State intervention in the democratic process

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makes the case for less, not more

It is not commonly realised that the US political system is one of the most highly regulated in the western world. A mass of regulations has been developed in order, ostensibly, to ensure fairness in elections. Of course, fairness cannot be created from the huge restrictions on political activity that these state interventions impose.

By contrast, the New Zealand electoral system has historically been relatively laissez-faire, with few state impediments to political activity. New Zealand political parties have generally been regarded as private organisations, and hence have had little obligation to report upon their internal affairs. Unfortunately, New Zealand has recently been shifting towards the American system of intense political regulation.

Instead, New Zealand could be following the lead of other western democracies that also operate under proportional representation and have low levels of regulation. For example, Austria, Iceland, Sweden, and Switzerland do not prohibit any anonymous donations, they do not require donation disclosure by political parties, and nor do they proscribe donations over a certain amount. In addition, Finland and Norway also have relatively unregulated systems. Perhaps surprisingly, it is in these unregulated systems that campaign spending is considered to be relatively low — Austria and Sweden, in particular, are cited as examples of the few democracies where election spending has not increased substantially since the 1970s. (Farrell and Webb "Political Parties as Campaign Organizations" in *Parties Without Partisans: Political Change in Advanced Industrial Democracies*, Dalton and Wattenberg (eds), OUP)

Alternatively, New Zealand could look to the rest of the Commonwealth, where tight regulatory regimes are not common. Of all the Commonwealth countries, only 51 per cent require donation disclosure, only 51 per cent have bans on political advertising on TV/radio, only 36 per cent have campaign spending limits, and only 20 per cent ban foreign donations. (Pinto-Duschinsky *Political financing in the Commonwealth*, Commonwealth Secretariat (2001) p 9) Until 2000, even the UK was regarded as having one of the most laissez faire political processes in the West. (Johns, "Political Parties: From Private to Public" (1999) 37 *Commonwealth & Comparative Politics* 89, 91) But as has happened in most other western countries, a number of political financing scandals pressured the UK government to implement reforms designed to re-establish public confidence in the political process.

Together with increased state funding of political parties, many of the political finance reforms in the west have led to decline in the voluntary and private nature of the parties. State intervention in politics can damage the crucial gap between party and state. The 1986 New Zealand Royal Commission on the Electoral System (RCES) anticipated the problems of the state-party relationship:

> we recognise that there are dangers inherent in excessive State intervention in the democratic process. If taken too far, controls may represent an unjustifiable intrusion on the freedom of individuals, groups, political parties and candidates. (p 185)

Arguably, the regulation of politics has now been taken too far in New Zealand. The consequences are not just a reduction in political liberty, but also many other apparently unintended consequences, including the creation of barriers to new political parties entering Parliament, and a reduction in the ability of the public to participate in politics.

In a perverse way, modern reforms actually exacerbate many of the problems they were intended to solve, as well as creating new problems along the way. Primarily, state intervention simply distorts political behaviour. As elsewhere, the reforms may be well-intended but the cure of political regulation ends up being worse than the disease of financial scandal.

HISTORICAL AUTONOMY OF PARTIES

For some time it was largely accepted that the political parties were self-regulating and their internal operations were their own business, with the state being kept at arm's length. This relationship with the state continued to be problematic however, according to Margaret Wilson, because "political parties have held an ambiguous position within New Zealand's constitutional arrangements", being partly private and partly public, but not entirely either. (Wilson, "Political Parties and Participation" in *The Constitutional Implications of MMP*, Simpson (ed), Department of Politics, VUW, (1998) 168, 169) In the past, the parties regarded themselves as private organisations, and society and the state generally agreed. Whenever issues have arisen about the size of their memberships or their financial affairs, the two main parties have been guarded about providing details, arguing that they are "voluntary, private organisations". (Jackson and McRobie (*New Zealand Adopts Proportional Representation: Accident? Design? Evolution?* Ashgate (1998) p 297) Hence the rules for selecting parliamentary candidates, for example, were left entirely in the parties' own hands, party finances were kept largely secret, internal rules were beyond state scrutiny, and they enjoyed no special legal recognition.

Clearly, the absence of state regulation resulted in a high degree of autonomy for the parties. By operating as "private associations", parties were often able to organise themselves

within this framework without any state recognition. The Incorporated Societies Act 1908 and other civil arrangements were entirely suitable for the regulation of these organisations.

