

## ARTICLE

**To Dismiss, or Not to Dismiss?**

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The Governor-General's reserve power of appointment and dismissal of Prime Ministers should be reformed to enhance the operation of the rule of law, defined as legal certainty. First, the theoretical framework of the political constitution, and the way in which Governor-General is an arbitrary actor within it, is explored. Second, the 1975 Kerr-Whitlam crisis in Australia illustrates that in the absence of clear and objective constitutional conventions surrounding the reserve power, the political and arbitrary elements of the political constitution can dramatically damage each other. Third, constitutional conventions guiding the use of the reserve power of appointment and dismissal are inherently and irredeemably uncertain. Fourth, legal codification of the reserve power is desirable as it would solve the uncertainty problem. Instead of creating a set of criteria for the exercise of the reserve power that is policed by strong judicial review, we should instead grant Parliament the power of appointment and dismissal, with no independent role for the Governor-General. This reform would strengthen both the political constitution, as it would enhance the ability of political actors to hold themselves to account, and the legal constitution, as it would enhance the operation of the rule of law through clarifying the uncertainty of the status quo.

**I Introduction**

The reserve power of the New Zealand Governor-General to appoint and dismiss a Prime Minister does not sit well with New Zealand's political constitution, which allows political actors to prescribe the nature and content of the constitution through the ordinary political process. The reserve power should therefore be codified to give greater pre-eminence to the rule of law. Doing so would remove the high degree of arbitrariness

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currently present in its exercise and bring greater certainty to our constitutional boundaries.

For my argument to be substantiated, there are a number of burdens that must be discharged. In Part II, I demonstrate that New Zealand predominantly has a political constitution, which gives actors in the system a high degree of discretion to determine the exact nature of the constitution, and I set out important continuities and discontinuities concerning the office of the Governor-General and the political constitution. In Part III, I demonstrate that the discretion surrounding the reserve power is characterised by uncertainty, as shown by its use and contribution to the 1975 crisis of the dismissal of Australian Prime Minister Gough Whitlam by Governor-General John Kerr. In Part IV, I discuss how the status quo of the reserve power cannot be justified under the rule of law, since a lack of comprehensive conventional guidance creates acute uncertainty. In addition, I identify that a Governor-General and a Prime Minister who each simultaneously has the power to remove the other can lead to a potential standoff and creates arbitrariness. In Part V, I examine constitutional codification of the reserve power of appointment and dismissal as a desirable remedy to further safeguard the rule of law and legal certainty, by removing the independent discretion of the Governor-General entirely and instead giving it to Parliament. First, however, it is important to look at the office and role of the Governor-General.

The office of the Governor-General is of great constitutional, ceremonial and communal importance to New Zealand.<sup>1</sup> While Queen Elizabeth II is the official Monarch and Head of State of New Zealand, the Governor-General, “Her Majesty’s representative in New Zealand”,<sup>2</sup> However, in practice the Governor-General acts independently as New Zealand’s effective head of state, even if he or she lacks that title.<sup>3</sup> Notably, the Governor-General is appointed “on the recommendation of the Prime Minister of New Zealand”.<sup>4</sup>

A number of statutes govern the office. The Governor-General Act 2010 provides for the salary, allowance, annuity and travel expenses relating to the office.<sup>5</sup> The Constitution Act 1986 provides that the Governor-General acts on the advice of the Executive Council when exercising a power.<sup>6</sup> By the same Act, the Governor-General has the power to give Royal Assent to sign a Bill into law, summon, dissolve and prorogue Parliament, and remove a Judge from the High Court.<sup>7</sup>

However, the most important legal instrument concerning the office is the Letters Patent Constituting the Office of the Governor-General of New Zealand 1983.<sup>8</sup> Under cl 10, the Governor-General is given the power to appoint Ministers of the Crown, including the Prime Minister.<sup>9</sup> This power of appointment necessarily includes the power of dismissal.<sup>10</sup> This power is known as a reserve power of the Crown, meaning that the Governor-General

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1 Gavin McLean *The Governors: New Zealand’s Governors and Governors-General* (Otago University Press, Dunedin, 2006) at 9–10.

2 New Zealand Government “The Office of the Governor-General” (27 February 2017) The Governor-General of New Zealand <<https://gg.govt.nz>>; and Constitution Act 1986, s 2(2).

3 McLean, above n 1, at 349.

4 New Zealand Government “The Office of the Governor-General” (27 February 2017) The Governor-General of New Zealand <<https://gg.govt.nz>>; and Constitution Act 1986, s 2(2).

5 Governor-General Act 2010, ss 5–14.

6 Section 3A(1).

7 Sections 16, 18 and 23.

8 Alison Quentin-Baxter and Janet McLean *This Realm of New Zealand: The Sovereign, the Governor-General, the Crown* (Auckland University Press, Auckland, 2017) at 95.

9 Letters Patent Constituting the Office of Governor-General of New Zealand 1983, cl 10.

10 Quentin-Baxter and McLean, above n 8, at 169.

can exercise his or her discretion independently of government advice, which ordinarily he or she must abide by.<sup>11</sup>

The exercise of the Governor-General's constitutional discretions are governed by convention, not hard law.<sup>12</sup> One of the most important constitutional conventions is that a Prime Minister who has lost the confidence of the House of Representatives must resign or advise the Governor-General to dissolve Parliament and call an election.<sup>13</sup> Theoretically, therefore, the Governor-General's power of dismissal should not have to be exercised, since Prime Ministers are obligated by constitutional convention to resign in certain scenarios and a dismissal would only be necessary if a Prime Minister refused.<sup>14</sup> However, as will be seen, this is not always the case.

In light of this legal context, let us turn to a possible normative framework for this office within the constitution.

## II Normative Framework

Unlike most constitutional frameworks around the world, New Zealand's constitution is not predominately a legal one. Rather, New Zealand's constitutional practice can best be explained by reference to the idea of the political constitution. Graham Gee and Grégoire Weber define a political constitution as one in which those who exercise political power are held to account, for the most part, through political processes and institutions.<sup>15</sup> This type of constitution is normatively indistinct and ill-defined, but the reason for this lies within the nature of the political constitution itself: it has minimal definitive prescriptions and few fixed constitutional boundaries to be policed.<sup>16</sup>

The reason people are content with this state of affairs is because the government is politically accountable, both to Parliament and the public more broadly: since people have the power to vote the government out of office at the next election, politicians moderate and regulate their own conduct to keep in step with the public's expectations of them.

By contrast, a legal constitution is one in which those exercising political power are to a substantial degree held to account through strong-form judicial review.<sup>17</sup> Under this framework, New Zealand's system is more similar to that of a political constitution than a legal one, since New Zealand does not have a single codified constitutional document, the courts have no strong judicial review powers to strike down primary legislation, and a short three-year election cycle brings laser-focused scrutiny to bear on politicians' actions in government. The Governor-General's role must therefore be located somewhere in the political constitution.

The Governor-General can be incorporated into the political constitution through a variety of methods. First, we can apply the model to the office of the Governor-General directly, thus conceiving of the Governor-General as a political actor. Gee and Webber state that although a political constitution is normatively prescriptive, it does not prescribe the nature and content of the constitution in any great detail, since the primary

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11 P A Joseph *Laws of New Zealand* Constitutional Law (online ed) at [160].

