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THE CASE FOR SUBSIDIARITY
AS A CONSTITUTIONAL PRINCIPLE
IN NEW ZEALAND

A THESIS
SUBMITTED TO THE FACULTY OF LAW
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The Case for Subsidiarity as a Constitutional Principle in New Zealand

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ABSTRACT

This doctoral thesis uses historical analysis, constitutional economics, and complexity theory to furnish positive and normative arguments for subsidiarity as a constitutional principle in New Zealand.

The principle of subsidiarity is the *hypostasis* of the Treaty of Waitangi, both in its English and Māori texts. It is also evident in the thinking behind the New Zealand Constitution Acts of 1846 and 1852. This constitutional tradition has been occulted since the abolition of the New Zealand provincial system in 1876.

Constitutional economics suggests an optimal limit to jurisdictional footprints (territories). This entails preference for political orders where sovereignty is shared between different cities rather states where capital cities dominate. The resuscitation of subsidiarity as a foundational element of our constitution holds the key to economic prosperity in a globalising world.

Moreover, insights from complexity theory suggest that sustainability is a response to the ‘problem of scale’. It is a fitness trait that prevents highly complex systems from collapsing. The nation state is a highly complex system within which cities function as ‘attractors’. The collapse of such systems would ensue if there were strong coupling between attractors. Such coupling obtains under legal monism. Only subsidiarity can make this eventuality improbable. Understanding the ‘emergent properties’ of sustainability and the ‘self-organizing’ properties of subsidiarity entails a shift in policy emphasis towards the latter.

The thesis recommends changes to the Constitution Act 1986 to reinstitute subsidiarity as a constitutional principle. New Zealand cities, in particular the Auckland supercity, would benefit from wider local autonomy under this vision. Nevertheless, constitutional change will have to start with public opinion, especially in relation to subsidiarity and its role in shaping the relationship between cities and the central government.

FOR THE LOVE OF YHWH

To my mother
for the sacrifices she has made.

Toitu he kīanga:
whatungarongaro he tangata

(People are transient things but the land endures)

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Glossary

- Attractors:** The area a dynamical system reaches in equilibrium. Attractors represent steady states of typical behaviour. Cities are the prime example of attractors in nation states.
- Catallaxy:** A self-organising system registering the emergence of exchange (as a form of cooperation) from diverse and uncoordinated objectives. Catallaxy anticipates the diversity inherent in cities and explains the economic and political processes (following constitutional economics) that lead to high complexity within modern nation-states.
- Cities:** Densely populated urban areas characterised by cosmopolitan diversity. What distinguishes cities from towns and villages is not the size of their population but their ability to attract all forms of capital. Cities play the role of ‘attractors’ in political states. In this paper, ‘city’ and ‘city-region’ are used interchangeably.
- Collapse:** The final phase in the life of a dynamical system (such as a nation state) where it exhibits chaotic behaviour that precedes destruction of the system’s structure. Collapse is a function of the level of coupling between attractors (such as cities). The higher the coupling (through harmonized legal systems), the higher is the probability of (system-wide) collapse.
- Complexity theory:** An analytical paradigm that moves away from reductionist tendencies and accepts the limitations on our ability to fully control or predict the behaviour of dynamical systems. Complexity is an attribute of dynamical systems that are evolving, i.e. systems that are adapting (through self-organisation) to local variations. What is complex is the structure of such systems—a dynamic network of interactions.
- Emergence:** The appearance in a dynamical system of new structures under self-organisation. Emergence introduces higher scales into existing structures, at the lowest possible increase in complexity.

Self-organisation:	The ability of a dynamical system to acquire a stable structure without external control. Self-organisation is inducive of emergence.
<i>Societas</i> :	In Roman law, signifies a partnership contract. To come to existence it requires the agreement of the parties and their good faith. When applied to political states it signifies the ‘legal state’ (<i>Rechtsstaat</i>). ¹
Sovereignty:	Etymologically, derives from the popular Latin for ‘above’ (<i>superānus</i>), ² as in ‘more powerful’, suggesting a relational basis where at least two parties negotiate attaining that ‘more powerful’ position.
Stability:	The ability of a dynamical system to remain within the area of an attractor in the face of sudden changes in its environment. Stability suggests immunity to collapse.
Subsidiarity:	A legal, political, and social principle that nests authority structures around constituent powers at the local scale. Under complexity theory, subsidiarity translates into self-organisation.
Sustainability:	A response mechanism that prevents complexity from leading to collapse. While sustainability is widely seen as a legal principle, it is better understood as an emergent property leading to stability and resulting from self-organisation.
Symmetry:	Symmetry exists where change leaves some aspects of a system unchanged. Symmetry is immunity to a possible change. ³ Symmetry generally implies that certain degrees of freedom are absent to enable

¹ Otto von Gierke *Community in Historical Perspective: A Translation of Selections from Das deutsche Genossenschaftsrecht* (the German Law of Fellowship) M Fischer (trans) Anthony Black (ed) (Cambridge University Press, Cambridge, 1990 [1868]) at 258, cited in L O’Sullivan (2000) “Michael Oakeshott on European Political History” 21(1) *History of Political Thought* 132 at 142.

² “Sovereign” in *The Oxford English Dictionary* (Oxford University Press, 1989).

³ For a general introduction to symmetry, see Joe Rosen *Symmetry Rules: How Science and Nature Are Founded on Symmetry* (Berlin, Springer, 2008) and K Brading and E Castellani (eds) *Symmetries in Physics: Philosophical Reflections* (Cambridge University Press, Cambridge, 2003).

a state of equilibrium. In this sense, symmetry is analogous to entropy. In particular, we can think of homogeneity as symmetry.

Symmetry breaking: Symmetry is broken due to instabilities in the local surroundings. More precisely, symmetry is broken when undifferentiated (identical) degrees of freedom become differentiated. Symmetry breaking does not mean that all symmetry is lost. There would be still a new symmetry but different from the one before.

Universitas: In Roman law signified a body corporate created by the state, such as municipalities. When applied to the state itself it signifies common purpose, which puts constitutional limits on the size of the (viable) jurisdiction of such states.

PREFACE

This thesis explains the constitutional evolution of New Zealand since 1835 through three lenses: the principle of subsidiarity, complexity theory, and constitutional economics. It is an interdisciplinary project that draws (mainly) on law, economics, politics, and history. The aim is to explain why our constitutional arrangements have evolved the way they did, and predict the future implications of our current constitutional designs, rather than to expound the foundations of any of these analytical lenses.

Central Idea

New Zealand has a rich history of subsidiarity seen in its early constitutional instruments. This was partially due to influences from New England and the United States. Subsequently, a polar reversal in favour of a centralised state has had a sustained negative effect on our economic development. Today, due to globalisation, economic and social wellbeing necessitates a return to subsidiarity, especially in the form of charter cities.

Structure

The thesis is structured as follows: Part I is based on a paper that has been published in the *New Zealand Journal of Environmental Law*.⁴ This part provides insights into the background that stimulated my interest in writing this thesis. It introduces a case study relating to the establishment of a UNESCO biodiversity reserve at Waiheke Island. The findings from this case study suggest that the New Zealand government is apprehensive of any governance instruments that could see a revival of local autonomy in New Zealand, opting instead for closely controlled national instruments such as the Resource Management Act (RMA) 1991. The chapter advocates bringing localism to the centre of any effective response to the current ecological crisis—and by doing so surrendering all other scales of socio-political organisation (from the national to the global) to subsidiarity. Disembeddedness (or delocalisation) is identified as the root cause to ecological crises. The

⁴ BF Gussen “The Marginalisation of Localism in Current Responses to the Ecological Crisis” (2012) 16 NZJEL 167.

chapter argues that there is a growing understanding of the importance of localism, shared by international organisations and the civil society. Unfortunately, this understanding continues to elude the New Zealand government.

In this thesis, localism is defined as⁵

“an umbrella term which refers to the devolution of power and/or functions and/or resources away from central control and towards front-line managers, local democratic structures, local institutions and local communities, within an agreed framework of minimum standards.”

