

Dennis Rose

Executive Power and the Head of State: Issues Arising from Proposals to Establish a Republic

Introduction

In New Zealand executive power is concentrated in the hands of the prime minister and ministers, all being members of an elected parliament upon whose continuing support they depend. This substantive power relationship is embedded in a constitutional structure in which an appointed governor-general acts as head of state, as representative of the monarch, who is also the monarch of the United Kingdom. By convention and law the head of state acts on the advice of the prime minister and ministers in all but exceptional circumstances.

Reliance on a geographically remote monarch seems anomalous to many and it is likely that at some point New Zealand will sever its ties with the English Crown and establish a republic with either an appointed or an elected head of state. But there is uncertainty about the extent to which proponents of change in constitutional form also envisage change in the substantive power relationships existing between the prime minister, Cabinet, ministers of the Crown and Parliament. The head of state occupies a pivotal position in relation to the executive, legislative and judicial branches of government so that any change in the form, function or powers of the head of state is likely to have wide ramifications.

Such changes are best made after an ongoing debate in which major issues have been identified, options canvassed and implications considered. It would be wrong to assume that a change from a monarchy to a republic is essentially a matter of form, easily accomplished at a convenient

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moment, such as following the death of the current monarch. The 1999 Australian referendum, on a republic with an appointed head of state, provided an object lesson on the pitfalls of putting one particular republican form to a vote in an environment where public discussion had not generated sufficient clarity around the main alternatives that might have been considered.

This brief article seeks to identify the major issues likely to arise in designing a republican constitution, particularly those relating to the role and powers of the head of state. It outlines a programme by which these issues might be explored. The objective is to clarify the implications of various possible changes rather than to advocate any particular course of action. Indeed, it is possible that we should be making no change at all. But that is a decision for the electorate as a whole, ideally informed by an understanding of the likely implications of various possible changes as compared with existing arrangements.

The powers of a head of state and the mode of selection are interrelated. Election establishes a democratic mandate and with that a common expectation that the person elected carries more authority than he or she would have if simply appointed. This interdependence suggests ordering our discussion around alternative views on the range of powers that might be accorded to the head of state.

I first review what would be involved in maintaining the current constitutional balance between an appointed governor-general and a prime minister responsible to Parliament, whilst severing the link to the Crown. I consider two options, under each of which the governor-general continues in his or her current role. Under the first option the governor-general is simply elevated to the position of head of state. Under the second option an additional formal entity is created, available for advice during times of constitutional stress and hopefully over time accruing some of the symbolic status that currently attaches to the monarch. Under either option various methods of appointment are possible. I then look at models where there is an elected president, starting with the Irish example, where the president exercises a fairly minimal set of additional powers. Next I consider what have been characterised as ‘semi-presidential’ systems, where an elected president shares some element of executive power with a prime minister responsible to an elected legislature, and conclude with reference to full presidential systems as in the United States, where the president heads the executive arm of government.

The current position in New Zealand – an appointed governor-general

The governor-general, appointed on the advice of the prime minister and government, represents the Queen, as sovereign of New Zealand. In recent decades all governors-general

have been New Zealand-born, with significant records of participation in public affairs. The governor-general performs important constitutional and ceremonial roles such as opening (and dissolving) Parliament, swearing in ministers, receiving the credentials of foreign diplomatic representatives, and investitures. In addition, governors-general maintain a busy programme interacting with New Zealand communities and, on occasion, make state visits overseas. The governor-general regularly chairs meetings of the Executive Council, formally approves legislation on behalf of the monarch and, centrally, holds important powers in relation to the appointment of the prime minister and the dissolution of Parliament.

As in other parliamentary democracies of the Westminster type, the governor-general ordinarily follows the advice of the prime minister, and ministers, in exercising his or her legal powers, to the extent that some have seen the post as little more than a rubber stamp. But governors-general possess reserve powers that may be exercised in exceptional circumstances, without the advice of ministers. The main reserve powers are: to appoint a prime minister; to dismiss a prime minister; to refuse to dissolve a Parliament; and, in limited circumstances, to force a dissolution.

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There have been no recent incidents of significance in New Zealand, but the 20th-century history of Commonwealth countries (including the United Kingdom), and of the constitutional monarchies of Western Europe, records significant interventions by heads of state, in relation to the position of the prime minister or the dissolution of Parliament. Three examples will suffice. In 1931 King George V encouraged the Labour prime minister, Ramsay MacDonald, faced with a serious division in the Cabinet, to form a ‘National’ government in alliance with members of the Conservative opposition, thereby splitting his own parliamentary Labour party. In 1975, the Australian governor-general, Sir John Kerr, dismissed the prime minister, Gough Whitlam, and, more recently, Fijian governors-general have played a role in the aftermath of military coups.

