

THE WITHERING OF THE STATE?

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I would not be offended if some of you were to tell me that they were somewhat surprised when they saw my name as speaker on the invitation to attend the 1996 Merv Leitch Lecture. You would only have shared my own surprise when I heard Peter Loughheed on the phone inviting me to deliver this address.

Where our reactions may have been somewhat different is that, I told him that in my case, the surprise was accompanied by great joy. Mr. Loughheed can testify that, although I felt that my agenda was already overloaded, this was an offer I could not refuse; and I do not mean it in the sense which is usually given to that expression.

Indeed, it is a real pleasure and honour for me to speak to you on this occasion. As the protagonists for our respective governments during our negotiations on the National Energy Program in 1980-81, we were probably seen, in the public eye, as two individuals with considerable personal animosity against each other. It is true that I was not exactly embraced by Merv when I landed in Edmonton to discuss energy policy following the Liberal election victory in February 1980, and even less so when I showed up after the NEP was announced in the November 1980 budget. But I can truly say that, through the months of, at first sporadic, and then almost continuous meetings which led to an agreement between our two governments in September 1981, the utmost civility always existed in our relations. I have never known Merv as a man who was making a great show of his feelings but I have the impression that a great deal of mutual respect developed between us and, at least as far as I am concerned, I came to consider Merv as a true friend. Our personal and warm relationship continued well after we each left politics for greener pastures.

Obviously, we did not see eye-to-eye on every issue and I am not sure that we would have agreed on

the content of tonight's address, but I am sure that we would have had a cogent, lively and friendly discussion.

I have entitled this speech "The Withering of the State?" with a question mark. One might say that this is a subject that should be treated in the political science rather than the law faculty. Yet, I hope to show that this question raises a significant challenge concerning the role of law in the society of tomorrow; and, in any event, lawyers may be the last of the renaissance citizens: nothing is indifferent to us.

The state, during the last decade, has been under attack on two fronts: the techno-economic front, and the political front.

On the techno-economic front, the creation of the World Trade Organisation, following the Uruguay round negotiations, has added to the steps taken under previous rounds a further major liberalization of trade in goods and services and in capital flows. In addition, bilateral agreements or regional groupings like the European Union, the NAFTA, the recent Canada-Chile Agreement, and the ASEAN represent, to different degrees, further openings of the borders between countries. While the process of freeing up international trade and investment has known a steady and gradual expansion since the creation of the GATT after World War II, the breathtaking technological changes of the 1980s and the 1990s have turned that process into a real firestorm. These changes have been awesome in terms of both their size and their rapidity.

In a recent World Economic Survey, the Economist magazine stated that, over the last two decades, the information-carrying capacity of the global communications network has increased a million times over and that computing power doubles every eighteen months or so; at the same time, it is estimated

that the price of that power is only one-hundredth of 1 per cent of what it was in the early 1970s, and we all know of the less spectacular but nonetheless significant decline of long-distance phone calls during the same period.¹ Product cycles also have evidenced similar fast changes; 70 per cent of the revenues of the computer industry comes from products that were not on the market two years ago; barely a week goes by without the announcement of some new product from that industry coming on the shelves. And it has become almost embarrassing to admit that you are not actually spending (or wasting) a few hours a week surfing on the Internet.

It is not surprising that the combination of the opening up of borders, at least in economic matters, and the technological explosion has resulted in a situation where international trade has grown twice as fast as output, and foreign direct investment three times as fast.

Governments and the citizens certainly had a big say in the liberalization of the international economy; acrimonious debates raged on and a national election was fought in Canada on the issue of free trade with the United States. In Europe, numerous referendums took place in connection with the decision of various countries to join in or to reject the Maastricht Treaty, and the debate is ongoing. On the whole, one can say that the evolution in favour of the liberalization of international economic relations has been the result of a democratic process.