Subsidiarity is a modality of localism where emphasis is on local communities.⁶ Subsidiarity is about embedding the decision-making process at the local level and ensuring that central government is only subsidiary to local government.

A related concept is ‘solidarity’ or “social cohesion”.⁷ It is defined as “a union of interests, purposes, or sympathies among members of a group; fellowship of responsibilities and interests”.⁸ Subsidiarity is the mechanism that bridges ‘solidarity’ (a local scale concept) and ‘sustainability’ (a global scale concept) (see below).

Part II accentuates the importance of subsidiarity through two analytical models. Chapter 2 is based on a paper that has been accepted for publication in *Public Law*.⁹ It introduces the auxilium model, where the concept of power is deconstructed into its social trust kernel. This model informs our understanding of the fiduciary principle and the principle of subsidiarity as prophylactic technologies intended to scaffold power structures by bolstering social trust. The chapter builds towards a formal introduction of the principle of subsidiarity in Part III.

Chapter 3 is based on a paper that has been published in the *Journal of Constitutional Political Economy*.¹⁰ It provides an understanding of subsidiarity through another

⁵ Mark Evans and others “Understanding Localism” (2013) 34(4) Policy Studies 401.

⁶ At 404.

⁷ Andreas Wildt “Solidarity: Its History and Contemporary Definition” (1999) 5 Philosophical Studies in Contemporary Culture 209.

⁸ Luis Gutierrez “Solidarity, Subsidiarity, and Sustainability” (2005) 1(8) Solidarity and Sustainability <<http://www.pelicanweb.org/solisust08.html>>.

⁹ BF Gussen “The State is the Fiduciary of the People” (2015) 3 Public Law (forthcoming).

¹⁰ BF Gussen “On the problem of scale: Hayek, Kohr, Jacobs and the reinvention of the political state” (2013) 24(1) Constitutional Political Economy 19.

analytical model, the complexity ansatz, which explains the relationship between symmetry, scale, and complexity. The chapter uses the writings of Friedrich Hayek, Léopold Kohr and Jane Jacobs to elucidate this model.

Part III, which also has two chapters, converges on subsidiarity in the New Zealand context. It pursues an historical analysis that excavates the subsidiarity-inspired origins of our constitutional designs, as well as an economic analysis that makes subsidiarity an imperative for our prosperity. Chapter 4 is based on a paper that has been published in the *New Zealand Journal of Public and International Law*.¹¹ It argues that subsidiarity is a constitutional principle in New Zealand. The principle of subsidiarity is the essence of the Treaty of Waitangi, both in its English and Māori texts. It is also evident in the thinking behind the New Zealand Constitution Acts of 1846 and 1852. This constitutional tradition has been occulted since the abolition of the New Zealand provincial system in 1876. The resuscitation of subsidiarity as a foundational element of our constitution holds the key to our economic prosperity in a globalising world. Central government should, as a strategic intent, ready local government to function as municipalities with wide legislative powers.

Chapter 5 is based on a paper that has been published in *Perspectives on Federalism*.¹² The Chapter provides a comparative analysis that examines the evolutionary effects of the constitutional morphogenesis of New England and New Zealand on their respective economic development. New England revolted against a dominion that limited the local autonomy of its colonies. On the other hand, almost 200 years later, New Zealand abolished a quasi-federal provincial system in favour of a unitary state. Constitutional economics is enlisted to explain the effects of the canvassed constitutional choices. The chapter argues that empowering local governments holds the key to economic prosperity in a globalising world, where the role of the nation state is increasingly marginalised. Nourishing local autonomy should be of import as far as constitutional aspirations are concerned.

Part IV continues the evolutionary analysis of subsidiarity through its effect on economic change (Chapter 6) and sustainability (Chapter 7). Chapter 6 enlists grounded theory to explain mechanisms of economic change based on analogies with biology. The chapter is critical in that it does not only attempt to understand social reality, but to change

¹¹ BF Gussen “Subsidiarity as a Constitutional Principle in New Zealand” (2014) 12 NZJPIL 123.

¹² BF Gussen “The Evolutionary Economic Implications of Constitutional Designs: Lessons from the Constitutional Morphogenesis of New England and New Zealand” (2014) 6(2) *Perspectives on Federalism* E-319.

it. It is also post-structural in that it focuses on structures and texts, and in that it requires a wider understanding of social change in order to understand the basis of economic change. The aim is to discover hypotheses embedded in the wider context of social change. Social change itself can be decomposed into a number of different strands:¹³ change as transformation, change as replacement, and change as addition or reduction. Only replacement is associated with qualitative change, and hence evolution. In the final analysis economic change is linked to the structure of the political state. Pathologies of economic change, including morphostasis,¹⁴ necessitate a rethinking of political organisation. The principle of subsidiarity, with a praxis inspired by sovereign cities, is imperative for the continuous evolution of societies', and hence economies. The common link in this school of thought could be described in many ways.¹⁵ Whatever we decide to attribute to the common link that brings the school together, we are bound to note its emphasis on city confederations that would ultimately bring political unification on a global scale. Such unification is not through a top-down approach, but one where local autonomy takes the lead in policy prescription at all scales. In this future, nation states become subsidiary. Sovereign cities replace nation states on the 'international' stage.

Chapter 7 argues not only that sustainability cannot occur without subsidiarity, but that subsidiarity guarantees sustainability. In order to respond effectively to ecological crises, decision-making has to devolve to local communities (as a body politic), while constitutionalising local adaptations protects the diversity of ecosystems. In essence, constitutional and environmental laws are inextricably linked. The chapter employs the complexity paradigm to explain this nexus between subsidiarity and sustainability. The main argument is that subsidiarity to sustainability is what 'self-organisation' is to 'emergence'. The chapter delivers a historical reconstruction of the concepts of sustainability and subsidiarity to elucidate their interdependence, and ends with a sketch of future global governance structures based on a subsidiarity where cities take the lead on sustainability.

¹³ Colin White "Morphogenesis, Continuity and Change in the International Political System" in Margret S Archer *Social Morphogenesis* (Springer, New York, 2013) 85 at 90.

¹⁴ In other words reaching a stage where the system's form, or organisation, is static.

¹⁵ See for example K Boulding *Collected Papers* (Colorado Associated University Press, Boulder, 1971) at 89 and 93; J Buchanan and J Yong (eds) *The Return to Increasing Returns* (University of Michigan Press, Ann Arbor, 1994); Lewis Mumford *The Condition of Man* (Harcourt, Brace and Company, New York, 1944) at 41; Peter Kropotkin *The Essential Kropotkin* (Liveright, New York, 1975) at 59.

My definition of sustainability follows Klaus Bosselmann's where the essence is 'ecological sustainability'.¹⁶

“Clarity can only come from defining the essence of ‘sustainable’ with respect to its object. The essence is neither ‘economic sustainability’, nor ‘social sustainability’, nor ‘everything sustainable’, but ‘ecological sustainability’.”

This then suggests that the legal principle around sustainability (i.e. “the duty to protect and restore the integrity of the Earth’s ecological systems”)¹⁷ should normatively be an elaboration of this ecological essence. It follows that sustainability as a legal principle cannot become truly operative without localism, especially community localism (i.e. subsidiarity). ‘Sustainability’ as a legal concept is defined as “the duty to protect and restore the integrity of the Earth’s ecological systems”.¹⁸ The normative aspect of this definition is embedded in the principle of subsidiarity rather than in a macro-level standard. The normative legal aspects of sustainability cannot be divorced from its scientific nature as an emergent property. Subsidiarity rather than sustainability is the “most fundamental of all environmental principles”.¹⁹

Part V elaborates on how subsidiarity could play a role in our future constitutional arrangements. In particular, this part looks at the Swiss Federal Constitution (Chapter 8), and Spinoza’s rendition of sovereignty (Chapter 9) for inspiration. Chapter 8 looks at Swiss constitutional designs. While each country has its own distinctive cultural context, which militates against universals as to optimal designs, there are two points of use to New Zealand: first, the Swiss model is divorced from the nation state ideal of one people, one language, one religion, and is instead based on a pragmatic subsidiarity where competition and cooperation are made feasible due to the small jurisdictional footprint of the constituent parts of the Confederation: the cantons. This goes to explain the longevity of the Swiss polity that extends over seven centuries. Second, the economic, social, and political

¹⁶ Klaus Bosselmann *The Principle of Sustainability: Transforming Law and Governance* (Ashgate, Farnham, Surrey (UK), 2008) at 53.

