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**'THE GOVERNMENT'S ROLE IS WHATEVER
THE GOVERNMENT DEFINES IT TO BE.'
DISCUSS**

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'THE GOVERNMENT'S ROLE IS WHATEVER THE GOVERNMENT DEFINES IT TO BE.' DISCUSS

A couple of months ago, the government committed over \$5 million of taxpayers' money to regain the America's Cup. According to the *Dominion Post* of 4 March, the prime minister, Helen Clark, was asked whether the government should be financing a yacht race. She replied that "the government's role was whatever the government defined it to be." That is an interesting statement of constitutional principle which I propose to explore.

I hesitate to disagree with the prime minister. I've just been reading Martin Amis's *Koba the Dread* about life under Stalin in the former Soviet Union, and have learned something about what can happen to people who disagree with those in high places. But I venture to suggest that the concept of government that she articulated is somewhat under-developed.

It would certainly seem under-developed to an American citizen, or at least one steeped in America's founding ideas. Behind the US constitution was the idea of limited government. Government was not something set up to rule over citizens. Rather, its limited powers were prescribed and delegated in a bottom-up fashion, as set out in the famous provision:

The powers not delegated to the United States [that is, the federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The most important thing that the constitutional safeguards sought to protect was freedom. As George Washington put it: "Government is not reason; it is not eloquent; it is force. Like fire, it is a dangerous servant and a fearful master." Similarly, Thomas Jefferson noted that "The natural progress of things is for liberty to yield and government to gain ground."

The American Founders understood the tendency of the democratic state to expand and reach into every corner of civil society if people let their guard down on liberty. They sought to chain Leviathan. Subsequent history has fallen far short of their goal,

but freedom – the injunction 'Don't tread on me' – remains the lodestar of American politics. The relatively limited, if over-expanded, role of government in the United States is a major source of its economic prowess and prosperity.

Not so long ago, New Zealand had virtually unlimited government – 'unbridled power', Sir Geoffrey Palmer called it. Sir Robert Muldoon used to boast that almost any government actions could be justified under the Economic Stabilisation Act 1948. Since he was ousted from office in 1984, many elements of what could be described as an economic constitution have been put in place. All have the effect of constraining governments' freedom of manoeuvre with the aim of obliging them to act in the interests of citizens at large rather than in their own political interests.

The first, and certainly the most internationally influential, element of this 'economic constitution' was the Reserve Bank Act 1989. This gives our central bank the responsibility for meeting inflation targets agreed with the government of the day. The aim was to ensure that the government doesn't inflate the economy for short-term electoral advantage as governments shamelessly did in the past. It has delivered the benefit of a decade of something much closer to stable prices.

Next up was the Fiscal Responsibility Act 1994, which obliges governments to 'open the books' and has put an end to post-election 'surprises' which governments exploited to break election promises. For a time, governments endeavoured to apply similar disciplines to local government and confine councils to a genuine public goods role. Business organisations have been calling for such statutes to be complemented by a Regulatory Responsibility Act to help constrain the endless flow of unwarranted government regulations.

In addition to these statutory measures, I see the opening up of the economy and the daily exposure of governments to the verdict of financial markets as being quasi-constitutional in nature. There have also been moves to get government out of business. Other innovations have included the Official Information Act 1982 and the expanded role of the Ombudsman. Finally, there is the New Zealand Bill of Rights Act 1990, which unfortunately is a somewhat muddled and limited statute. All of these

things have helped to curb governments' behaviour and protect citizens' freedoms. So government in this country is rather more limited than it used to be.

But how secure are these rules of the economic game when our political leaders claim the prerogative to make up their role as they go along? On the one hand I am sure that the prime minister doesn't really believe in unlimited government: that she would never suspend *habeas corpus* and lock up her political opponents without trial, or close down critical newspapers, or abolish general elections. But on the other hand the economic constitution has in recent years been eroded around the edges, raising legitimate fears that it will suffer death by a thousand cuts, with damaging effects on economic stability and prosperity.

For example, property rights have been trampled upon in ways that would not be tolerated in the United States – the Resource Management Act 1990 and Max Bradford's electricity reforms are just two examples – and state ownership has been creeping back in several areas. The Reserve Bank's Policy Targets Agreement has been modified three times in six years – as Wolfgang Kasper has commented, this is "not a sign of a steady hand and a stable rule system".¹ Local government has been given an expansive role, including a so-called power of general competence, and the government is proposing that the anchor of the Privy Council should be cut adrift.