The globalization of economic activities has affected the traditional perception of the role of the state. With the adoption of new and more effective international and regional trade and economic agreements, the States have voluntarily curtailed the exercise of their political sovereignty. They do this, not out of some fascination for internationalism but because they have concluded that such steps are serving the best interests of their citizens. In the case of the European Union, those restrictions have gone beyond the economic and into the political sphere, not without some difficulty. Citizens who used to turn to their nation state to protect their economic interests are now being told that their government's hands are tied and that they have to take their complaints to another jurisdiction (Brussels, for instance, in the case of the EU) with which they are not familiar and upon which

they do not feel they have political leverage. It is not surprising that, in such circumstances, they come to consider their national state is losing relevance and they tend to take matters into their own hands. This phenomenon vividly came to my attention, a few years ago, as I was visiting a friend in Normandy. I met with a local mayor who also happened to be the president of a newly formed regional administration. He told me that he was just back from a meeting with Basque colleagues in Spain where he had been discussing a common strategy to be adopted concerning fishing rights on the Grand Banks, off the shores of Newfoundland. He said they had decided upon such an approach after they had been told by their elected officials in Paris and Madrid that this was now a Community affair, not one of the French or Spanish government. I would never have thought that, in the centralized state that France is, there would be a day when a regional administration would take over the mantle of dealing in international affairs. A few years earlier, that mayor might very likely have found himself promptly removed from office by the French Government, for acting against the interests of the state. I can confirm that this example is far from unique.

In the case of Canada, the WTO and the NAFTA agreements have not led to the same transfer of sovereignty and to the same degree of frustration. But, having to adjust to the combined impact of those agreements and of the technological revolution, Canadian citizens have equally questioned the role of the state. This has taken the form not only of pressures for a greater devolution in favour of provincial governments but also from provincial governments to regional and local authorities and to what Henry Mintzberg, in a recent Harvard Business Review article, calls the "non-owned organisations," referring to non-business and non-cooperative organisations as well as to the traditional non-government organisations.²

I see nothing wrong in the intense debate taking place in many western countries in that regard. This is the debate about what the Europeans, after the French, have come to call the debate on the principle of *subsidiarité*; political authority should be exercised at a higher level only if it can be carried out in a better way than at a lower level.

¹ "The World Economic Survey" *The Economist* (28 September 1996) 1.

² "Managing Government, Governing Management" (1996) 74 *Harvard Business Review* 75-83.

If that aspect of globalization flowing from international agreements has been the result of popular will and government action, the same certainly cannot be said about globalization resulting from the technological revolution.

I believe that the technological revolution is a significant factor leading to current questioning of the role of the state. For the first time in history, the modern state is trying to handle a wild horse that it may not be able to tame. The new technologies have resulted in a huge expansion of the expression of the right to communicate and express oneself. Yet, one cannot but feel some unease at the concept that, although traditional legal and regulatory levers still exist, they have, in many respects, become unenforceable in practice in the new communications field. You may have read an article in yesterday's *Financial Post* reporting on a recent seminar held in Toronto considering, among other things, the great difficulty for governments to control conduct that occurs on the Internet.³ Reference was made to the idea advanced by some legal theoreticians to the effect that the Internet should be treated as a separate "jurisdiction," away from and beyond national jurisdictions, with its own formal laws, courts and enforcement mechanisms. Such a "jurisdiction" would be called Cyberspace and its legal code, according to one expert, would be a "geodesic dome of contracts among private parties." The best analogy to such a development would be the creation of the Law Merchant during the Middle Ages. Hearing of all this, I can tell you that negotiating the National Energy Program with Merv Leitch was a cinch compared to what we, as jurists or politicians, will have to deal with in the future.

But there is more to the current questioning of the role of the state, in every society, than the impact of globalization and of the technological revolution.

