

## THE UNRECOGNISED RESERVE POWERS

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### Introduction

In Australia, the scope of the reserve powers has been largely discerned from the examples of their exercise. Much time has been spent raking over the ashes of the experiences of the Lang dismissal in 1932 and the Whitlam dismissal in 1975, with more limited attention being paid to the reserve powers to appoint a Prime Minister or to refuse a dissolution. Reference is sometimes made to the extremely limited exercise of the reserve powers in the United Kingdom and occasionally to Canada, but that is all. Most commentators would deny that there are any other reserve powers beyond those three classic powers and see as mischievous, or even dangerous, any suggestion that there might be other circumstances in which a vice-regal officer could exercise power without advice, or contrary to advice, or refuse to exercise a power as advised.

Today, I would like to look at the reserve powers from a different perspective – by identifying the principles that underlie them and how those principles intersect and conflict and support the reserve powers. It seems to me that instead of looking at the reserve powers as isolated and anomalous exceptions from the operation of the Constitution, a preferable approach is to integrate them into the Constitution and identify their scope by reference to established constitutional principles. In doing so, I will be taking a much wider sample of circumstances in which such powers have been exercised as a means of illustrating the principles that underlie them and their possible application. In practice, the reserve powers have been more commonly exercised in former British colonies that are developing countries in Africa, Asia, the South Pacific and the Caribbean, where the likelihood of political instability is greater and constitutional boundaries tend to be pushed. In many of these countries, attempts have been made to codify the reserve powers, at least to some extent, leading to their justiciability and an interesting wealth of jurisprudence in court decisions about not only those aspects of the reserve powers that have been codified, but also the scope of the uncodified reserve powers and the conventions that apply to their use.

The criticism might well be made that examples from these countries are quite inappropriate to Australia, where military coups and other extreme events are most unlikely to occur. While this may be true in relation to many of the examples used, what is of importance here is what they reveal about the principles underlying the reserve powers, and this is what I would like to explore today.

The three main principles that I will discuss are:

- Responsibility;
- The rule of law; and
- Necessity

Responsibility is the key principle. It potentially justifies most exercises of the reserve powers. The reserve power to appoint a Prime Minister arises in circumstances where there are no responsible advisers. A dissolution may be denied to a Prime Minister who has lost the confidence of the House and is therefore no longer responsible, if there are others who could form a responsible government. A Prime Minister who has lost the confidence of the lower House and refuses to resign may be dismissed.

The rule of law is also an important principle. It potentially supports the dismissal of a Prime Minister who persists in serious breaches of the law or the Constitution. It also would potentially permit a Governor-General to decline to act upon advice to commit a manifest breach of the Constitution or of a law. However, the application of this principle is often tempered by another principle, the separation of powers and the role of the judiciary in determining legality. Where the judiciary may not determine legality, because the matter is not justiciable, or where the breach of the rule of law is both serious and uncontestable or uncontested, then an exercise of a reserve power to reject advice or to seek new advisers, may be warranted.

Most difficult to apply, however, is the doctrine of necessity. It may override the rule of law, by permitting extra-constitutional or other acts contrary to the law. It may also result in the exercise of executive power and the acceptance of advice from persons who are not responsible advisers. It arises in those rare circumstances where constitutional action is not possible or practical. Its use, however, is only justified to provide means to restore the rule of law and responsible government. The danger is that the doctrine of necessity is used as a legal fig-leaf to justify the abrogation of the Constitution, to support the rule of might over the rule of law and to divorce government from responsibility. It is therefore a dangerous beast that needs to be kept under strict control.

### **Responsibility**

The Queen and her vice-regal representatives act upon the advice of 'responsible' Ministers. While the Queen may receive advice through the *channel* of her Governor-General, she cannot, in ordinary circumstances, be *advised* by the Governor-General, as he or she is not 'responsible' to Parliament for that advice. This point was stressed by the British Government during the negotiation of the *Australia Acts*, where at one stage it was proposed that the Governor-General advise the Queen about the appointment of State Governors.<sup>1</sup> Such a proposal was eventually rejected in favour of the Queen being advised directly by her responsible Ministers, being State Premiers. For the Governor-General to advise the Queen, other than as a channel for responsible advice, would breach the cardinal principle of responsible government.

Responsible Ministers are those who hold the confidence of the lower House of the Parliament and who are responsible to the people through the Parliament for the advice that they give to the Queen or her vice-regal representatives. Responsibility is also critical in the establishment of separate Crowns. A new Crown is established when the Queen is advised by the Ministers of a polity who are responsible to the people of that

polity through its legislature. The polity itself does not need to have attained formal independence or to be internationally recognised as sovereign, as long as it is self-governing and its responsible Ministers advise the monarch and the Governor-General.<sup>2</sup>

What if the Queen or the Governor-General is advised by Ministers who have ceased to be 'responsible'? To what extent must the monarch or her vice-regal representative act upon advice of a Minister or other person exercising executive power who is not responsible?

### *Appointment of a Prime Minister*

This may arise in a number of different circumstances. For example, imagine a Prime Minister has been overthrown by his or her own party and a successor elected by the parliamentary party. What if the Prime Minister, upon resigning from office, advises the Governor-General to appoint someone else as Prime Minister, rather than the person chosen by his or her parliamentary party? The Prime Minister, by virtue of his or her resignation as a Minister, has ceased to be responsible to Parliament for any advice given.<sup>3</sup> Hence, he or she cannot provide binding advice to the Governor-General.<sup>4</sup> While advice is routinely given in practice by outgoing Prime Ministers,<sup>5</sup> this advice is generally regarded as not binding upon the Governor-General (although, to the extent that the advice identifies the person most likely to hold the confidence of the Parliament, the Governor-General would normally have no other choice).<sup>6</sup> Hence the Governor-General would be obliged, by convention, to appoint as Prime Minister the person most likely to hold the confidence of the lower House, regardless of who the outgoing Prime Minister advised should be appointed.

In India, where such issues tend to be the subject of litigation, Mitra J of the High Court of Calcutta concluded that it could not be said 'that the Governor is bound to act, in appointing a Chief Minister, on the advice of the outgoing Chief Minister who has lost his majority in the Legislative Assembly as a result of the General Election'.<sup>7</sup> This was because such advice was not being given by a responsible Minister.