Such events are inevitably controversial. But the essential point is that reserve powers, wisely used or not, are a necessary underpinning in constitutional systems where the prime minister depends upon his or her being able to maintain the support of a majority in Parliament. That support will occasionally fail and whilst, in the normal course

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of events, the parliamentary players will resolve the problem themselves, there may come a point where the head of state sees a need to act, so as to resolve a hiatus or to protect the constitution. Attempts to codify the circumstances under which such reserve powers should be exercised are unlikely to cover every contingency and may unreasonably limit the head of state's power to act appropriately in extreme circumstances.

The governor-general, as a member of the Executive Council, and as the assenting signatory to bills passed by Parliament, is privy to important political matters. In Britain the Queen is seen as having the right, and some argue duty, to express her views on such matters to ministers, conditional on keeping those views private, and subject to the ongoing obligation to act on the advice of those ministers. Dame Sylvia Cartwright, speaking towards the end of her term as governor-general of New Zealand, reported: 'Executive Council meetings, which are generally held every Monday, give me the opportunity – and I take it on a regular basis – to ask Ministers questions about the conduct of government business' (Cartwright, 2006). Governors-general are politically aware citizens. The need to maintain, and to be seen as maintaining, political neutrality in the performance of their role necessarily circumscribes their ability to take a public position on major issues of the day. Nevertheless, governors-general are expected to speak on an extraordinary range of occasions and will, inevitably, sometimes touch upon politically sensitive issues.

Minimalist change – an appointed president

What would be involved in a minimalist change from the present structure?

The key change would be severance of the tie to the Queen of England. Under our first two options this entails elevating the office of the governor-general from its current position as Queen's representative to head of state in its own right. Current arrangements for the selection of a new governor-general, or president, would remain in place but the detailed mechanics of appointment would have to change.

At present the government recommends the chosen person to the monarch for approval and appointment as governor-general. By convention the monarch accepts the recommendation, but there is an inherent possibility that she, or he, might query or object to the suggestion. So it would be sensible to expose the prime minister's recommendation to scrutiny by an external body. Obvious possibilities include: Parliament, a committee of MPs (in effect extending the current practice of prior consultation with the leader of the opposition); a panel of eminent persons (selected by position or eminence); or a panel of citizens. The proposal embodied

in the 1999 Australian republican referendum envisaged that the president would be appointed by two-thirds majority vote of the House of Representatives, following nomination by the prime minister and secondment by the leader of the opposition. An earlier Australian proposal, advanced during the 1990s by Richard McGarvie, was to create a three-member Constitutional Council, appointed by formula from former governors-general and judges. The council, on receipt of advice from the prime minister, would appoint his or her nominee as governor-general. The council would also be required to dismiss an incumbent governor-general within two weeks of receiving advice from the prime minister.

As New Zealand head of state, the Queen, normally through the governor-general, but occasionally in person, plays key symbolic roles in relation to the judicial system and to the armed forces. The 'Crown' of itself is a powerful and ubiquitous symbol, and particularly in some areas, such as Māori-Pākehā relations and the Treaty of Waitangi, is seen as having more than symbolic status. Treaty-related issues are discussed separately later, but the symbolic status of the Crown suggests a need for a review of the likely consequences, across the field, of removing the link to the 'Crown' and an exploration of mechanisms that might possibly augment or complement the role of an appointed head of state. The hereditary monarchy, combining as it does long history, echoes of once awesome powers, and a more recent but still long tradition of studiously apolitical behaviour, provides a convenient politically neutral personification of the state. The past few decades have probably weakened that status but it remains strong. Nation states require symbolic central reference points, so that removal of the status and symbolism of the monarchy suggests a need to consider institutional innovations to replace them.

Under our second minimalist option an attempt would be made to vest some symbolic power in New Zealand entities or sites whilst maintaining the current position and powers of the governor-general (possibly renamed president).

A written constitution, formalising the key power relationships within the state, would itself constitute a powerful symbol. Another obvious possibility would be to augment the role of the body responsible for approving the prime minister's recommendation on appointment of the governor-general. In practice the governor-general already acts as head of state, and the Queen's role is essentially symbolic. That said, it is always the case that persons in positions of authority will, under some circumstances, find it useful to be able to seek advice and guidance. A Constitutional Council, with a wider role than that proposed by McGarvie in Australia, would provide a legally constituted reference point, available to offer advice, for example, to a governor-

general contemplating exercise of the reserve powers at times of constitutional stress or crisis.

