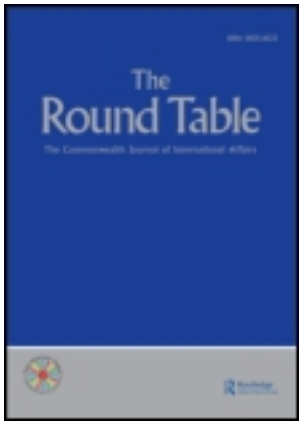


The Round Table: The Commonwealth Journal of International Affairs
Publication details, including instructions for authors and subscription information:
http://www.tandfonline.com/loi/ctrt20

# Proposed Constitutional Reform in New Zealand: Constitutional Entrenchment, Written Constitutions and Legitimacy

Noel Cox [a]
[a] Aberystwyth University, Ceredigion, Wales, UK

To cite this article: Noel Cox (2013): Proposed Constitutional Reform in New Zealand: Constitutional Entrenchment, Written Constitutions and Legitimacy, The Round Table: The Commonwealth Journal of International Affairs, 102:1, 51-70

To link to this article: http://dx.doi.org/10.1080/00358533.2013.764090

*The Round Table*, 2013
Vol. 102, No. 1, 51–70, http://dx.doi.org/10.1080/00358533.2013.764090



# Proposed Constitutional Reform in New Zealand: Constitutional Entrenchment, Written Constitutions and Legitimacy

NOEL COX
Aberystwyth University, Ceredigion, Wales, UK



ABSTRACT *This article addresses the question of possible constitutional reform, specifically in the New Zealand context, but also more generally. In any process of constitutional reform, an understanding of how the existing system works and how it came into being is important. It is also important to ask just what is meant by national identity, and how far this can be reflected in the existing system of government. This should be addressed before any detailed consideration of parts of the governmental structure, and then be permitted to inform the discourse and influence the development of proposals for change. Public opinion is of paramount importance, and indeed it may be questioned whether significant constitutional reform proposed by politicians rather than resulting from popular demand has legitimacy; but public opinion and direct or representative democracy alone is not necessarily sufficient.*

KEY WORDS: New Zealand, Constitutional reform, Treaty of Waitangi, Unwritten constitution, Constitutional legitimacy, Entrenchment, Constitution Act 1986, The Crown, National identity

## Introduction

Two principal difficulties immediately come to mind when considering reform of the New Zealand constitution. The first is the question of a written constitution, and the second is the (not unrelated) issue of the Treaty of Waitangi. Both of these questions must be considered carefully, and in light of current understanding of constitutional theory and practice. This article will consider these two related questions in the light of the overarching question of constitutional legitimacy.

It is a common misconception that New Zealand (like the United Kingdom and Israel) does not have a written constitution. It is true that there is no one document called 'the constitution'; but the principal Acts that establish, empower and regulate the organs of government are readily identifiable.[1] The meaning behind the assertion that New Zealand does not have a written constitution is simply that New Zealand's constitution is not entrenched. Thus Parliament can, and does, amend the constitution through a simple majority vote.[2]

*Correspondence Address:* Noel Cox, Head, Department of Law and Criminology, Aberystwyth University, Old College, King Street, Aberystwyth, Ceredigion SY23 2AX, UK. Email: noel.cox@aber.ac.uk

In the modern world New Zealand, together with the United Kingdom, is virtually alone in not having an entrenched constitution. Unlike the United States, Canada and Australia—not, coincidentally, all federal systems—New Zealand cannot look to one single document embodying its constitution; but, although the provisions of the Constitution Act 1986 are not entrenched[3] and major constitutional changes could legally be effected virtually overnight by a bare majority of the House of Representatives,[4] the issue is not purely or even mainly the legal one of entrenchment.

The approach of the New Zealand constitution is one of flexibility. The written rules are underpinned by what are called conventions. They are rules of political practice that are regarded as binding by those to whom they apply. Laws are enforceable by the courts, conventions are not.[5] The major convention upon which the constitution is built is the constitutional principle known as the rule of law. This is based upon the practice of liberal democracies of the western world.[6] It means that what is done officially must be done in accordance with law.[7]

In Europe, where an entrenched constitution is the touchstone for legitimacy of government,[8] there might be a general grant of power to the executive, and a bill of rights to protect the individual. In the British tradition, which New Zealand is alone in following in this respect, public bodies must point to a specific authority to act as they do.[9] Thus, we rely upon numerous specific grants of authority to the various organs of government, a much more flexible approach.

New Zealand might choose to adopt an entrenched constitution, but this would mean adopting a new approach to public law. In Canada, the newly renamed Constitution Act 1982 attributed to itself a position of legal paramountcy.[10] On the model of the American Constitution there was to be no higher legal authority. This has meant that the Supreme Court of Canada has had to become increasingly involved in the political arena. This has its advantages and its disadvantages, both in principle and in practice. One consequence is in relation to the constitutional locus of authority in the state—if the courts have the power to invalidate legislation then parliamentary sovereignty, and even democracy itself, must be understood differently.

Additionally, it is a debatable point whether New Zealand has lost anything by not having an entrenched constitution. Not only would an entrenched constitution require the courts to assume a greater, more controversial role, thereby increasing the possibility of political selection of judges, but entrenched constitutions also tend to become out of date. This is due to the difficulty of amending them to take into account changes in circumstances. In Australia it was this latter aspect that was the root cause of the sacking of the Whitlam government in 1975 by the Governor-General, Sir John Kerr.

## Entrenchment and Better Government

An entrenched constitution is in no way an inherent guarantee of better government, or necessarily an effective limitation upon excessive legislative, executive (or judicial) independence. Those countries that suffer most from military coups, revolutions, putsches and similar upheavals normally have (ostensibly) entrenched constitutions. The way in which society functions and the emotional attachment to democratic processes are better safeguards than a so-called written constitution.

Because in Canada and Australia authority is shared between the federal and provincial or state parliaments, there must be some higher authority that determines who shall have what power or responsibility. As a unitary state, there is arguably no technical need for the New Zealand constitution to be entrenched, apportioning authority and placing limits on the powers of Parliaments.

It is generally agreed that Parliament is a sovereign body, able to enact, repeal or amend any law, including any self-imposed limitations.[11] Such limitations are effective only in a federal state, where limitations on capacity are, by definition, part of the constitutional structure. Short of adopting a federal system of government precisely to entrench a constitution, it is doubtful whether any constitution would be held by the courts to be truly entrenched.

In August 1998 the Supreme Court of Canada considered the question of the Canadian constitution being circumvented by a referendum, thereby affirming the sovereignty of the people; but it felt that political institutions draw their legitimacy from the rule of law, which precluded such action.[12] In the New Zealand context, this would mean that any attempt to introduce a truly entrenched constitution would threaten the legitimacy of the established legal order, because of its reliance upon inherited authority.

A more important factor to consider, and one that might point the way to the adoption of a new theory of government (one in which entrenchment, should this be necessary or desirable, is possible), is the position of the Treaty of Waitangi.



## Treaty of Waitangi

In New Zealand, the Treaty of Waitangi, as a principle of the constitution, is now *politically* all but entrenched. Formerly it might be said that the traditional national identity was of one people with one culture, that culture being (predominantly) Pakeha;[13] but, like Canada, and especially since the 1970s, our liberal democratic ethos has generated what Kelsey calls an integration ethic and a self-determination ethic.[14] These two ultimately may prove impossible to reconcile. They must, however, be addressed in any examination of the constitution. It must also be observed that the Treaty was itself a reflection of the then-contemporary understanding of constitutional principles, and in particular the proper relationships between subject and Crown, and settlers and indigenous peoples.