Equally, if in such a case a Prime Minister, deposed by his or her party, sought a dissolution, the Governor-General would be entitled to reject that advice if he or she came to the view that there was another person who could be commissioned to form a responsible government. This is because the Governor-General is not bound to act on the advice of a person who has ceased to be a responsible adviser.<sup>8</sup> In India, this proposition has been taken even further, so that a Governor's decision in 2002 to grant a dissolution to a government that had lost confidence was overturned by a court on judicial review. The court held that the Governor not only was not obliged to accept the advice of his Ministers, but also that he ought to have enquired as to whether an alternative viable Government could have been formed and whether it was necessary to impose the financial burden of an election.<sup>9</sup>

### *Caretaker conventions*

Another circumstance in which the issue of a lack of responsibility arises is where a government has been defeated in a vote of confidence or in an election but continues in office until a new government can be formed. In such cases, the government cannot be regarded as 'responsible' as it clearly does not hold the confidence of the lower House. More contestable are the circumstances in which Parliament has been dissolved but an election has not yet been held or the outcome of an election is still being ascertained and the incumbent government remains in office pending the formation of a new government. In such a case, the government may or may not hold the confidence of the newly elected House, but is not currently responsible to it as the House is not in existence, having not yet been reconstituted.

In both cases caretaker conventions apply in Australia. These are, however, conventions and not laws. If a government, that was not responsible to the Parliament, advised the Governor-General to act in breach of the caretaker conventions by implementing an important decision with ongoing ramifications that would bind any future government, would the Governor-General have a reserve power to decline to act upon that advice because his or her advisers were not responsible?

Again, Indian jurisprudence covers this issue with the courts holding that the President is not obliged to accept the advice of Ministers of a caretaker government that had never established its responsibility to Parliament, except in relation to the day-to-day administration of government.<sup>10</sup> While no one would want the Governor-General to be required to assess whether each and every act taken by a caretaker government falls within the caretaker conventions, it is arguable that a Governor-General could decline to act on the advice of Ministers who had ceased to be responsible in circumstances where acting on that advice would give effect to a major breach of the caretaker conventions which could not be remedied by an incoming government. At the very least, he or she could defer action upon such advice until the composition of the new responsible government is known.<sup>11</sup>

For an Australian example, on 26 February 1968, the South Australian Premier, Don Dunstan, recommended the appointment of Sir Mark Oliphant as Governor,<sup>12</sup> just days before the State election was due to be held on 2 March 1968. This breached the caretaker conventions about making significant appointments after the dissolution of Parliament and immediately before an election. In those days, Governors were appointed by the Queen on the advice of her British Ministers. The British Government, with the support of the Palace,<sup>13</sup> declined to recommend Oliphant's appointment to the Queen and delayed any appointment until after the election.<sup>14</sup> The new Premier, Mr Hall, requested the appointment instead of a different Australian, Sir James Harrison, who was appointed as requested. Oliphant later became Governor in 1971 after Dunstan was returned to office.

*Difficulty in ascertaining whether advisers remain responsible*

If vice-regal reserve powers are dependent upon the responsibility of Ministers, then this leads to the difficult question of how one determines whether responsibility has been lost. There have been numerous disputes within countries that operate a system of responsible government as to whether responsibility must be determined on the floor of the House or whether a vice-regal officer may determine responsibility on the basis of a letter or sworn statement by a majority of the lower House that the Prime Minister or Premier no longer has their support.<sup>15</sup>

Perhaps the most interesting case in which difficult issues of responsibility arose occurred in Nigeria in 1962. The Premier of Western Nigeria, Chief Akintola, lost the support of a majority of his party and was instructed by the party to resign as Premier.<sup>16</sup> He refused to do so. He sought a dissolution, which was refused by the Governor, and he sought the recall of Parliament to determine confidence, which was refused by the Speaker. He was dismissed by the Governor without there having been a vote of no confidence against him. He claimed to be invalidly dismissed and advised the Queen to dismiss the Governor.

The British Government and the Queen took the view that she could not act on Akintola's advice because he was no longer her responsible adviser. The Supreme Court of Nigeria, however, held that a vote of no confidence was required before the Premier could be dismissed.<sup>17</sup> Hence Akintola remained Premier and the Queen's constitutional adviser. But the Nigerian Government had declared a state of emergency, taking over the government of Western Nigeria, suspending the Premier and the Governor.<sup>18</sup> So Akintola was not the Queen's responsible adviser. The state of emergency was terminated on 31 December 1962 and Akintola was restored as Premier without fresh elections.<sup>19</sup> Whether or not he held the confidence of Parliament at that time was uncertain, because it had not been recalled and no vote of confidence had been taken. Nonetheless, at this stage the Queen acted on Akintola's advice and dismissed the Governor.<sup>20</sup>

Akintola later regained the confidence of the legislature, with two votes of confidence in his favour, showing he was responsible.<sup>21</sup> The Privy Council, however, then reversed the Supreme Court of Nigeria, holding that Akintola had been validly dismissed, so he was not the Queen's responsible adviser.<sup>22</sup> Akintola responded by causing the Western Nigerian Parliament to pass a constitutional amendment, with retrospective effect, so that the Premier cannot be dismissed unless there is a vote of no confidence in him on the floor of the House.<sup>23</sup> This restored his status as a responsible Minister. His responsibility was later terminated by a bullet in a coup d'état.

This saga gives rise to two important points. First, that the codification of conventions, to the extent that it renders reserve powers justiciable, is unwise as it can lead to long periods of uncertainty and instability. Moreover, court decisions determining who is validly Premier or Prime Minister are usually ineffective, especially when they are in conflict with the will of the Parliament or of those who effectively control the executive

government. Fiji<sup>24</sup> and Papua New Guinea<sup>25</sup> give further evidence of the impotence of courts in this regard.

Secondly, responsibility is the key to the power to advise the Queen. The Queen is entitled (although not obliged) to ignore the advice of a person who exercises executive power in one of her Realms but who is not responsible to the local legislature because he or she does not hold its confidence or who no longer holds the office of Minister. Hence, in a race to the Palace, a Prime Minister's advice to dismiss the Governor-General will not be successful if the Governor-General has first managed to dismiss the Prime Minister.