Removal of the monarch effectively removes a layer of recourse from within the constitutional structure and thus may occasion a need to review the constraints within which a New Zealand head of state would operate. Under our second option the New Zealand entity (possibly named a Constitutional Council) would provide an additional layer of responsibility and recourse within the system and could be expected to accrue symbolic status over time.

More generally, either of our two minimalist adjustments would require amendment of a substantial swathe of legislation, including a rewriting of the Constitution Act and almost certainly further codification of the constitution.

An elected president – a minimalist model

Election confers a democratic mandate to a president, particularly when election is by popular vote rather than indirectly through Parliament. A popular mandate inevitably brings some degree of extra moral authority, and thereby potential power. It is also likely that election will bring change to the range of persons from which presidents are selected. Political parties are likely to nominate candidates, so that elected presidents can be expected to have rather more strongly defined political characteristics than appointees. Some non-party persons who would accept an appointed position may well blanch at submitting themselves to a competitive national election.

Election establishes a president in that position as of right and so encourages more confident expression of personal opinion. Any such tendency will, however, stand in conflict with the convention that the head of state in a parliamentary system does not express him or herself in public on major policy issues. The term of Mary Robinson as elected president of the Irish Republic illustrates the tensions that may be generated when previously active politicians succeed to the presidency.

In her inaugural address Robinson identified issues which she would like to address during her presidency, several of which led to tensions between her and the elected government. In 1992 Robinson expressed sympathy for the sense of frustration felt by Irish women and girls in the face of a government decision to restrain a young woman travelling to Britain to secure an abortion. In 1993 Robinson shook hands with Gerry Adams of Sinn Fein at a meeting in west Belfast, at a time when Sinn Fein was banned from Irish and British broadcasting and Adams denied a visa to

the United States. Robinson's strong interest in human rights in the Third World led to an invitation to co-chair a panel on the future of the United Nations, an invitation that she declined only after strong political pressure.

The Irish constitution provides mechanisms by which the president may refer legislation to the Supreme Court to test its constitutionality, or, in response to a petition from the Senate, withhold his or her signature pending a referendum or dissolution of the lower house. These provide more explicit, but also more circumscribed, mechanisms than the shadowy and rarely used power of a governor-general in most Westminster democracies to seek to modify a bill by refusing assent. In New Zealand explicit powers to withhold assent, and indeed to amend bills, which had been a feature of New Zealand law from colonial times, were omitted from the replacement Constitution Act of 1986. It was asserted that the change did not affect the underlying power, subject, as it is, to the strong convention that the governor-general follows the advice of responsible ministers in all but exceptional circumstances.

There are, of course, many other examples of elected presidents with normally minimal, but potentially important, powers. Because an elected president with limited powers is the most likely alternative to an appointed presidency, it would be useful to review experience in an array of countries, such as Ireland, Finland and India, with particular reference to the powers accorded to the president, to the constitutional constraints under which the president operates, to the sources of advice available to the president, and to the mode of election.

Shared powers – a semi-presidential system

The term 'semi-presidentialism' is variously defined, but I use it to describe systems in which there is an elected president, constitutionally endowed with personal prerogatives, alongside a prime minister and ministers entrusted with executive and governmental powers that they can exercise only so long as Parliament leaves them in office. The constitutional boundary between presidential and prime ministerial powers differs from case to case, with particular significance attaching to the role of the president in relation to the appointment of the prime minister, the relationship between Cabinet ministers and the legislature, presidential approval of legislation, recourse to emergency powers, and the president's role in foreign affairs. Experience shows that much also depends on the party affiliation and position of the president, the personalities of the prime minister and

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president, circumstances prevailing at particular moments and evolving precedents.

Historically important examples of semi-presidential states include Weimar Germany, where the division of powers, along with the extreme form of proportional representation in the Reichstag, were held to have contributed to the failure of that system in the face of Nazism, and France since 1958, under the fifth republic. In the post-war period many newly independent nations and, more recently, many of the successor states to communist regimes in the former Soviet Union and Eastern Europe have adopted semi-presidential systems. The multiplication of practical examples has led to increased academic attention (Duverger, 1980; Elgie, 1995; Siaroff, 2003; Skach, 2006; Power, 2008).

Division of power between a president and a prime minister, taken together with the fact that each can claim a democratic mandate, creates the possibility that differences between the two, on important issues of policy, or in times of emergency, will lead to conflict over who has final decision authority. Grey areas in law may encourage intransigence and create situations in which the president is tempted to exert undue influence on the basis of his or her constitutional ability to exercise emergency powers, buttressed as those usually are by a constitutional role as commander-in chief of the armed forces.