¹⁷ At 57.

¹⁸ Klaus Bosselmann *The Principle of Sustainability* (Ashgate, Farnham, Surrey (UK), 2008) at 53 and 57 to 63.

¹⁹ At 62.

integration questions put to the Swiss model by European and global dynamics, are creating new sovereignties around agglomerations or city-regions within Switzerland. This requires relinquishing the contiguous nation state model and looking for an interpretation of the state as a ‘network’ of sovereign cities joined together by a ‘nation’ state.

Chapter 9, which is based on a paper that has been published in the *Journal of Philosophical Economics*,²⁰ argues that sovereignty, as envisaged by Spinoza, is the logical foundation of constitutional economics. Constitutional constructs such as sovereignty weave an evolutionary dialectic between different organisational scales (the local, national, and global). This dialectic continues to wreak havoc at the local scale, and can be interrupted only through explicit constitutional constraints on the size of jurisdictions. The chapter argues for constitutional orders in which sovereignty is shared between different cities rather states where capital cities dominate.

In the final part, Chapter 10 looks at the constitutional issues and challenges that could result from introducing subsidiarity as a constitutional principle, including the aspirational objective of setting up charter cities across New Zealand. The chapter scrutinises the work by the Constitutional Advisory Panel and its November 2013 Report, pointing out to the lack of emphasis on our quasi-federal constitutional heritage, as well as the lack of any analysis of subsidiarity, especially as an objective in constitutional change overseas. The chapter then sketches a four-phase strategy for the introduction of subsidiarity, primarily through amendments to the Constitution Act 1986, and the interpretive role played by the Waitangi Tribunal of Treaty principles. However, the Achilles heel of this constitutional change is the lack of public awareness in relation to subsidiarity, its relation to the Treaty, and the need for charter cities. It is envisaged that a long gestation period (possibly decades) would be necessary before any amendments can be successfully implemented.

Chapter 11 provides an overall conclusion. It starts with a summary of the main proposition, namely that subsidiarity is and should be a constitutional principle in New Zealand. The Chapter goes on to summarise the positive and normative arguments in support of this proposition, and ends with a reiteration of the implementation issues that need to be resolved, in particular the buy-in of New Zealand voters, before attempting any constitutional change.

²⁰ BF Gussen “On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics” (2013) 7(1) *The Journal of Philosophical Economics*.

PART I PRELUDE

1. The Marginalisation of Localism in Current Responses to the Ecological Crisis

1.1. Introduction

“... Spinoza advocates ... a polycentric aristocratic republic where sovereignty would be shared between a number of cities and provinces. Spinoza argues ... that power resting in more than one place results in a better political balance ... ”²¹

No meme²² has caused more suffering to the collective of mankind than that of ‘nation’, especially as institutionalised under the modern state. Donald Livingston provides a poignant account of this tragedy:²³

“Prior to [the French Revolution], Europe was an order of federative polities ... The French Revolution *destroyed all independent social authorities* ... It is the structure of the modern state itself, independent of whether it wears the mask of liberalism, fascism, or Marxism, that ... must be called into account.” (Emphasis added)

The rise of the modern state, and the centralisation of power, are the genesis of the inferno of the 20th century. It is within this logic that we can find a direct link between the modern state and the ecological crisis. The following example illustrates how nationalism, the main idea behind the modern state, can distort the consciousness of local communities:²⁴

“Originally Israeli national pride was grounded in the belief that the country had restored, through irrigation and reforestation, the fertility of a land that had been nearly turned into

²¹ Raia Prokhovnik “Spinoza’s Conception of Sovereignty” (2001) 27 *History of European Ideas* 289 at 301. See also Prokhovnik “From Democracy to Aristocracy: Spinoza, Reason and Politics” (1997) 23 *History of European Ideas* 105.

²² A meme is a blend of “gene” and the Greek word μιμητισμός for ‘something imitated’. Memes are the cultural counterpart to genes. For the genesis of the term, see Richard Dawkins *The Selfish Gene* (2 ed, Oxford University Press, 1989) at 192.

²³ Donald Livingston “Secession and the Modern State” (1996) *Stalking the Wild Taboo* <www.lrainc.com/swtaboo/taboo/dwlviv01.html>.

²⁴ Joachim Radkau *Nature and Power* (Cambridge University Press, Cambridge, 2008) at 239.

a desert ... However, the extremely high water consumption ... pushed Israel's water economy into ... an 'ecological catastrophe' ... In contrast to the earlier ecological nationalism, environmental awareness today tends to promote an understanding between Israelis and Arabs.”

This chapter ascertains the role of disembeddedness,²⁵ or the assault on local (political) organisation, in the ecological crisis we face today.²⁶ While extremely vague as a legal concept,²⁷ for our purposes, localities are *autonomous* legal entities with a relatively small jurisdictional footprint.²⁸ The key differentiators are the small size of the entity, and free ingress and egress of all forms of capital.²⁹

The role of disembeddedness in the ecological crisis became of particular interest to me after an opinion I wrote on whether Waiheke Island should become a (UNESCO) biosphere reserve.³⁰ This issue was central to the election (in October 2010) of a new five-seat Waiheke Local Board as part of a new Auckland supercity governance. The first port of call was to understand the history of the concept of biosphere reserves.³¹ Their investigation led to two underlying principles. The first gives effect to what is known as 'participatory governance'.³² It is associated with risks and opportunities when taking into account the

²⁵ For an elaboration on the concept of embeddedness see Mark Granovetter "Economic Action and Social Structure: The Problem of Embeddedness" (1985) 91(3) *American Journal of Sociology* 481. The original contribution on embeddedness comes from Karl Polanyi *The Great Transformation* (Beacon Press, Boston, 1944). For the purposes of this chapter I use embeddedness, localism and locality interchangeably.

²⁶ I use the terms 'ecological crisis' and 'environmental crisis' interchangeably although the former term is preferable given its emphasis on a stronger version of sustainability.

²⁷ Yishai Blank "Localism in the New Global Legal Order" (2006) 47(1) *Harvard International Law Journal* 263.

²⁸ Compare Gerry Stoker "New Localism, Participation and Networked Community Governance" (2007) Institute for Political and Economic Governance. Our interest is not only in the devolution of managerial powers but also political ones. This political aspect was at the heart of calls for localism in the 20th century.

²⁹ The small size (geographic and demographic) results in default integration of the ecological, economic and social spheres—and hence accomplishing one of the fundamental substantive elements underlying 'sustainable development', namely the principle of integration. See Sumudu Atapattu *Emerging Principles of International Environmental Law* (Transnational Publishers, Ardsley (NY), 2006) at 129.

³⁰ BF Gussen "Legal Opinion on Waiheke Biosphere Reserve" (2010) Waiheke Forever <waihekebr.info/legal-opinion-on-waiheke-biosphere-reserve>.

³¹ See Biosphere reserves: The Seville Strategy and the Statutory Framework of the World Network 28 C/Res 2.4, UNESCO GC (1996).

³² See Panagiotis Getimis and Grigoris Kafkalas "Empirical Evidence and Comparative Analysis of Policy-Making in the Pursuit of Innovation and Sustainability" in H Heinelt et al (eds) *Participatory Governance in Multi-Level Context: Concepts and Experiences* (Leske + Budrich, Opladen, Germany, 2002) 155.

various stages of socio-economic development.³³ The second principle requires that each reserve has its own governance system to ensure that it meets its functions and objectives. Under these principles, biosphere reserves give effect to a weak version of *local autonomy*, which creates a pattern of multi-governance.³⁴ These principles (requiring *autonomous* community-based governance systems) could well explain why New Zealand has been shying away from establishing biosphere reserves for the last fifty years: biosphere reserves localise governance, which is not in line with our current constitutional design.