### *Summoning and proroguing of Parliament*

If a vote on the floor of Parliament is necessary to determine confidence and hence, responsibility, then questions arise as to whether any reserve powers exist concerning the summoning and proroguing of Parliament. Can a Prime Minister who has potentially lost the confidence of the House avoid the establishment of such a loss of confidence by advising the Governor-General to prorogue the Parliament or by refusing to reconvene Parliament to determine confidence?

In Canada in 2008 the Harper Government controversially advised the Governor-General to prorogue Parliament in the face of the prospective loss of a vote of confidence in the Parliament. The Governor-General did prorogue Parliament, but most commentators took the view that she had a discretion to refuse to act on that advice if she so chose.<sup>26</sup> Hogg took the view that there is no discretion to refuse advice to prorogue if the Government clearly maintains the confidence of the lower House and is therefore responsible. Where, however, an imminent loss of confidence is likely, Hogg thought that the Governor-General had a reserve power to refuse advice to prorogue, if the Governor-General regarded this as the best alternative in the circumstances.<sup>27</sup> This is a good example of a case where the reserve power is tethered to responsibility and therefore only arises in limited circumstances.<sup>28</sup>

A further question arises as to whether a vice-regal representative who has the formal power to summon Parliament on advice, may also have a reserve power to do so without advice in circumstances where the Prime Minister or Premier is deliberately deferring the recall of Parliament in order to avoid a vote of no confidence.<sup>29</sup> The analysis here is different from that concerning prorogation, because it involves the vice-regal representative taking positive action without advice, rather than simply declining to act on advice. One argument is that summoning Parliament is a less serious action than dismissing a government and therefore a better alternative.<sup>30</sup> In West Bengal, for example, when it appeared that the government had lost confidence, the Governor requested that Parliament be recalled on three separate occasions over a period of a month, but was rebuffed each time. The Governor, fed-up, and with an escalating crisis of famine and lawlessness in the State, dismissed the Premier. His action was upheld in the courts.<sup>31</sup> In another case in Uttar Pradesh, the Indian Supreme Court itself ordered

that that a special session of the Uttar Pradesh Assembly be summoned to determine confidence.<sup>32</sup>

The question of whether there is a reserve power to summon a meeting of Parliament to deal with the issue of confidence has also been considered in the Solomon Islands with mixed results. In 1994 the Prime Minister admitted to the Governor-General that he did not have the confidence of Parliament, but carried on governing and refused to advise that Parliament be summoned. The Governor-General eventually dismissed the Prime Minister and summoned Parliament. The Court of Appeal held that the Governor-General could summon Parliament without advice. Two of the judges noted that 'a Prime Minister who hangs on to office while conceding that he has no majority is in no position to insist that the Governor-General's functions can only be exercised on his advice'.<sup>33</sup> But in 1998, when the same issue arose, the Court of Appeal held that the Governor-General had no power to summon Parliament and that such a reserve power did not exist.<sup>34</sup>

### *Responsibility and necessity*

An even more extreme case, which is most unlikely to occur in Australia, is where the Queen ceases to have any responsible Ministers in a country at all, because a coup has occurred and the Parliament has been disbanded. A new revolutionary government may seize effective control of a country and seek to retain the position of Governor-General and the role of the Queen, as occurred in Sierra Leone in 1967, in Grenada in 1979 and in Fiji in 1987. Should the Queen and her vice-regal representatives, however, continue to accept advice from 'Ministers' who are not responsible at all to an elected Parliament or the people? If we accept that a new Crown is created when the Queen is directly advised by Ministers responsible to a legislature of a particular polity, is it also the case that a Crown may self-destruct if responsible government ceases? Does the Queen have a reserve power to terminate the Crown in a polity?

### *Sierra Leone and Grenada*

The coups in Sierra Leone and Grenada are interesting on a number of grounds.<sup>35</sup> First, they show why the role of the Queen and sometimes the Governor-General are preserved by revolutionary or military regimes. This is because of international recognition. The need to recognise a new regime only arises if there is a change in state, not a change in government. If you keep the Queen as head of state, then you retain international recognition by other countries. This is something that British diplomats explain to the new revolutionary government, so that the British don't have to worry about whether or not to give recognition to the new regime and can avoid 'presentational' issues arising in the Westminster Parliament.

Secondly, if a Governor-General's existence becomes inconvenient, they are easily despatched by what is known as the 'Irish solution', which involves sending them on leave prior to retirement. This must appear to be 'voluntary' for 'presentational' reasons.

But it is often far from voluntary, as the resignation letter is written by British officers and given to the coup leaders to persuade the unfortunate incumbent to sign.

Thirdly, and most remarkably, neither the British Government nor the Palace, at least in 1967 and 1979 appeared to have the slightest qualms about the Queen being advised by a military junta or a revolutionary government. The fact that her advisers were not responsible to anyone did not raise even a mention in British files. Nor did the question arise as to whether the Queen should cease to give legitimacy to non-democratic and sometimes brutally oppressive regimes by terminating the role of the Crown.

### *Fiji*

The Queen's role in relation to the first Fijian military coup of 1987 was different. She played a much more active role, perhaps because of the interests of other Commonwealth countries, such as India, in the racially discriminatory aspects of the coup. The Queen supported the Governor-General when he rejected the authority of the coup leader and assumed executive power himself.<sup>36</sup> Her Majesty accepted that as her Prime Minister and other Ministers were being detained, the Governor-General was the sole legitimate source of executive authority in Fiji.

Her Majesty continued to support the Governor-General, even after he dissolved Parliament and dismissed all Ministers. When her deposed Prime Minister, Dr Bavadra, was released and sought to see her in London, she refused to meet him. In doing so, the Palace stated that Her Majesty was acting on the advice of the Governor-General.<sup>37</sup> Implicit in acceptance of this advice was acceptance that Dr Bavadra had been effectively deposed and was no longer her responsible adviser and that the Governor-General, by virtue of the doctrine of necessity, continued to be her only adviser.

