

ELECTORAL ALCHEMY OR FUNDAMENTAL SOLUTIONS? NEW ZEALAND AND ITALY

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Professor Patrono addressed a meeting of the New Zealand Association for Comparative Law on 12 October 1999. His topic was contemporary issues of constitutional concern and he developed ideas concerning the relationship of the welfare state to the protection of human rights, and the value of separating Parliamentary representation from the election of government. Two short papers were distributed at the meeting. This is the first of them - it was prepared as a newspaper comment.

Situated at opposite sides of the world and yet similar in climate, geography, and territorial dimensions, New Zealand and Italy also have in common concern about how their parliaments are elected. Both countries changed their electoral systems between 1993 and 1995. Both were responding to perceived structural problems with voting systems. Italy, freeing itself from the bond of allegiance which for almost 50 years had tied it to proportional representation, became captivated by the attractions of the First Past The Post (FPP) system. In contrast, New Zealand abandoned its founding traditions of FPP to take what some might say was the hazardous road of MMP.

Why the differences?

Italy chose what were believed to be the two great virtues of the majority system:

- 1 by reducing the number of political parties and compelling them into a bipolar system, that is to say ranging them on two opposing alignments, the FPP system creates stability of government:
- 2 by taking away from the hands of the parties' oligarchy the right to choose the government and by giving back the sovereign power to the people, the FPP

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system allows the citizens to make their voice felt in the great political issues, albeit in broad bi-polar terms.

New Zealand, basically, wanted to avoid the perceived illegitimacy of giving 'unbridled power' to governments which had been elected by a minority of voters across the country.

But if we consider the underlying motives which led the two countries to the electoral revolution of the nineties, the driving public pressure was probably the same in both countries: - to improve democratic governance. With difference emphases in each country, the issues were extremely basic. Government should reflect the will of the majority, should not be subject to manipulation or control by a party oligarchy, and should work stably for the term of parliament, up to the next election.

This was expected in the framework of parliamentary government: that is to say where elected members can make and unmake the government, at any time.

I would argue that the results have defeated the general expectations both in New Zealand and in Italy, to the point that, in both countries, there is talk of reverting: in Italy to proportional representation, in New Zealand to FPP. This is preached in Italy by the Minister for Institutional Reforms Mr Giuliano Amato, former Prime Minister; and is hinted at in New Zealand by PM Jenny Shipley. There are still many people, of course, who want to go ahead on the road already taken. In New Zealand they say: the choice made in 1995 favouring PR was valid, but a few changes are necessary to deal with a few unexpected problems. In Italy they say: first past the post was the right choice, if it has not worked, this is because the FPP system was "diluted" by keeping 25% to be allocated by PR; let us adopt a "hard and pure" FPP (as in the UK) and the problem will be solved.

But what exactly is the 'problem'?

I believe the problem, in both countries, is essentially that of governmental stability. In Italy since 1994 we have had two general political elections and 4 different governments, with a fifth on the horizon. In New Zealand the run up to MMP and the experience since 1996 has been of considerable governmental uncertainty. In these few years, more MPs have defected from their parties than over the previous century as a whole, and there has been the constant possibility of a government falling at any point.

What are the causes? I simplify them into two, the same in New Zealand and Italy. First, the defections of numerous individual MPs who, abandoning their party of allegiance, move with their baggage from the majority to the opposition (and vice versa) and in so doing unbalance the fragile government axis. Secondly, the exit of a political party from the government coalition, with the consequent birth in parliament of a government different from that resulting from the ballot boxes (in Italy this practice is

referred to by the term "ribaltone" which indicates a sudden tipping over of political alliances). The message this carries is that at the centre of the State there is not the sovereign people, but a political class which considers itself free to override the popular will expressed in general elections. From this there ensues a loss of respect and legitimacy for the democratic process which might be seen in declining voter turnout, a pervasive cynicism with politics and resentment of the citizens against the political parties, the parliaments and the governments.