However, to be fully informed on this matter, I put the question to Nikki Kaye, the National Party MP for central Auckland, who in turn raised the issue with the then Minister for the Environment, the Hon Dr Nick Smith. Dr Smith replied in these words:³⁵

“The sustainability and public engagement focus of the Resource Management Act 1991 largely covers what a biosphere reserve status aims to achieve. The [central] government is focussing [on] supporting local government through ... a proposed national policy statement for freshwater management. The current programmes provide the appropriate level of protection ...”

In summary there was no mention of the ‘local autonomy’ principle underlying the concept of biosphere reserves. Instead, emphasis was placed on national legislation in the form of the Resource Management Act 1991 (RMA 1991). The key idea in the paragraph is ‘supporting local government’ through national policy, rather than the biosphere approach of giving local government direct autonomy.

The same day I received Dr Smith’s response, Alastair Morrison, the Director General of the Department of Conservation, gave a speech at Lincoln University about building biodiversity in New Zealand, where he criticised New Zealand’s current response to the ecological crisis for being driven mainly by economic considerations.³⁶ I felt inspired by

³³ T O’Riordan and S Stoll-Kleemann “Deliberative Democracy and Participatory Biodiversity” in O’Riordan and Stoll-Kleemann (eds) *Biodiversity, Sustainability and Human Communities: Protecting Beyond the Protected* (Cambridge University Press, Cambridge, 2002) 87.

³⁴ On multi-governance see J Pierre and BG Peters *Governance, Politics and the State* (MacMillan Press Ltd, London, 2000).

³⁵ Letter from Hon Dr Nick Smith to the author regarding biosphere reserves (7 October 2010).

³⁶ Alastair Morrison, the Director General of the Department of Conservation “Building Biodiversity: Building New Zealand” (Lincoln University, 7 October 2010) <www.doc.govt.nz/about-doc/news/speeches/al-morrison-at-lincoln-university>.

his critique and send him my biosphere reserve opinion together with Dr Smith's response, hoping for a different view on the issue. Here is an excerpt from Mr Morrison's response.³⁷

“In terms of governance, New Zealand is a small country and we already have significant local participation in local resource management ... Designation as a biosphere reserve would not seem to add significant value ... but would incur costs ... through participation in the programme. It is hard to see how these costs can be justified.” (Emphasis added)

The argument is that 'local autonomy' would not work for a small country such as New Zealand. Instead, 'local participation' within a 'national' framework would be a more appropriate approach.

It is respectfully submitted that the assessment by Dr Smith and Mr Morrison is inaccurate. Even International organisations such as the UN and the World Bank disagree with their assessment. The RMA specifically is nowhere near granting local autonomy to combat the crisis. This is clearly evident in the area of climate change. Currently, the RMA is not used for reducing Greenhouse Gases (GHGs).³⁸ These gases were deliberately exempted in 2004. Under the RMA, local authorities are not able to consider the effects of GHGs on climate change when writing local plans and when granting air discharge consents. The RMA 1991, as amended in 2004, suggests that the effects on climate change can be considered only with respect to the development of renewable energy (Sections 7 and 104E). Hence, while in practice the RMA is administered by local authorities, the 2004 amendment means local government is not allowed to consider climate change. Section 104E explicitly prohibits considering the effects of climate change.³⁹

The fact that the RMA is not geared towards local autonomy (as a response to the ecological crisis) can also be seen in its content and structure. In particular, the rationale behind the Act is the use of 'sustainable management' (s 5(2)) rather than 'sustainable development'. This not only excludes social inequities and global redistribution of wealth as envisioned by the Brundtland Commission, but also exhibits a positivist approach to the

³⁷ Letter from Alastair Morrison to the author regarding biosphere reserves (17 November 2010).

³⁸ Klaus Bosselmann "Carbon Neutrality and the Law" in N Harré and Qu Atkinson (eds.) *Carbon Neutral by 2020: How New Zealanders can tackle climate change* (Craig Potton Publishing, Nelson, 2007) 258.

³⁹ See *Greenpeace NZ v Northland Regional Council and Mighty River Power Limited* [2007] NZRMA 87.

ecological crisis.⁴⁰ In particular, the RMA looks at local government instrumentally—as merely an administrative arm of the central government. This is further confirmed by Part IV of the RMA which divides responsibility between three sectors: central government, regional councils, and territorial authorities. Central government furnishes the national policy statement and environmental standards. The local government implements the statement and the standards. The RMA never envisaged local government taking the lead in tailoring responses to the ecological crisis to meet the different needs of each locality. In contrast, this chapter places delocalisation at the heart of the causes of the ecological crisis.

The chapter is structured as follows. After this introduction, section 1.2 canvases the causes of the ecological crisis and synthesises these into one proposition: the root cause of the crisis is the move away from locally organised communities. Section 1.3 considers the historical response to the crisis in the European context where evidence suggests that the response was led by local communities. Section 1.3 also contrasts the modern response (to the crisis) with the historical one, and criticises the former’s emphasis on coordinating the response on a global scale. The paper ends with section 1.4 which provides suggestions on how to move forward.

⁴⁰ A ‘positivist approach’ here refers to both logical empiricism that remains sceptical of the existence of the ecological crisis, and legal positivism that sees the law as a social construct. See also Delyse Springett “Business Conceptions of Sustainable Development: A perspective from critical theory” (2003) 12 *Business Strategy Environment* 71.

1.2. Delocalisation and the emergence of the ecological crisis

“Agrarian societies always had a tendency to push their ecological limits. Peasant families tended to maximize births as a survival strategy. States and entrepreneurs tended to seek a technological edge over local competitors by modifying existing technologies. Mining, in particular, tended to stimulate technological innovations, as its high energy demands continually provoked crises and bottlenecks requiring solutions. Trade and migration provided access to goods, ideas, and people not locally available, but introducing these could have unforeseen destabilizing consequences.”⁴¹

Today a number of well publicised issues came to be known collectively as the environmental crisis. These include the destruction of tropical rainforests, acid rain, reduction of CO₂ emissions and the polar thawing process, to name just a few. These ecological problems are seeping into the sociological sphere. There is now increase in respiratory diseases worldwide, violent clashes with demonstrators, and even predictions of the imminent collapse of civilisation.⁴²

In order to put a stop to the crisis, we need to understand how it emerged in the first place. While many different hypotheses have been put forward to explain the root causes of the crisis,⁴³ there seems to be a common thread, namely the move away from local organising—in one word, disembeddedness.

Some scholars see the universal dogmas of Christianity as fostering exploitive technologies largely responsible for the destruction of the environment,⁴⁴ even though environmental destruction commenced long before the advent of Christianity.⁴⁵ Others identify evolutionary roots to the crisis, where technology-led population growth greatly

⁴¹ Edmund Burke III “The Big Story: Human History, Energy Regimes, and the Environment” in Edmund Burke III and Kenneth Pomeranz (eds) *The Environment and World History* (University of California Press, Berkeley, 2009) 33 at 38.

⁴² See for example the Planetary Calendar in Klaus Bosselmann *When Two Worlds Collide: Society and Ecology* (RSVP, Auckland, 1995) at 37.

⁴³ For a summary of these arguments see Daniel D Chiras *Environmental Science* (8th ed, Jones and Bartlett Publishers, Mississauga, Ontario, 2010) 34.

⁴⁴ See Lynn White “The Historical Roots of Our Ecologic Crisis” (1967) 155 *Science* 1203.