The Queen continued to support the Governor-General publicly after a second military coup took place in September 1987 and the coup leader, Colonel Rabuka, declared that Fiji was a republic.<sup>38</sup> But the Queen's support went silent after the Governor-General stated that he saw the necessity of changing the Fijian Constitution to entrench special political rights for indigenous Fijians, including a permanent majority of seats in Parliament, and the reservation of all important offices, such as Governor-General, Prime Minister, Minister for Foreign Affairs and Minister for Home Affairs, for indigenous Fijians.<sup>39</sup> As the press noted at the time, such an approach would be contrary to the principles that underlie the multi-racial Commonwealth.<sup>40</sup>

Worse still, the Governor-General endorsed a plan by a former Prime Minister, Ratu Sir Kamisese Mara, that such changes to the Constitution should be made by the Queen herself, under a supposed extraordinary prerogative to directly amend the Fijian Constitution. When Ratu Mara came to London, as the Governor-General's emissary, to advise the Queen on this proposal, she refused to see him.<sup>41</sup> This time she did not act on the Governor-General's advice.<sup>42</sup> Her Majesty then, through her Private Secretary, pressured the Governor-General to resign and stated that acceptance of his resignation terminated her role as Queen of Fiji.<sup>43</sup> For the first time, the Queen ended her

sovereignty over a nation, without the advice of any responsible advisers. The extraordinary prerogative or reserve power that she exercised in this case was not to amend the Constitution *per se*, but to do so in effect by terminating the Crown and her office as Queen of Fiji.

### **Rule of Law**

One vital aspect of the ‘rule of law’ is that the executive is subject to the law and to the Constitution. As the Privy Council has noted, ‘the rule of law requires that those exercising public power should do so lawfully’ and ‘in accordance with the Constitution’.<sup>44</sup> This applies not only to Ministers but also to the Governor-General. From colonial times, vice-regal representatives were obliged to obey the law.<sup>45</sup> Alpheus Todd, quoting from an 1870 despatch from the Colonial Secretary to the Governor of NSW, noted that if the law requires the Governor to do one thing, and the Governor’s Ministers advise the Governor to act contrary to the law, it is the Governor’s ‘plain duty to obey the law; and it would be idle to object that such obedience was unconstitutional; for the Governor is himself a branch of the legislature’.<sup>46</sup>

Sir Ellis Clarke, who was successively Governor-General and then first President of Trinidad and Tobago, strongly adhered to this view. He stated:

Provided that he is satisfied as a matter of law that he has the power to do something, the President must exercise that power in accordance with ministerial advice. Such advice cannot, however, endow the President with a power denied him by law. One must first ascertain the legal competence of the act contemplated, and, if it exists, then how the power is exercised is a matter for ministerial advice. If what is advised is not *intra vires*, the advice must be rejected for no advice, including that of an Attorney-General can render legal that which is, advice apart, *ultra vires*.<sup>47</sup>

The difficulty, however, is *how* the Governor-General ascertains that the actions that he or she is being advised to take are legally valid. Not all vice-regal representatives are lawyers. For the most-part, however, it is simply a matter of checking that the relevant action falls within the specified statutory power. Executive Council minutes are provided in advance and when potential mistakes are identified, the matter is queried with relevant public servants and legal advice is taken to correct any errors. Given the volume of material that goes to Executive Council, it is not unusual for errors to be spotted and dealt with in this way. The former Governor-General, Sir Paul Hasluck, saw it as one of the ‘main responsibilities of the Governor-General... to make sure that all actions of the Government [taken through the Federal Executive Council] are constitutionally correct and lawful.’<sup>48</sup>

Where the legal issue is more difficult or controversial, a vice-regal representative may seek the advice of the Crown Law Officers, being the Attorney-General, the Solicitor-General and the Crown Solicitor, on the legality of proposed action. If advised that it is legal, the Governor is entitled to act upon that advice, in which case responsibility for the

Governor's actions vests in the government. This point was stressed by the British Colonial Office to Governors in the early 20<sup>th</sup> century when they raised concern that they would be participating in illegal acts if they issued warrants for expenditure without an appropriation or assented to appropriation bills that had not been passed by the upper House.<sup>49</sup> The Governors were told that if they acted in accordance with ministerial advice and the formal written advice of the Crown Law officers as to the validity of their actions, then responsibility for any invalid action would rest with Ministers rather than the Governor.<sup>50</sup>

If, however, Crown legal advice admits illegality or the Government declines to provide legal advice when requested or does not deny that the action advised is illegal, then the Governor *may* choose not to act as advised.<sup>51</sup> This does not mean that he or she *should* do so. Other considerations also come into play, such as respect for the separation of powers and the consideration that in most cases issues of legality should be left to the courts to decide.

If the matter cannot be dealt with by a court, or if the crisis is such that waiting for a court decision is impractical, then another alternative is resignation. Sir Fred Phillips, when Governor of St Kitts, took this course rather than accept advice he considered unlawful.<sup>52</sup> However, while the publicity attracted by a Governor-General's resignation might bring the issue to a head, in most cases it simply passes the problem on to someone else, rather than resolving it. For example, if a State Governor were to resign or temporarily stand aside to avoid being involved in illegality, this would drop the problem in the lap of the Lieutenant-Governor or Administrator, who is usually the State Chief Justice. Query whether a Chief Justice, in order not to compromise his or her judicial office<sup>53</sup> must place greater weight on the rule of law than on responsibility when performing the duties of the Governor?