12 Quentin-Baxter and McLean, above n 8, at 170.

13 At 199.

14 At 169.

15 Graham Gee and Grégoire C N Webber "What Is a Political Constitution?" (2010) 30 OJLS 273 at 273.

16 At 275 and 286.

17 At 273.

characteristic of the political constitution is that it leaves it up to political actors to determine the exact nature of the constitution through ordinary political processes.<sup>18</sup> Applying this to the Governor-General, the equivalent would be that in the absence of a supreme law constitution, the vacuum is filled by constitutional conventions which are malleable and exist only if the political and constitutional actors involved regard them as binding upon themselves. In other words, conventions which govern the Governor-General's exercise of the reserve powers are as potentially fluid as politics itself, ebbing and flowing as the actors themselves see fit.

Since almost anything can happen, it may seem like the system is perpetually teetering on the verge of constitutional danger; however, the strength of the political constitution in this area is that no single actor within the system can unilaterally effect change. Conventions reflect what people actually do in an area and must be adhered to while in effect, but a convention can be changed if done with the agreement of the actors concerned.<sup>19</sup> The political constitution thus does not allow for unilateral change but rather spreads authority and responsibility across a number of different actors, which, along with good statute law, prevents it from collapsing in on itself for lack of definitive mass. However, there are a number of problems involved with any attempt to conceptualise the Governor-General as a political actor within this model.

Instead, the office of the Governor-General might be best conceived of as being only indirectly related to the political constitution. The office of Governor-General is fundamentally non-political in nature, in that the office is not politically accountable either to Parliament or the public more generally. Technically, the only office in the executive higher than the Governor-General is the Sovereign. Consequently, the Governor-General is an arbitrary actor in the system. This, ironically, gives the framework a sense of aura and legitimacy, in that the Governor-General attempts to embody the heritage of a centuries-old constitutional monarchy updated for the New Zealand context, and acts as an even-handed and neutral figurehead for the nation as a whole.

Generally, we are content with this arrangement because the Governor-General is seen but not heard, leaving the substance of politics and government to Ministers of the Crown who are politically accountable. This is in keeping with Gee and Webber's view of the political constitution as being "prescriptive without really prescribing", a system which steps back and allows representatives acting through political institutions to do the prescribing themselves.<sup>20</sup> The Governor-General is thus like the political constitution itself in that they both take a strictly hands-off approach. Since the Governor-General is not political in terms of accountability, but is an arbitrary albeit neutral figure, then it follows that political partisanship is also off limits. The office holder should not involve themselves in political policy and politicians should not encourage him or her to engage in the political fray.<sup>21</sup>

However, the problem with casting the Governor-General as an arbitrary and neutral figure within the political constitution is that the system does not cope well when the Governor-General is forced to get involved in politics, violate their neutrality, and exercise the reserve power against elected representatives. While the Governor-General's

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18 At 287.

19 Geoffrey Marshall *Constitutional Conventions: The Rules and Forms of Political Accountability* (Oxford University Press, Oxford, 1984) at 216–217.

20 Gee and Webber, above n 15, at 289.

21 Noel Cox *A Constitutional History of the New Zealand Monarchy: The Evolution of the New Zealand Monarchy and the Recognition of an Autochthonous Polity* (VDM Verlag Dr Müller, Saarbrücken, 2008) at 216.

arbitrariness seems quaint in ordinary times, in a crisis there is a danger that an exercise of the reserve power will be perceived as malicious against democracy.

However, a conception of the role of the Governor-General neatly within the rubric of the political constitution would, even if possible, not be without risk. The risk is that although the political constitution works well in everyday politics, it is not as well equipped to deal with constitutional crises. It does not cope well when the Governor-General is forced to get involved in politics, violate their neutrality, and exercise the reserve power against elected representatives. The great strength of the ill-defined and indistinct political constitution model is its flexibility, which allows it to roll with the punches so well in ordinary times; however, when hit by a raging storm of events this same flexibility becomes its weakness.

If we accept that law is nothing more than one means by which to resolve political conflict, then the answer to constitutional problems is not to engage in formal written statements such as a bill of rights or a codified constitution, but rather to enlarge the scope of what is subject to political debate and political processes, including the constitution itself.<sup>22</sup> However, a lack of firm constitutional boundaries to be policed fails to align with the rule of law, since it leads to uncertain, arbitrary and unpredictable processes and outcomes. The danger is that if we were to widen the political debate too much to the extent that a vice-regal actor must intervene in the deadlock of a political dispute, then the system, which has an arbitrary dimension to it through the Governor-General, might shudder under the pressure. Indeed, if the Governor-General was required to take an active role in politics, then that would imply the failure of the political process (and by implication the political constitution) as he or she would cease to be neutral.<sup>23</sup> Ultimately, “[n]o constitutional sovereign can survive for long once he or she comes to be seen as a partisan.”<sup>24</sup>

By having a political constitution which is too flexible and constitutional conventions which are too imprecise, the Governor-General can act in a completely arbitrary fashion, a law unto themselves, and a judge of their own case. Taken to its logical conclusion, this would mean that everything that happens is constitutional—in other words, that it is impossible for the Governor-General to act unconstitutionally.<sup>25</sup>

The counter-argument is that flexibility and discretion in the reserve powers are necessary as they allow the Governor-General to better respond to problems as they arise. Having only a limited number of fixed principles in its structure, the political constitution is continuously changed by political developments and the government is very adaptable as a result.<sup>26</sup> Former New Zealand Governor-General Dame Silvia Cartwright has even suggested that the powers of the office (including dismissal) stabilise and rationalise the actions of Parliamentarians.<sup>27</sup> However, the presence of the reserve powers clearly did not deter politicians from forcing the Governor-General into the political realm, and neither

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22 J A G Griffith “The Political Constitution” (1979) 42 MLR 1 at 20; and Gee and Webber, above n 15, at 278–279.

23 Cox, above n 21, at 216.

24 Vernon Bogdanor *The Monarchy and the Constitution* (Clarendon Press, New York, 1995) at 66.

25 Griffith, above n 22, at 19.

26 Grant Duncan “New Zealand” in Brian Galligan and Scott Brenton (eds) *Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges* (Cambridge University Press, Cambridge, 2015) 217 at 218.

27 Silvia Cartwright *The Role of the Governor-General* (New Zealand Centre for Public Law, Wellington, 2001) at 17.

was the Governor-General deterred from using the powers in a highly contested fashion, in the Australian Kerr-Whitlam constitutional crisis in 1975.