⁴⁵ See, for example, Russell Christman “Environmental theology” (1980) 14 (11) *Environ Sci Technol* 1271.

increased our environmental impact. On the other hand, some see population growth as a result of the way we organize our societies. In 1967 MacArthur and Wilson described two models of reproductive behaviour:⁴⁶ (1) the ‘r’ strategy, used in unstable environments, which entails producing a large number of short-lived off-spring; and (2) the stable-environment ‘K’ strategy of producing limited number of offspring, which “is likely to occur where a clearly circumscribed living space is evident. By this reasoning, *the progressive elimination of boundaries* [which leads to instability] in the world is threatened [through the ‘r’ strategy] by population pressure, struggle, misery, and mass death”⁴⁷ (Emphasis added). Yet other scholars believe the ecological crisis originated from the spread of democracy as championed by the nation state, which put land ownership and wealth in the hands of many, and the agro-industrial revolutions, which brought mass production and spread wealth throughout society.⁴⁸ The transformation of mankind from hunters to farmers through the agricultural revolution caused the first environmental crisis 11,000 years ago,⁴⁹ with cities playing an important role in bringing about the crisis.⁵⁰ The industrial revolution intensified the crisis since the 18th century.⁵¹ These revolutions caused a *cultural acceleration* of evolution, which led to “linearity of supply and use of resources” and “singularity of production objective and lack of focus on waste management and pollution”.⁵² Through the interweaving of overpopulation (biological), self-interest prevailing over collective interest (psychological), growing mobility, and global interconnectedness (technological) “[t]he balance between humans and their environment ... is upset by ... the *loss of autonomy*”.⁵³ (Emphasis added).

The diagnostic discourse above does not identify delocalisation as ‘the’ or even ‘a’ cause of the environmental crisis. However, a closer reading exhumes a strong nexus with

⁴⁶ See ER Pianka “On r and K Selection” (1970) 104 *American Naturalist* 592. For the original work refer to R MacArthur and EO Wilson *The Theory of Island Biogeography* (reprint, Princeton University Press, Princeton, 2001).

⁴⁷ Radkau *Nature and Power* at 7.

⁴⁸ See Lewis Moncrief “The Cultural Basis of Our Environmental Crisis” (1970) 170 *Science* 508.

⁴⁹ Bosselmann *When Two Worlds Collide* at 34.

⁵⁰ J Donald Hughes *An Environmental History of the World* (Routledge, New York, 2001) at 48 and 104.

⁵¹ At 136.

⁵² Bosselmann *When Two Worlds Collide* at 48.

⁵³ Radkau *Nature and Power* at 7.

delocalisation. The agro-industrial revolutions relied on the production of scales through networks. For example, irrigation networks resulted in centralisation of power and eventually to ecological suicide (due to soil salinization) as documented by the fall of the Sumerian state under the auspices of the (national) Code of Hammurabi (around 1800 BCE) and its strict rules governing irrigation.⁵⁴

Networks compressed space and time to justify ‘manufactured’ operational scales. Over millennia, settlements grew in size to form cities, which connected to form nation states.⁵⁵ Here the genesis of the ‘growth explosion’ was seen both in geographic and demographic terms: populations grew in size, while social organisation occupied a larger footprint. The ‘growth explosion’ had been further accelerated by the industrial revolution through harnessing energy from fossil fuels to do the work hitherto the drudgery of man and beast. Space and time were being further compressed—to a zero dimension. Organisation was now not only on a national scale, but on a global one.

The agro-industrial revolutions are manifestations of delocalisation,⁵⁶ the precursor of what I refer to as *the problem of scale*.⁵⁷ The rise of the unitary nation state centralised decision-making to pave the way for agro-industrial networks. These networks allowed urban settlements to grow to a scale never seen before. Human needs became insatiable. Radkau gives an example of this dynamic from sugarcane plantations, which resulted in the worst combination of social and ecological effects:⁵⁸

“Sugarcane had no equal among cultivated plants in the colonies in the way it promoted large capitalist landholding and slavery as well as deforestation: not only through the insatiable consumption of good soil, but also through the need for firewood by the refineries, which was one reason why the production of sugar was profitable only in large enterprises with plenty of capital. Prior to the rise of the sugarcane plantation in Madeira

⁵⁴ At 95.

⁵⁵ This, however, is not necessarily the only mechanism for the emergence of cities. See for example Aidan Southall *The City in Time and Space* (Cambridge University Press, Cambridge, 2000).

⁵⁶ Edmund Burke III “The Big Story: Human History, Energy Regimes, and the Environment” in Edmund Burke III and Kenneth Pomeranz (eds) *The Environment and World History* (University of California Press, Berkeley, 2009) 33 at 41, 43.

⁵⁷ For a delineation of this point see BF Gussen “On the problem of scale: Hayek, Kohr, Jacobs and the reinvention of the political state” (2013) 24 (1) *Constitutional Political Economy* 19.

⁵⁸ Joachim Radkau *Nature and Power: A Global History of the Environment* (Cambridge University Press, Cambridge, 2008) at 161.

in the fifteenth and sixteenth centuries, Cyprus had been Europe's sugar land; the fact that a Cypriot refinery foreman sought to conserve wood by using eggs reveals how hopeless the wood problem was becoming for large-scale wood users in the forest-poor Mediterranean. The island of Madeira, whose name means "wood," and which was originally famed for its abundance of woodlands, lost the majority of its forests to sugarcane. Since harvesting of cane leaves behind a stump in the ground from which a new plant will grow, crop rotation, which regenerates the soil and broadens the dietary basis, is impossible. Except for the need for wood, this was presumably the most important reason for shifting the cultivation of sugarcane from the Mediterranean to sunny colonies."

From the rise of the unitary nation state, and its networks (especially transportation networks), it was only a matter of time before the ecological crisis signalled the failure of this organisational approach.⁵⁹

There are good indications that delocalisation is one of the root causes of the crisis; it would only be reasonable to expect any response to move back to localism—autonomous decision-making at the local scale. But is such a reversal possible today, under the nation state? In the next part I investigate this question by examining the response to the environmental crisis in the Middle Ages and in the modern era.

1.3. Localism in the (historical and modern) responses to the ecological crisis

*“Modern Communist China offers a prime example that a totalitarian, centralised state may use [environmental] problems to legitimise itself, but that it cannot solve these problems satisfactorily with its top-down methods. Today the water resources in some regions of China are being overused ... It would appear that the spirit of cooperation that is necessary for successful water management can be effective, if at all, only on the local level, but not within a framework of a gigantic state”.*⁶⁰

⁵⁹ Bosselmann *When Two Worlds Collide* at 44.

⁶⁰ Radkau *Nature and Power* at 110.

This part contrasts the historical (pre-Enlightenment) response to the environmental crisis with the current (post-Enlightenment) response under the international law paradigm. The Enlightenment explained human life without regard to metaphysical levels. Its approach to law and governance required positive verification of social norms against rationality and scientific evidence. This ‘scientific approach’ was the precursor to the industrial revolution which, as discussed in the following section, culminated with the current ecological crisis.

Unfortunately, responses to the ecological crisis do not follow a few simple basic patterns. Solutions to environmental problems are “often hidden within social and cultural history, and it is there that we must decipher them”.⁶¹ Inevitably, however, there are typical response patterns that arise from organising at higher scales. This results in responses to the crisis becoming increasingly⁶²

“subject to the laws of power and the preservation of authority ... Environmental history is always also the history of political power—and the more it moves away from practical problems on the ground and into the sphere of high-level politics, the more that is the case ... Environmental history is inevitably shaped also by the formation of ever larger political and even more expansive economic entities, and by the growing interconnectedness of the world.”

This section argues that local autonomy was the cornerstone of the historical response to the environmental crisis. In contrast, within the modern approach, under international law, localism is relegated to an instrumental role. This was a direct result of the rise of ‘positivism’, which in turn emerged from 18th century Enlightenment.

Next is a brief account of the historical response to the ecological crisis in the European context. This then is contrasted with the modern response driven by international law, which also arises from the European context.

⁶¹ At 9.

⁶² At 10.

The historical response⁶³

Given the European origins of international law, I want to focus on the historical response in the European context. In the fourteenth century, Europe suffered its first ecological crisis (peak timber).⁶⁴ The response was based on the role of local communities:⁶⁵

“In response to the crisis, local principalities and townships took measures of large-scale reforestation and enacted laws based on sustainability. The idea was to not clear more wood than would grow again and to plant new trees so that future generations would benefit. From the end of the fourteenth century, local laws in Middle Europe were guided by sustainability concerns.”

“The approach to sustainability laws centred around a land use system known as ‘Allmende’ in German and ‘commons’ in English. Essentially, the land was seen as public good setting limitations to individual land use rights ... The rule was public ownership, the exception private use.”