The Treaty occupies an uncertain place in the New Zealand constitution.[15] Legally, it is not part of the general law.[16] No Māori law was recognised by the colonial legal system.[17] The New Zealand Parliament has never doubted that it had full authority despite the Treaty. There have been some signs that this orthodoxy may be challenged,[18] but it is difficult to see how this could be achieved in the absence of an entrenched constitution and a Supreme Court on the American model.[19] The Treaty did, however, reflect long-standing principles of the common law, and developing practice of imperial governance, in its treatment of indigenous peoples.

The time may yet come for the courts to give judicial recognition to the Treaty of Waitangi as a formal part of the constitution, as they have been called upon to do by, among others, Professor Whatarangi Winiata of the Victoria University of Wellington.[20] There have been clear signs that Lord Cooke of Thorndon, while President of the Court

of Appeal, was inclined to reconsider the position of the Treaty,[21] whose orthodox position was outlined by the Privy Council in 1941.[22]

Although the New Zealand political system is a democratic and popular one, it is not based upon the concept of popular sovereignty—nor is tino rangatiratanga. In this respect, the differences between lawyer and politician are great. The politician could well argue that the New Zealand system of government is a popular sovereignty, along the lines that Locke discussed in his *Two Treatises of Government*. Locke said that 'every one has the Executive Power of the law of nature'. The right of governing, and power to govern, is a fundamental, individual, natural right and power.[23] To the lawyer, whatever the political reality, the legal sovereignty remains vested in the Sovereign in Parliament. Neither view necessarily reflects traditional Māori understanding of government.

The Māori dimension in New Zealand government is significant. The legal status in the Treaty of Waitangi is secondary to how it is perceived by Māori.[24] Whatever the legal status of the Treaty of Waitangi, the chiefs yielded kawanatanga to the Queen. The Treaty settlement process has encouraged reconsideration of the system of government, and the constitution in general; but without specific concurrence from the Māori, as Treaty partner with the Crown, the significant revision of the constitution, such as the abolition of the monarchy, would appear to lack legitimacy.[25] Nor would a move to a republic absolve a future government of its Treaty obligations.[26]



## Legitimacy

New Zealand, in contrast to Canada, has only two principal competing constitutional interests. Legal legitimacy in New Zealand is based legally upon the assumption of authority (of legal sovereignty) by the British Crown and Parliament in the middle of the 19th century; but this authority has been called in question, in particular by those who claim Māori sovereignty.[27] Indeed, a crisis of legitimacy is afflicting all countries whose origins lie in colonial conquest and settlement. This is due in part to the justification for colonialisation being largely discredited.[28]

As Hayward has said:

> [T]he Treaty of Waitangi is a fundamental document in New Zealand, because it allowed for the settlement by Pakeha and the establishment of legitimate government by cession (as opposed to by military conquest).[29]

Yet this may be only partly true, for legally, the acquisition of sovereignty and the settlement of this country by Europeans can be ascribed to an act of state,[30] though this may have been of a revolutionary nature.[31]

Legitimacy is sought through the advancing and acceptance of a political formula, a metaphysical or ideological formula that justifies the existing exercise or proposed possession of power by rulers as the logical and necessary consequence of the beliefs of the people over whom the power is exercised.[32] This legitimacy is based upon two acts of state, the Treaty of Waitangi and the proclamation of sovereignty over New Zealand by the Crown.

The authority of the Crown was imposed by Governor Hobson by a proclamation of 21 May 1840;[33] but this was based, morally at least, on the Treaty of Waitangi. However, the Māori version of the Treaty gave rather less authority to the Crown than

did the English, and retained rather more for the Māori chiefs. Nor did all the chiefs sign the Treaty.

There is also a marked degree of dispute among Māori as to the extent of the powers given up by those Chiefs who signed the Treaty of Waitangi. Sir Hugh Kawharu, Professor of Māori Studies at the University of Auckland, in evidence to the Waitangi Tribunal, observed that:

> [W]hat the Chiefs imagined they were ceding was that part of their mana and rangatiratanga that hitherto had enabled them to make war, exact retribution, consume or enslave their vanquished enemies and generally exercise power over life and death.[34]

The leading Māori lawyer Moana Jackson proposed a markedly different view:

> [In Article 1 the Māori granted] to the Crown the right of kawanatanga over the Crown's own people, over what Māori called 'nga tangata whai muri', that is, those who came to Aotearoa after the Treaty. The Crown could then exercise its kawanatanga over all European settlers, but the authority to control and exercise power over Māori stayed where it had always been, with the iwi.[35]

Kawanatanga could easily be taken for a distant power of protection against foreigners and other tribes, which would not impinge on the mana of individual chiefs and their own tribes.[36]

Whatever the Chiefs believed, it is unlikely that they had any conception of the unlimited parliamentary sovereignty that was imposed upon them. However, the Treaty at least partially justifies or legitimates Parliament's claims to power, though in Jackson's view only in respect of Pakeha.[37] Legitimation by effectiveness and durability of even a revolutionary assumption of power is a well understood principle of law,[38] even among the early Māori.[39] However, such a resolution presupposes that the original assumption of sovereignty was in some way illegal, itself a question open to dispute.[40]

## Manageability

As can be seen from the above cursory examination of two issues of the constitution, entrenchment and the Treaty of Waitangi, any serious revision of the constitution risks rapidly becoming an unmanageable exercise. Although the general public are not overly concerned with esoteric concepts of constitutional theory, any reform must first seriously consider the theoretical basis of our legal and political system. This is especially important in view of Māori claims for 'sovereignty'. It would therefore be premature to ask, for example, what procedures for constitutional amendments would be appropriate in a new constitution.

At a time when the constitution is already facing a crisis of legitimacy, rather than looking to alternatives, it might be worthwhile looking at solutions within the existing structures.

In the view of Canadian observers such as David Smith and Anthony Birch, the most important of the defects of the liberal model of the Westminster-type constitution—the view of the political theorist—are its failure to depict the role of the Crown in the system of government and the implications of the interrelated independence of the executive.[41]

Smith would argue that the Crown provides the necessary underlying structure. Monarchy concentrates legal authority and power in one person, even where symbolic concentration alone remains.[42] The monarchy can be extolled as the one unifying symbol that New Zealand currently has. Its continuance is not merely consistent with the Treaty of Waitangi, but arguably required by it.

Unless they are prepared to wrestle with large issues, the most contentious of which is the Treaty of Waitangi, or entrenchment (through which the Treaty could be preserved[43]), proponents of constitutional reform should tread wearily.

Revision of constitutional arrangements to reflect national identity requires agreement as to what precisely is New Zealand's national identity. The Māori and Pakeha cultural heritage, the special position of the Māori and their relationship with the Crown are all aspects that are currently reflected in our constitution. An entrenched constitution would be alien to our constitutional traditions, but would make formal entrenchment of the Treaty of Waitangi into the constitution easier (assuming for the moment that this was necessary or desirable). However, whether this would be acceptable to the Pakeha majority is unclear.

Although some may argue that our present system is ad hoc and lacking in conceptual uniformity, this is itself a reflection of national identity. There has traditionally been a reluctance to address strongly theoretical issues. Nor, in fact, is our constitution lacking in a theoretical basis. Our present system reflects both a degree of inclusiveness and a flexibility that would be hard to emulate in a deliberately constructed constitution.