### III Kerr-Whitlam Crisis

The Kerr-Whitlam crisis took place in a legal system which has a number of both differences from but also similarities with the New Zealand system. For background constitutional context, Australia uses a bicameral system, whereby law-making authority, in the form of the Commonwealth Parliament, is jointly shared by the House of Representatives and the Senate in order to reflect Australia's distribution of power between the Federal Government and the Australian States.<sup>28</sup> New Zealand, by contrast, has a unicameral system in which the central government is virtually uncontested in its authority and Parliament consists only of the House of Representatives.<sup>29</sup>

The heart of the 1975 crisis stemmed from the deadlock in the Senate, which has no equivalent in New Zealand since our upper chamber, the Legislative Council, was abolished in 1950.<sup>30</sup> Additionally, in Australia the power to appoint and dismiss Ministers is not a power of the royal prerogative (like in New Zealand under the Letters Patent 1983) but rather a legal power granted under s 64 of the Australian Constitution, which is captured by the phrase "shall hold office during the pleasure of the Governor-General".<sup>31</sup> However, the substance of the office of Governor-General is set out in the Letters Patent Relating to the Office of Governor-General of the Commonwealth of Australia 2008, which is similar to New Zealand's Letters Patent.<sup>32</sup>

Even though Australia has a codified constitution, I consider the Governor-General's power of dismissal to be more similar to the political constitution in both countries. This is because although Australia and New Zealand locate the power to dismiss a Prime Minister from different instruments, in both there is no guidance as to how that power should be used, instead leaving it up to the actors themselves to determine in accordance with constitutional convention.

The Kerr-Whitlam crisis of 1975 was a culmination of many different factors coming together for the perfect political and constitutional storm. After Labour won the 1972 election, the Liberal Party, seeing itself as the ordained party of government, threatened to deny Labour supply.<sup>33</sup> In 1974, Prime Minister Gough Whitlam called another election and was returned to government with a reduced majority in the House but a better position in the Senate.<sup>34</sup> Opposition Leader Malcolm Fraser promised that since the government had a lower House majority, it was entitled to see out its term, assuming nothing "reprehensible" happened.<sup>35</sup> The Liberals acquired a majority in the Senate

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28 George Williams, Sean Brennan and Andrew Lynch *Australian Constitutional Law and Theory* (6th ed, The Federation Press, Sydney, 2014) at 232 and 654.

29 Philip A Joseph *Constitutional and Administrative Law in New Zealand* (4th ed, Brookers, Wellington, 2014) at 18 and 22–23.

30 Duncan, above n 26, at 217.

31 Geoffrey Sawer *Federation Under Strain: Australia 1972-1975* (Melbourne University Press, Carlton, 1977) at 147.

32 Williams, Brennan and Lynch, above n 28, at 356.

33 D A Low "The Dismissal of a Prime Minister: Australia, 11 November 1975" in D A Low (ed) *Constitutional Heads and Political Crises: Commonwealth Episodes, 1945-1985* (Macmillan, Basingstoke, 1988) 90 at 90–91.

34 At 91.

35 At 93.

through the twin events of the New South Wales Premier deciding to break the Senate casual vacancies convention, instead appointing a Liberal MP to replace a Labour MP, and the death of a Labour Senator who was replaced with a rogue determined to topple the Whitlam government.<sup>36</sup> Scandals plagued the government, including the Loans Affair and several ministerial resignations.<sup>37</sup> When the Liberals found out a Minister had deliberately disobeyed Cabinet authority, they used their Senate majority to defer the Appropriation Bills.<sup>38</sup> The aim was to force the government to have another election, since the Liberals were now confident of victory.<sup>39</sup>

Legal uncertainty pervaded debates concerning the Senate and Governor-General's powers. Bob Ellicott, the Liberal shadow Solicitor-General, issued an opinion which stated that if the Prime Minister did not advise an election, then the Governor-General could dismiss him.<sup>40</sup> Maurice Byers, the Solicitor-General, disagreed, stating that the Senate had never frustrated the supply of a government with lower House support and that the Senate's threatened Appropriation Bill rejection required neither government resignation nor vice-regal intervention.<sup>41</sup> Governor-General Sir John Kerr was troubled and unsure about how to respond.<sup>42</sup>

After a failed negotiation between the parties, Kerr decided that since supply would run out by 30 November and the last day for an election that year was 13 December, if the crisis had not ended by 11 November, he would dismiss Whitlam and install Fraser to restore supply and call an election.<sup>43</sup> On the 11th, after confirmation that the situation had not changed, Kerr revoked Whitlam's commission as Prime Minister before Whitlam could advise the Governor-General that he wished to call a half-Senate election to break the deadlock.<sup>44</sup> Kerr then quickly appointed Fraser as Prime Minister, the Senate passed the Appropriation Bills, and Fraser advised the Governor-General to dissolve Parliament and call an election.<sup>45</sup> Whitlam famously said, "God save the Queen, because nothing will save the Governor-General".<sup>46</sup> But Whitlam never got his chance to act on this implied threat, as Labour lost the 1975 election and the Liberals gained power for the next seven years.<sup>47</sup>

Was the Governor-General's action constitutionally legitimate? The merits of the Kerr-Whitlam crisis are still hotly debated in Australia today, and this continuing debate sends a clear warning to New Zealand about the reserve power of dismissal. One reason for this is that there were compelling arguments on both sides. The Governor-General acted to break a political deadlock and avert a potentially devastating financial situation. The Prime Minister was supremely confident in his right to govern since his control of the lower House meant the Governor-General had to act on his advice. Whitlam also had a mandate, having been re-elected only eighteenth months prior.<sup>48</sup> Both actors on the public stage considered themselves to be in the right, based on how they perceived their relative responsibilities and powers. In particular, the two actors had radically different

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36 At 93–94.

37 At 92.

38 At 94–95.

39 At 95.

40 At 96.

41 At 97.

42 At 98.

43 At 99.

44 At 100.

45 At 100.

46 Gough Whitlam *The Truth of the Matter* (Penguin Books, New York, 1979) at 118.

47 Low, above n 33, at 100.

48 Sawyer, above n 31, at 161.

interpretations of what would justify a constitutional dismissal by the Governor-General. This disagreement over the reserve power's nature is crucially important, as it reveals that significant constitutional uncertainty creates a plethora of plausible interpretations which cannot be conclusively and objectively disproven. Key arguments centre on confidence and supply, the unprecedented nature of the dismissal, the risk of financial breakdown and the procedure Kerr adopted. Each of these is now explored.

First, the traditional conception of confidence and supply clashed with Kerr's interpretation. It is universally accepted that the Australian government is responsible only to the lower House,<sup>49</sup> and accordingly, after an election the Governor-General appoints the Prime Minister based on who is likely to command lower House confidence.<sup>50</sup> Whereas a loss of supply in the lower House has always been an important way of communicating a lack of confidence,<sup>51</sup> a loss of upper House supply is regarded as irrelevant to responsible government.<sup>52</sup> By extension, one cannot govern with Senate support alone, and equally one does not need the support of both House and Senate. However, Kerr thought "two Houses hold the purse strings",<sup>53</sup> and since both Senate and House denial of supply lead to the same result, thought that the government must consequently also maintain the confidence of the Senate through its provision of supply as well.<sup>54</sup>

Thus, Kerr believed that a Prime Minister who could not secure supply (whether in the House or Senate) had an obligation to either advise a double dissolution for an election or resign.<sup>55</sup> Fraser did not advocate that the Senate could influence the Cabinet's make-up, but merely claimed the power to compel the House of Representatives to go to the people.<sup>56</sup> However, the ability to call an election is similar to a vote of no-confidence as both can bring the government to an end. Although a Prime Minister without lower House supply or confidence can be legitimately dismissed,<sup>57</sup> Killey stresses that the situation regarding loss of upper House supply is murky and ambiguous.<sup>58</sup> All this in mind, arguably there is no constitutional duty to dismiss a government that has only lost upper House supply.