The fact that local principalities enacted laws suggests a high level of local autonomy. “Sustainability ... was ... always within small communities”.⁶⁶ Land use was decentralised and fully controlled by local communities. The local communities’ intimate knowledge of their eco-systems allowed for informed decision-making, while the form and extent of land use could be easily adjusted to changing ecological conditions. Put differently, “[h]istorians, who are fascinated by long-distance trade, have often overlooked that, until very recently, humanity’s food supply was largely dependent on local and regional

⁶³ Since I am interested in contrasting the historical and modern responses, I limit my analysis to the European context, as it is this context that ‘manufactured’ what came to be known today as the modern response.

⁶⁴ Klaus Bosselmann *The Principle of Sustainability* at 12-25, 40-41.

⁶⁵ At 14. Note that this approach does not lead to the ‘tragedy of the commons’ give the limited local scale through which the community exercises public stewardship over land. Excessive land use could not have obtained under the *Allemande* or the commons systems.

⁶⁶ Bosselmann *The Principle of Sustainability* at 15.

subsistence, and that an effective response to environmental problems was most likely to occur at those levels—if at all”.⁶⁷

In summary, the response to the ecological crisis was localised, both through the *legislative* and *administrative* functions of governance. This response ensured common interests had preference over individual interests, which prevented excessive land use. Optimization became the aim of (often rotational) land use rather than maximization. The reforestation measures were successful until 1800, when the demographic increase in Europe and the advent of the industrial revolution ushered another ecological crisis: “At the beginning of the nineteenth century public environmental law virtually disappeared. The emerging system of private law and absolute property rights was largely ignorant of environmental protection, let alone sustainability”.⁶⁸

The modern response

In contrast, the post-Enlightenment response, whether from secondary sources such as academic commentary, or primary sources such as UN declarations, is mainly conceived at the global and national levels. Local communities are largely relegated to implementing the policies of the international society, with its nation states and non-state actors such as Non-Governmental Organisations (NGOs).⁶⁹

⁶⁷ Radkau *Nature and Power* at 10.

⁶⁸ Bosselmann *The Principle of Sustainability* at 15.

⁶⁹ For example, the word ‘local’ does not even appear in the *Preamble of Agenda 21* (United Nations Conference on Environment and Development, Agenda Item 21 (1992)). Instead, it is the ‘global partnership’ and ‘[n]ational strategies [that] are crucial in achieving’ the successful implementation of Agenda 21. See para 1.3. Nevertheless, Agenda 21 advocates ‘increased local control of resources, local institution-strengthening ...’ (3.4(b)), and stresses ‘the empowerment of local and community groups through the principle of delegating authority ...’ (3.5(a)). However, even when Agenda 21 refers to ‘local authorities’ it is their supporting role to strategies developed at the national level that seems to permeate the response: ‘Local authorities ... assist in implementing national and subnational environmental policies ...’ even when establishing ‘local environmental policies and regulations’ (28.1). The absence of any reference to the local scale in the Preamble makes it difficult to see the Agenda advocating other than an instrumental role for local communities. At best, Agenda 21 envisages a ‘New Localism’ approach where devolution takes a managerial rather than political character. See <www.un.org/esa/dsd/agenda21>. The International Council for Local Environmental Initiatives (ICLEI) does not fare much better on the local front. The ICLEI mission is ‘to build and serve a worldwide movement of local governments to achieve tangible improvements in global sustainability with special focus on environmental conditions through cumulative local actions’ (ICLEI Charter 1.3). Nevertheless, its local action principles are guided by the Earth Charter

The new crisis also started as one of deforestation, this time caused by rapidly increasing economic demand (from 1650 onwards). The new crisis emerged under the feet of the industrial revolution. The revolution had three transformational aspects:⁷⁰ (1) the environmental aspect with fast growing populations causing the agricultural system to expand its boundaries; (2) the philosophical aspect with its Newtonian mechanistic-atomistic image of nature favouring exploitation over ecological sustainability; and (3) the energy aspect where renewable energy resources were replaced by fossil fuels.

The Enlightenment consummated an unholy alliance between the state and the economy.⁷¹ The state externalised the environmental costs which should have been borne by those causing them, especially the costs for ‘freely available goods’ like air and clean water (public goods). Economic calculations listed only that which increased material prosperity. The economy was basically living off destroying the environment. The state shared the ecological blindness which also characterises the economy. “The state structure is therefore in no way ‘neutral’. It favours a way of thinking which sees economic prosperity as the basic requirement for human existence”.⁷²

It took governments until the second half of the 20th century to realise that some environmental safeguards may be needed. Not surprisingly, international agreements approached the subject primarily from a utilitarian perspective that sought to maximize economic exploitation. This approach was moderated in the 1960s when governments began to demonstrate concern over the general state of the environment. But even the new public environmental laws of the 1960s and 1970s added only certain environmental duties to otherwise unrestricted private property rights.⁷³

The current response can be summarised as a legal approach to environmental questions where “the [nation] state is the central actor, co-operation between states the dominant process, international law the desirable outcome, and the creation of new international

(ICLEI Charter 1.7). The shortcomings of the latter vis-à-vis enabling an effective local response are discussed in Part 3. See <www.iclei.org>.

⁷⁰ Bosselmann *The Principle of Sustainability* at 15.

⁷¹ Bosselmann *When Two Worlds Collide* at 64.

⁷² At 71.

⁷³ Bosselmann *The Principle of Sustainability* at 15-16.

institutions the method of implementation”.⁷⁴ The most common method for conducting the ‘response’ process is “the big, set-piece international conference, usually organised under the auspices of the United Nations”⁷⁵—think the Copenhagen Summit in 2009, Cancun in 2010, and the Rio+20 Earth Summit in 2012. The response is driven by legal protection through the international society (both nation states and NGOs) and its international law instruments.⁷⁶ Here the main actor is the nation state rather than local communities.

Nevertheless, while sovereignty has long served as the backbone of public international law, the power of the nation state was also somewhat diluted by the rise of the international law paradigm.⁷⁷ The challenge for the decades to come is how to balance state sovereignty with localism. If we (as contemporary societies) are able to accept ‘relative sovereignty’,⁷⁸ are we also able to accept the shared sovereignty of ‘charter cities’ as an alternative to the nation state?⁷⁹

Large-scale states cannot know enough about local conditions to devise and enforce suitable policy, while multiple (small-scale) polities could easily learn from one another which practices are best. The counterargument is that local, small-scale environmental management runs into difficulty in cases where the things to be managed (such as air pollution) are global— moving from one jurisdiction to another. Historically, of course, few of these things were subject to much regulation. The fallacy of this ‘complexity imperative’ is in that the perceived complexity is not inherent. This illusion is addressed in more detail later in this part.

⁷⁴ Tony Evans “International Environmental Law and the Challenge of Globalisation” in Tim Jewell and Jenny Steele (eds) *Law in Environmental Decision-Making: National, European, and International Perspectives* (Oxford University Press, Oxford, 1998) 207 at 207-208.

⁷⁵ At 208.

⁷⁶ See Alexander Kiss and Dinah Shelton *International Environmental Law* (3rd ed, Transactional Publishers, Ardsley (NY), 2004) at chapter 1.

⁷⁷ See Niko Schrijver “The Dynamics of Sovereignty in a Changing World” in Konrad Ginther Erik Denters and Paul Jim de Waart (eds) *Sustainable Development and Good Governance* (Kluwer, Boston, 1995) 80.

⁷⁸ Relative sovereignty goes beyond the idea that states are subject to international law. Relative sovereignty needs to be understood from the internal and external perspectives of state sovereignty. Similar to the evolution of internal sovereignty from monarchical monopoly to popular sovereignty, there is now a shift in external sovereignty from an international law dominated by state actors to one of power-sharing between state and non-state actors. See Ivan Simonovic “Relative Sovereignty of the Twenty First Century” (2002) 25 *Hastings International and Comparative Law Review* 371.

⁷⁹ Refer to Livingston <www.lrainc.com/swtaboo/taboo/dwlviv01.html>.