The boundary between presidential and prime-ministerial powers is clearly critical. That it also lies on a continuum is illustrated by the fact that the Irish constitution, which subjects the executive government to the oversight of Parliament, is nevertheless sometimes categorised as semi-presidential. If the constitutional debate in New Zealand is to include semi-presidentialism as a form to be considered, that debate would desirably be informed by analyses of the range of prerogative powers that might be accorded to a president, how these might impact on the powers of the prime minister, and their implications for the body of New Zealand law.

A presidential system

A full presidential system along American lines is the final option to be considered. The 2004 Australian Senate inquiry report *The Road to a Republic* concluded, on the basis of survey data, that this option was not widely favoured in Australia. Nevertheless, such a model will be in some people's minds when they talk of movement to a republic and it seems sensible to canvass this option within any programme aimed at testing public opinion on republican options in New Zealand.

The essential feature of the American system is that executive power is concentrated in the president and that there is no prime minister. The legislature exists as a separate arm of government and, impeachment for misconduct

aside, does not have the power to bring down the president. It does have the power to veto appointment to some key government positions and it may also frustrate the executive by refusing to pass legislation promoted by the executive or by passing legislation contrary to its wishes. The president and the legislature are elected by popular election, but there is nothing in the system to guarantee that the executive arm as a whole has the confidence of the legislature. Different political parties may hold the presidency and effective power in the Congress.

Any move to a system approximating that in the United States would be a truly radical change and would require parallel consideration of issues such as the adoption of a written constitution and the constitutional separation of powers between the executive, legislative and judicial branches of government.

Powers of the prime minister

Our focus has been on the powers that might be accorded to a president under various constitutional options. The range of issues that have arisen suggests that it will be sensible to review in parallel the powers to be accorded to the prime minister under that same set of options. Movement from a monarchy focuses attention on the powers of the new head of state and whether these should be reduced or augmented. Coming at the issue from the perspective of the contemporary functioning of New Zealand's parliamentary democracy, the role of the prime minister is properly seen as central. Indeed, some argue that the powers of a prime minister, responsible to a single house of Parliament, are greater than those enjoyed by a president constrained by constitutionally separate legislative and judicial arms. This possibility suggests a need to consider institutional changes that would constrain prime ministerial powers, in areas such as the timing of elections. MMP has augmented political constraints on the position of prime minister but the constitutional issue remains.

The primary focus for many of those seeking a republic is the move from the monarchy and it is not clear whether advocates of change are content with the basic framework of a prime minister dependent on the continuing support of a majority in Parliament, or whether they are also seeking change in this central, and arguably more fundamental, feature of New Zealand's constitutional system. There is therefore a strong case for examining the role and powers of the prime minister within our Westminster system, and considering how these might change under different republican alternatives. A vote on whether or not to move to a republic is likely to be conditional on the form of republic proposed.

Wider issues

Despite its largely symbolic status, the Crown is central to the constitutional framework. Its removal would affect power relationships along several dimensions. This article has focused on the relative powers of the head of state and the prime minister, but other relationships will also be affected. What is the role of Parliament in relation to the head of state? Does it play a part in selecting and appointing that person? Does it have a constitutional role enabling it to remove the head of state from office in some circumstances? What is the role of the head of state with reference to legislation passed by Parliament?

Any constitution embodies a system of checks and balances. The powerful position of a prime minister supported by Parliament is ultimately subject to the will of the electorate. In the shorter term it is subject to the law, as interpreted by the courts, and to the potential exercise of such powers as the head of state may exercise. If the chosen constitution holds those powers to a minimal level then it may be appropriate to consider again the case for a second parliamentary chamber.

Any wider rewriting of New Zealand's constitutional arrangements should desirably also consider their relationship with the evolving pattern of international law

and precedent. Nations do not exist in isolation, and in recent decades national legal structures have been affected by the developing pattern of international law on human rights and the developing integration of commercial law between groups of countries. New Zealand's legal framework, like its constitutional structure, was nurtured within the template of British law. A stocktake at this point in time will show many linkages to international covenants, some of which may be sufficiently fundamental as to warrant explicit constitutional linkage.

The Crown has a continuing role as signatory to the Treaty of Waitangi. Most Māori and Pākehā commentators see a sharp contrast between the undertakings made when Governor Hobson signed the Treaty on behalf of the Crown and the actions of successor settler governments, actions which created the grievances that give rise to the continuing series of Treaty claims and settlements. Contemporary settlements are, of course, agreements between the Crown and affected Māori. Removal of the Crown from the constitution and the likely codification of the constitution will raise major issues for Māori. Identification and resolution of these issues may well be difficult and time-consuming and will require ongoing cross-cultural dialogue. Consideration of a move to a republic will in any event need to be carried



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