Issues of legality most commonly arise in relation to the exercise of the power to grant royal assent to bills. As the validity of Bills or Acts can be determined by the courts, the view rightly taken in Australia is that it should be left to the courts to decide, either after assent has been given, or sometimes, where manner and form issues arise, before assent is given.<sup>54</sup> The Western Australian *Marquet* case is an example.<sup>55</sup>

Interestingly, in 1979 the British Foreign Secretary, Lord Carrington, sent a despatch to the NSW Governor stating that, if reserved, it would be his duty to advise her Majesty to refuse her assent to the *Privy Council Appeals Abolition Bill 1979* (NSW) because in his view it was unconstitutional.<sup>56</sup> Australian officials argued that its constitutionality was a matter for the courts, but the British could not be dissuaded.<sup>57</sup> They would not permit the Queen to assent to a Bill that they regarded as invalid. British officials also considered refusing assent to the Victorian *Constitution Act 1975* on the ground that one clause, regarding legislative power in relation to offshore mining, might be unconstitutional.<sup>58</sup>

What if a court decides that a Bill is invalid but the Government insists that assent still be given to it? This situation arose in St Kitts in 1981. The Bill in question increased significantly the salaries of Ministers. It was declared constitutionally invalid by the

High Court. While an appeal was pending, the Government submitted the Bill to the Governor for royal assent. The Governor refused to give assent until such time as the courts found the Bill to be valid. The Premier requested the Governor's resignation for refusing to act on advice. The Governor refused to resign. The Premier then advised the Queen to withdraw the Governor's commission and she did so. The Governor apparently found out when a Royal Navy helicopter landed in his garden and he was handed the notice of the termination of his appointment.<sup>59</sup>

So even if we accept that in the normal course, a Governor should assent to a law that is potentially constitutionally invalid, leaving it to the courts to decide its validity, must he or she give assent, on ministerial advice, in circumstances where a court has already held the Bill to be unconstitutional, even if the matter is on appeal? In such a case, one might reasonably take the view that the rule of law trumps responsibility. Curiously, however, while the British Government appears to have taken the view that the rule of law trumps responsibility when it comes to the grant of royal assent to reserved bills, the Queen seems to have accepted the advice of her responsible ministers over considerations of the rule of law, when it came to dismissing a Governor. Although it is sometimes suggested that the Queen has a reserve power to refuse advice from a responsible adviser to dismiss a vice-regal representative,<sup>60</sup> there is no evidence, yet, of her exercising such a power, and she certainly did not do so in this case.

For reasons of time, I will pass over the 1932 dismissal of the Lang Government, other than to note that when the Governor, Sir Philip Game, sought and received Crown legal advice that the infamous NSW Government Circular did not breach the *Audit Act* 1902 (NSW), he accepted that advice and concluded that he had no grounds upon which to act. It was only a month later, when the Circular was renewed and in conflict with a Commonwealth law, and the Premier both refused the Governor legal advice and did not contest that the Government was in breach of the law, that the Governor acted. While it is true that the issue of legality *could* and probably *should* have been decided by a court,<sup>61</sup> given the extreme economic and political circumstances of the time and the imminent threat of serious violence, one must have some sympathy with the Governor's view that immediate action to refer the issue back to the people in an election was the preferable course.

### **Necessity**

When it comes to reserve powers, the doctrine of necessity may justify acts that would otherwise be unconstitutional if they were undertaken in extreme circumstances in order to restore constitutional government. An example arose during a crisis in Dominica in 1979. The President left the country without taking the required constitutional steps for appointing an Acting President and the Speaker resigned. The result was that Parliament could not be convened and could not be dissolved. It was only by extra-constitutional action that a new government was chosen and responsible government was restored.<sup>62</sup>

In other circumstances, extra-constitutional action may be necessary to save lives. An example occurred in Trinidad in 1990. An armed group seized the Parliament and held

the Prime Minister and other Members captive. The militants insisted upon being granted a pardon before they would release the hostages. The Prime Minister, while still a captive, refused to advise that a pardon be issued. Instead he recommended that the army storm the building. His captors responded by shooting him, although not fatally. The Acting President signed the pardon on the condition that all the captives be safely returned. They were released some days afterwards, after further negotiations.

The militants were then arrested. Their action for habeas corpus, relying on the pardon, was successful in the Privy Council.<sup>63</sup> The Government then challenged the validity of the pardon on the ground that it had been given under duress. The Privy Council concluded that it was not given under duress, as the Acting President was not subject to direct physical violence,<sup>64</sup> but it was invalid because the militants had not been sufficiently prompt in releasing the hostages.<sup>65</sup> Curiously, the point was not made that the Acting President had no power to issue the pardon.<sup>66</sup> He could only act on the advice of his responsible Ministers, although this was not possible given that they were being held hostage. Presumably the doctrine of necessity applied, turning a power that normally had to be exercised upon advice into one that could be exercised without advice and at discretion.

Most modern jurisprudence on the doctrine of necessity now relies upon the judgment of Haynes P in the Grenada Court of Appeal in *Mitchell v DPP*. He held that the doctrine of necessity could be used to validate unconstitutional legislation in exceptional circumstances where immediate action is necessary to protect or preserve some vital function of the State, where no other reasonable course of action is possible and the action does not impair the rights of citizens. He stressed that the sole effect of the action must not be to consolidate or strengthen the revolution.<sup>67</sup>

In *Republic of Fiji v Prasad*,<sup>68</sup> the Court of Appeal of Fiji followed this analysis, holding that the doctrine of necessity authorised the taking of all necessary steps after the 2000 coup, whether authorised by the Constitution or not, to restore law and order and secure the release of the government hostages. However, once they were released and the emergency had abated, the application of the Constitution revived. The Court concluded that the 'doctrine of necessity does not authorise permanent changes to a written constitution, let alone its complete abrogation'.<sup>69</sup>

The danger of the doctrine of necessity is that it is later used by new coup leaders to justify further unconstitutional action. This was the case in Fiji, where the President and the head of the armed forces attempted to justify many of their actions in relation to the 2006 coup on the ground of necessity as well as the identification of a prerogative to deal with national emergencies, which was claimed to have been inherited from the previous constitutional monarchy and which apparently turned into a reserve power during the emergency. The Court of Appeal of Fiji dismissed these arguments, holding that the doctrine of necessity did not apply and nor was there a reserve power to dismiss the Prime Minister or deal with an emergency.<sup>70</sup>

The Court of Appeal did, however, apply the doctrine of necessity to allow the President to appoint a caretaker Prime Minister to advise the issue of the writs for a new election.<sup>71</sup> The doctrine of necessity was therefore used for the purpose of restoring democracy through the holding of elections, rather than to justify the usurpation of legislative and executive power and the termination of responsible government.

It did not, however, work, as the response of the coup leaders was to abrogate the Constitution, dismiss the judges and ignore the judgment. The use of the doctrine of necessity as both a justification for departure from responsibility and the rule of law and a bridge to restore responsibility and the rule of law is not always effective, at least where there are persons with sufficient ammunition to blow that bridge up.