I am referring here to the ideological attack on the state itself, and the welfare state in particular, that has been going on in the last decade. The United States is without a doubt the country where that attack has been the most virulent, the most consistent, and the most coherent. Taking account of the impact that everything American has on Canada, it is not surprising that those voices have found some echo in Canada.

³ Michael Fitzjames, "The Internet: A New Jurisdiction Called Cyberspace" *The Financial Post* (19 November 1996) 15.

As in all debates, however, some people tend to take radical positions which may make good headlines in the media but which do not do much to enlighten the public as to the real options available. I have come to believe that the political spectrum is not a straight line with the left at one end and the right at the other. In fact, a more adequate representation of that spectrum would rather take the form of a horse-shoe, if not a circle, where the extreme right and the extreme left end up almost touching each other. The apologists of the "best government is no government" are not so far from Karl Marx's thesis on the perfection of communism which was to lead to "The Great Dawn," the vanishing of the state. In that regard, it is interesting to note that, in practice, the extreme right and the extreme left have both led to dictatorial regimes.

Even though I may have had the reputation (undeserved, I would argue), I have no quarrel with the notion that we can be overgoverned, that the state is not the best institution to run a business and that the burden of regulation can become excessive. The general slimming process which most western governments are going through today is not a necessary evil; it should be applauded by all those who have at heart the good functioning of a dynamic market economy and of a responsible democracy. But I am concerned when I hear pundits and/or politicians take the line that tax increases are bad and tax cuts are good *per se*; that any decrease in regulation has to be welcomed automatically; that the best government is no government and, somehow, that the state is the enemy of progress.

When President Clinton declared, in his last State of the Union Address, that the era of big government was over, he was reflecting the view of a good majority of citizens not only in the United States but in countries all over the world, although the interpretation of that statement would have significantly varied from one place to the other. Although Canadians, by and large, would have subscribed to Mr. Clinton's expression of what is more a wish than a reality, they nonetheless have resisted up to now the siren songs of politicians trying to enchant them with more extreme slogans. There is even some comfort in the fact that in the recent U.S. elections, the simple promise of a 15% tax cut was not sufficient to accede to the presidency. The repetition *ad nauseam* that "it's your money, it's your money" was not enough to convince voters that the government was necessarily making bad use of the taxes it collected.

We have to go back to basics and rediscover the role of the modern state.

I do not need to spend time vaunting to this audience the merits of the market economy as the best instrument to ensure economic growth and prosperity; even the few remaining communist countries are trying to square the circle by claiming that what they want to establish is a "socialist market economy."

But recognizing the virtues of markets is a very long cry from making the marketplace the sole arbiter of the elements constituting a decent society. A society built exclusively upon the satisfaction of individual wants and the production of private goods would rapidly turn into a Hobbesian one where, for a vast number of citizens, life would turn out to be "poor nasty, brutish and short."

The British North America Act of 1867 endowed the Parliament of Canada with the responsibility of exercising its powers for the "peace, order and good government" of Canada. Nobody is taking issue with the duty of the state to ensure peace and order; the whole debate is rather centered on the definition of "good government" and how the political — if not the judicial — interpretation of those words has evolved since the adoption of the BNA Act.

I will begin by stressing that our constitution talks about "good government," in opposition, I presume, to "bad government;" it does not say "peace, order and small government," in opposition to "big government." The danger in the current debate is that we may end up confusing the kind of government we want with the size of government we should have. Governments, like every other institution in society, should be efficient, although the discipline of the market is more difficult to apply to the production and distribution of public goods rather than private goods.

All western democracies are going through very difficult adjustments, as they find that their financial resources are not sufficient to ensure the services that governments have committed themselves to provide. This has led to agonizing reappraisals of the activities of governments in all fields and to the transfer of many of them to the private sector, with significant benefits to the general public, both as taxpayers and as consumers of services. But we must be careful, as we are proceeding to remove the fat from government, that we do not remove government itself in some of its essential functions.

