

Harshan Kumarasingham

Executive Power 60 Years On Has Anything Changed?

When New Zealand changed its electoral system from first-past-the-post (FPP) to mixed member proportional representation (MMP), the move was heralded as the end of old politics. Prime ministers and their Cabinet would no longer be the ‘elected dictatorship’. The executive would now be constrained by greater checks and balances. The two-party system that had held New Zealand politics hostage for at least 60 years would end and instead a greater diversity of interests would be represented in the House of Representatives, a House that could better hold the executive to account. This was the aim, but has it happened? This article examines recent instances of executive actions that are akin to those taken in the FPP era that MMP has been unable to eliminate. It also offers suggestions for how to increase the accountability of the executive by strengthening the constitution and other branches and offices of state.

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After being prime minister for three terms, the Labour leader conceded defeat after a convincing loss at the general election. The long and eventful Labour administration was to be replaced by a National one headed by an energetic and ebullient leader untested in experience as prime minister, but primed and prepared for power. John Key, the 11th National Party leader, in 2008 replaced Helen Clark, the 11th Labour Party leader, as prime minister after nine years just as Sid Holland succeeded Peter Fraser almost 60 years earlier.

Key, like Holland (except for a few months in the War Cabinet in 1942), became prime minister without having critical experience of government, and yet both Key and Holland had long held the ambition to become leader of New Zealand. They had also both campaigned on the promise that National had something new to offer the electorate after the long years of Labour rule. However, Holland and Key astutely did not seek to tamper with many of the successful policies of the previous administration. Instead they projected their vitality and freshness, because, although government had become almost synonymous with ‘Old Peter’ and ‘Aunty Helen’, the

New Zealand people had decided it was only fair to 'give the other fellow a go'.

Clark, like Fraser, had generous experience of the Treasury benches and had won three election victories. These Labour titans, however, after nine years in the top job were both unable to persuade the voters to give them another term in office, allowing the National Party to gain office with a mandate for reform, but not revolution.

The MMP era

So, 60 years on is executive government in New Zealand the same? No. The MMP representation system has revolutionised the electoral system and changed the political landscape without question. The hegemony over the political system that Labour and National governments exerted under Fraser and Holland is effectively over. The two-party dominance is gone and instead the House of Representatives and the Cabinet table must be shared by other parties and partners in a way that a parliamentary historian would have to look way back to the Massey–Ward era to find some form of precedent for. The proportional system has compelled the 'Wellington model' of the Westminster system to adopt governing arrangements and parliamentary accommodations that would have been unthinkable and unnecessary 60 years ago.

However, many of the constitutional issues that faced the era of Fraser and Holland can also be seen in the era of Clark and Key. The change to New Zealand's electoral system did not cause the evaporation of concerns over the excesses of the executive. Indeed, it would be delusional to heap on MMP the responsibility for curing all our constitutional ills. The executive may no longer be unbridled, but nor has it become completely bridled. The Westminster system's innate flexibility allows many of its core principles to continue despite key changes that MMP has demanded. As legal scholar Philip Joseph argues:

'The more things change, the less they change.' And so it is with MMP. MMP has wrought major changes to the New Zealand political landscape. It has changed the way we do the

business of government but has left untouched the essential ground-rules of Westminster government ... In its essential respects, the Cabinet system New Zealand inherited in the 1850's has remained remarkably resilient ... From a constitutional perspective, there has been an almost seamless transition from the former plurality voting system to MMP. The cabinet remains much as it was before ... Retaining the confidence of the House remains the axis around which the entire system revolves. This imperative facilitates the democratic ideal and is the bedrock of the Westminster system. It has been so ever since the cabinet system was introduced in 1856. (Joseph, 2008)

MMP has given more choice and more representativeness to the New Zealand voter, but this is not the same as giving more formal or informal checks and balances on the political executive. New Zealand in 2010 is still unitary, unicameral, and governed by an unwritten constitution. The executive, and prime minister in particular, still retains many of the prerogatives that were available to Fraser and Holland. In the Clark–Key era there have been subtle and not so subtle executive emanations that have demonstrated that prime ministerial power is still alive and well.