## Competing Interests

This does not preclude the adoption of such a constitution; but the rationale for such an innovation would have to be developed, and would be at least as important a question as the composition of any such constitution. It also concerns, because of the interplay between the potentially competing interests of the Treaty of Waitangi and entrenchment, broader questions of authority and legitimacy.

The precise nature of the authority of a state within its own territory is heavily influenced by the particular constitutional, political, historical, social and economic heritage of individual states. It is therefore difficult to generalise about the nature and form of government. However, there are certain common elements, at least among the modern legalistic entities that we call states. In earlier times, that is, before the advent of modern juridical states, there was a greater element of flexibility and consequently a lesser degree of similarity in statehood. Because of the universality of international law, however fluid it may be, this has had an influence on the development of the notion of the state domestically.

The spread of European colonial empires across much of the world, and especially in the 19th century—at the height of the notion of the sovereign state in international law—also had important implications domestically. Whereas in a state such as Somalia institutional government was weak and the 'state' depended on internal checks and balances, post-colonial states sought to emulate the strong government models of the West—whether or not these were suited to their own particular circumstances. The world community also sought to impose certain domestic standards, such as democracy and the rule of law, again irrespective of the applicability of such concepts—which were assumed to be ubiquitous.

With the growing dominance of democratic concepts of government[44]—though not necessarily the spread of democracy—it might be thought that if the people believe that a governmental institution is appropriate then it is also legitimate;[45] but this scheme omits important substantive questions about the justice (or even the role) of the state and the protection it offers the individuals and communities who belong to it.[46] It is generally more usual for commentators to maintain that a state's legitimacy depends upon its upholding certain human rights.[47] This may be seen in the use of such terms as freedom, democracy, rule of law and tolerance, to be found even in the constitutions of totalitarian dictatorships.[48] Truly democratic states scarcely need to assert such principles (because they comprise the foundations of the constitution, formally or practically), yet they are rarely absent from modern constitutions.[49] But the state is as much an economic as it is a social or legal construct,[50] and it is important for its legitimacy and viability that the constitution remains broadly consistent with economic and technological realities.

Economic and technological changes eventually alter constitutions because they change society, which constitutions reflect to a greater or lesser degree.[51] These changes need not necessarily be in the formal written Constitution, where these exist. It may be—and is indeed more likely to be—in the understanding, operation, or perception of the constitution. It is likely to be in the nature of the fundamental relationship between individuals and the state, between communities or society as a whole and the state, and between state and state. Yet because of their nature they may be only dimly perceived, and then possibly only with the incontestable advantage of hindsight.



## Formal Continuity

Constitutional reform itself may be revolutionary yet preserve apparent formal continuity.[52] Changes need not be revolutionary in a strict legal sense, yet their effect may be revolutionary—as indeed may be its *Grundnorm*. The formalist approach of Kelsen maintains that if the constitution is changed according to its own provisions then the state and its legal order remain the same.[53] In this view it does not matter how fundamental the changes in the substance of the legal norms may be. If they are performed in conformity with the provisions of the (formal) constitution, continuity of the legal system will not be interrupted.[54]

Thus, even though the nature of the relationship between individual and state—or between state and state—may have been altered profoundly, there is no revolutionary change to the constitution.[55] As an illustration, when the former republics of the Soviet Union declared their independence in 1991–92,[56] the provisions of the former Constitution of the Soviet Union (under which the constituent republics apparently enjoyed considerable autonomy) meant that the revolutionary nature of the dismemberment of the union was more real than apparent. Thus, the formal structures of the post-Soviet states often closely resembled—at least during the transitional phase—their Soviet forms, yet their actual operation was quite distinct. However, this understanding appears to minimise the real effect of constitutional change. Constitutions both reflect and influence governmental and societal behaviour, and fundamental changes in constitutions, however achieved, are likely to have significant medium- and long-term implications.

Nor does apparent continuity mean that there is real continuity. Ross emphasises the necessary discontinuity of a new constitutional order that has replaced an earlier one.[57] According to Ross, the legitimacy of a constitutional order goes beyond the legal system. If the political ideology changes at a time of constitutional change, so the legal continuity is disrupted.[58] In other words, if there is a profound social, political, or economic change, any resulting constitutional change may well be revolutionary in nature.[59] In this model the post-Soviet states were truly revolutionary in nature, as they rejected the social, economic and political model of communism—although their formal constitutional structures survived for a time. But it must be recalled that a constitution is far more than a statement of a formal power structure—it includes the ways in which that power structure actually operates.

Bearing this in mind, it may be seen that there are profound constitutional changes occurring even when the formal constitution remains essentially unchanged. This may of course also be observed even in those countries that have not undergone a revolutionary change of political or economic *Grundnorm*. The United States of America is far more centralised politically than it was when it was established a little over 200 years ago, but the formal constitutional division of responsibilities between the states and the federal government remain largely unaltered.

The importance of this distinction between the legitimacy of a continuous legal order (however great the changes in the underlying norms may be) and the discontinuity of a new order is profound. For, although superficially the constitutional order remains unchanged, in one model legitimacy is preserved, in the other it is undermined. It might well be wondered how this could be so, unless the notion of legitimacy is unrelated to any practical social application. Surely, it could be argued, the people of a given country know whether their governing regime is legitimate or not? It should not be a matter for political theorists to advise them, but should rather be an instinctive reaction to the regime that controls the state, the (non-political) apparatus of the state, and the role of the state.

This would again appear to be an illustration of the political discourse of legitimacy being controlled by the academic writers and having comparatively little impact on the general population. The model of legitimacy envisaged by some of these writers is not always strongly grounded upon sociological and political reality. This may be seen in the development of popular uprisings, mass protests and similar manifestations of popular discontent, however the formal legitimacy of the state may be maintained. Ross would appear to reflect more accurately the political reality, which might be put simply thus: a government, however great its military or bureaucratic stranglehold on a country, cannot survive long if it does not have the support or at least the acquiescence of a sizeable proportion of the population—though it may lengthen this hold through judicious manipulation of education and communications.

It is also important to consider the role and purpose of the state—though this has been a fundamental problem of all theories of the state since Aristotle,[60] and doubtless will remain so. Legitimacy of government has its social, political and economic aspects. As Hobbes maintained, government was a product of consensual alliance, and although it was generally for the common good, its primary purpose was to further the interests of the individual.[61] These interests are economic, in that the state should be able to ensure that the majority of its people have sufficient resources to live reasonably comfortably. They are also political, in that the population has certain expectations of

involvement in decision-making, or at least some degree of consultation over matters that concern them. Social aspects include the element of belonging, a feeling of community with others of the nation-state.

Grady and McGuire have considered the nature of constitutions from an economic perspective. They have concluded that constitutions are not the product of consensual choice, but rather the result of weaker humans banding together to resist forceful appropriations from more dominant humans.[62] This conception may fit one economic model, but it does not necessarily assist us greatly when we consider the constitutional implications of the knowledge revolution. Nor may it be particularly helpful when we consider that government in any modern state—or even any pre-modern state—is more than simply a tribal alliance such as they appear to conceive it to be. That is not to say that this model does not adequately describe the origins of tribal and pre-city government.