The shift towards regulation

Calls for greater regulation of politics are not new, and as early as 1948, political science professor Leslie Lipson was advocating greater controls and monitoring of political parties:

> Certain current defects could be removed if more publicity were attached to party affairs, for the conception that the internal management of a party's business is purely its own concern is a juristic fiction devoid of political validity. Furthermore, the parties which seek to operate the democratic process must themselves be organized in concord with democracy's principles. (*The Politics of Equality: New Zealand's Adventures in Democracy* University of Chicago Press (1948) p 251)

Because Lipson was writing before the rise of any substantial antipathy towards political parties, such suggestions of regulation did not have much currency. The modern debate in New Zealand about campaign spending limits and the disclosure of donations then began after the breakdown of political consensus in the 1980s and the subsequent violations of political culture by Labour and National governments. This growth in anti-partyism then made calls for regulation more influential. At the same time, the 1986 RCES advocated, among other things, a number of state controls and regulations on donations to political parties, with the overall aim of making their financial affairs more transparent. The demand for regulation was also fuelled by the Labour Party's 1987 election campaign, where the party was widely alleged to have spent over $3.5 million, mostly made up of business donations (Vowles "Parties and Society in New Zealand" in *Political Parties in Advanced Industrial Democracies*, Webb et al (eds), OUP (2002) p 420)

Subsequently, political pressure and the shift to MMP forced the Fourth National Government to implement some of these recommendations in 1995, albeit in an altered form. The change in the electoral system finally gave political parties legal status. This was primarily because parties are explicitly central to elections that use a list system of representation and therefore they could no longer stay outside any sort of legal recognition. The RCES recommended that political parties should be required to register with the state in order to be eligible to contest the party vote under MMP. The Electoral Law Select Committee endorsed this finding, leading to its enactment in the Electoral Act. In order to carry out the registration process, the Electoral Commission was established.

Recent dissatisfaction with the effectiveness of the Electoral Act has caused demand for strengthened rules, especially after the 2005 election scandals involving the Labour Party's publicly funded pledge card and the Exclusive Brethren's extensive parallel spending effectively in favour of the National Party.

EFFECTIVENESS OF THE REGULATIONS

In evaluating the impact and appropriateness of the state regulations it is important to ascertain their effectiveness in achieving their stated objectives, because the interventions of the state into party affairs are always prone to failure. It is in the interests of at least some parties and citizens to evade the rules, and they inevitably find legal means to do so. Wherever in the world such controls have been introduced, they have been followed by the discovery of new loopholes and technique of funding parties that avoid the rules. As political finance specialist Michael Pinto-Duschinsky says, "as fast as legislators close old loopholes, political managers find new ones", which means that more and more complex legislation is then required. In countries such as the US, Italy, Germany and France, therefore, it has led to a series of unending "reforms of reforms". ("Political Finance and Democracy: Major Challenges for Reformers and Scholars" conference paper to *Political Finance and Democracy in East Asia* conference, 28–30 June 2001, Seoul, p 14)

The failure of regulation is most obvious in regard to the disclosure of donations. In this area there are a number of loopholes whereby large donations can be made without being declared. Sometimes political parties attempt to evade the regulations by getting their donors to break their large contributions into smaller donations that are below the level specified in the state regulations. Donations can also be disguised as loans. In this situation, the parties benefit from investing these no-interest loans, or through subsequent write off of the loans by the donor.

It is in the US that state regulation of donations is most advanced. Despite the extreme constraints on contributing to politics (the most that an individual can donate to a candidate is US$2200; trade unions and companies are banned from donations) the laws are widely regarded by scholars and participants as a joke. Political action committees (or PACs) and "527" organisations (named after the tax loophole number), mean that enormous "soft money" contributions still flow through to politics.

Likewise, in New Zealand, wealthy donors are still able to donate large sums under the regime created by the Electoral Finance Act 2007 (EFA). They will easily construct devices to get around the legislation's requirements. Although it has been widely reported that the EFA imposes upon parties a limit of $240,000 in anonymous donations, the overlooked fact is that this only applies to anonymous donations over $1000. Parties are allowed to receive as many sub-$1000 anonymous donations as they want. In practice, a wealthy anonymous donor can still make unlimited sub-$1000 deposits into a party bank account without breaking the rules or triggering disclosure.