Enduring executive prerogatives

Helen Clark's political style has been described as 'presidential' since '[h]er focus is squarely in her ability to go over Parliament, front for the Executive and work her way through and around the constitutional checks and balances, and persuade New Zealanders of the rightness and rectitude of her policies and unite them behind her' (O'Sullivan, 2005). The commentator cited admits, however, that 'the move towards a more presidential style of direct action did not suddenly emerge under Clark's regime. Over the past 20 years New Zealand prime ministers have increased the Executive's reach'. An analysis of Clark's leadership by a respected political journalist assessed that Clark 'imposed iron discipline on colleagues, her caucus and the party ... As Prime Minister,

she puts the emphasis on "prime", being well briefed on what is happening across all portfolios, jumping on colleagues who muck up and even taking over if things are not fixed' (Armstrong, 2008). The same could have been written of Fraser. Clark had a loyal deputy prime minister and finance minister in Michael Cullen (just as Fraser had Nash concurrently in the same positions) to buttress this state and provide much of the policy grunt required to action prime ministerial edicts often without the involvement of Cabinet.

The Clark government's decision to abolish appeals to the Privy Council and create a Supreme Court in New Zealand as the final appellate court in 2003 was arguably, after MMP, the biggest constitutional change since the abolition of the Legislative Council.

Executive vs. judiciary

This method of government increased tension between the executive and judiciary as well. The Clark government's decision to abolish appeals to the Privy Council and create a Supreme Court in New Zealand as the final appellate court in 2003 was arguably, after MMP, the biggest constitutional change since the abolition of the Legislative Council. Unlike MMP, the abolition of the right to appeal to the Privy Council was not put to a referendum (Harris, 2006, pp.117-9). Thus, as with the removal of the upper house, the Privy Council appeal was eliminated from the

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New Zealand political landscape without direct public involvement. Questions over judicial independence arose during the Clark era when the government, clearly annoyed with the judiciary, overturned the Court of Appeal's 2003 decision in

*Attorney-General v Ngati Apa*¹ with the Foreshore and Seabed Act 2004. Around the same time the chief justice, Dame Sian Elias, was also worried that the judiciary's independence was being eroded by many of its administrative functions being taken over by the Ministry of Justice (similar concerns have been made about the Office of Governor-General being administered by the Department of the Prime Minister and Cabinet) and it therefore being 'beholden to a minister', further ensuring the judiciary to the executive. Clark replied to Dame Sian's position by stating she should 'stick to the bench'. Further to this Clark appointed Cullen, 'who had led the parliamentary charge against the Chief Justice', as attorney-general, thereby charging a non-lawyer, finance minister and deputy leader of the Labour Party (among his other important political roles) to become the 'principal legal advisor to the Government' and 'disregard partisan advantage in exercising his duties' in recommending judicial appointments (see Stockley, 2006; NZ Herald, 2005).

National's justice minister, Simon Power, has carried on the executive tradition of expecting the other branch of state to keep away from its exercise of power. Dame Sian delivered a speech which, among other issues, raised concerns about overcrowding in prisons and the question of whether alternatives to prison sentences might have to be discussed. Power immediately responded, with the prime minister's backing, stating brusquely, 'This is not Government policy. The Government was elected to set sentencing policy, judges are appointed to apply it'. Even though Dame Sian's speech acknowledged that the elected politicians must decide on this the head of the judiciary was again told to 'stick to the bench', even though constitutionally it is within her role to discuss such matters, especially with her 'extensive first hand experience of criminal justice matters' (Geddis, 2009).

Strained conventions

The new National-led government in its short time in office has already tested many

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constitutional conventions in asserting the New Zealand practice of impressing executive power over the other branches and offices of state. The legislature in the Westminster system has always been open to dominance by the executive. MMP has lessened this trend, but it has not succeeded in completely evading this political reality. In fact, the Key Cabinet is almost like the FPP cabinets of old, since there is only one party at the Cabinet table – the support party ministers sit outside Cabinet – and has been acting like an FPP one. National's November 2008 result 'mirror[ed] the certainty that had resulted from elections under the FPP system' since '[f]or the first time under MMP it seemed a coalition agreement would not be necessary' (Hayward, 2010, p.227). The Clark ministry had already tested concepts of ministerial and collective responsibility when Clark creatively allowed for an 'agree to disagree' concept to reign. However, this left, for example, a constitutionally awkward situation and, especially for our international partners, the confusing spectacle of having a foreign minister (Winston Peters, the New Zealand First leader) vocally and publicly against critical aspects of foreign policy trade initiatives. Despite this, the foreign minister retained his authority over the ministry that implements foreign policy and the confidence of the Cabinet by representing the government overseas. In terms of the coalition politics expected of MMP this was pragmatic politics on the part of Prime Minister Clark in accommodating Peters, but for the health of conventions and executive accountability it was a further strain on responsible Westminster constitutional practice.

