Bartlett and Michael Everett, 'The Royal Prerogative'. House of Commons Library, Briefing Paper, Number 03861, 17 August 2017, p10. Accessed at: http://researchbriefings.parliament.uk/ResearchBriefing/Summary/SN03861

> who appears to him best able to command the support of the majority of the members of that House.

The 1997 Constitution's s 98 repeated this wording almost unchanged. However, when the 2013 Constitution treated this process, the selection of the Prime Minister did not involve the President at any level. If the general election returns a party with 'more than 50% of the total number of seats', s 93(2) specifies that the party leader 'assumes office as the Prime Minister by taking before the President the oath or affirmation of allegiance and office'. The President does not have any discretion although the same section provides that administering the oath cannot be delegated or refused by the President.

However, if the s 93(2) condition is not met, then s 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'. Even a vacancy does not create an opportunity for presidential discretion. Section 93(5) states that 'if a vacancy arises in the office of the Prime Minister under subsection (4), then the Speaker shall immediately convene Parliament and call for nominations from members of Parliament' where the post-election arrangements apply.

While the President is frozen out of any role in resolving disputed claims to the prime ministerial office, the lack of discretion has its own consequences for political parties. Unlike the recent experience in Australia with the revolving door to the prime ministerial office, internal party disputes over leadership in Fiji cannot be resolved without going through the constitutionally prescribed processes, should a party 'spill' cost a Prime Minister the support of his party. Section 93(6) appears to prevent any party spill imposing a resisted vacancy. It asserts that the 'Prime Minister shall serve for the full term of Parliament, unless dismissed in a motion of no confidence under section 94, and shall not be otherwise dismissed'. A Prime Minster who refused to resign on losing a party room leadership vote could not be dismissed by the President. Of course, the party could expel the loser to ensure that a Prime Minister who lost the vote was ineligible to sit in Parliament.

A 'PRESIDENTIAL' PRIME MINISTER?

The President's role with regard to other ministerial appoints is even more remote. As noted above and rather at odds with standard Westminster practice, Ministers are not directly responsible to Parliament. Moreover, s 92(3) states explicitly that the Prime Minister 'appoints' and 'dismisses' Ministers. This may not seem surprising at first blush, since generally it is accepted that Prime Ministers make these determinations around the Westminster world. However, its significance becomes clearer when contrasted with the more conventional wording regarding this relationship. For example, s 99(1) of the 1997 Constitution states, 'The President appoints and dismisses other Ministers on the advice of the Prime Minister'. Until the 2013 Constitution, Ministers were clearly Ministers of state, having received their appointments to office from the head of state, the Governor-General or the President.

Thus, technically, the usual Westminster description of the Prime Minister as 'primus inter pares'—the first amongst equals – does not apply in Fiji today. Arguably, under the 2013 Constitution, the Ministers are subordinates of the Prime Minister. In effect, formally Fiji's responsible Government system lies somewhere between a traditional Westminster system where all Ministers are formally equal in rank (but not in precedent or status) and the American system where all the political heads of departments are subordinates of the President. This locates the current Fijian parliamentary system in a hybrid grey area somewhere between the Westminster model and the American model of executive autonomy. It is closer to the Westminster model but clearly the 2013 Constitution has altered significantly the relationship between the legislative and executive arms of government and between both of these and the state of Fiji.

SUMMONING, PROROGUING AND DISSOLVING THE PARLIAMENT

The 2013 Constitution has codified the conventions regarding the head of state and the several stages of determining when a Parliament is convened and is dissolved. These powers are assigned to the President but with some significant qualifications on their use. Section 67(1) provides for the President to summon the Parliament but the discretion for using this power is limited to the obligation to issue the summons 'no later than 14 days after the announcement of the results of the general election'. The other occasion when the President might summon the Parliament is after a prorogation 'on the advice of the Prime Minister' but with the qualification that 'no longer than 6 months must elapse between the end of one session and the start of

another' [s 67(3)].