Similarly, trusts will still be able to transfer unlimited amounts of money to parties without having to disclose the original source. As an example, the Panda Trust will be able to pass funds onto the Zebra Trust, which will gift the money to the Kangaroo Trust which can make the obscured donation to the Animal Party. The use of private businesses will also allow obscured political contributions to be made. For example, in theory there would be nothing to stop a political party setting up a unit to provide advice to trade unions or businesses. This unit might provide confidential "advice" to such clients and charge, say, $1m to each client. Likewise, according to rules outlined by the Electoral Commission, "people who pay to attend a fund-raising event will generally be paying for goods or services rather than making a donation" and hence are not subject to the disclosure regulations. (Electoral Commission *Guide to Disclosure of Donations Made*

to Registered Political Parties, (1998), p 14) Political parties can therefore hold fundraising events, such as a dinner attended by party leaders, to which entry would require a large amount of money, and this would be deemed a business transaction rather than a political contribution.

In terms of these inevitable loopholes, political finance scholars often refer to the "hydraulic nature of political money". Like water, political finance is thought to always find the weakest links through which to flow. Barriers erected merely redirect funds through other channels. This relentless ability to create a multiplicity of avenues means that state intervention in this area is somewhat futile.

Inevitably then, political finance regulation usually acts to obscure the public's understanding of where parties obtain their finances and how they spend them. A false sense of security is created about the legitimacy of the political process. The regulations succeed in reassuring voters of the legitimacy of the political system, but such confidence is unfounded.

UNINTENDED CONSEQUENCES

Many of the consequences of the modern highly-regulated political process are unintended and unforeseen at the time of the regulatory design. These unintended consequences merely lead to continuous "reform of reforms" to correct subsequent problems. One significant consequence is the effect of regulations on the organisational operations of parties. Peter Mair has argued that, "much of the character of contemporary party organization and party activity is increasingly shaped by state regulations". (Mair, *Party System Change: Approaches and Interpretations*, OUP (1997) p 147) The establishment of rules for how parties operate leads to convergence in ways of organising the parties.

In New Zealand, political parties are increasingly adopting similar organisational methods. They are increasingly similar in the way they organise their membership, fundraising, campaign methods, conferences, decision-making and internal communications. This contrasts strongly with the situation half a century ago. In 1954, visiting scholar David S North noted that while the heavily regulated US party system ensured that each political party had the same internal framework, "The reverse is the case in New Zealand, where the absence of any law regulating the parties as such has allowed each party to evolve its own internal structure". (North, "Political Campaign Tactics in New Zealand" MA Thesis (Politics, VUW (1954)) p 6) Since that time, with the introduction of the new party laws, it seems that substantial organisational variations are becoming outdated, adding to the increasing organisational convergence of the parties.

In a similar way, the laws limiting election expenditure have the perverse effect of triggering an early start to the election campaign by the parties. Regardless of when the regulated period in which parties are restricted in their expenditure begins, the parties will always begin their campaigns before that. This pushes the parties further towards the permanent campaign.

Another unintended consequence is that the less money political parties and third parties are allowed to spend, the more powerful is the role of the media in deciding elections.

Encouraging litigation in politics

Litigation is often the consequence of complex legal regulation, and politics is no exception. The shift to a highly regulated political process under the EFA means that political outcomes will start to owe more to legal battles than electoral battles. A more litigious system has been presaged by the Electoral Commission, which has said that political parties will no longer be able to rely on legal advice from their agency, owing to the complexity of the new rules. The Chief Executive, Helena Catt, has suggested that parties will need to seek their own advice on what is legal. More specifically, speaking on National Radio recently, Catt has voiced her apprehension about legal battles becoming the focus of party contests:

> Our fear is that litigation will become part of the election campaign. You know, it will go the American route where each party lawyers-up, and firing the lawyers at each other becomes as much part of the campaign as the traditional advertising.

Those disadvantaged by such a litigious system will be those without the wealth to employ specialist lawyers. The large political parties, the Electoral Commission, and the Parliamentary Service will all have the substantial legal means to take on legal battles, but smaller parties and interest groups will be deterred from involving themselves in politics owing to the risk and the expense of legal advice.

Increasingly, courts will be called upon to adjudicate on the internal affairs, rules and procedures of the parties. Commenting on the general issue, Judge Hodge has declared: "We don't want judges running the internal machinery of political parties — and the judges themselves don't want this". (McManus "Peters Decision: What's Really Involved" *The Independent*, 5, 26 February 1993, p 5)

STATE CONTROLS ON LEGITIMACY

Often in the debate on the EFA, its proponents appealed to the need to allow only "legitimate" debate in politics. The Green Party, for example, has spoken of its desire for legislation that only protects "genuine attempts to change the way that people vote", and to only allow the free speech of "people with legitimate election issues".