Executive vs. legislature

After just a week in office the new government surprised many by using urgency to rush through five major legislative enactments. The previous administration had also used urgency. What this showed to one astute observer was that 'National appears to be behaving no better. Its first week in control of the new Parliament indicates that it also intends treating this institution's lawmaking power as nothing more than a convenient means of getting the outcomes

it wants'. Parliament would be relegated to the inglorious role of being 'a rubber stamp that transforms the wishes of the government parties into law as quickly as possible' (Geddis, 2008). The more deliberative democracy role of the House of Representatives hoped for under MMP has not eventuated enough to stymie executive inclinations, as urgency has become a more frequent practice which raises too few constitutional eyebrows.

Distinguished political and legal philosopher Professor Jeremy Waldron recently argued that New Zealand's unicameral Parliament is dangerously the 'plaything of the executive', lacking even with its select committees 'the multiple layers of consideration that bicameralism provides'. Looking at our slender institutional structures, Waldron confesses that he is 'worried that New Zealand not only abandoned its second chamber, but abandoned also other safeguards in its legislative process', leaving the country 'with virtually none of the safeguards that most working democracies take for granted' (Waldron, 2008). The purity of the executive largely remains.

Select committees were a New Zealand innovation meant to provide a pragmatic parliamentary check on the executive. The appointment of the associate local government minister, John Carter, in May 2009 to chair a special select committee dealing with Auckland local government issues has been described as 'unconscionable' and an act that shows the government 'riding roughshod over parliamentary convention', since it 'draw[s] the executive too closely into Parliament's role of scrutinising how ministers spend the money that Parliament votes for the running of their portfolios'. Labour had allowed comparable practices during its term, and the Carter episode is a further reminder 'that the independence of select committees is more a mirage than reality' (Armstrong, 2009). And government members of Parliament making up the majority of the committee's membership is a further reminder of the danger of select committees being facsimiles of executive instruction as they were in the FPP days.

Guardians of the state

Senior public servants have increasingly had to deal with their advice competing for ministers' attention with that of political advisers during the Clark–Key years.² The public service, as Colin James has argued, has the 'opportunity – I would say the duty – to develop and keep in mind a longer perspective on what constitutes the public interest'. However, National ministers, he observes, like their Labour predecessors have taken on an influential phalanx of personal policy advisers, endowing them with

quasi-public service status despite being clearly political [they are often paid for by departments though answerable to the minister and not the chief executive] ... Ministers are often frustrated by constitutional niceties. They want things done. Departments and agencies often fall

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short of ministers' hopes, for ideas and in execution. So ministers are tempted to, and occasionally do, step over the boundary. (James, 2009b)

Therefore, if the public service is not guarding the guardians, who, asks James, is? He states that although it should be the the governor-general this is actually a nominal power, since the contemporary truth is that 'in our constitution now the Governor-General is the cabinet's gopher', which is a great concern when there is 'a Prime Minister who is accumulating constitutional minuses' (James, 2009a).

How to check the excesses of the executive?

What is the solution to all these conspicuous exercises of executive power? Can they be remedied? Should they be

changed? Do we care? Yes, we should care, but the solutions, remedies and changes are not as easy to determine. There is no constitutional crisis in New Zealand, but we cannot be mollified by that tired cliché ‘if it ain’t broke, don’t fix it’. Crises are not in the habit of providing a detailed forward agenda. Small events can quickly spiral into the chasm of constitutional unrest. We need only look to comparable constitutional monarchies for constitutional crises such as what occurred in the United Kingdom during the early part of the 20th century, when the monarch was actively drawn into a parliamentary fracas; in Australia in 1975, which witnessed ‘The Dismissal’ by Sir John Kerr of Gough Whitlam; and more recently in Canada in December 2008, when the governor-general controversially prorogued Parliament, thus anticipating a vote of confidence that could have brought down the government. In our own backyard Pacific pool, Fiji (as both a constitutional monarchy and a republic) and Solomon Islands have demonstrated

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the potential constitutional calamities that can arise in rapid sequence.

Republic?

Will becoming a republic allow New Zealand the comfort of being immune from constitutional emergency? No. If the country were to change from the Realm to the Republic of New Zealand it is almost certain that it would remain a parliamentary-based democracy, which means most of the same issues would apply. Comparable systems that have similar characteristics of multi-party politics, non-executive heads of state, Cabinet and parliamentary-based government which we could credibly emulate in becoming a republic are India, Ireland and Italy. Their vaunted republicanism has not prevented executive excess.