In the face of extremely rapid changes in the economy and its globalization, the more enlightened economists and business people argue against protectionism and subsidies as a defence against those phenomena. What governments should do, they say, is to give the people the tools they need to cope better with change. To quote from the World Economic Survey I referred to before: "The worst thing governments can do is to slow down the process of adjustment through regulation, subsidies and protectionism. Instead, governments should do everything possible to encourage adjustment — while easing the pain for those worst hit by change. They also need to ensure, by improving the skills of their workforce, that more people will be able to take advantage of the new opportunities."⁴

That is fine as far as adjustments to economic changes are concerned but that is surely not enough as a description of the type of society we want to have. A purely economic definition of the task is not enough to describe a *projet de société*, as we say in French. Such a *projet* encompasses all the activities and the interests of a collectivity of human beings. It is defined neither mainly nor only by the state, but by all the elements of a society. To speak like the ancient philosophers, the state remains the primary instrument which will ensure that a society will be able to achieve the common good. This is why we need to keep our eyes on the right objective which is "good government" rather than "small government." In cutting down government, there is no free lunch.

Nobody is contesting that the nation state must be there to ensure external and internal security (peace, law and order). Equally, it is agreed that the nation state must pursue a fiscal and monetary policy that will encourage stable economic growth. The role of the state, however, does not end there. Rather, there are common values that we have developed in Canada during the 20th century which deserve to be sustained and made to flourish equally in the 21st century. These values include: respect for individual rights, tolerance, solidarity and compassion. If a purely market-oriented state can live with the first of these values, it could not care less about the others. Yet, as pointed out by E. J. Dionne, in his book *They Only Look Dead*: "The central irony of our time is that so many of the new conservatives wish to avoid is this: A capitalist society depends on non-capitalist values in order to hold

⁴ "The World Economic Survey", *supra* note 1.

together and prosper.”⁵ If Marx was at best naive to predict the vanishing of the state under communism, he was dead on when he stated that unbridled capitalism bore in itself the seeds of its own destruction.

In order not to appear uselessly provocative, let me take an example from our neighbours to the South. The U.S. Labor Bureau published some time ago a forecast of the changes in selected occupations in the U.S., for the period 1994-2005.⁶ It is interesting to note that, while the first and second largest percentage increases will be those for home health care workers and computer system analysts/ programmers, the third and the fifth will be for security guards and police and prison officers; teachers come seventh (just after lawyers!). In terms of volume, the increase in the number of security guards almost exactly matches that of home health care workers. And if you add the guards to the police and prison officers, their total number is equivalent to that of the computer system analysts/programmers. Those figures tell you a lot about the type of society Americans are building.

Equally, in the United States, we are noticing a very significant increase in wage inequality. The gap between the earnings of the average American male college graduate in relation to a high-school graduate has increased from 49 per cent in 1979 to 89 per cent in 1993. And, in the past 20 years, the pay of the average chief executive has gone from 35 times to 120 times that of the average production worker. Even looking at the ratio of the earnings of the lowest average decile to the median wage, the disparity has increased by some 15 per cent between 1990 and 1995. In Canada, the increase in disparity has been more modest, in the range of 5 per cent. Yet, this is no cause for rejoicing when one realizes that, between 1981 and 1992, the real income, after taxes, of the average Canadian family has actually declined. I have no reason to believe that the situation has improved since.

For Canada, these figures raise a few questions. Do we want a society where personal security and the repression of crime is going to absorb a larger and larger share of our economy? Can we hope to live in peace in a society with rapidly increasing economic

disparities? I am convinced that the overwhelming majority of Canadians would answer a resounding no.

If we want to preserve national Canadian values, the state will need to continue to play a major role in the field of social policy, in order to help people to adjust to the rapid changes that are inevitably taking place and to protect those that will be the victims of those changes. This means the state will need to have the financial resources to achieve those purposes; and that means that the politicians will need to have the courage to raise those funds through taxation and the voters will need to be confident that this is money well spent, that the state is not their enemy but the defender of the common good.