The revolutionary potential of the knowledge revolution involves the empowerment of smaller and smaller groups, until one reaches the nadir, the wholly empowered individual. It is possibly true that no true Lockean constitution (where state and society are in a true compact[63]) exists today.[64] However, consent—through acquiescence and participation—is found in most governmental systems.[65] It may just be that the level at which consent occurs, and the means of obtaining consent, are in the process of change.

The nature of the state is reflected in the manner in which it functions, though there is no one single model of state. It may well be helpful to consider some possible models, in order to ascertain, if possible, some indications for future reform. Let us begin with a review of four theories of the origin of the state, courtesy of Grady and McGuire.[66] These are the Hobbes–Buchanan contractarian theory, Karl Wittfogel's hydraulic despotism theory, Robert Carneiro's circumscription theory and Mancur Olson's stationary bandit theory.[67] I shall examine each of these in turn.

Thomas Hobbes began his analysis of the state with a consideration of the state of nature, for he saw the one as dependent upon the other. He assumed that before formal governments existed people were reasonably equal in endowments[68]—an assumption that might perhaps be subject to challenge, but which is nonetheless an appropriate starting point. Each individual, approximately equal mentally, physically and morally, had an equal hope of acquiring the same ends, which were scarce (food, shelter and similar necessaries of life, as well as the rarer 'luxuries'). Each individual depended on his/her own efforts for his or her livelihood, and those his/her family.[69] As a consequence, individuals were in direct and indirect competition with each other. This resulted in the 'war of every man against every man'.[70] In such a state of being, opportunities for production, investment, learning and exchange were limited because each individual possessed 'continual fear and danger of violent death'.[71] Life was, or could very easily be, 'nasty, brutish and short'.[72] This created an incentive to seek improvement, though not necessarily the opportunity.

To escape from this ongoing cycle of conflict, individuals have an incentive to organise themselves into a commonwealth. This, in Hobbes's model, is a hierarchy that 'tie [s] them by fear of punishment to the performance of their covenants and observation of th[e] laws of nature ... '[73] They institute this commonwealth by giving a monarch or an assembly the right to represent them.[74] Government, then, was a product of self-interested consensual alliance. Although it was, in practice, generally for the common good, its primary purpose was to further the interests of the individual.[75]

This model, which may be described as a contract theory of government, was especially popular during the 17th century, at a time when the tensions of a most-mediæval monarchy and early-modern society come to the fore in England. At a time of dynamic tension it is common to seek answers in the writings of theorists—rarer perhaps to find the answers there. The importance of the contract theory lay not in its perspicuous author's foresight but rather in its universality and applicability at once to a traditional early-modern society and a modern post-industrial state. Whereas in earlier societies the relative immobility of individuals led to a greater sense of community, which would allow the development of commonwealths, modern technological substitutes for the community provide equivalent mechanisms.

The new social and political structures potentially facilitated by advances in information technology offer the possibility of something very much like a constitutional contract,[76] though not necessarily with existing states or forms of states.[77] All existing states may, however, be much more complex constitutional structures than the Hobbesian constitution would appear to suggest.



## Sovereign Appropriation

In Grady and McGuire's view,[78] Hobbes and Buchanan[79] have not fully addressed the problem of what they termed sovereign appropriation. At least Hobbes assumed that the sovereign would behave benevolently, though this assumption may perhaps be correct only if the sovereign is deemed to be rational. Nevertheless, with a monopoly of force over a particular geographic area, a sovereign possesses a private incentive—or at the least the opportunity—to appropriate from his or her subjects,[80] without inhibition. This, however, is unlikely to happen because the sovereign, whether individual, oligarchy, or party, will wish to retain power. When over-reaching occurs, revolution (formally such, or constitutional shifts in the balance of power or authority) will occasionally restore the balance[81]—though not necessarily rapidly.

As a result of the greater mobility of people and assets that it brings,[82] the networked economy reduces the ability of sovereigns to appropriate, because their subjects can more easily exit over-reaching regimes.[83] This assumes the networked economy is independent of state control to the extent that the state does not restrict, in part or in whole, this movement. The reduction in transaction costs created by the Internet, and by information technology more generally, creates the possibility of competing Hobbesian commonwealths, each constituted by customers and dependent upon their continuing loyalty. This view was widely held in the halcyon days of Internet growth in the 1990s,[84] but has since fallen out of favour,[85] as the reality of the Internet was seen to be not as independent or as robust as many observers had hoped and expected. But, whereas the Hobbesian state was a social construct, it would appear that its nature—even its existence—was determined by the technological limitations of its makers.

If this is so, fundamental changes in technology may—and perhaps should—result in changes to the constitution itself. If the individual's need for protection, assistance or supervision is reduced (or disappears), so the role of the state changes.[86] A specific example of this is the tendency of the Internet, and modern electronic telecommunications in general, to reduce the degree of reliance on formal contact with governmental agencies—such as educational institutions—for information and knowledge. This both

tends to break down the dependence upon and also allows greater interaction with the state—at the user's choice. This may result in a centralisation of government agencies, and a gradual decline in the importance of regional, provincial, state and municipal agencies.

The second theory of the state to be considered is that of Karl Wittfogel. Wittfogel argued that despotic governments often arose around rivers, as in ancient Egypt, China and Mesopotamia.[87] He theorised that the state arose when villages banded together to develop common irrigation projects, which vastly improved the productivity of agriculture.[88] Nevertheless, once the state came into being as a means of developing irrigation, it soon turned its bureaucracy to oppressive purposes.[89] As mentioned above, this is fundamentally a technology-driven model of the state.[90] Although this model might be of particular relevance to more primitive and less sophisticated states than are found today (or even in mediæval times), it nevertheless illustrates the dependence of states on their physical environment.

Carneiro, an anthropologist, theorised that states began in areas of environmental or social circumscription.[91] These were areas where the physical environment imposed some limitation on geographical growth, or where linguistic cultural or other social circumstances restricted the spread of populations. He looked at the places where states first arose (as far as our imperfect knowledge of human pre-history can tell us). These were areas such as the Nile, Tigris–Euphrates and Indus valleys in the Old World, and the Valley of Mexico and the mountain and coastal valleys of Peru in the New World. These were all areas where water or arable land was present, but in a severely limited area.

He found that all were areas of 'circumscribed agricultural land'.[92] In his words, '[e]ach of them is set off by mountains, seas, or deserts, and these environmental features sharply delimit the area that simple farming peoples could occupy and cultivate'.[93] He contrasted these 'environmentally circumscribed' areas to areas in which states did not arise as early, for instance the Amazon basin and the eastern woodlands of North America.[94] From this we might conclude that states arose when competition for scarce responses—with no room for expansion—reached a critical level. The necessity of economic survival led to the development of settled states.[95] This may be less obviously a technology-driven state; but even here it was the degree of technological development that determined when this critical level, which led to state development, would occur.[96] Settled agriculture—as distinct from the hunter-gatherer culture—was a more technologically advanced economic structure,[97] which led to a more advanced constitution.

In the fourth and last of the models of the state considered by Grady and McGuire,[98] Mancur Olson has argued that the state can be equated to a 'stationary bandit', who robs the people within his or her jurisdiction (through taxes and the like) and protects them from roving bandits[99]—competitors. These quasi-parasitical arrangements are similar to the 'manors' of the criminal underworld in many 19th and 20th century western cities. Olson argues that ruled people prefer a stationary bandit to roving bandits because the stationary bandit has an incentive to invest in public goods that increase the people's wealth and therefore the tax revenues that can be extracted from them.[100] Thus, a 'bandit' will wish to provide services to his or her subject people because of the direct and indirect benefits they receive.