Whether New Zealand is a republic or realm, the necessity of checks and balances on the executive is critical. However, most countries, including our own, have the checks and balances; the problem is how aware we and our representatives are of them. A greater awareness and appreciation of the responsibilities and duties of our governor-general, prime minister, Cabinet and individual branches of state, and of our own as conscientious citizens would do much to limit the excesses of executive power. Too often there have been major constitutional changes and executive actions without comprehensive review or participation. The principal political actors have, knowingly or not, abdicated their responsibility. If not abdicated, then they have willingly colluded to abuse constitutional safeguards by their actions or inactions that have resulted in change to our system with worrying ease.

Get rid of MMP?

The prime minister as part of a campaign pledge promised a referendum on the electoral system. This is more than what Sid Holland did with the change to unicameralism, or Fraser with the end of the country quota.

However, there is still a fear that despite a referendum being held in conjunction with a general election there would be, in Philip Temple’s understanding (*NZ Herald*), ‘no consultation with the voters,

no review of inquiry, no select committee hearings’. Temple and others such as Green Party co-leader Metiria Turei believe ‘an independent review of how MMP was working with full public consultation would be better in the first instance than spending millions on a referendum’. Indeed, rather than weighing in against or for MMP, many feel jilted by having the issue decided by Cabinet decree with its ‘simplistic yes–no referendum’ which does not give opportunity to examine the merits and demerits of the electoral system and any alternatives (*NZ Herald*, 2009b). Justice minister Simon Power confirmed that a referendum will be held in 2011 on MMP and that voters will be asked two questions: ‘the first will ask voters if they wish to change the voting system from MMP. The second will ask what alternative voting system they would prefer from a list of options’. However, even the Cabinet papers released with this October 2009 announcement voice concern about the potential that ‘voters will not know the alternative voting systems they will have to choose from’ and therefore could ‘have difficulty in making an informed choice’ (Power, 2009).

A new separation of powers

Such feelings illustrate the need and the importance of knowing and being involved with our constitution before undertaking system change. Whatever your view on the change itself, it should be elementary that comprehensive contemplation and participation be demonstrated before any action is taken. A greater emphasis on and understanding of the separation of powers is required, and that relies on the executive admitting and supporting the fact that it is just one of the branches of state. A ‘new separation of powers’ could see a ‘constrained’ prime minister and Cabinet by granting independence and influence to ‘other checking institutions’ and give a renewed impetus to providing constant attention to checks and balances (Akerman, 2000).

How can a new separation of powers be realised in New Zealand? Our constitutional infrastructure is somewhat bare so it would require an enhancement – though sometimes nothing more than a realisation – of the powers of existing

institutions whose duty it is to check the executive and hold it accountable.

An upper house?

Parliament is the natural fulcrum and forum of our system. I have argued elsewhere on the value an upper house could have added to the New Zealand system (Kumarasingham, 2010). Even an appointed upper house could use its position, despite a weak veto power, to highlight legislative or political questions about government policy.

A legislative council could have copied Britain's approach and created an independent and effective appointments commission to make recommendations on 'non-party-political members'. The commission could have the power to 'vet all recommendations to the House of Lords', including political appointments, which would enhance the convention of political parity in the upper house (House of Lords Appointments Commission, 2008). Recent scholarship in the United Kingdom argues for the importance of an appointed chamber as a critical source of 'deliberative democracy'. Rather than focusing on elections and voting procedures to define democracy, 'deliberative democrats concentrate on the processes by which opinion is formed and alternatives debated': as such, the less politicised House of Lords has the power with its 'scrutiny and accountability role' to force government 'to defend in public its actions and intentions' by being effective in 'drawing media or activist attention to an issue'. Therefore, the House of Lords can 'catalyse public debate and influence the nature of that broader democratic discussion' (Parkinson, 2007). At the very least an upper house in New Zealand would have added another level for legislation to go through, and would have potentially halted the fast-tracking of bills and other constitutionally questionable methods of enacting controversial policy (Cooke, 1999, pp.140-1).

More power to Parliament?

In response to the rumblings over his predecessor's creative constitutionalism and executive power, Gordon Brown and his lord chancellor, Jack Straw, published a green paper in July 2007. The paper

outlined recommendations that would restrict executive power to the benefit of Parliament. The British prime minister, like ours, exercises 'authority in the name of the Monarch without the people and their elected representatives in their Parliament being consulted', and when using these prerogative powers 'it is difficult for Parliament to scrutinise and challenge government's actions'. Based on the recommendations in the green paper, here are some proposals for reform that could restrict executive power in our own Westminster.