Kerr therefore effectively tried to create a new convention in Australia that a government requires the confidence of both House and Senate.<sup>59</sup> This was unprecedented: the dismissal of a lower House majority government on the grounds of a denial of upper House supply was unheard of in any Westminster system.<sup>60</sup> Neither has it ever been suggested by constitutional writers that there is a rigid rule requiring the dissolution of Parliament if supply is denied by an upper House.<sup>61</sup> Although Prime Ministers facing such blockage have in the past either resigned or advised a double dissolution of both Houses, they have not been dismissed for doing nothing.<sup>62</sup> Indeed,

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49 At 171.

50 Ian Killey *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, Melbourne, 2009) at 133.

51 At 146.

52 At 146.

53 John Kerr *Matters for Judgment: An Autobiography* (Macmillan, Melbourne, 1978) at 328.

54 At 315.

55 At 326.

56 Sawyer, above n 31, at 121–123.

57 Killey, above n 50, at 140–142.

58 At 148–149.

59 At 151.

60 Sawyer, above n 31, at 145.

61 At 146.

62 At 145.

there were 12 pre-1975 Australian examples of State upper Houses blocking supply which did not lead to government dismissal.<sup>63</sup> What made the 1975 situation different was that neither resolution nor dissolution was occurring.<sup>64</sup> Even today, the 1975 crisis is the sole example of a dismissal of its kind.<sup>65</sup> For Kerr to have effectively claimed the authority on the basis of the reserve powers to intervene to prevent a loss of supply before it was even close to occurring, and where doing so was totally unprecedented, is both factually and legally controversial to say the least.

Such pre-emptive action could potentially have been justified if an imminent loss of supply risked an economic disaster. In October 1975, Treasurer Bill Hayden said that if supply was not restored there would be a major economic collapse.<sup>66</sup> The need to counteract potential financial chaos is one of Kerr's most persuasive arguments. A Prime Minister can be dismissed for losing confidence in the lower House or for persisting in illegal or unconstitutional conduct.<sup>67</sup> Such a government would be acting illegally as it would either not be meeting the country's financial liabilities or it would be using illegal methods to raise revenue.<sup>68</sup>

However, it was simply not necessary for Kerr to dismiss Whitlam on 11 November as supply had not yet actually run out.<sup>69</sup> At that time there were still 19 days of supply left, meaning there was ample time before intervention was necessary to restore supply.<sup>70</sup> Additionally, when Whitlam was dismissed he was in fact bringing advice to call a half-Senate election which could have broken the deadlock.<sup>71</sup> A political solution to the crisis was thus still possible and preferable to pre-emptively using the reserve power.<sup>72</sup> Indeed, Whitlam characterised the crisis as purely political in nature and only constitutional to the extent that politicians misused conventions.<sup>73</sup> In other words, the operation of the political constitution was prematurely cut short by the Governor-General.

By dismissing Whitlam, Kerr obstructed the smooth functioning of the political constitution by pitting the system against itself, as it forced people to choose sides between their elected government and the arbitrary, unaccountable Governor-General. Ultimately, whether Kerr sided with Whitlam or Fraser, his political neutrality would have been violated. The Governor-General acted in a partisan fashion by picking winners and losers which bitterly divided the nation when he was supposed to embody its unity. To exercise the reserve power of dismissal is to take the initiative for resolving the problem out of the hands of the political actors involved, which is fundamentally incompatible with the political constitution itself.

Finally, the Governor-General's dismissal violated good procedure as he should have warned Whitlam he was considering exercising the reserve power and thus given him time to change course. According to Bagehot's classic statement, the Queen has three rights: the right to be consulted, the right to encourage and the right to warn.<sup>74</sup> A State Governor

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63 Killey, above n 50, at 149.

64 At 149.

65 At 149.

66 At 152.

67 Williams, Brennan and Lynch, above n 28, at 358.

68 Killey, above n 50, at 151.

69 At 152–153.

70 At 153.

71 Low, above n 33, at 100.

72 Williams, Brennan and Lynch, above n 28, at 359.

73 Whitlam, above n 46, at 72.

74 Bogdanor, above n 24, at 69.

or Federal Governor-General should never ambush a Premier or Prime Minister but instead exercise the reserve power only after giving adequate warning.<sup>75</sup> Kerr ignored the only Australian dismissal precedent, in which New South Wales Governor Phillip Game had warned Premier Jack Lang that he would “obtain Ministers who feel able to ... carry on essential services without breaking the law” unless Lang ceased to act illegally.<sup>76</sup> Kerr himself retorts that there was no risk of the Governor’s recall in 1932, but that generally recall would be a real risk whenever an exercise of the reserve powers is contemplated.<sup>77</sup> This implies a greater risk of recall in 1975 than in 1932, which, in Kerr’s mind, justified the secrecy towards Whitlam. However, if the Prime Minister had been warned, either Whitlam would have changed his advice, Whitlam would have recalled Kerr, or Kerr would have dismissed Whitlam after giving him opportunity to change course.<sup>78</sup> Any of these outcomes would have been more preferable as it would have respected that Whitlam still had the confidence of the House of Representatives.

In summary, there are a number of plausible arguments on both sides of the Kerr-Whitlam crisis. The grievances against Kerr were essentially that he adopted the wrong procedure, based the decision on a mistaken principle, and intervened prematurely.<sup>79</sup> Nevertheless, academics still vehemently disagree over the crisis.<sup>80</sup> The ambiguous definition of the reserve powers and lack of comprehensive constitutional conventions reveal that the political constitution in this area is inherently uncertain, and thus problematic. While ordinarily we are content with this uncertainty because it is resolved by political actors who are politically accountable to us, in such a crisis as that in 1975 the political and arbitrary elements of the constitution clash with each other. One argument is that because Fraser’s Liberals decisively won the election following Whitlam’s dismissal, the Governor-General’s actions were retrospectively vindicated.<sup>81</sup> However, since people vote in elections based on party preferences not constitutional niceties, the 1975 Liberal victory proves nothing about the dismissal’s constitutionality.<sup>82</sup>

The contradiction within the political constitution is that when political actors are deadlocked, intervention through the power of dismissal might be necessary, but in so doing the Governor-General violates the political constitution by cutting across the ability of political actors to resolve such problems themselves. In such a case, the democratically elected and accountable government is dismissed by an undemocratic, arbitrary and politically unaccountable actor. Ultimately, the Kerr-Whitlam crisis was plagued by

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75 Killey, above n 50, at 205.