The problem with unlimited government in our society is not that politicians are evil or wicked but that they are prone to succumb to interest group pressures and to the elitist notion that they know best how to run other people's lives. The prime minister's remarks thus raise two related issues: what the role of government should be, and how governments can be constrained to stick to that role. I want to say something about each of these issues in turn.

In a free and open society the role of the government would most certainly not be determined by the government itself. Moreover, it should be limited to tasks which free citizens cannot undertake adequately through voluntary efforts. Such tasks may arise because the benefits of some goods and services are 'public' in nature, meaning

¹ Wolfgang Kasper, *Losing Sight of the Lodestar of Economic Freedom: A Report Card on New Zealand's Economic Reforms*, New Zealand Business Roundtable, December 2002, p 12.

that, once available, they are freely available to everyone. Defence, police, justice, open-access parks and streetlighting are standard examples. Sometimes private benefactors and voluntary organisations can fill the gap. But in some important cases at least the *funding* of public goods has to be organised by governments even though the *provision* of such public goods and services can often be undertaken by the private sector under contracts.

Adam Smith famously spelt out the appropriate agenda of government two and a quarter centuries ago in *The Wealth of Nations*. His examples were activities such as law and order, defence, and 'public works' like harbours and bridges. In the nineteenth century, largely because of the influence of Smith's ideas, the role of government did indeed shrink in this direction. Then it expanded again as the belief gained ground that mutual help and private philanthropy were deficient and that 'market failure' was not limited to the problem of public goods but was all-pervasive. Monopoly was regarded as a major problem and it was recognised that markets cannot guarantee any particular distribution of income. The first of these problems led to deep government intervention in the economy, including measures like state ownership, planning, and regulation; the second to high levels of taxation to finance the welfare state and the provision of free or subsidised education and health care.

In recent decades, this agenda of big government has itself come under criticism, and efforts have been made to restore more limited government. This counter-revolution has been based on two central propositions, for which the empirical evidence is overwhelming: that markets are dynamic and often self-correcting if left alone, and that government intervention can itself fail, and in some cases may be worse than the market failures it is meant to cure. As a result, almost everywhere countries have been reducing the extent of intervention in their economies. The most visible evidence of this has been the worldwide privatisation movement. Some forms of regulation, for example those that created barriers to trade, have been reduced and markets have been allowed to work better. Some other forms, such as environmental regulation like the Resource Management Act have increased. The monopoly problem has been seen as better solved by reducing barriers to entry, and exposing firms to competition than by close control of business decisions. Social regulation can also be made market-friendly or even replaced by markets. For example, in the United States most improvements in

the rate of workplace injury have been achieved, not by occupational health and safety regulation, but by wage premiums for risky occupations and private workers' compensation insurance. Both of these create incentives for employers spontaneously to improve workplace safety.² Market mechanisms are being used widely to help deal with environmental problems.

A big exception to the movement to reform and reduce the role of government is, of course, the welfare state. But there is no doubt that reform is possible and desirable. Income support would do a better job of restoring many dependants to employment if it took the form of a safety net with inbuilt work obligations for the able-bodied, and if voluntary organisations, including charities and churches, were allowed to offer alternatives to state schemes. Standards of education and health care would be improved, without violating the principle that people should not be denied access to some level of these services on financial grounds, if the government concentrated on its regulatory and funding role and freed schools, hospitals and insurance markets from many controls. This would promote competition, freedom of entry, and consumer choice.

This brief summary of an agenda of government for a freer society does not, you will notice, allow for the subsidising of yacht races with taxpayers' money. Yet I fear that the prime minister's assertion of the government's right to extend its agenda indefinitely expresses all too accurately the way many New Zealanders have been conditioned to view government. New Zealanders are hardly unique in this respect. With the growth of government everywhere in the twentieth century, Thomas Jefferson's warning that liberty tends to yield to government has been borne out to a vastly greater degree than even he would have imagined. At the same time, the more recent counter-revolution in economic policy has been accompanied by more explicit limitations on government, like the economic constitution that I summarised, and governments cannot nowadays get away with attempts to expand their powers as easily as they once could.

Indeed, in the history of Western political ideas the idea of government for, by and of the people has always been associated with constitutionalism. The first systematic

² W Kip Viscusi, *Risk, Regulation and Responsibility*, Melbourne, Institute of Public Affairs, 1996.

student of constitutions was the ancient Greek philosopher Aristotle. After observing that states were governed by one, or by the few, or by the many, Aristotle noted that in each case the rulers could govern in the interests of the general public or exclusively in their own interests, and that if they were to govern in the public interest they had to be constrained by law. In fact, Aristotle defined 'democracy' formally as government by the majority in the interests only of the majority: what de Tocqueville in the nineteenth century was to call 'the tyranny of the majority'. It was only in the twentieth century that the word 'democracy' lost its association with mob rule and became the accepted name for the only legitimate form of government.