This theory is very similar to a more general theory developed independently by Grady and McGuire to explain primate, including human, political structures.[101] In some respects it is an economic model of society, but it is, like Hobbes's model, based

on self-interest rather more than physical environment. It also has strong parallels with the feudal system of allegiance and service, which was based primarily on the idea of reciprocal obligations.

The basic idea common to both Grady and McGuire's theory and that of Olson is that the sovereign[102] is effectively the residual claimant of the group he or she (or more usually 'it', as the sovereign is likely to be corporate) rules.[103] When the group creates a surplus of resources, the sovereign is in a position to appropriate that surplus, though it will not inherently do so. Olson stressed that the sovereign's position of residual claimant—or what we might call eminent domain—could induce the sovereign to create public goods, such as irrigation projects (to use Wittfogel's example). The sovereign could then appropriate the surplus from these investments.[104]

The sovereign would have an incentive to keep peace within the group and even to enforce efficient private law because these types of legal rule would increase the surplus from group activities and therefore create a greater possibility for sovereign appropriations.[105] The surplus, as in ancient Egypt, was then at the disposal of the state, which might use it to undertake further public works or to feed the population in times of need.[106] The 'surplus' model may be correct, but it was very often the existence of a technological system that enabled this surplus to be achieved in the first place.[107] It is also a mechanistic model that pre-supposes conscious or unconscious self-interest as the predominant motivation for state action.

Each of these models for the origins of states is, in effect, an attempt to explain not only why states come into existence, but also why they survive—at least for a time. It is thus an explanation of a principal aspect of the states' legitimacy, that derived from continuity, and (perhaps more importantly), the functional efficiency of the state, what might be called its utility. Without this utility the state ceases to have a reason for existence. Changes in the expectations of its people, through new technologies and greater capabilities—economic, educational and otherwise—place potential pressures upon the legitimacy of the state, as it challenges the underlying reason for the existence of the state.



## The State as a System

The state is more than simply a collection of individuals, however powerful; it is a system. This system may be described in accordance with the specific constitution of that state. Whichever model of state is preferred—and it may well be than none is adequate to describe the complex modern state—all are attempts to explain the functional rationale for the existence of the state, and for the particular power structures that they contain. As the physical environment—including human expectations and requirements—that gave rise to the state change so the constitution changes, though this may be less rapid than might be desirable.

The concept of the state is very resilient, both internally and externally, as an institutional entity, and as a concept in international law. However, the late 20th century was marked by the development of new types and new hierarchies of state, as understood in international law. This was the result partly of the ending of the Cold War and partly independent long-term political and economic developments, such as globalisation, and colonial and post-colonial legacies. Transnational organised crime is said to threaten the viability of societies.[108] These developments brought challenges to the Westphalian

model of exclusivity and equality, especially as the co-operation of states, which had become more sophisticated during the 19th century and into the 20th century, fractured under the pressure of an increasing number of states.

Several studies have shown that the so-called 'post-modern' state has matured (or is in the process of maturing) in the West. In these, the state confines itself—or is confined—to guarding and improving the free market conditions through which wealth is generated. It is in Second and Third World countries (perhaps more the former than the latter) that the strong state is still sought.[109]

In *The Breaking of Nations*,[110] Cooper denies what he calls the universality of international society. In effect it is a rejection of the 20th century acceptance of the equality of states—an idea that was not accepted in earlier centuries and rarely enunciated formally. He divides states into three types (or rather, the world into three parts, as not all the world is necessarily comprised of states), the pre-modern, the modern and the post-modern. The pre-modern world covers an expanding area of the world where the state has lost the monopoly of the legitimate use of force (which is an essential attribute of de facto or de jure statehood), and where it is without fully functioning—or even any notional—states. The modern state is primarily concerned with the notion of territorial sovereignty (its creation, preservation and, at times, its expansion) and national interest (which may be more inward-looking). In the post-modern state foreign and domestic policy are inextricably linked, and tools of governance are shared. Security is no longer based on control over territory or the balance of power (as in Europe for much of the 19th and 20th centuries). Cooper wrote that:

> we have, for the first time since the 19th Century, a terra nullius … And where the state is too weak to be dangerous, non-state actors may become too strong. If they become too dangerous for established states to tolerate, it is possible to imagine a defensive imperialism. If non-state actors, notably drug, crime or terrorist syndicates take to using non-state (that is pre-modern) bases for attacks on the more orderly parts of the world, then the organised states will eventually have to respond. This is what we have seen in Colombia, in Afghanistan and in part in Israel's forays into the Occupied Territories.[111]

The pre-modern parts of the world—or states—are the failed states.[112] These include Somalia, Afghanistan and Liberia,[113] and other states and former states where chaos rather than order has prevailed. Many of these are post-colonial states. The failure might not necessarily be irreversible—indeed in some cases apparently terminal decline was reversed, usually through the intervention of other states. In the cases where no revival has yet occurred, the state no longer fulfils Max Weber's criterion of having a legitimate monopoly on the use of force. Cooper develops this notion with respect to Sierra Leone.[114] That country's collapse taught three lessons (as Carty paraphrased Cooper):

> Chaos spreads (in this case to Liberia, as the chaos in Rwanda spread to the Congo). Secondly, as the state collapses, crime takes over. As the law loses force, privatised violence comes in. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world.[115]

To Cooper, the United Nations is an expression of the modern, whereas failed states come largely within the ambit of the pre-modern. The Charter is simply conceptually

inapplicable.[116] The modernity of the United Nations is that it rests upon state sovereignty and that, in turn, rests upon the separation of domestic and foreign affairs.[117]

Cooper describes the European Union as advancing a policy of replacing balance of power diplomacy with a diplomacy enmeshed in law and linked through economics—the epitome of the most-modern, security not being based on the traditional search for security.

The pre-modern, the modern and the post-modern division may also be seen as linked to state success or viability. The pre-modern can rarely compete with the modern and post-modern. It is yet to be seen whether the modern can compete with the post-modern, but in terms purely of industrial production the former is generally successful, if only because of sheer volumes of production and a (generally) lower wage structure. They cannot necessarily compete in the high-technology, high-skills fields—although the development of the so-called 'knowledge economy' is by no means confined to the post-modern world.



## State Failure

Studies have shown that there a several strong indicators of high risk of state failure.[118] In one report these were described as being: when a state favoured a closed economic system (such as when openness to international trade was low or non-existent); when infant mortality was high; and when it was undemocratic.[119] Lack of democracy fed on itself,[120] and led to other social and economic ills. States in the early stages of modernity may suffer especially seriously from these symptoms, as they have a developed authority and a degree of centralisation, but are otherwise in some respects undeveloped.

It has been observed by Rotberg that some states fail because they are 'convulsed by internal violence and can no longer deliver positive political goods to their inhabitants'.[121] In *State Failure and State Weakness in a Time of Terror*, a book he edited, contemporary cases of nation-state collapse and failure are examined. Perhaps more importantly, it establishes clear criteria for distinguishing collapse and failure from generic weakness or apparent distress, and collapse from failure.[122]

Clarke and Gosende examine how Somalia, a nation-state with an apparently strongly cohesive cultural tradition, a common language, a common religion and a 'shared history of nationalism', could fail. They suggested that it could perhaps be due to Somalia never having been a single coherent territory.[123] In Cooper's model, Somalia would be a pre-modern state.