76 At 207. Other prominent examples of the use of reserve powers are plentiful. For Governor-General Byng’s refusal to dissolve Parliament, see Roger Graham *The King-Byng Affair, 1926: A Question of Responsible Government* (Copp Clark Publishing Co, Toronto, 1967); for the dismissal by Governor Game, see Herbert Evatt *The King and His Dominion Governors: A Study of the Reserve Powers of the Crown in Great Britain and the Dominions* (Cheshire, Melbourne, 1967) at 157–175; for Governor Bennett consulting with the Opposition about an alternative government, see Alex Castles “Post-Election Constitutional Usage in the Shadow of Mount Wellington: Tasmania’s Constitutional Crisis, 1989” (1989) 12 *Adelaide Law Review* 292; and for Governor-General Jean’s proroguing of Parliament on Prime Ministerial advice to prevent a confidence vote, see Lorne Sossin and Peter Russel *Parliamentary Democracy in Crisis* (University of Toronto Press, Toronto, 2010).

77 Kerr, above n 53, at 56.

78 Killey, above n 50, at 209.

79 Sawyer, above n 31, at 170.

80 Killey, above n 50, at 152.

81 Quentin-Baxter and McLean, above n 8, at 215.

82 Williams, Brennan and Lynch, above n 28, at 359.

vigorous disagreement over not only how certain constitutional conventions were applied in the circumstances but also whether they even existed in the first place.<sup>83</sup> This clash between the role, basic rights and powers of the Governor-General and the Prime Minister is unacceptable in modern constitutional life. The status quo is flawed if, as in Australia and New Zealand, a plethora of conflicting constitutional views surround the legitimate exercise of the reserve power. This lack of an objective answer is unacceptable in a crisis. New Zealand should learn the lesson that it is better to make the constitution legally certain so as to try to prevent crises before one occurs than it is to neglect to resolve the matter and suffer the consequences of this uncertainty later.

#### IV Uncertainty

Since the office of the Governor-General is insulated from ordinary political accountability mechanisms, and thus does not fit neatly into the political constitution, and because uncertainty at the margins is an acute concern in the circumstances of a constitutional crisis, it may be useful to turn to the rule of law to justify the exercise of the Governor-General's powers. In particular, the idea of the rule of law as certainty may serve as a useful lens of analysis to help remedy the shortcomings of the political constitution's operation in this area. The rule of law could provide a normative justification for why an actor should be able to exercise significant public powers and yet not be politically accountable. The office of the Governor-General might be similar to the judiciary: even though it is not democratic, it still serves important values of a free society. However, even though this is not the case, since the reserve power of dismissal fails the rule of law standard of certainty, the rule of law can nevertheless provide the solution.

The rule of law is generally conceived of as either an intricate web or a hopeless tangle of different ideas, but remains an ideal to which most legal academics attach great weight. AV Dicey's first formulation of the rule of law as a fundamental principle of the English constitution, and the one which I adopt, is "the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government".<sup>84</sup> It also meant that everyone is equal before the law such that even government officials could be called to account in the courts and it meant that citizens' rights were sourced from the courts themselves not a constitutional code.<sup>85</sup>

In terms of the reserve power, this means that there should not be arbitrariness, or a high degree of discretion, in its exercise. Joseph critiqued Dicey for being far too procedurally oriented and ignoring the substantive, moral and prescriptive aspects of the rule of law, since the mere existence of law in a totalitarian society would not qualify as rule of law.<sup>86</sup> However, Matthew Palmer, a constitutional realist, would in turn criticise Joseph's conception of the rule of law trying to encompass too many aspects of the legal system, with the result that the rule of law as a distinct concept loses its essence, potentially leading to constitutional incoherence.<sup>87</sup> After surveying influential thinkers on

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83 Sawyer, above n 31, at 173.

84 AV Dicey *The Law of the Constitution* (JWF Allison (ed), Oxford University Press, Oxford, 2013) at 202.

85 At 202–203

86 Philip Joseph "The Rule of Law: Foundational Norm" in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis NZ Ltd, Wellington, 2011) 47 at 50–52.

87 Matthew Palmer "Constitutional Dialogue and the Rule of Law" (2017) 47 HKLR 505 at 522.

the rule of law, Palmer concluded that the basic core of the concept which is shared across the various perspectives is certainty and freedom from arbitrariness,<sup>88</sup> and indeed even Joseph has admitted that the quintessence of the rule of law is the absence of arbitrary power.<sup>89</sup> Arguably, then, our constitutional framework and processes should conform at least to the uncontested essence of the rule of law as certainty and non-arbitrariness. The question then becomes whether the power of dismissal meets that minimum standard.

The power of dismissal fails the rule of law standard on both counts—a lack of comprehensive conventions to guide the exercise of the reserve power creates uncertainty, while the potential conflict between the Governor-General and Prime Minister, who each have the ability to remove the other, creates arbitrariness.

First, the absence of comprehensive constitutional conventions governing the use of the reserve power creates uncertainty in how the power is exercised. Generally, the powers of the Sovereign delegated to the Governor-General can only be exercised on the advice of Ministers.<sup>90</sup> By definition, however, when exercising the reserve powers the Governor-General does not have to obey the advice of the Prime Minister on his or her own appointment or dismissal.<sup>91</sup> When appointing a Prime Minister, the fundamental convention is that the Governor-General should take into account the public statements of the parties, then appoint the person whom he or she reasonably believes can form a government with a majority in Parliament.<sup>92</sup> However, there is no corresponding convention which covers all scenarios for dismissals. Anne Twomey considers a number of grounds for which a Prime Minister could be dismissed, such as:<sup>93</sup>

- (1) failure to resign or call a Parliamentary dissolution within reasonable time after an election loss or a vote of no-confidence;
- (2) loss of the support of one's Cabinet and caucus;
- (3) corrupt or illegal conduct;
- (4) breach of fundamental constitutional principle;
- (5) failure to achieve supply; or
- (6) that the government is out of step with the people.

However, it is uncertain whether most of these would apply in the New Zealand context and, if they would, how they would apply. For instance, constitutional conventions may no longer authorise a Governor-General to dismiss a Prime Minister except in extreme circumstances when the constitution itself is at stake.<sup>94</sup> However, one cannot be certain even on this since no one can definitively state the extent of the powers. Although a Governor-General could theoretically consult with anyone for non-binding advice on whether to dismiss a Prime Minister, Alison Quentin-Baxter and Janet McLean state that in New Zealand today, “there is little or nothing to give them reliable guidance about how they should act”.<sup>95</sup> The ambiguity over which constitutional conventions and grounds potentially justify a dismissal creates an uncertainty which is effectively a blank cheque for a Governor-General. A Governor-General could dismiss a Prime Minister on one of the

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88 At 520–521.

89 Joseph, above n 29, at 154.

90 Quentin-Baxter and McLean, above n 8, at 143–144.

91 Joseph, above n 29, at 723.

92 Quentin-Baxter and McLean, above n 8, at 198.

93 Anne Twomey *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, Cambridge, 2018) at 265, 301, 306, 320, 326 and 342–343.

94 Quentin-Baxter and McLean, above n 8, at 203.

95 At 222.

contested grounds and no one would be able to refute or review it. Such a situation is not consistent with the rule of law.