It is fair to say, however, that the constitutional limits on government, and correspondingly awareness of those limits, have been less prominent in New Zealand than in some other countries. The contrast I drew earlier with the United States is all the more instructive because both countries were originally British colonies, and both inherited versions of the English constitution that emerged from the long struggle to protect individual liberty by subjecting the monarchy to the rule of law. This stretched from the signing of Magna Carta in 1215 to the English Revolution of 1688 establishing the constitutional monarchy. When the Americans drafted their version of the English constitution in the late 1780s, they saw federalism and the separation of powers as necessary checks and balances to constrain government and preserve freedom. But when many of the former British dominions became independent, they adopted a 'Westminster' version of the English constitution, in which the separation between the executive and the legislature was to some degree masked by parliamentary government where the executive is drawn from the legislature: the 'responsible government' model, as it came to be known. The constitutions of Canada, Australia and South Africa, being federal, incorporated some American-style institutional separations. New Zealand acquired a version of the Westminster system that was, like Britain's, unitary. And since the abolition of the Legislative Council in 1951 it has been unicameral, and so even simpler than Britain's.

Against this background, the rise of political parties has made it possible for governments virtually to unite the executive and legislative functions. Rather than parliament acting as a check on the government, it has been turned by party discipline into a rubber stamp for many executive decisions. By contrast, in the United States,

political parties have been unable to subjugate the Congress to the presidency to anything like the same degree. The main formal check on government-in-parliament under the Westminster system is the periodic general election, although informal factors, like public opinion, operate as well.

Most people seem happy with this. Indeed, it would be hard to exaggerate the grip of the culture of majority rule in New Zealand. For very many people, a government can legitimately do what it likes so long as it has the support of 50 per cent plus one of the members in parliament. Michael Cullen famously responded to criticism of policy reversals with the words 'We won, you lost. Eat it'. The triumph of majoritarianism has resulted in a waning of any widespread sense of the proper role of government, or even of any demand for serious, principled public debate, argument or persuasion about public policy. All that matters is whether the government has the numbers.

Very largely because of this attitude, majoritarianism is liable to produce outcomes that serve not genuinely common interests but special interests, whether of minorities or, quite often, majorities that fall short of the public at large. If legislation requires the support of only a simple majority in the parliament to become law, it is that much easier and cheaper for lobbies to mobilise support, especially as a parliamentary majority may represent only a minority of the citizenry. And if the issues that dominate elections are not voted on separately but are bundled by political parties into rival packages that have to be accepted or rejected in their entirety, the electorate has to go along with items in a policy programme that it dislikes as a price for getting others that it genuinely prefers.

What, if anything, could be done to revive or enhance a 'constitutional attitude' in New Zealand with the aim of protecting the liberty of all its citizens and ending the exploitation of some citizens by others?

For a start, our political system does contain more constitutional constraints than the popular majoritarian caricature of it suggests. Although the institutional separation between the executive and the legislature is blurred, the judiciary is clearly separate from both the government and the parliament. Unlike in the United States, where the Supreme Court applies 'judicial review' and can invalidate legislation it judges to be unconstitutional by reference to the written constitution, in more thoroughgoing

common law countries like New Zealand the courts interpret statutes strictly as the will of parliament. This means that judges, being unelected, are quite rightly not lawmakers except in the narrowest sense. But it also means that governments have to govern within the terms of the law as expressed by parliament and also with due regard to common law principles that have evolved in case law. It is true that neither in the United States nor in New Zealand have the courts done much to stem the expanding economic role of government. Nevertheless, as things stand, New Zealand's highest court, the Privy Council in London, is fully independent of the New Zealand executive and constitutes an important check on it, which is a major reason why the business community at large, Maori (as a minority group in society) and many in the legal profession are opposed to the government's moves to do away with it as New Zealand's final court. The strength of the English common law tradition compared with other systems, such as the European civil law system, is its defence of individual liberty. We need a strong and independent judiciary to ensure that governments cannot lightly override the common law.