This provision does open the possibility that the President may be able use his powers without advice. While this provision appears prescriptive, there is an ambiguity about how the President might act if the Prime Minister failed to give the required advice within the required timeframe. The President could feel legally bound to honour the constitutional obligation on him to summon the Parliament back into session and so act without advice. Alternatively, the President might retreat behind the need to act only on advice and refuse to issue the summons. Presumably, the President's decision on such an occasion would hang on the circumstances as to why a Prime Minister would want to refuse the advice to recall Parliament. There is an argument that an internally divided Government that wants to have an extended period without the additional pressure of parliamentary scrutiny should be forced back into Parliament so that the head of state can be certain of the level of the support the Government enjoys in the chamber.

There is another constitutional empowerment for summoning the Parliament that appears completely obligatory. Yet, the circumstances when it might be used seems so controversial that it might be queried why the provision exists. Section 67(4) allows the Opposition to give directive advice to the President requiring him to summon a prorogued Parliament back into session. It states that 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 shall summon Parliament to meet'. The basis for petitioning the head of state would be 'to consider without delay a matter of public importance'.

The democratic virtue of s 67(4) is clear. A Government under stress may not wish to be forced to defend its decisions in Parliament. This provision offers a parliamentary path around executive obstructionism. The politics of using this provision could be fraught, nonetheless. A Prime Minister having a majority might regard the recall of the Parliament against his wishes as a loss of control over the chamber. Another possibility is that the request to the President may not be as directive as it appears. On prime ministerial advice or on his own cognisance, the President may decide that the petition lacks merit in raising a matter of *sufficient* public importance. A post-Cyclone Winston attempt to use this provision in 2016 demonstrated both its potential for political mischief as well as some resistance to regarding the presidential

response as automatic as its users might wish.[11]

The presidential power of prorogation is provided for under s 58(2) but using the power seems carefully circumscribed by the words 'acting on the advice of the Prime Minister'. Again, there is an 'however'. There is little doubt that a President could not use the power to prorogue without advice. The more important democratic issue may be whether the President can refuse advice to prorogue. There are examples where a Government under pressure has sought a prorogation in order to avoid parliamentary scrutiny and the head of state has resisted the attempt.[12] Interestingly, such a controversial exercise of discretion by the head of state may not even be subject to review by the courts. The proceedings of the Parliament are protected by privilege, which could deter the courts from giving a ruling on the constitutional validity of any action. If a court viewed the process of prorogation as a proceeding of Parliament, the decision might be privileged.

The President's power to dissolve the Parliament is again qualified by explicit reference to acting on prime ministerial advice but any scope for discretion is severely restricted by an extra time dimension that does not apply to prorogation. Section 58(3) allows the President to act on the advice of the Prime Minister to dissolve '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'. Given a long-time practice of allowing Governments some flexibility regarding the precise election date, this limitation is scarcely likely to cause difficulties for either side.

ASSENT TO LEGISLATION

Given that this is the critical element in the identification of the concept of the

[11] See Vijay Narayan, 'Opposition Leader Calls on President to Call Parliament'. *FijiVillage*, 15 March 2016. Accessed at: http://fijivillage.com/news-feature/Opposition-Leader-calls-on-President-to-call-parliament-r5sk92; Bruce Hill, 'Fiji's President refuses to call special cyclone sitting of parliament'. *ABC Pacific Beat*, 17 March 2016. Accessed at: http://www.abc.net.au/news/programs/pacific-beat/2016-03-17/fijis-president-refuses-to-call-special-cyclone/7255914 .

[12] See Don Morris, 'The Perils of Defining the Reserve Powers of the Crown'. Paper presented at The Twenty Eighth Conference of The Samuel Griffith Society, 12-14 August, 2016. Adelaide, South Australia.

Sovereign-in-Parliament, it is scarcely surprising this convention is codified constitutionally in most Westminster jurisdictions. The President's assent to legislation has been incorporated in the 2013 Constitution in a way that appears to have obviated any discretion. Section 48 requires all Bills that have passed the Parliament to be presented to the President for assent. This section also stipulates that the President 'must provide his or her assent' within seven days or without his assent 'the Bill will be taken to have been assented to' after the seven days period. The value of a week's time for reflection appears to lack purpose. There may some political embarrassment if a President refuses assent but in which direction? Would the public reaction favour the Prime Minister or the President? Much would depend on the issue and the public's view of it and the two actors who had engineered the dispute. Presumably a dispute over assent would not arise in ignorance.