Ordinarily, of course, the Governor-General has a high degree of incentive to remain aloof and not exercise his or her reserve powers in an untested or controversial manner, given the risk of scandal. Any dismissal of a Prime Minister by the Governor-General would be seen by a large section of the community as violating the duty to be politically neutral, put the constitution itself at risk, and likely spur major constitutional reform.<sup>96</sup> If a Sovereign acted against the advice of Ministers, this might put the whole future of the Monarchy at risk; likewise, if a Governor-General acted against the advice of Ministers, there would be the risk of the Governor-General being recalled.<sup>97</sup>

However, to advance this argument is to admit that the Governor-General, through the exercise of the reserve power of dismissal, has the potential to do a lot of harm to public life and constitutional principle. A dismissal of a Prime Minister by a Governor-General is particularly troubling because whereas the Prime Minister must have been democratically elected at some point, the Governor-General is not subject to ordinary political accountability mechanisms, such as democratic election or responsibility to Parliament. In fact, it is difficult for the Governor-General to be held to account using any means at all.

Secondly, the Governor-General's reserve power of dismissal fails to meet the rule of law standard since it fosters unpredictability and arbitrariness through tension between the offices of Governor-General and Prime Minister. Since both office-holders can have the other removed, it may simply be a question of who gets in first.<sup>98</sup> In this potentially Wild West, high-noon standoff scenario one party might feel pressured to pre-emptively shoot before they themselves are shot.<sup>99</sup> Constitutional convention provides that the Sovereign will appoint or recall a Governor-General based on the advice of the Prime Minister.<sup>100</sup> If a Governor-General hinted at dismissal, he or she would likely be recalled first.<sup>101</sup> Some people use this reasoning to justify Governor-General Kerr secretly preparing to dismiss Prime Minister Whitlam, since he might have been pre-emptively recalled if he had let Whitlam know beforehand.<sup>102</sup>

However, a Prime Minister cannot recall the Governor-General as easily as the Governor-General can dismiss the Prime Minister. Geoffrey Marshall's position was that the Sovereign was not duty-bound to accept a Prime Minister's advice to recall the Governor-General, since the power is a personal prerogative of the Sovereign and it would be a matter of assessing the consequences of refusing the advice.<sup>103</sup> If a Monarch were asked to recall a Governor-General, not only would the Monarch want good and defensible reasons for doing so in writing, there would likely be a tactical delay under the auspices of taking advice in order for the crisis to resolve itself domestically.<sup>104</sup> Such a tactical delay would in any case present the Governor-General with an opportunity to dismiss the Prime

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96 At 223.

97 At 212.

98 BV Harris "The Irish President, the New Zealand Governor-General and the Head of State in a Future New Zealand Republic" [2009] NZ L Rev 605 at 620-621.

99 Andrew Stockley "Becoming a Republic? Issues of Law" in Luke Trainor (ed) *Republicanism in New Zealand* (The Dunmore Press, Palmerston North, 1996) 81 at 95.

100 Quentin-Baxter and McLean, above n 8, at 125.

101 At 212.

102 At 215-216.

103 Marshall, above n 19, at 174.

104 Twomey, above n 93, at 829-832; and Killey, above n 50, at 208-209.

Minister in the meantime.<sup>105</sup> The resolution of a crisis would thus not be by proper constitutional principle or law, but by chance, since it would be unpredictable as to who would be able to dismiss or recall the other first and each would be unlikely or unable to prevent a wrongful dismissal in time. The status quo therefore also fails the rule of law standard of certainty in having such clear arbitrariness in the dynamic between the two offices. The reserve power, however, remains ever-ready to be used by the Governor-General in New Zealand.

New Zealand cannot remain complacent when it comes to the Governor-General's reserve powers. Even though no New Zealand Premier or Prime Minister has ever been dismissed through the Governor-General's intervention in a crisis,<sup>106</sup> New Zealand is not immune from constitutional crises and we have no way of knowing when a crisis may occur in the future.

One such crisis occurred in 1984. Even though Labour decisively won the 1984 election, outgoing National Prime Minister Robert Muldoon refused to devalue the New Zealand dollar, contrary to incoming Prime Minister David Lange's instructions, who was then still powerless.<sup>107</sup> The consequences of not devaluing the currency were potentially economically catastrophic.<sup>108</sup> Deputy Prime Minister Jim McLay and his other senior National colleagues decided to tell Muldoon to comply with any request by the incoming Labour government or they would force the issue in Cabinet. If that failed, McLay would advise the Governor-General that Muldoon be dismissed as he no longer had the confidence of Cabinet and that McLay be appointed Prime Minister for the last few days as he would comply with Labour's instructions.<sup>109</sup> McLay did so knowing any such action on his part would be denounced as a constitutional coup d'état by Muldoon loyalists, his political career would be over and he would be pilloried like Sir John Kerr was after the 1975 Whitlam dismissal.<sup>110</sup>

McLay contacted the Official Secretary of the Governor-General and let him know that Muldoon's colleagues were willing to ensure the incoming government's wishes were respected.<sup>111</sup> Governor-General Sir David Beattie gave an undertaking that, if assured that Muldoon had lost the support of the National Cabinet and caucus, he would dismiss Muldoon as Prime Minister and swear in Jim McLay to give effect to the devaluation of the dollar.<sup>112</sup> Muldoon eventually came to his own decision to comply with Lange's advice, but hardly anyone knew that his hand had been forced by a confrontation with his senior colleagues.<sup>113</sup>

The 1984 crisis illustrates that New Zealand is not immune to circumstances which could require the Governor-General to dismiss a Prime Minister. It is clear from the 1984 crisis that the Governor-General still has the power to dismiss a Prime Minister today.<sup>114</sup> Some may suggest there is a low chance of such a crisis reoccurring in New Zealand in the future, for example because the Mixed Member Proportional (MMP) system has reinforced

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105 Marshall, above n 19, at 174.

106 Quentin-Baxter and McLean, above n 8, at 201; and Duncan, above n 26, at 219.

107 Jim McLay "1984 and All That: Opening Address to the Empower NZ Workshop" (2012) 10 NZJPIL 267 at 274.

108 At 275.

109 At 275.

110 At 275.

111 At 276.

112 McLean, above n 1, at 310.

113 At 276.

114 Quinton-Baxter and McLean, above n 8, at 218.

the importance of Parliament rather than Crown discretions.<sup>115</sup> However, we have no reason to believe that the different branches of government, or even departments within the various branches, do not experience severe friction on occasion, potentially amounting to a level of crisis. Given the huge amount of damage that could be done against our form of government and the New Zealand public if we do not act to clarify the reserve power of dismissal, we need to engage in reform. The midst of a crisis is too late to clarify our constitutional framework.

The rule of law as certainty may, beyond merely pointing out the status quo's flaws as above, light the way to a solution, in particular by codifying this area of our constitution. The law on this matter should be clear and objective. Codification would clarify what the rules are and who could do what and when, thus mitigating the uncertainty of not knowing what the grounds of dismissal are and precisely when they operate. Parliament, instead of the Governor-General, should have the responsibility of appointing or dismissing the Prime Minister. This would ensure certainty in procedures and predictability in outcomes, mitigating the arbitrariness of potentially random outcomes to crises and thereby enhancing the rule of law. Such an approach would aid in preventing crises in the first place, as well as better equipping ourselves to deal with ones that do still arise. Thus, even though the dismissal power fails the rule of law standard, the rule of law can provide the solution through codification.