Crucially, Somalia had existed with a finely balanced anarchical tribal order, based on the Xeer, a self-regulating set of rules and norms, which balanced economic and political life, in which one was prevented from dominating others.[124] European-style centralised governmental institutions, based on hierarchical notions of sovereignty, were alien,[125] and the subsequent endeavours of the post-colonial regime to develop a merchant and middle class merely exasperated the problem.[126]

The advent of the modern state (to use again Cooper's structure) was not necessarily the solution, because the country was as yet naturally at the pre-modern stage, and the imposition of a new model, whether from within or without, led to apparently unsolvable tensions. Some of these tensions are based on the domestic concept of a state—concepts that evolved in Europe over a period of centuries, during which time the

notions best suited to that continent, and to the various states within it, were developed. One of these was democracy (though for much of Europe this arose only in the past century or two), and another was legitimacy.

Davenport observed, in a paper on the evolution of segregation in South Africa, 'can liberal doctrines be applied in states whose citizens are backward?'[127] Even J. S. Mill, in the introduction to his essay 'On liberty' (1859), argued that: 'Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion'.[128] Indeed, Hobhouse observed that 'A specious extension of the white mans' rights to the black may be the best way of ruining the black'.[129] Though these may be relatively extreme examples, their message is clear—we may have a consistent and ubiquitous notion of the state in international law, but the state domestically may not be so uniform, and we impose uniformity at the risk of destabilising the state.



## Conclusion

Where does this leave the question of New Zealand constitutional reform, and particularly the issue of a written constitution, and the Treaty of Waitangi? Clearly, the issue of whether there should or should not be a written constitution cannot be seen in isolation from the position of the Treaty of Waitangi. Majoritarian democracy, reflected in an entrenched constitution, is arguably inconsistent with the preservation—let alone the enhancement—of the Treaty of Waitangi. These are questions of legitimacy and authority that extend well beyond the legitimacy of popular opinion or the authority of the ballot box. An entrenched constitution would be impossible without a fuller understanding of the constitutional ethos or nature of the existing New Zealand constitutional-political landscape; and any entrenchment inherently freezes the constitution in a form and structure reflective of contemporary political discourse, in an inherently ahistorical manner.

It may well be that the constitutional model that best describes the New Zealand situation is a modern or post-modern Hobbes–Buchanan contractarian theory state. However, to impose an entrenched constitution based on that conceptualisation would be to entomb or entrap such a conception, which would threaten to undervalue or obscure the role of the Treaty of Waitangi, and the broader place of Māori in New Zealand society and government.

## Notes

1. One of the purposes of the Constitution Act 1986 was to bring together in one place important constitutional provisions.
2. Though there is a procedural entrenchment of parts of the Electoral Act, it is doubtful whether this is effective.
3. Whether Parliament can in fact entrench an enactment remains controversial. The Union with Scotland Act 1706 (6 Ann c 11) (Eng) was declared to be entrenched, but has been subject to repeated amendments. Most recently, article 22 was repealed by the Statute Law (Repeals) Act 1993 (UK), s 1 (1) and schedule 1.

4. Although it may be questioned whether the Governor-General could, or indeed should, decline to give the royal assent to such a measure. See Sir Owen Dixon (1935) 'The Law and the Constitution, *Law Quarterly Review*, 51, p. 590.
5. *Madzimbamuto v Lardner-Burke* [1969] 1 AC 645 (PC); NO 1968 (2) SA 284; *Adesebenro v Akintola* [1963] AC 614, 630. C. Munro (1975) 'Laws and conventions distinguished', *Law Quarterly Review*, 91, p. 218. For a possible reorientation of the classical view about the non-enforceability of conventions, see Norman Doe (1987) 'Non-legal rules and the courts: enforceability', *Liverpool Law Review*, 9, pp. 173–188.
6. R. F. V. Heuston (1964) *Essays in Constitutional Law*, 2nd ed., pp. 40–41.
7. *Arthur Yates and Co Pty Ltd v The Vegetable Seeds Committee* (1945) 72 CLR 37, 66 per Latham CJ.
8. I. Hardin and N. Lewis (1987) *The Noble Lie*, p. 7.
9. *Entick v Carrington* (1765) 19 State Tr 1030 per Lord Camden.
10. s 52. There is no single document that constitutes 'the Constitution', though the Constitution Act 1982 (as the British North America Act 1867 (30 and 31 Vict c 33 (UK)) was renamed) comprises most of what one would expect in such a document. Most importantly, because of the federal nature of Canada the legal capacity of the federal (and provincial) parliaments is limited by an enabling Act, which is itself entrenched.
11. Though this has only been established by a series of *obiter dicta* judicial statements, which may have authority, but are not binding in any other court.
12. 'Breaking New Ground' (1998) 111 (135) Maclean's 18.
13. Jane Kelsey (1995) 'Restructuring the nation: the decline of the colonial nation-state and competing nationalisms in Aotearoa/New Zealand', in Peter Fitzpatrick (Ed.), *Nationalism, Racism and the Rule of Law*, p. 185.
14. Kelsey (1995, p. 185).
15. For the general background to the Treaty, see, for example, Paul Moon (1994) *The Origins of the Treaty of Waitangi*. For a discussion of its future role, see Richard Mulgan (1989) 'Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?', *Political Science*, 41(2), pp. 51–68.
16. *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, 596–597; [1941] AC 308, 324, per Viscount Simon LC (PC).
17. *Wi Parata v Bishop of Wellington* (1877) 3 NZ Jur (NS) SC 72.
18. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 305; F. M. Brookfield (1992) 'Kelsen, the Constitution and the Treaty', *New Zealand Universities Law Review*, 15, pp. 163, 175.
19. F. M. Brookfield (1994) 'A New Zealand Republic?', *Legislative Studies*, 8, pp. 5–13.
20. 'Revolution by Lawful Means' (1993) New Zealand Law Conference Papers, *The Law and Politics*, ii, pp. 13, 16–18.
21. *Te Runanga o Wharekauri Rekohu Inc v Attorney-General* [1993] 2 NZLR 301, 305 (CA).
22. *Te Heuheu Tukino v Aotea District Māori Land Board* [1941] NZLR 590, 596–597; [1941] AC 308, 324, per Viscount Simon LC (PC).
23. John Locke (1988) Treatise II, in Peter Laslett (Ed.), *Two Treatises of Government*, chapters 6–9, 13, pp. 128–130.
24. The Royal Commission on the Electoral System, in its Report, concluded that MMP would obviate the need for Māori seats, thereby indicating a lack of appreciation for the different perceptions of Māori to their need for representation in Parliament; (1986) *Towards a Better Democracy*, pp. 81–97.
25. Lord Cooke of Thorndon (1995) 'The suggested revolution against the Crown', in Philip Joseph (Ed.), *Essays on the Constitution*, p. 38.
26. Jane Kelsey (1995) 'The Agenda for change', p. 12; Andrew Stockley (1996) 'Parliament, Crown and Treaty: inextricably linked?', *New Zealand Universities Law Review*, 17, pp. 193–220.
27. Dona Awatere, *Māori Sovereignty* (1984); Jane Kelsey (1984) 'Legal imperialism and the colonization of Aotearoa', in Paul Spoonley (Ed.), *Tauiwi*.
28. Richard Mulgan (1989) 'Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?', *Political Science*, 41(2), pp. 51–52.
29. Janine Hayward (1995) 'In search of a treaty partner: who, or what, is the Crown?', unpublished Victoria University of Wellington PhD Thesis, p. 2.
30. An act committed by the sovereign power of a country which cannot be challenged in the courts.