What can be done? Who is right? Those who want proportional representation or those who want FPP? I believe that the causes and solutions are probably more fundamental.

The Prime Minister Jenny Shipley may well show a certain nostalgia for FPP, in the sense that proportional representation dramatically changes Cabinet's life. But a proposed therapy of returning to FPP may itself not be good medicine. Existing political parties do not disappear by "order" of electoral law. Like chameleons, parties can disguise themselves within required alliances, temporarily, until the ballot box is closed. As we have seen, strategic alliances in both countries between parties could be formed but crumble in the course of parliamentary session. Similarly, FPP -in this framework- cannot prevent or avoid the MP "defections".

On the other hand those who defend MMP in New Zealand and in Italy surely also have a point that PR is necessary for the election of the diversity of parliamentary representatives which a community might support. But I would argue that the laudable intention of preserving the legitimacy of the democratic process, does not justify anti-defection proposals which contradict one of the pillars of the democratic process: that MPs do not represent only the parties (or constituencies) but the "Nation" as a whole. Moreover anti-defection proposals risk dragging politics into the courts. This is especially the case in Italy, where the constitution preserves parliamentary autonomy of representatives to make decisions on behalf of the whole nation.

The truth is probably that defections and changing governments are probably a fact of democratic life, under any electoral system. Like other democracies, the boundaries in New Zealand and Italy, between "left" and "right" in political and economic ideology have virtually disappeared. Almost everybody acknowledges the value of the free market and the necessity of transforming the welfare state, which was until a few years ago considered the great success, in terms of social justice of the "mature" democracies. Faced with profound changes, I would argue that electoral alchemy cannot cure the identity crisis of the political parties, nor the "disorientation" of MPs. This is reality, like it or not.

I believe that the legal solutions, at least, lie in more basic constitutional principles, particularly in the separation of powers. Facing the question of how to retain the benefits of MMP in terms of "representation" without paying a too high price on the side of

"governability", I argue that the obvious solution is to separate the election of the parliamentary representation from the election of the government, sheltering the life of the latter from the continuous ambush of parliament. If one wants to maximise the objectives of "representation" and "stable governance", the solution is surely in cutting the umbilical cord which still binds government to parliament.

There will be objections that this risks giving excessive power to the Executive and the political party which elected it. This is not necessarily so. In Italy the government, tied up as it is by a thousand fetters and snares from the European Community, has -like the other countries of the EC (with the partial exception of Great Britain), long since lost its freedom of action, and is today reduced to take care of the execution of the big choices carried out in Brussels. In the European Community, therefore, the wild beast/government has been caged for quite a long time.

The problem - if that is the case- arises in New Zealand whose international alliances are not - at present - so compelling to its own internal sovereignty. I believe - if a foreign constitutional lawyer is allowed to express such radical judgments which anticipate the slow pace of politics - that New Zealand will choose sooner or later from the alternatives: either to accept an diminishing of interest in politics (a thing that nobody wants, and that no democracy can allow to fall beyond a certain threshold); or (as we say also in Italy) to take the bull by the horns. I mean to say that perhaps one day not far away, New Zealand will seriously face the problem of fixing the terms of the social contract in casting bronze of a "rigid" type Constitution, that is to say, made up in the form of Supreme Law of the Land. This will give a clear solution to all the main problems of the country: whether to keep the monarchical form of the State or to adopt the democratic form of Republic; whether to give more strength, by incorporating in it the Bill of Rights. It may also serve to define the relationship between Maori and Pakeha in the debate which involves the whole country concerning the vitality of the Treaty of Waitangi; and to determine whether to elaborate a short code of rules which link up the competitiveness of its enterprises in the world markets with the social interests of its citizens; and much more.

The constitution is the most efficient way to avoid the excessive power of the Executive and of the majority which upholds it. Tackling such issues by tinkering further with the electoral laws, risks, in both countries, being only theatre.