- The royal prerogative powers exercised by the prime minister are put onto a statutory basis and brought under stronger parliamentary scrutiny and control (though this does not propose changes to the governor-general's 'constitutional or personal prerogatives, although in some areas the Government proposes to change the mechanism by which Ministers arrive at their recommendations on the Monarch's exercise of those powers').
- A convention is developed under which the government could deploy armed forces without the approval of the House of Representatives.
- A prime minister requires the approval of the House of Representatives before asking the governor-general for a dissolution.
- A majority of members of Parliament can ask the speaker to recall the House, 'including in cases where the Government itself has not sought a recall'.
- The attorney-general is no longer a senior member of the government and attends Cabinet only when legal issues are directly concerned. This could enhance public confidence and trust in the office of attorney-general as the chief legal adviser to the Crown and his/her role as guardian of the public interest.
- Greater transparency, more consultation and a greater role for Parliament in major public appointments that are carried out by executive instruction. In addition, for certain appointments, where appropriate, the government nominee

is subject to a pre-appointment hearing with the relevant select committee.³

Another recommendation is that the granting of honours has strictly limited political involvement. Indeed, an editorial by the *New Zealand Herald* which backed the Key government's decision to bring

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back titular honours in March 2009 nonetheless advocated that:

The whole system should be taken out of politicians' hands. The honours are awarded in the Queen's name and there seems no reason that her representative, the Governor-General, could not appoint a panel to sift nominations and recommend a list of worthy recipients. So long as it was one function for which the office did not have to act on ministers' advice, the system would be relieved of suspicion that it might be used for political rewards. (NZ Herald, 2009a)

Greater role for the governor-general?

This conveniently suggests another proposal: strengthen the role of the governor-general as our de facto head of state to act more confidently as the 'guardian of the Constitution'. This would give the office that sits atop the entire system a greater check on the system. Brown's green paper for Britain did not make direct proposals for changing the Queen's personal and constitutional prerogatives (reserve powers), instead

concentrating on those the government exercised in her name. However, it is useful to reform (not remove) those ancient prerogatives to strengthen a governor-general's authority over them. Sir Michael Hardie Boys has outlined the five powers, 'which need not be exercised in accordance with advice', as being:

- to appoint a prime minister;
- to dismiss a prime minister;
- to refuse to dissolve Parliament;
- to force a dissolution of Parliament; and
- to refuse assent to legislation. (Hardie Boys, 1997)

These five powers are all, or at least can be if the situation is not clear, controversial and critical. However, a governor-general in such situations where the decision is far from obvious or where he or she is unsure as to the validity of the choice is compelled to make decisions with minimal opportunity for consultation. The governor-general in the exercise of the reserve powers, and in

making other judgements concerning such responsibilities as Crown appointments and honours, could rely on a 'Council of State' to assist and add credence to the his or her choices. This Council of State with a membership similar to the Irish Council of State⁴ could act as an 'integrity branch' (Akerman, 2000, pp.294-6) made up of the highest practitioners from the three branches of state and chaired by the governor-general (see Power, 2008). The Council of State could act like a Privy Council, but without political executive domination, advising the governor-general in the discharge of the office's powers. The Council of State would thus strengthen the governor-general by not only providing expert advice, but also by removing through its existence and mana a sense of submissiveness towards the political executive. It would end the isolation a modern governor-general feels when making major decisions to become a real guardian of the constitution.

No magic formula or constitutional fantasy will make New Zealand into some democratic utopia. There can be no hope of some divine oracle announcing granite laws of constitutional perfection to a Moses or Maui on Mount Sinai or Mount Ruapehu. We should, however, be ever mindful of the dangerous potential for executive excesses that have been demonstrated since before the time of Fraser and Holland, and certainly since, due to ignorant or lazy observance and understanding of the New Zealand constitution. We would do well to be vigilant and prevent further misuse.

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1 [2003] 3 *New Zealand Law Reports* 643

2 For a more thoroughgoing analysis of these issues see Boston and Halligan (2009).

3 These recommendations are taken directly from Secretary of State for Justice (2007).

4 The Irish Council of State is composed of the prime minister, deputy prime minister, chief justice, president of the High Court, presiding officers of the two houses of Parliament, attorney-general, any former president, prime minister or chief justice willing to serve and up to seven presidential nominees.