I mentioned that the New Zealand Bill of Rights Act 1990 provides some protection for individual freedom. Yet the Act is limited in important ways. It excludes any explicit protection of freedom of contract, or any protection of private property such as the Fifth Amendment in the US constitution which prohibits the taking of private property for public use 'without just compensation'. As a result, although the Act has allowed the courts to resist the encroachment of legislation on the civil and political rights specified in the Act, it has not helped them to limit government intervention in the economy. A more general problem with the 'human rights' approach to limited government is that the worldwide human rights movement is inspired less by a desire to protect individual freedom from government interference than by a redistributive agenda that requires government to promote preferential treatment for certain allegedly disadvantaged groups. 'Justice' was once uncontroversially whatever resulted from the fair application of the rules: a fair trial led to a just verdict. Nowadays, justice is often far from blind, and its requirements are read off from various rights doctrines. Consequently the procedures have to be manipulated so that they lead to the 'correct' outcomes.

Any serious constitutional reform programme in New Zealand would focus on legislative procedures as well as judicial ones. Parliament could be given a strengthened role in scrutinising regulations with a view to assessing their likely costs as well as benefits. Options range from a Regulatory Responsibility Act, modelled on the Fiscal Responsibility Act, to widening the criteria against which the Regulations Review Committee could test secondary legislation.³ Similarly, there would be merit in looking again at the Fiscal Responsibility Act in the light of 10 years' experience of its operation. The Act has not been very successful in constraining government spending. US state government constitutions like the Colorado Taxpayer Bill of Rights, passed in 1992, would be worth studying. This caps spending growth at the rate of population growth plus inflation and requires immediate refunds of surplus revenues to taxpayers. The result is that Colorado taxpayers have received \$3.2 billion in tax rebates since 1997, an average of \$900 per taxpayer. At the same time, Colorado's economy has been exceptionally strong. Between 1995 and 2000, Colorado ranked first among all US states in gross state product growth and second in personal income growth.

Another possibility would be to extend the use of referenda, perhaps by making them mandatory for certain types of legislation. A referendum has two very clear advantages over parliamentary votes. It unbundles issues from the policy packages that political parties present at election time, so that the voters can express a clear and unambiguous preference on them. It also undermines the special-interest lobbies that dominate party politics by potentially embracing everyone affected by a policy, both for good and for ill. Thus, proposals to redistribute wealth from the general public to specific groups would have to run the gauntlet of the taxpayers. Equally, spending proposals that did benefit the general public would stand a good chance of passing. Government constrained by referendum is therefore likely to concentrate on genuinely public goods. Of course, a 'tyranny of the majority' could still emerge from the referendum, but the use of super-majorities (such as two-thirds) would limit that possibility.

³ These and other options are canvassed by Bryce Wilkinson, *Constraining Government Regulation*, New Zealand Business Roundtable, 2001.

The experience of political systems that routinely use referenda is somewhat encouraging. The best-known is Switzerland, which uses referenda at both the central and the cantonal levels. One study found that in those Swiss cantons where new government spending programmes have to be approved by referendum, the budget size is about 17 per cent lower than in cantons where no such requirement applies.⁴ It is possible that the use of referenda explains why Switzerland's central government is smaller than the combined cantonal governments – perhaps uniquely so among federations. Switzerland has clearly benefited economically from limited government; indeed, it is one of the world's most prosperous and stable countries. And not only are the names of Switzerland's politicians famously unknown in the rest of the world, there is some anecdotal evidence that the Swiss themselves are rather hazy about them. Maybe this could be counted as an additional benefit.

There is, then, no shortage of proposals for reviving constitutionalism. Putting forward such proposals is perhaps one way of combating the mentality that allows politicians to get away with expanding the role of government in inappropriate ways. Political debate nowadays is dominated to a high degree by opportunism; principles are often invoked only when they support pre-existing prejudices, and are otherwise ignored. This is true even of democracy: we tend to invoke the principle of democracy when we agree with the majority, but some other principle (like minority rights) when we don't. But at least this indicates that we do not really, after all, believe in unlimited government: we all believe that there are some things that the government should not do and indeed should not be allowed to do.

Wider debate on these issues could help generate an explicit awareness that only limited government preserving and conforming to the rule of law can be good government. The wisdom of James Madison, perhaps the most important figure in the framing of the American constitution, is no less pertinent today than it was over two centuries ago:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be

⁴ Lars P Feld and John G Matsusaka, 'Budget Referendums and Government Spending: Evidence from Swiss Cantons', February 2001, at www-rcf.usc.edu/~matsusak.

administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.⁵

So, to conclude, I respectfully beg to differ with the prime minister's view that the role of government is whatever the government defines it to be. Democracy, understood today as government for, by and of the people, means governments should respect the rights and freedoms of each and every citizen, and the rights of minorities as well as majorities. We should resist the concept of government as unbridled power. We need 'auxiliary precautions'.

⁵James Madison, *The Federalist Papers*, Paper No 51, The Penguin Group, New York, 1961, p 322.