## V Codification

Codification is a major hallmark of the legal constitution, usually embodied in a supreme law constitution. The primary identifying feature of a legal constitution is often seen as being able to hold those with political power to account to a substantial degree using judicial review.<sup>116</sup> If we view the legal constitution as strong judicial review, then a codification of the reserve power to appoint and dismiss Prime Ministers would specifically set out when a Governor-General can and cannot dismiss a Prime Minister. However, in terms of reforming the reserve power of dismissal a different approach should be adopted rather than a strong judicial review of the Governor-General's exercise of that power. Rather, focusing on the rule of law paradigm of greater certainty and predictability, we should abolish the discretion of the Governor-General to appoint or dismiss Prime Ministers altogether. Instead, Parliament should vote on who the Prime Minister is and the Governor-General would merely rubber stamp what Parliament decided, along the lines of the Scottish Parliament and Geoffrey Palmer and Andrew Butler's proposal for a New Zealand Constitution.

This is necessary because codification has a number of disadvantages which make judicial review of the Governor-General's use of the reserve power of dismissal an inappropriate avenue of reform. For instance, it is difficult to formulate rules to cover every eventuality and it is equally difficult to formulate the relevant conventions in language which is sufficiently clear and precise so as to avoid misinterpretation.<sup>117</sup>

Caroline Morris rightly raises the criticism that if we cannot predict constitutional crises, then how could we confidently codify the solutions when we do not yet know what

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115 Noel Cox "The Effect of the Advent of the Mixed-Member Proportional Voting System Upon the Role of the Governor-General of New Zealand" (2002) 14 Bond LR 424 at 435-436.

116 At 273.

117 Stockley, above n 99, at 96-97.

the problem is?<sup>118</sup> Drafting the provision is problematic as it might be either too broad and not substantially helpful in overcoming uncertainties, or too narrow as a result of unforeseen issues. Ideally, we do not want the courts getting embroiled in political issues, because the courts are only equipped to deal with legal issues and because courts in liberal-democratic countries have tended to show deference to the legislature and executive on political matters.<sup>119</sup> Furthermore, we should not have judicial review of the reserve power because if we did, it would no longer be a reserve power. This is in keeping with the New Zealand Court of Appeal, which agreed with the House of Lords that the appointment of Ministers is by its very nature not susceptible to judicial review.<sup>120</sup>

However, this does not mean that a Governor-General's actions have never been at issue in an actual case, and the *Conacher v Canada* line of cases demonstrate what some of the issues might look like if we tried to implement a system for judicial review of the Governor-General's actions. Duff Conacher, President of Democracy Watch, brought this judicial review case against Prime Minister Stephen Harper over his decision to advise the Governor-General to dissolve Parliament and set an election date for 14 October 2008, which was earlier than had recently been provided for in the Canada Elections Act which purported to create fixed election dates.<sup>121</sup> The applicant asked the Federal Court for declarations that a new constitutional convention had been created that prohibited the Prime Minister from advising the Governor-General to dissolve Parliament except in accordance with s 56.1, that the Prime Minister's actions contradicted s 56.1, and that holding the election earlier than intended infringed the rights of citizens under the Canadian Charter of Rights and Freedoms.<sup>122</sup> Shore J ruled that there was no convention as there was no agreement or statement from the Governor-General or Prime Minister, that s 56.1 explicitly stated that the Governor-General's discretion was unaffected and that the applicant had not provided evidence that the election was unfair.<sup>123</sup> Thus no declarations were made and the application was denied.<sup>124</sup> Subsequently, the Federal Court of Appeal dismissed the appeal as s 56.1 specifically preserved the discretion of the Governor-General to call an election, which in turn extended to the constitutional conventions surrounding the Prime Minister's advice-giving role on this matter.<sup>125</sup> Although Conacher sought leave to appeal to the Supreme Court, his application was dismissed without reasons.<sup>126</sup>

The *Conacher* cases demonstrate that judicial review of the exercise of the Governor-General's prerogative or reserve powers would violate comity between the judiciary and executive. The Federal Court said that the determination of when a government has received a vote of no confidence should reside with the Prime Minister and not be turned into a legal issue for the courts to rule on.<sup>127</sup> By the applicants' reasoning, people could take the Prime Minister to court to test whether the government had lost confidence and

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118 Caroline Morris "The Governor-General, the reserve powers, Parliament and MMP: A new era" (1995) 25 VUWLR 345 at 370.

119 Such as through the "political questions doctrine" in the United States. See Oliver P Field "The Doctrine of Political Questions in the Federal Courts" (1924) 8 Minn L Rev 485 at 485.

120 *Burt v Governor-General* [1992] 3 NZLR 672 (CA) at 678.

121 Peter Hogg *Constitutional Law of Canada* (Thomson Reuters Canada, Toronto, 2017) at 9–32.

122 *Conacher v Canada (Prime Minister)* [2009] FC 920 at [2].

123 At [46]–[47], [57]–[58], [61] and [66].

124 At [77]–[78].

125 *Conacher v Canada (Prime Minister)* [2010] FCA 131 at [4]–[6] and [13].

126 *Conacher v Canada (Prime Minister)* [2010] SCCA 315.

127 *Conacher v Canada*, above n 122, at [59].

the court would be able to “force the Prime Minister to dissolve Parliament, effectively dictating to the Governor-General to exercise his or her discretion”.<sup>128</sup> Such a ruling by a court would arguably overstep its bounds and violate the separation of powers. Judicial review of the Governor-General’s actions is also problematic because supreme law jurisdictions like Canada often have courts which frequently avoid judicial review of prerogative powers through justiciability tests and even then usually limit themselves to procedural review.<sup>129</sup> Ultimately, political conventions are unenforceable by the judiciary and political issues should be resolved by Ministers and by Parliament, not the Supreme Court.<sup>130</sup>

Accordingly, as proposed above, a process should be codified whereby Parliament would vote on who a Prime Minister is and the Governor-General would merely rubber stamp what Parliament decided, along the lines of the Scottish Parliament and Palmer and Butler’s proposed constitution. While some might question the point of codifying the reserve power if it would not be justiciable in the courts, there would nevertheless be an overall gain in certainty by helping to identify the extent of the Governor-General’s responsibilities.<sup>131</sup> This would be preferable to trying to create a list of scenarios in which dismissal would be justified and then potentially having judicial review second-guessing a Governor-General’s decision.