## Conclusion

There is a tendency to place the reserve powers in boxes. One might well call them Pandora's boxes, because there is great trepidation about opening them, for fear of what might be released. In my view, they are better considered in terms of the constitutional principles that underlie them. While this may open up the possibility of reserve powers being used in relation to other subjects, such as the operation of caretaker conventions or the prorogation or summoning of Parliament, this should not be a matter of alarm as long as they are applied in accordance with the relevant constitutional principles to secure responsible constitutional governance, rather than as anomalous exceptions.

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<sup>1</sup> See further: Anne Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence* (Federation Press, 2010) p 137.

<sup>2</sup> *R v Secretary of State for Foreign and Commonwealth Affairs; Ex parte Indian Association of Alberta* [1982] 1 QB 892, 917 (Lord Denning MR). See further: Anne Twomey, *The Australia Acts 1986 – Australia's Statutes of Independence* (Federation Press, 2010) pp 457-467.

<sup>3</sup> Geoffrey Marshall and Graeme Moodie, *Some Problems of the Constitution*, (Hutchinson & Co Ltd, London, 4<sup>th</sup> ed 1967), 50-1; Jorgen Rasmussen, 'Constitutional Aspects of Government Formation in a Hung Parliament' (1987) *Parliamentary Affairs* 139, 142; Republic Advisory Committee, *An Australian Republic – The Options*, Vol 2, Appendix 6, (Cth Gov Printer, 1993) 250, 254.

<sup>4</sup> Note Brazier's concern about the order of advice – if the advice on a successor is given after, rather than before, resignation, he sees this as not being 'formal' advice: Rodney Brazier, *Constitutional Practice*, (Oxford University Press, 3<sup>rd</sup> ed, 1999) 14. Note, however, that in practice, Commonwealth Prime Ministers announce their intention to resign in the first paragraph of their letter and advise on their successor in a later paragraph, but the resignation is stated not to take effect until a new Prime Minister is appointed: Anne Twomey, 'Changing the Leader – The Constitutional Conventions Concerning the Resignation of Prime Ministers and Premiers' (2011) 39 *Federal Law Review* 329, 342.

<sup>5</sup> Commonwealth and State practice is discussed in: Anne Twomey, 'Changing the Leader – The Constitutional Conventions Concerning the Resignation of Prime Ministers and Premiers' (2011) 39 *Federal Law Review* 329, 342.

<sup>6</sup> Canada, Privy Council Office, *Manual of Official Procedure of the Government of Canada* (Ottawa, 1968), 145.

<sup>7</sup> *Mahabir Prasad Sharma v Prafulla Chandra Ghose*, AIR 1969 Cal 198, [43].

<sup>8</sup> See examples of refusals of dissolutions in India: M P Jain, *Indian Constitutional Law with Constitutional Documents – An Exhaustive and Analytical Commentary on Indian Constitutional Law* (Lexis Nexis, 6<sup>th</sup> ed, 2010) p 439.

<sup>9</sup> M P Jain, *Indian Constitutional Law with Constitutional Documents – An Exhaustive and Analytical Commentary on Indian Constitutional Law* (Lexis Nexis, 6<sup>th</sup> ed, 2010) pp 438-42. See also: *Rameshwar Prasad v Union of India* AIR 2006 SC 980 where the Indian Supreme Court set aside a dissolution in Bihar; and Nepal where a court overruled a dissolution: Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (CUP, 2002) p 121.

<sup>10</sup> *Madan Murari Verma v Choudhary Charan Singh* AIR 1980 Cal 95, [20]. The decision was upheld (although the issue regarded as moot) by the Supreme Court of India in *Harsharan Verma v Charan Singh* (1985) SCR (2) 70; SCC (1) 162. See also *Sudershan Goel v Union of India* 44 (1991) DLT 328 [6] (Delhi High Court) for recognition that the President of India may refuse and had refused to accept some advice during the caretaker government period.

<sup>11</sup> Note Hasluck's observation that a Governor-General may defer action on advice by a single Minister that would involve a breach of the caretaker conventions and seek the advice of the Prime Minister and Cabinet as to whether the urgency is so great that the action must be taken at once: Sir Paul Hasluck, *The Office of Governor-General*, (MUP, 1979) p 18.

<sup>12</sup> Memorandum by Mr Dunstan to the SA Governor, 26 February 1968; and Despatch by SA Governor to the Foreign Secretary, 26 February 1968: UK Public Records Office ('PRO'): FCO 49/131.

<sup>13</sup> Letter by Sir M Adeane, Private Secretary to the Queen, to Sir M James, FCO, 7 May 1968: PRO: FCO 49/131.

<sup>14</sup> Memorandum by Sir M James, FCO, to the Secretary of State, 29 February 1968: PRO: FCO 49/131. Note that Evatt raised such a scenario in 1936, querying whether, if a Ministry sought the appointment of a new Governor-General on the eve of a general election, the King was bound to act upon such advice immediately or could await the result of the election: H V Evatt, *The King and His Dominion Governors*, (OUP, Oxford, 1936), p 193.

<sup>15</sup> See, eg, in Malaysia: *Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli* [1966] 2 MLJ 187; *Datuk (Datu) Amir Kahar bin Tun Datu Haji Mustapha v Tun Mohd Said bin Keruak, Yang di-Pertua Negeri Sabah* [1995] 1 MLJ 169; *Dato' Seri Ir. Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir* [2010] MYFC 14; in India: *Jagdambika Pal v Union of India* AIR 1998 SC 998; and in Fiji: *Yabaki v President of the Republic of Fiji* [2003] FJCA 3.

<sup>16</sup> Oluwole Idowu Odumosu, *The Nigerian Constitution: History and Development* (Sweet & Maxwell, London, 1963) p 277.

<sup>17</sup> *Akintola v Aderemi and Adegbenro* [1962] 1 All NLR 442.

<sup>18</sup> Oluwole Idowu Odumosu, *The Nigerian Constitution: History and Development* (Sweet & Maxwell, London, 1963) pp 280-3.

<sup>19</sup> The lack of fresh elections has been criticised. Ojo has argued that if elections had been held, the Opposition would have won: J D Ojo, *The Development of the Executive under the Nigerian Constitutions 1960-1981* (University Press, Ibadan, 1985) p 158.