That the state should be given the power to determine what is politically acceptable should, of course, be questioned. This is made apparent by the example of the candidate known as Jesus Christ, who was refused the right to stand for office in the 1972 general election. The Chief Electoral Officer determined that the nomination was "offensive and not made in good faith" and an amendment to the Electoral Act was used to refuse the nomination (Cleveland *Government in New Zealand*, School of Political Science and Pub Admin, VUW (1977)). In contrast, and perhaps inconsistently, during the same election, a candidate with the name Mickey Mouse was considered acceptable by the Chief Electoral Officer. Similarly, socialist parties have at times been threatened with bans by the state — for example, National Prime Minister Robert Muldoon considered introducing legislation to outlaw the Socialist Unity Party. It is therefore conceivable that if the state is given powers to regulate who may contest for the party vote in elections, parties that are seen as too far outside the political centre might be excluded for ideological reasons. Already in some Western countries, certain "extremist" parties can be declared illegal by the state. In Germany, a party that is deemed to constitute "a threat to freedom and democracy" can be ruled unconstitutional by the courts, in Italy the Fascist Party is forbidden, and in Spain, parties with links to the ETA Basque liberation campaign are outlawed.

COMPLIANCE COSTS

The lesson from the US is clear: electoral regulation stifles political competition and actually favours the wealthy. The interventionist elements of political regulation clearly impose an expensive and bureaucratic demand upon political parties and other participants. The demands of accountability to the state often prove so onerous that it is the poor that are deterred from participation in politics. Accounting, auditing, and record keeping does not come cheap. In matters of such complexity it is the parties with money and specialist knowledge that are advantaged.

Similarly, there is a long history of radical parties — of left and right — bearing the brunt of the state's regulation of political activity. Authorities inevitably use these rules and tools to clamp down on the radical groups. In the US, for example, there is a long history of suppression of socialist parties using all sorts of electoral rules.

A CIVIL SOCIETY MODEL OF REGULATION

Due to the undesirability and futility of state intervention in politics, it might be more appropriate if political parties were left to regulate themselves and voters trusted to make their own decisions on whether the activities of political parties are acceptable. Society has its own built-in suspicions of corruption and antagonisms towards high-spending politicians. There is a well-established voter caution against parties "buying" their way into office. New Zealand voters are inclined to dislike and distrust parties that spend heavily. Many voters are also suspicious of parties that appear to be close to business donors.

In this sense, the public are already on guard against such violations of political culture and there is therefore a role for academics and journalists to investigate and evaluate these issues of interest regarding how the parties operate. Even without state intervention, it normally becomes apparent to voters which parties are spending large amounts of money. Academics and the media together can play a useful role in this respect, investigating the financial relationships of parties. The subsequent publicity and outrage of the public is usually censure enough to ensure that political finance scandals do not occur too regularly. When they do, the primary accountability mechanism should be electoral.

CONCLUSION

Whenever parties and governments attempt to regulate political activity they invariably do so in a way designed to advantage themselves. As Pinto-Duschinsky says of the regulations imposed by the state:

> [T]here is the underlying danger that they will benefit some parties at the expense of others. With the best will in the world, it is hard to devise neutral regulations. In fact, the ruling authorities of the day make the regulations and cannot be expected to create rules that disadvantage themselves (Pinto-Duschinsky, *Administration and Cost of Elections* (ACE) Electronic Publication, www.aceproject.org (1998)).

The importance of party autonomy and independence from the state is not just an esoteric principle or belief, but something that has a real impact on politics. The increasingly low level of independence affects the way that parties organise, and most importantly, it affects parties' relationship with social constituencies — again reducing pressure on them to formulate, promote and deliver policies that represent these voter groups.

The main question to arise from the controversy over the EFA centres on the extent to which it is proper for the state to supervise and intervene in the activities of voluntary associations such as political parties, interest groups, and citizens. Clearly, the regulation of parties and interest groups undermines their private and voluntary nature. Just as the postwar process of corporatism brought interest groups into a state-client relationship, the parties have been legally recognised by the state and taken under its wing. This has compromised their ability to represent their respective economic or social sectors. Parties need to stop being treated as "public utilities" and instead be seen as an essential part of civil society at a remove from the state. Democracy is enhanced by political parties having sovereignty over their own affairs and voters making the final decision on whether they approve of the political nature and organisational practices of a particular party. ❐