Given current international law discourse, even in aspirational instruments such as the Earth Charter (see below), it seems that nation states rather than local communities would still continue to be the principal actors in international relations. This reliance on nation-state-centred forms of governance may have disastrous consequences. For example, Tony Evans argues that international law cannot deliver the conditions for an effective response to the ecological crisis.⁸⁰ The ‘international society’,⁸¹ like (logical) positivism,⁸² does not offer a convincing view of history. Both fail to realise that the nation state is not a fact of nature, but an historic solution to the problem of increasing complexity in economic, social, and political life, first recognised in the 17th century. International society is therefore a conservative approach that views all new problems through the prism of familiarity.

Moreover, Evans indicates that globalisation is changing the role of the state from being an active policy-maker to a passive unit of administration. Transnational Corporations (TNCs) and Multinational Corporations (MNCs) modulate the ability of the state to legislate environmental laws by shopping for jurisdictions with less stringent regulations. Now the *Nébuleuse* (e.g. WTO and G20),⁸³ which are not democratically elected (at least directly), dictate governance on national governments. From this perspective, the role of international law is to legitimise the ‘technical fix’ that supports particular global interests.⁸⁴ International law offers an illusion of orderliness that deflects attention from wide-ranging, fundamental disagreement when thinking about the environment.

⁸⁰ Evans in Jewell and Steele (eds) *Law in Environmental Decision-Making: National, European, and International Perspectives* 207 at 208, 209.

⁸¹ The ‘international society’ approach is a middle way between classical realism (state conflict) and classical liberalism (state cooperation). It regard international relations as a society of states. It assumes that states do not subscribe to a limited set of rules that serve their common interests. However, the approach assumes that states are the active agents of change, with the capacity to reach and implement co-operative agreements. See Kenneth N Waltz *Theory of International Politics* (Addison-Wesley, Reading (MA), 1979); Hedley Bull *The Anarchical Society: A Study of Order in World Politics* (2nd ed, Columbia University Press, New York, 1977); Kai Alderson and Andrew Hurrell (eds) *Hedley Bull on International Society* (Palgrave Macmillan, London, 2000). See also MJ Peterson “Transnational Activity, International Society and World Politics” (1992) 21(3) *Millennium* 371.

⁸² Positive historians follow analytical empiricism to uncover generalised laws of historical development.

⁸³ The term *Nébuleuse* is used by Cox to refer to “a group of formal and informal organisations without democratic pretensions”. See RW Cox “A Perspective on Globalisation” in JH Mittelman (ed.) *Globalization: Critical Reflections* (Lynne Rienner, London, 1996) 21, cited by Evans in Jewell and Steele (eds) *Law in Environmental Decision-Making* 207 at 220.

⁸⁴ At 222.

However Evans does not suggest localism as an alternative. Similarly, the critique by Birnie and Boyle does not discuss localism.⁸⁵ They argue that while international organisations, such as the UN, have been exercising powers of international governance for over a century, the historical background and original goals of the UN and its agencies have not generated a system that is well suited to synthesising environmental and developmental goals—a fusion that United Nations Conference on Environment and Development (UNCED) identified as the key issue in the achievement of sustainable development.⁸⁶ But they too seem resigned as to the inevitability of a globalised response.

Some academics inch closer to localism by arguing for a ‘new institutionalism’ but only to move yards away. For example, Oran Young directs attention to governance instead of government and to institutions instead of organisations.⁸⁷ While he discusses decentralised political systems in which governance without government is the rule rather than the exception, he is quick to also point out to the existence of difficulties under such a decentralised system where there are links between efforts to protect the environment and to promote economic development. Young never takes the additional step of identifying the localisation of decision-making as a rudimentary organisational form that provides governance in the absence of government, at least as typified by the nation state. I suggest that the distinction between governance and government is one of scale, where larger organisational blueprints require a hierarchical complexity that leads from social institutions (rules of social practice) to organisations (the material actors in social practices). At the micro level, within a given locality, the (power) distance between governance and government is minimal. This of course would result only where the locality has local autonomy that minimises its dependence on higher organisational scales (whether national or global).

⁸⁵ PW Birnie and AE Boyle *International Law and the Environment* (2nd ed, Oxford University Press, Oxford, 2002) at 34-37, 47-57, 66-71.

⁸⁶ Birnie and Boyle at 69.

⁸⁷ Oran Young *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press, Ithaca, 1994) at 12-32.

Summary:

This section looks at the responses to the ecological crisis both historically and in modern times. What is apparent is that localism was at the crux of the historical response. However, since the rise of the nation state, localism was marginalised.⁸⁸

1.4. Conclusion: Lessons for New Zealand

*“Let us accept the fact that states have lifecycles similar to those of human beings who created them. Hardly any Member State of the United Nations has existed within its present borders for longer than five generations ... Restrictions on self-determination threaten not only democracy itself but the state which seeks its legitimation in democracy”.*⁸⁹

Through the lens of the historical and modern responses to the ecological crisis, history emerges as a struggle between alternating forces of (power) centralisation and decentralisation. While both centralisation and decentralisation are required at different junctures in the human saga, now it seems the pendulum is shifting to decentralisation.

The cause of the ecological crisis can be understood as a problem of scale resulting from a move away from localisation. This started with the agricultural, and intensified under the industrial revolutions. Parallel to these revolutions there was a rise of the nation state, their enabler, and its universal natural rights. Today there is yet a new wave of power centralisation through the international society and its push towards globalisation. The end result will be more adverse to local communities than under any nation state, unless local autonomy is re-embedded in urban agglomerations.

The historical response to the ecological crisis was alive to the importance of re-embedding decision-making back into local communities. In contrast the modern response puts more emphasis on global coordination. The modern literature suggests that the move

⁸⁸ Localism has been marginalised through three main instruments: the ‘indigenous people’ discourse, the ‘universal human rights’ paradigm, and the ‘complexity imperative’ illusion. For more on this point refer to BF Gussen “The Marginalisation of Localism in Current Responses to the Ecological Crisis” (2012) 16 NZJEL 167.

⁸⁹ Prince Hans-Adam II of Liechtenstein, speaking to the International Institute for Strategic Studies on 25 January 2001.

from the global to the local is inevitable given today's world is far more complex than that of the Middle Ages where the historical response to the crisis took place.⁹⁰ However, the nature of this complexity is not inherent in our world. This complexity is manmade and is due to the very reason that caused the ecological crisis in the first place. By assuming that this complexity is here to stay, one simply defeats all effective responses to the crisis. This complexity needs to be reduced by devolving the response to local communities, and then using only weak (organisational) links between local communities to enable coordination where negative environmental externalities so require.

The only way forward is to relegate the nation state to a supporting role to local authorities. No more should there be a monopoly by the nation state on the legislative process:⁹¹

“[W]e must ... question the legitimacy of the modern consolidated state itself ... *that economic integration required political integration into a larger polity* ... There is no reason today why, here and there, an order of city states cannot again flourish ... The modern state is not a fated existence; it is a human artefact only two hundred years old. And it no longer has the authority it once had. The ... demonstrated viability of small states, raises new and exciting possibilities.” (Emphasis added)

The future political world map should have small jurisdictional footprints representing local communities that do not go beyond the scale of cities or small regions (city-regions). The future should look like Singapore and Hong Kong. In 2015, both cities were ranked among the world's ten most environmentally and economically sustainable cities.⁹² This organisational mode, coupled with a tendency to enable local communities to be self-sufficient in all aspects of production and consumption, will simplify the complexity seen

⁹⁰ For a detailed analysis of this point refer to BF Gussen “The Marginalisation of Localism in Current Responses to the Ecological Crisis” (2012) 16 NZJEL 167.

⁹¹ Livingston <www.lrainc.com/swtaboo/taboo/dwlv01.html>.