<sup>20</sup> Geoffrey Sawer, 'Emergency Powers in Nigerian and Malayan Federalism' (1964) 6 *Malaya Law Review* 83, 91.

<sup>21</sup> B O Nwabueze, *Constitutional Law of the Nigerian Republic*, (Butterworths, London, 1964), p 235, referring to statements made in a speech by the Prime Minister, Sir Abubakar, introducing the motion for the ratification of the *Constitution of Western Nigeria (Amendment) Law* 1963: House of Representatives Debates, 3 June 1963.

<sup>22</sup> *Adegbenro v Akintola* [1963] AC 614.

<sup>23</sup> This constitutional amendment was ratified by the federal Parliament: J D Ojo, *The Development of the Executive under the Nigerian Constitutions 1960-1981* (University Press, Ibadan, 1985) p 148.

<sup>24</sup> See: *Republic of Fiji v Prasad* [2001] 2 LRC 743 (the response to which was the dismissal of the restored Prime Minister and the dissolution of Parliament); and *Qarase v Bainimarama* [2009] 3 LRC 614 (the response to which was the abrogation of the Constitution and the dismissal of the judges).

<sup>25</sup> *In re Reference to Constitution section 19(1) by East Sepik Provincial Executive* [2011] PGSC 41; SC1154 (12 December 2011); and *In re Constitution Section 19(1) - Special reference by Allan Marat; In re Constitution Section 19(1) and 3(a) - Special reference by the National Parliament* [2012] PGSC 20; SC1187 (21 May 2012).

<sup>26</sup> Andrew Heard, 'The Governor-General's Decision to Prorogue Parliament: A Chronology and Assessment' (2009) 18 *Constitutional Forum* 1, 5; Eric Adams, 'The Constitutionality of Prorogation' (2009) 18 *Constitutional Forum* 17; Peter Hogg, 'Prorogation and the Power of the Governor General'

(2009) 27 *National Journal of Constitutional Law* 193, 196-9; C E S Franks, 'To Prorogue or Not to Prorogue: Did the Governor General Make the Right Decision?' in P Russell and L Sossin, *Parliamentary Democracy in Crisis* (Uni Toronto Press, Toronto, 2009), 33, 44.

<sup>27</sup> Peter Hogg, 'Prorogation and the Power of the Governor General' (2009) 27 *National Journal of Constitutional Law* 193, 197-8 and 201.

<sup>28</sup> See also the view of the then Tasmanian Governor, Sir Stanley Burbury, that the Governor has a discretionary power with regard to prorogation, but should only decline to act on advice in exceptional circumstances, such as when a motion of no confidence is before the House: Letter by Sir Stanley Burbury to Mr James Guest MLC, 12 March 1984, reprinted in: *Proceedings, Proceedings of the Australian Constitutional Convention*, Brisbane, 1985, Vol II, Structure of Government Sub-Committee Report, August 1984, Appendix H, 72-3. See also Taylor's view that 'the Crown might very properly refuse to prorogue the Legislative Assembly despite advice to do so during a debate on a no-confidence motion and in the period after notice of such a motion has been given': Greg Taylor, *The Constitution of Victoria*, (Federation Press, 2006) 131.

<sup>29</sup> Note Winterton's view that there is a 'strong case' for such a power being added to the list of reserve powers, 'for otherwise incumbent Premiers could prolong their tenure in the face of a threatened no-confidence motion by refusing to advise the Governor to summon Parliament': George Winterton, 'The Constitutional Position of Australian State Governors' in H P Lee and G Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 274, 297. See also: D Lumb, *The Constitutions of the Australian States*, (University of Queensland Press, 5<sup>th</sup> ed, 1991) 78, where Lumb appears to contemplate such a use of the reserve powers.

<sup>30</sup> See: Greg Taylor, *The Constitution of Victoria*, (Federation Press, 2006) 131 and 141. Taylor's argument seems to apply both the doctrine of necessity and the principle of responsible government. Cf Killey who seems more skeptical about the existence of such a reserve power: Ian Killey, *Constitutional Conventions in Australia*, (Australian Scholarly Publishing, 2009) 181.

<sup>31</sup> *Mahabir Prasad Sharma v Prafulla Chandra Ghose* AIR 1969 Cal 198, [47].

<sup>32</sup> *Jagdambika Pal v Union of India* AIR 1998 SC 998, 999. Note that a court has also made such a ruling in Nepal: Graham Hassall and Cheryl Saunders, *Asia-Pacific Constitutional Systems* (CUP, 2002) p 121.

<sup>33</sup> *Hilly v Governor-General of Solomon Islands* [1994] 2 LRC 27 [33] (Connolly P and Los JA).

<sup>34</sup> *Prime Minister v Governor-General* [1999] SBCA 6.

<sup>35</sup> The following discussion is based upon British Government files accessed in the UK National Archives and documents received under a freedom of information application.

<sup>36</sup> 'A Powerless Plea for Calm', *Sydney Morning Herald*, 19 May 1987, p 9, setting out the full text of a broadcast by the Governor-General which quotes from the Queen's message of support.

<sup>37</sup> 'Queen won't See Ex-Fiji Premier Seeking Her Help, London Says', *Los Angeles Times*, 8 June 1987; Amit Roy, 'Fiji's ousted prime minister is left to ponder the meaning of democracy: Bavadra limps home spurned by Britain', *The Sunday Times*, 14 June 1987. See also: Foreword by Sir William Heselstine, Private Secretary to the Queen, in Len Usher, *Letters From Fiji 1987-1990* (Fiji Times Ltd, Suva, 1992) pp v-vii.

<sup>38</sup> Andrew Bolger, 'Rare Royal Warning May Tip Balance', *Financial Times*, 1 October 1987, p 20; and 'Governor is in charge, Queen tells the Colonel', *Sydney Morning Herald*, 2 October 1987, p 7.

<sup>39</sup> Mary-Louise O'Callaghan, 'Ganilau concedes Fijian rights', *Sydney Morning Herald*, 13 October 1987, p 13.

<sup>40</sup> Chris Sherwell and Robert Mauthner, 'Dilemma for Governor as Fiji Talks Fail', *Financial Times*, 6 October 1987, p 24.