31. See F. M. Brookfield (1999) *Waitangi and Indigenous Rights*.
32. Fatos Tarifa (1997) 'The quest for legitimacy and the withering away of utopia', *Social Forces*, 76(2), pp. 437–472.
33. For the text, see the despatch of Hobson to the Secretary of State for the Colonies, 25 May 1840, in *Parliamentary Papers* 1841/ 311, 15 at pp. 18–19.
34. *Report of the Waitangi Tribunal on the Kaitunga River Claim* (1984), p. 14.
35. Ramiri Young (Ed.) (1991) 'Māori Law, Pakeha Law and the Treaty of Waitangi', in *Mana Tiriti: The Art of Protest and Partnership*, p. 19.
36. Richard Mulgan (1989) 'Can the Treaty of Waitangi provide a constitutional basis for New Zealand's political future?', *Political Science*, 41(2), p. 56.
37. Kelsey (1995, p. 186).
38. R. W. M. Dias, 'Legal Politics: Norms behind the *Grundnorm*' [1968] CJ 233, 237.
39. Moana Jackson (1988) *The Māori and the Criminal Justice System: A New Perspective: Te Whaipaanga Hou*, Part 2, pp. 35–44; Moana Jackson (1991) 'Māori Law, Pakeha Law and the Treaty of Waitangi', in Ramiri Young (Ed.), *Mana Tiriti: The Art of Protest and Partnership*, pp. 15–16.
40. F. M. Brookfield (1995) 'Parliament, the Treaty, and freedom—millennial hopes and speculations', in Philip Joseph (Ed.), *Essays on the Constitution*, pp. 41–60, 43–46.
41. David Smith (1995) *The Invisible Crown*; Anthony Birch (1993) *The British System of Government*.
42. 'The attraction of monarchy for the Fathers of Confederation lay in the powerful counterweight it posed to the potential for federalism to fracture'; Smith (1995, p. 8) relying on W. L. Morton. Provincial powers grew as the provincial ministries were accepted as responsible advisers of the Crown.
43. Though the action of constitutional entrenchment of the Treaty could be seen as undermining the Treaty, by institutionalising it.
44. Initially in western liberal democracies and, by extension, particularly through such institutions as the Commonwealth, throughout most of the world; see 'The Harare Commonwealth Declaration, 1991', issued by Heads of Government in Harare, Zimbabwe, 20 October 1991, http://www.thecommonwealth.org/gender/htm/commonwealth/about/declares/harare.htm.
45. Penelope Brook Cowen (1997) 'Neo liberalism', in Raymond Miller (Ed.), *New Zealand Politics in Transition* (Auckland), p. 341.
46. This is illustrated by the study of the application of the model to Mummar Qadhafi's Libya; see Saleh Al Namlah (1992) 'Political legitimacy in Libya since 1969', Syracuse University PhD Thesis.
47. See John Rawls (1993) *Political Liberalism* (New York); Ted Honderich (Ed.) (1995) *The Oxford Companion to Philosophy* (Oxford), p. 477; Matthew Swanson (1995) 'The social extract tradition and the question of political legitimacy', University of Missouri-Columbia PhD Thesis.
48. Such as the 1977 Constitution of the Soviet Union; Constitution of the Union of Soviet Socialist Republics, 7 October 1977.
49. The Constitution of the European Union also states that the Union is founded on the values of 'respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights …' in a society in which 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' (Article 1-2).
50. See, for instance, John Locke; Martyn P. Thompson (1987) *Ideas of Contract in English Political Thought in the Age of John Locke* (New York).
51. See, generally, J. Woodford Howard Jr (1987) 'Constitution and society in comparative perspective', *Judicature*, 71, pp. 211–215.
52. See Peter Paczolay (1993) 'Constitutional transition and legal continuity', *Connecticut Journal of International Law*, 8, pp. 559–574; Ralf Dahrendorf (1990) 'Transitions: politics, economics, and liberty', *Washington Quarterly*, 13, pp. 133–142.
53. Hans Kelsen (1945) *General Theory of Law and State*, trans. Anders Wedberg (Cambridge), pp. 117–118.
54. Kelsen (1945, p. 119).
55. Therefore the knowledge revolution would be economic and social, but not political.
56. Edward W. Walker (2003) *Dissolution: Sovereignty and the Break-up of the Soviet Union* (Lanham).
57. See Alf Ross (1958) *On Law and Justice* (London).
58. Ross (1958).
59. See, for instance, F. M. Brookfield (1999) *Waitangi and Indigenous Rights: Revolution, Law, and Legitimation* (Auckland).

60. He maintained that 'all associations are instituted for the purpose of attaining some good'. (1958) *The Politics of Aristotle*, trans. Ernest Barker (London), p. 1, cited by Hermann Heller (1996) 'The decline of the nation state and its effect on constitutional and international economic law', *Cardozo Law Review*, 18, p. 1,139.
61. See, generally, works on 16th and 17th century political economy; Gerald Aylmer (1975) *The Struggle for the Constitution, 1603–1689: England in the Seventeenth Century*, 4th ed. (London); John Pocock (1987) *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge).
62. Mark F. Grady and Michael T. McGuire (1999) 'The nature of constitutions', *Journal of Bioeconomics*, 1, pp. 227–240.
63. See Thompson (1987).
64. If, that is, it ever did.
65. See Noel Cox (2001) 'The evolution of the New Zealand monarchy: the recognition of an autochthonous polity', University of Auckland PhD Thesis, chapter 2.
66. Grady and McGuire (1999).
67. Thomas Hobbes (1994 [1688]) In Edwin Curley (Ed.) *Leviathan* (Indianapolis); James Buchanan (1975) *The Limits of Liberty: Between Anarchy and Leviathan* (Chicago); Karl A. Wittfogel (1957) *Oriental Despotism: A Comparative Study of Total Power* (New Haven); Robert L. Carneiro (1970) 'A theory of the origin of the state', *Science*, 169, pp. 733–738; Mancur Olson (1993) 'Dictatorship, democracy, and development', *American Political Science Review*, 87, pp. 567–576.
68. He wrote that: 'Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he' (Hobbes, 1994 [1688], p. 74).
69. See J. Desmond Clark (1990) *The Common Heritage: The Significance of Hunter-gatherer Societies for Human Evolution* (Canberra).
70. Hobbes (1994 [1688], p. 76). For Hobbes, war did not consist only of actual battles, but also threats of battle ('For War consisteth not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known')
71. Hobbes (1994, p. 76).
72. 'No arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short' (Hobbes, 1994, part 1, chapter xviii).
73. (Hobbes 1994, p. 106).
74. (Hobbes, 1994, p. 110).
75. See, generally, works on 16th and 17th century political economy; see Aylmer (1975); Pocock, (1987).
76. For an example, see Ronald M. Peters Jr (1978) *The Massachusetts Constitution of 1780: A Social Compact* (Amherst).
77. See, for instance, the arguments of the 'cyberspace'; John Perry Barlow, co-founder of the Electronic Frontier Foundation (EFF), made the seminal statement to this effect: Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather. John Perry Barlow, 'A Declaration of the Independence of Cyberspace', http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration.
78. Grady and McGuire (1999).
79. Buchanan (1975).
80. Grady and McGuire (1999).
81. Formerly great theologians of the Church such as St Thomas Aquinas (John A. Oesterle (Ed.) (1964) *Summa Theologiæ*, Vol. II–II (Englewood Cliffs), Q. xlii, a.2), Francisco Suarez ((1944) 'Defensio fidei', book VI, in *Selections from Three Works: De Legibus, ac deo Legislators, 1612, Defensio Fidei Catholicae, et Apostolicae Adversus Anglicanae Sectae Errores, 1613, De Triplici Virtute Theologica, Fide, spe, et Charitate, 1621*, trans. Gladys L. Williams, Ammi Brown and John Waldron (Oxford), chapter iv, p. 15) and Domingo Bañez, O.P. (*De Justitia et Jure*, Q. lxiv, a. 3) permitted rebellion against oppressive rulers when the tyranny had become extreme and when no other means of safety were available. This carried to its logical conclusion the doctrine of the Middle Ages that the supreme ruling authority comes from God through the people for the public good. As the people immediately