I agree that governments must balance their books and, even, where possible, reduce their debts. But one must not go overboard; if a government should try and balance, over time, its operating expenditures with its taxation revenues, there is no necessity whatever (it could even be counter-productive) to finance all its expenditures out of current revenues. The construction of an airport or of a highway or the building of a school no more need to be paid in cash than the purchase of a house by a family.

I also agree with the efforts of governments to make the most efficient use possible of resources allocated to the social sector, whether they be for health, education or social security. But I am convinced that any reduction in the share of our GNP reserved for those purposes will only result in increased costs under another form, whether they be to fight increased crime resulting from economic misery or loss of competitiveness resulting from an inadequately trained work force.

Finally, I make a plea for national economic solidarity. To begin with, while governments in Canada claim to recognize the values of a market economy and have opened our borders more than ever to free trade, we are still facing a situation where it is sometimes easier to trade with a foreign country than between provinces. Surely we can do better than that.

Secondly, the redistributive functions of the Canadian government must receive the continued strong support from the regions of the country which are net contributors to that function. The various regions of this country have not been endowed with the same natural resources nor with the same economic opportunities since the beginning of Confederation. I do not have to remind the older members of this audience that Alberta has not always been a net

⁵ E.J. Dionne, *They Only Look Dead: Why Progressives Will Dominate the Next Political Era* (New York: Simon and Shuster, 1996) at 297.

⁶ United States, Department of Labor, *Occupational Projections and Training Data, 1992 Edition* (Washington: U.S. Government Printing Office, May 1992).

contributor. Economic conditions change with the times and the beneficiary of today can tomorrow become the contributor. Equalization and shared-cost programs have been the privileged instruments for the manifestation of Canadian solidarity and it is hoped that Canadians from all regions and of all political convictions will continue to support their use in the future.

The rise of neo-conservatism in the 1980s and 1990s or, to be more accurate, the rediscovery of primitive economic liberalism, has had many positive consequences for the western economies as well as for developing economies and economies in transition. That phenomenon has forced us to re-examine our public institutions and their functioning — a more efficient and a more productive economy has no doubt resulted — and that questioning must continue. But let us not be deluded into thinking that freeing up the market from taxation and regulation will by itself result in a better society. Lower taxation is not automatically a virtue and deregulation a panacea. In fact, even the most reformist governments in that regard have quickly learned that, while they were removing obsolete and obnoxious regulations in some sectors, they were simultaneously enacting new regulations in the same or in other fields. In other words, deregulation often took the form of re-regulation.

The state will not wither away in the 21st century, notwithstanding the claims or the outcries of the ultra-liberals (or ultra-conservatives, if you wish; there is considerable irony in seeing the right in the U.S. accusing its opponents of being liberals). What the citizens wish and are entitled to is not necessarily smaller government but better government; this may sometimes lead to smaller government but not always. Our country has been built under strong governments, not weak ones, and there is no reason to believe that this will not be the case in the future.

The technological revolution and globalization require us to rethink the way governments have been operating. They provide us with an opportunity to have smarter and more efficient governments but they will never replace them. The modern state must not only continue to guarantee to its citizens the freedom *to* produce and sell goods and services, it must also make every effort to give them the freedom *from* poverty and misery, *from* ignorance and under-education. Nowadays, that duty applies not only within national borders but internationally; willy nilly, the 21st century will make us truly citizens of the world.

Peace, order and good government remain today the same noble task for government as it was 129 years ago. I can only hope, in spite of the contemporary denigration of governments and public officials, Canadians will in the future be fortunate enough to count on able and devoted men and women to serve them in public life as well as Merv Leitch did in our own times. And I hope and pray that the citizens of Canada will strongly support them in resisting the establishment of what Professor Michael Bliss has called “an atmosphere of private opulence and public squalor.”□

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