A Government should be aware of the President's views if the obligations of s 92(2) to 'keep the President generally informed about the issues relating to the governance of Fiji' is maintained properly. This section is what allows the President to exercise Bagehot's three rights of the head of state—the right to be consulted, the right to encourage, the right to warn.[13] The Prime Minister has no equals in the cabinet, especially under a constitution that makes subordinates of all his or her Ministers. Thus, there may be some democratic value for the dual executives discussing the affairs of state from their differing perspectives for the benefit of the nation. The power to refuse assent has not been used in the United Kingdom since Queen Anne in 1708, so the real benefit of this power cannot be in the threat of its use. Rather, it lies in the need to explain the Bill in the regular meetings leading up to the request for assent, where the head of state can use Bagehot's three rights to persuade a Government to avoid rash or ill-conceived legislation. The perfunctory role for the President in the assent process would appear to undermine the opportunity for the President to employ his independent authority to use consultations to encourage and to warn.

[13] Bagehot, *The English Constitution*, p. 124.

CONCLUSIONS

Walter Bagehot had grounds for his assessment that errors of consistency would be made in copying the Westminster constitution without properly understanding these unwritten conventions both in historical context and in relationship to the overall operation of the system. Nevertheless, all the deviations from the basic conventions of the Westminster model cannot be regarded as 'errors' just because, in some interpretation of Bagehot's view, the conventions have not been maintained in precisely the same way today across all Westminster jurisdictions. Historically, adaptation was necessary to meet the differing experiences, histories, and cultural foundations in the countries embracing the Westminster parliamentary model. Codifying the Westminster conventions regarding the traditional reserve powers of the Sovereign-in-Parliament has proved difficult in the localisation of the Westminster model. The process of decolonisation was generally more focused on the Sovereign-in-Council constitutional arrangements than those governing the Sovereign-in-Parliament. The perceived priority was to provide for stable Government rather than fine-tuning a relationship between the head of state and Parliament that few understood, assuming it was either uncomplicated or irrelevant.

Post-colonial attitudes generally continued to favour 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 that democracy requires to be a mere ceremonial cypher acting only under the direction the Government of the day. Indeed, there appears to have been a progression in favour of the Government and against parliamentary oversight with each redrafting of Fiji's constitutional foundations. The 2013 Constitution demonstrates this trend rather clearly. The President's discretion as head of state with regard to the exercise of reserve powers has been significantly diminished. Sir Harry Gibbs' concern that the codification of the reserve powers of the head of state would diminish the capacity of the Sovereign-in-Parliament to protect to the Parliament from executive over-reach appears to be confirmed by the 2013 Constitution, although earlier constitutions had set the trend toward a totally ceremonial office.

The degree to which any of these developments matter to good governance comes back to the reasons why the Westminster conventions were developed. Historically, the objective has been to secure a balance between ruling authority and the interests of the people. Bagehot argued there was a need to find some stability between the continuing interest of the state and the more ephemeral interests of governments pursuing public popularity. The head of state moderated these tensions by lending

the legitimacy of the state to the acts of Government while serving to preserve some of Parliament's independence from complete executive dominance. The American solution was to divide the legislative and executive roles completely and so protect each so that each arm of government could check and balance the powers of the other. Sir Harry Gibbs supported Bagehot, arguing that the Westminster model worked as long as the head of state was able to preserve the conventions critical to the protection of the Parliament.

Has the constitutional weakening of the independent authority of the President in Fiji crossed a line? Bagehot would almost certainly respond 'yes' but his own argument could be used against him. The risks to the democratic balance depend on whether the strengthening of the executive has been offset by compensatory strengthening of the mechanisms for executive oversight and responsibility. This paper does not explore the possible non-parliamentary options for achieving such a democratic re-balancing. The argument herein is that some of the key traditional elements of parliamentary restraint on the executive have been altered in the 2013 Constitution, including even those limited checks that depend on the head of state. Further research will be necessary to assess whether legal and administrative machinery developed in the 2013 Constitution provides sufficient redress for these parliamentary losses.