give sovereignty to the ruler, so the people can deprive him of his sovereignty when he has used his power oppressively (mediæval rulers were seldom women).

82. It has been said that a global economy is largely replacing and overwhelming national and regional economies; Louis Henkin (1999) 'That "S." words: sovereignty, and globalization, and human rights, et cetera', *Ford Law Review*, 68, pp. 1–14, 5–6.
83. See, for instance, Noel Cox (2003) 'Tax and regulatory avoidance through non-traditional alternatives to tax havens', *New Zealand Journal of Taxation Law and Policy*, 9, pp. 305–327.
84. See David R. Johnson and David G. Post (1996) 'Law and borders: the rise of law in cyberspace', *Stanford Law Review*, 48, pp. 1,367–1,402.
85. See Jonathan B. Wolf (2000) 'War games meets the Internet: chasing 21st century cybercriminals with old laws and little money', *American Journal of Criminal Law*, 28, pp. 95–117.
86. The converse is true also. In the course of the Industrial Revolution the scale and complexity of the state grew enormously, in part as a consequence of the technological change, and as a result of the social changes that these wrought. See, for instance, Steven Puro (1985) 'Technology, politics and the new Industrial Revolution', *Public Law Forum*, 4, pp. 387–398.
87. Wittfogel (1957).
88. He wrote that: 'In a landscape characterised by full aridity permanent agriculture becomes possible only if and when coordinated human action transfers a plentiful and accessible water supply from its original location to a potentially fertile soil. When this is done, government-led hydraulic enterprise is identical with the creation of agricultural life. This first and crucial moment may therefore be designated as the "administrative creation point"' (Wittfogel, 1957, p. 109).
89. Wittfogel (1957, pp. 126–136).
90. Remembering the definition of technology as processes and things people create for the purpose of using them to alter their lifestyle or their surroundings.
91. Carneiro (1970, p. 738).
92. Carneiro (1970, p. 734). The degree of circumscription varied considerably.
93. Carneiro (1970, pp. 734–735).
94. Carneiro (1970, p. 735). It might be countered that the Amazonian jungle provided a commensurate degree of circumscription—and even the woodlands of North America may have done so.
95. See Anthony Molho, Kurt Raaflaub and Julia Emlen (c.1991) *City States in Classical Antiquity and Mediæval Italy* (Ann Arbor).
96. The processes used to alter their lifestyles being settled agriculture—including animal husbandry.
97. See Max Weber (1976) *The Agrarian Sociology of Ancient Civilizations*, trans. R. I. Frank (London).
98. Mark F. Grady and Michael T. McGuire (1997) 'A theory of the origin of natural law', *Journal of Contemporary Legal Issues*, 8, pp. 87–129.
99. See Olson (1993, pp. 568–570).
100. Olson, (1993, p. 569).
101. See Grady and McGuire (1997).
102. Meaning the holder of authority in a state, not necessarily limited to hereditary monarchs of traditional form.
103. The Crown, in British law and practice, remains the residual landlord, and entitled to the assets of those who die without any heirs, under the doctrine of *bona vacantia*; Chris Ryan (1982) '"The Crown" and corporate bona vacantia', *Kingston Law Review*, 12, pp. 75–87.
104. See Olson (1993, pp. 569–571).
105. See Grady and McGuire (1997, pp. 118–120).
106. For Egyptian administration generally, see Klaus Baer (1960) *Rank and Title in the Old Kingdom; The Structure of the Egyptian Administration in the Fifth and Sixth Dynasties* (Chicago); Naguib Kanawati (1977) *The Egyptian Administration in the Old Kingdom: Evidence on its Economic Decline* (Warminster). See also Joseph G. Manning (2003) *Land and Power in Ptolemaic Egypt: The Structure of Land Tenure* (Cambridge).
107. This may be governmental technology, or human resource management, rather than mechanical technology (though even this latter played a part).
108. Neil Boister (1993) 'The trend to universal extradition over subsidiary universal jurisdiction in the suppression of transnational crime', *Acta Juridica*, pp. 287–313.
109. Robert I. Rotberg (Ed.) (2003) *State Failure and State Weakness in a Time of Terror* (Washington, DC), pp. 3–4.

110. Robert Cooper (2004) *Breaking of Nations: Order and Chaos in the Twenty-first Century*, rev. ed. (London).
111. Cooper (2004, pp. 17–18).
112. A term introduced by G. B. Helman and S. R. Ratner (1992–93) 'Saving failed states', *Foreign Policy*, 89, pp. 3–20.
113. Anthony Carty (2005) 'The Iraq invasion as a recent United Kingdom "contribution to international law"', *European Journal of International Law*, 16, p. 143.
114. Cooper (2004, pp. 66–69).
115. Carty (2005, p. 143).
116. Cooper (2004, pp. 16–37).
117. Cooper (2004, pp. 22–26).
118. Daniel C. Esty, J. Goldstone, T. R. Gurr, P. T. Surko and A. N. Unger (2003) 'State failure task force report', in Robert I. Rotberg (Ed.), *State Failure and State Weakness in a Time of Terror* (Washington, DC).
119. Esty *et al*. (2003).
120. Rotberg (2003, p. 9).
121. Rotberg (2003, p. 1).
122. Rotberg (2003, p. 1).
123. Walter Clarke and Robert Gosende (2003) 'Somalia: can a collapsed state reconstitute itself?', in Robert I. Rotberg (Ed.), *State Failure and State Weakness in a Time of Terror* (Washington, DC).
124. I. M. Lewis (1982) *A Pastoral Democracy: A Study of Pastoralism and Politics among the Northern Somali of the Horn of Africa* (Oxford); (1988) *A Modern History of Somalia: Nation and State in the Horn of Africa*, 4th ed. (Oxford); J. Chopra (1996) 'Achilles' heel in Somalia: learning from a conceptual failure', *Texas International Law Journal*, 31, pp. 495–525.
125. Gerard Kreijen (2004) *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonisation of Sub-Saharan Africa* (Leiden), p. 66.
126. A. I. Sarnatar (1992) 'Destruction of state and society in Somalia: beyond the tribal convention', *Journal of Modern African Studies*, 30, p. 625.
127. T. R. H. Davenport (1960) 'Civil rights in South Africa, 1910–1960', *Acta Juridica*, pp. 11–28, at p. 27.
128. *Utilitarianism* (London, 1910), p. 73.
129. L. T. Hobhouse, *Liberalism* (London, 1911), pp. 43–44.