Under r 4.1 of the Standing Orders of the Scottish Parliament, a vote on who the First Minister will be is conducted within 14 days of an election, and any Member of Parliament can be nominated for the position of First Minister up until 30 minutes prior to the vote, provided that they are seconded by another Member and swear an oath or conduct a solemn affirmation.<sup>132</sup> In r 11.10, for a First Minister to be elected, at least 25 per cent of the total Members must take part in the vote, and a candidate wins either if he or she can command a simple majority (if one or two candidates) or gain more votes than all the other candidates combined (if three or more candidates).<sup>133</sup> If there are multiple candidates but no candidate gets the necessary amount of votes, there may be multiple rounds of voting, in which the candidate with the least votes in each round drops out until there emerges a clear winner.<sup>134</sup>

Palmer and Butler have a very similar recommendation for the appointment and dismissal of Prime Ministers, as outlined in their *A Constitution for Aotearoa New Zealand*. Under art 10(2)(c) of their proposed constitution, Palmer and Butler state that one of the functions of the Head of State would be that:<sup>135</sup>

The Head of State must ... on receipt of the report of the Speaker of the House of Representatives, appoint as the Prime Minister the person elected to that office by the House of Representatives and accept the resignation of the Prime Minister when tendered by the Prime Minister ...

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128 At [74].

129 Jennifer A Klinck “Modernizing Judicial Review of the Exercise of Prerogative Powers in Canada” (2017) 54 *Alta L Rev* 997 at 1001.

130 *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 at [3], [141] and [144].

131 Stockley, above n 99, at 96–97.

132 Standing Orders of the Scottish Parliament 2018, Rule 4.1.

133 Rule 11.10.

134 Rule 11.10.

135 Geoffrey Palmer and Andrew Butler *A Constitution for Aotearoa New Zealand* (Victoria University Press, Wellington, 2016) at 37–38.

The election of the Prime Minister would be by a majority of the voting members of the House of Representatives.<sup>136</sup> According to art 18(4) of the proposed constitution, the Prime Minister would cease to hold office (a) if he or she ceases to be a member of the House of Representatives, (b) if the Head of State receives his or her resignation letter, or (c) when another person is elected Prime Minister by the House.<sup>137</sup>

After consulting widely with the New Zealand public, Palmer and Butler revised and updated their proposal for a constitution in a new book called *Towards Democratic Renewal* but the provisions relating to the appointment of Prime Ministers remained essentially the same.<sup>138</sup> By this proposed constitution, therefore, the discretion of the Governor-General to unilaterally dismiss a Prime Minister would be removed.

By giving Parliament the final say in who becomes Prime Minister, rather than leaving it to the discretion of the Governor-General, this proposed reform would bridge the gap between the legal constitution and the political constitution in a satisfactory way. It would make legal constitutionalists happy as there would finally be legal certainty when it comes to the process of appointment and dismissal, and it removes any risk of an unjustified dismissal of a Prime Minister by a politically and legally unaccountable Governor-General, as arguably happened in 1975. It would also make political constitutionalists happy as the institutional body to which the Prime Ministership matters most—Parliament—would have its own members decide their own destiny through the selection of their own Prime Minister. Instead of a hierarchical, top-down dismissal, the wrongful exercise of which could threaten the continued existence of the Monarchy in New Zealand itself, there would be a horizontal appointment of a new Prime Minister in a spirit of equality with one's own parliamentary colleagues.

In any case, politicians after an election already determine who the Prime Minister will be while the Governor-General waits for them to prove they have the confidence of the House.<sup>139</sup> This proposal is consequently one on which both legal and political constitutionalists could agree—to their mutual advantage. By removing this element of arbitrariness from the system, and ensuring greater certainty around the circumstances in which a Prime Minister could be dismissed, the rule of law in New Zealand would be greatly enhanced.

The final matter for determination is the procedure for codifying the substance of the proposal. Having shown the need for codification and established the content of what is to be codified, all that remains is a brief technical assessment of the different possible methods of codification. The three options are through the Cabinet Manual, an ordinary Act, or a codified (and potentially supreme) constitution. The type of reform envisioned is inappropriate to effectuate through the Cabinet Manual. Official political handbooks reinforce constitutional conventions by facilitating greater understanding of Ministerial responsibilities and acting as a guide for conduct.<sup>140</sup> However, Cabinet Manuals are not “legitimate sources of law”, even though they comment on legal doctrine and discuss constitutional conventions.<sup>141</sup> In addition, the Cabinet Manual does not itself give effect to

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136 At 41.

137 At 41.

138 Geoffrey Palmer and Andrew Butler *Towards Democratic Renewal: Ideas for constitutional change in New Zealand* (Victoria University Press, Wellington, 2018) at 318 and 336.

139 Joseph, above n 29, at 731–732.

140 James WJ Bowden and Nicholas A MacDonald “Writing the Unwritten: The Officialization of Constitutional Conventions in Canada, the United Kingdom, New Zealand, and Australia” (2012) 6 *Journal of Parliamentary and Political Law* 365 at 366.

141 *Carter v Coroner’s Court at Wellington* [2015] NZHC 1467, [2016] 2 NZLR 133 at [64].

legal change but merely records incremental change as it occurs.<sup>142</sup> This proposal would not be an incremental change, but rather a wholesale restructure of the law concerning the reserve power, which therefore necessitates an Act of Parliament. While optimally New Zealand should move towards a supreme constitution along the lines of Palmer and Butler's proposal, the many arguments both for and against doing so fall outside the scope of this article, leaving the adoption of that proposal for later consideration. In any case, to use such a method to solve the reserve power problem alone would be the equivalent of using a sledgehammer to crack a nut. Therefore, codification by ordinary legislation is the most feasible and achievable method of choice at present. Accordingly, my recommendation is that the government should introduce a Constitution (Amendment to the Reserve Power of Appointment and Dismissal of Prime Ministers) Bill into the House of Representatives.

## VI Conclusion

The Governor-General's reserve power of appointment and dismissal in relation to Prime Ministers is problematic as its potential exercise is plagued by uncertainty at the margins. This problem can be solved, however, with the proposed reform of removing the Governor-General's discretion to dismiss and instead allowing Parliament to determine who the Prime Minister will be, or if the current Prime Minister will remain in office.

The status quo is compatible neither with the political constitution, defined as political accountability, nor the legal constitution, defined as the rule of law. The reserve power is incompatible with political accountability because by its exercise the Governor-General is taking a political problem out of the hands of democratically accountable representatives and instead intervening in the political realm, thus violating the duty to be politically neutral. It is also incompatible with the rule of law because the constitutional conventions which are supposed to govern the exercise of the power are vague, contested and sometimes non-existent. In other words, a lack of hard law in this area leaves the power open to abuse. Any dismissal of a Prime Minister is arguably an abuse because it necessarily invades the ability of the political constitution to operate effectively. Additionally, the simultaneous ability of the Governor-General and the Prime Minister to effectively dismiss each other is inherently arbitrary as it is purely coincidental as to who succeeds first.

By contrast, the proposed reform actually enhances both the operation of political accountability and the rule of law. Political accountability is enhanced as Members of Parliament vote on the Prime Ministership themselves, which is effectively a vote of confidence in whoever wins. The rule of law is enhanced as it provides constitutional certainty in this area, namely that the Governor-General has zero discretion on this matter that is independent of Parliament, but rather would simply swear in the Prime Minister as a mere formality. Thus, the proposed reform would clear up the current ambiguity once and for all.

People often say "if it ain't broke, don't fix it" when it comes to New Zealand's constitutional framework. Can we afford to change the reserve power? My conviction is that it *is* broken and we cannot afford *not* to fix it.

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142 Quentin-Baxter and McLean, above n 8, at 171.