<sup>41</sup> Mary-Louise O'Callaghan, 'Mara takes Fiji plan to Queen', *Sydney Morning Herald*, 9 October 1987, p 1.

<sup>42</sup> Michael Evans, 'Ganilau supports changes: Fiji crisis and the Commonwealth' *The Times*, 12 October 1987.

<sup>43</sup> Daryl Tarte, *Turaga – The Life and Times and Chiefly Authority of Ratu Sir Penaia Ganilau in Fiji* (Fiji Times Ltd, 1993) p 188.

<sup>44</sup> *Bobb v Manning (Trinidad and Tobago)* [2006] UKPC 22, [14] (Lord Bingham of Cornhill).

<sup>45</sup> W Hearn, *The Government of England* (George Robertson & Co, Melbourne, 2<sup>nd</sup> ed, 1886) p 133; A Todd, *Parliamentary Government in the British colonies* (Longmans, Green & Co, London, 2<sup>nd</sup> ed, 1893) p

632; and Sir H Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (Clarendon Press, Oxford, 1902) p 110.

<sup>46</sup> A Todd, *Parliamentary Government in the British Colonies* (Longmans, Green & Co, London, 2<sup>nd</sup> ed, 1893) pp 634-5.

<sup>47</sup> Sir Ellis Clarke, 'Trinidad and Tobago' in Republic Advisory Committee, *An Australian Republic – The Options*, Vol 2, (1993) 206, 217.

<sup>48</sup> Sir Paul Hasluck, *The Office of Governor-General*, (MUP, 1979) p 17. See also: Richard E McGarvie, *Democracy – Choosing Australia's Republic* (MUP, 1999) 66-70. Compare: Geoffrey Lindell, 'Governor-General' in T McCormack and C Saunders (eds) *Sir Ninian Stephen – A Tribute* (The Miegunyah Press, 2007) 26, 40-1.

<sup>49</sup> See Despatches by the SA Governor, Sir Henry Galway, to the Colonial Secretary, Mr Long, 13 January 1917 and 23 July 1917; and replies by the Colonial Secretary, 28 February 1917 and 20 February 1918: PRO: CO 881/15/6. See also: Despatches by the Tas Lieutenant-Governor, Sir H Nicholls, to the Colonial Secretary, 25 November 1924 and 1 December 1924: PRO: CO 881/15/8.

<sup>50</sup> Telegrams by Colonial Secretary to the WA Governor, 6 December 1924; and to the Tasmanian Lieutenant-Governor, 29 November 1924 and to the Tasmanian Governor, 21 January 1925 and 26 November 1925: PRO: CO 881/15/8.

<sup>51</sup> A B Keith, *The Dominions as Sovereign States* (McMillan & Co Ltd, London, 1938) p 228.

<sup>52</sup> Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law*, (Cavendish Publishing, 2002) p 332.

<sup>53</sup> On the need not to compromise the perceived independence of the judiciary, see: *Kable v DPP (NSW)* (1996) 189 CLR 51; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

<sup>54</sup> Note also the controversy as to whether a vice-regal representative acts upon the advice of the Houses of Parliament or upon the advice of Ministers in giving assent, and whether he or she should refuse or defer assent if so advised by Ministers: Anne Twomey, 'The Refusal or Deferral of Royal Assent' (2006) *Public Law* 580; John Waugh, 'Government Control of Royal Assent in Victoria' (2006) 8(4) *CLPR* 69; Greg Taylor, 'Two Refusals of Royal Assent in Victoria' (2007) 29(1) *Sydney Law Review* 85; Kate Murray, 'Royal Assent in Victoria' (2008) 23(2) *Australasian Parliamentary Review* 41-65.

<sup>55</sup> *Attorney-General (WA) v Marquet* (2003) 217 CLR 545.

<sup>56</sup> Despatch by Lord Carrington to Sir Roden Cutler, 19 November 1979.

<sup>57</sup> See further: Anne Twomey, *The Chameleon Crown – The Queen and Her Australian Governors*, (Federation Press, 2006), pp 182-190.

<sup>58</sup> See further: Anne Twomey, *The Australia Acts – Australia's Statutes of Independence* (Federation Press, 2010) pp 283-4.

<sup>59</sup> See further: Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law*, (Cavendish Publishing, 2002) p 332.

<sup>60</sup> G Lindell, 'The Role of a State Governor in Relation to Illegality' (2012) 23 *Public Law Review* 268, 273-4; and R Lumb, *The Constitutions of the Australian States* (UQP, 5<sup>th</sup> ed, 1991) pp 78-83.

<sup>61</sup> See further: Anne Twomey, 'The Dismissal of the Lang Government' in George Winterton (ed), *State Constitutional Landmarks*, (Federation Press, 2006) 129, 157-60.

<sup>62</sup> Sir Fred Phillips, *Commonwealth Caribbean Constitutional Law*, (Cavendish Publishing, 2002) pp 200-3.

<sup>63</sup> *Lennox Phillip and Ors v DPP and Attorney-General of Trinidad and Tobago* [1992] 1 AC 545.

<sup>64</sup> *Attorney-General of Trinidad and Tobago v Lennox Phillip* [1995] 1 AC 396, 412-3 (Lord Woolf).

<sup>65</sup> *Attorney-General of Trinidad and Tobago v Lennox Phillip* [1995] 1 AC 396, 415-7 (Lord Woolf).

<sup>66</sup> Michael de la Bastide, 'Commonwealth Caribbean Jurisprudence and the Privy Council' (1995) 22 *Revista IIDH* 27, 45.

<sup>67</sup> *Mitchell v DPP* [1986] LRC (Const) 35, 88-9 (Haynes P).

<sup>68</sup> *Republic of Fiji v Prasad* [2001] 2 LRC 743; [2001] NZAR 385. See also *Prasad v Republic of Fiji* [2001] NZAR 21 (Gates J) at first instance.

<sup>69</sup> *Republic of Fiji v Prasad* [2001] 2 LRC 743; [2001] NZAR 385, [50]-[51].

<sup>70</sup> *Qarase v Bainimarama* [2009] FJCA 9, [132].

<sup>71</sup> *Qarase v Bainimarama* [2009] FJCA 9, [158].