⁹² Arcadis *Sustainable Cities Index 2015* (Arcadis, Amsterdam, 2015). The 2015 report is available at <<http://www.sustainablecitiesindex.com>> . Note that while some cities in nation states also made it to the top ten list, this also highlights that only a few cities made the list in any given nation state. Take for example Germany, where only Frankfurt and Berlin made the top ten. The point is that having smaller jurisdictional footprints through subsidiarity (see the following chapters) would help bring more cities into top rankings. From another angle, the higher density brought about by subsidiarity (through charter cities) would reduce energy use per capita. See Vishaan Chakrabarti *A Country of Cities: A Manifesto for an Urban America* (Metropolis Books, New York, 2013) at 80.

in the world today, and therefore provide the hope for an effective response to the ecological crisis.⁹³

The above *weltanschauung* integrates strands from philosophy, economics, systems theory, and organisation theory. In particular, it builds on the emerging perception that the nation state is moribund. The international law paradigm has diluted the power of the nation state in acknowledging sub- and supra- national actors. A new world order is emerging. This new order is based on the decentralisation of governance structures towards local communities (i.e. towards existing socio-economic structures rather than artificial ones). At the same time cooperation between local communities will expand to continental dimensions. Further evidence for this proposition is given in chapter 3 under the complexity ansatz, and in chapters 6 and 7 under the evolutionary effects of subsidiarity.

What is proposed is not to replace the national or global jurisdictions with local ones, but to allow for competition between different jurisdictions at different scales. The world would still have nation states but ones that look more like *Emmentaler* cheese, with ‘eyes’ that represent free cities.⁹⁴ The idea is to establish evolutionary dynamics by maximizing available options.⁹⁵ This could be, for example, through allowing for various currencies to compete within one jurisdiction. In the context of the Greek sovereign debt crisis, a city like Athens (among other cities in Greece) could be given wide autonomy as a charter city, including issuing its own currency. Athens would not need to abolish the Euro, but have it compete with, for example, the Drachma (at the city-region level).⁹⁶ Competition between such cities would also result in innovative environmental and economic solutions geared towards local needs.

Dr Smith and Mr Morrison fail to realise that today, notwithstanding failures of the modern response to the ecological crisis, international law is increasingly viewing local

⁹³ For clarity, the point here is that small jurisdictions would be more environmentally and economically sustainable than large jurisdictions.

⁹⁴ To appreciate the role of cities in the proposed evolutionary process refer to Jane Jacobs *Cities and the Wealth of Nations* (Vintage Books, New York, 1985). See also the discussion in chapter 8 on the Swiss constitution and the ideas of Jean-Jacques Rousseau.

⁹⁵ See Sean Gould *The Theory of Options: A New Theory of the Evolution of Human Behaviour* (revised ed, Universal Publishers, Boca Raton (FL), 2007).

⁹⁶ This is in the spirit of Hayekian parallel currencies. For a detailed discussion of Hayek’s perspective, see Anthony Endres “Currency Competition: A Hayekian Perspective on International Monetary Integration” (2009) 41(6) *Journal of Money, Credit and Banking* 1251.

governments (including city-regions) as vehicles for the advancement of policies on a global scale:⁹⁷

“The traditional legal focus on state actors is shifting on to local governments, giving them *independent legal status* in the new global order ... The evolving global status of local governments manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries. To date, however, there has been almost no academic account of this significant legal transformation. International legal theory has remained captive to the centralist and unitary conception of local governments ... In contemporary international legal practice and policy making, however, localities are already being recast as independent semi-private entities, no longer mere state agents subsumed by their national governments.” (Emphasis added)

The only effective response to the ecological crisis is through an ‘economy’ in the original sense—pertaining to management of the household or the local. Self-sufficiency, even subsistence, is still relevant to the response today as it was historically.

I hope to have highlighted important lessons for New Zealand that go beyond the status of Waiheke as a UNESCO biosphere reserve. This chapter endorses a proposition for an Emilia-Romagna (*Terza Italia*) approach to governance in New Zealand.⁹⁸ This has particular relevance to the Auckland supercity. In essence, Auckland should be given local autonomy and self-determination, potentially as wide as that granted independent cities such as Vienna, or even Hong Kong. In particular, the status of Hong Kong and Macau as Special Administrative Regions (SARs) with a high degree of autonomy (except acts of state like diplomatic relations and national defence), is more conducive for the wellbeing of Auckland, and by implication, for the wellbeing of New Zealand as a whole.

⁹⁷ Blank (2006) 47(1) Harv Int'l L J 263.

⁹⁸ Emilia-Romagna is a region in north eastern Italy with a high level of local autonomy. The region is the home of iconic brands such as Ferrari and Lamborghini, and is one of the richest in Europe. It has its own (Romance) language.

PART II MODEL BUILDING AND ANALYSIS

2. The Auxilium Model: Understanding Subsidiarity through Social Trust

2.1. Introduction

*“Our society is evolving into one
based predominantly on fiduciary relations”⁹⁹*

It would not be hyperbolic to claim that legal systems are a footnote to the concept of (social) trust. An abundance of evidence comes from the evolution of the common law legal system. Even more evidence can be furnished from the sociological genesis of the law.¹⁰⁰ The latter is what this chapter essays to provide. Through the ‘auxilium model’, the chapter argues for an overarching principle that bridges the gap between private and public law.¹⁰¹ Its praxis can be seen in the subsidiarity and fiduciary principles. This chapter argues the need for, and existence of, an overarching ‘auxilium’ obligation (on the state towards its subjects) that is independent of any legislative enabler, and is superior to parliamentary sovereignty. This superiority derives directly from the nature of social relations, although there are also important arguments to be made from (common law) historical analyses. This obligation stresses the informational asymmetries inherent in the state-subject relationship. It also highlights the ethical dimension and high standard of conduct expected from public servants, beyond the current questionable accountability mechanisms, especially under new managerialism.¹⁰²

⁹⁹ Tamar Frankel “Fiduciary Law” (1983) 71 California Law Review 795 at 798.

¹⁰⁰ See for example Niklas Luhmann “Law as a Social System” (1988) 83 (1&2) Northwestern University Law Review 136.

¹⁰¹ See for example Dawn Oliver *Common Values and the Public-Private Divide* (Cambridge University Press, Cambridge, 1999). In the context of fiduciary duties the gap between public and private law has been bridged in cases such as *Attorney-General v Aspinall* (1837) My & Cr, 613 where the fiduciary duties imposed on directors of companies was introduced into local government law.

¹⁰² See Christine Brown “The Fiduciary Duty of Government: An Alternative Accountability Mechanism or Wishful Thinking?” (1993) 2 Griffith Law Review 161.

Equity features in all areas of law.¹⁰³ The use of trust (*qua* equity¹⁰⁴ and its fiduciary principle) as the basis for describing the relationship between the state and its subjects is hardly an innovation.¹⁰⁵ However, the advent of judicial review vitiated the influence of equitable principles.¹⁰⁶ Moreover, the expansion of the tort of negligence into public authority liability stultified the development of equitable compensation for breach of equitable obligations.¹⁰⁷ The concern of administrative law for elaborating the rule of law and the corresponding jurisdictional boundaries of public decision-makers has overshadowed the development of administrative law duties based on equitable principles.¹⁰⁸

Recourse to general principles of justice in order to assist the ‘just’ application of law is a feature common to major legal systems.¹⁰⁹ The ‘trust’ basis of the fiduciary principle is illustrated by the history of the word fiduciary.¹¹⁰ Over the years courts recognized that

¹⁰³ *Bateman’s Bay* (1998) 194 CLR 247 at 257; Cited in David Wright “The Role of Equitable Remedies in the Merging of Private and Public Law” 12 Public Law Review 40 at 43.

¹⁰⁴ Here equity means a body of general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state. What is critical is the attachment of equity to the conception of justice and its detachment from the rules of any particular legal system. See Vaughan Lowe “The Role of Equity in International Law” (1988) 12 Australian Yearbook of International Law 54.

¹⁰⁵ See for example Kathleen Clark “Do We Have Enough Ethics in Government Yet?: An Answer form Fiduciary Theory” (1996) University of Illinois Law Review 57; Anthony Mason “The Place of Equity and Equitable Remedies in the Contemporary Law World” (1994) 110 Law Quarterly Review 238, also in Donovan Waters (ed.) *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1993) at 4.

¹⁰⁶ Martin Loughlin *Legality and Locality* (Clarendon Press, Oxford, 1996) at 258.

¹⁰⁷ Anthony Mason (1994) 110 Law Quarterly Review 238.

¹⁰⁸ Lorne Sossin “Public Fiduciary Obligations, Political Trusts, and the Equitable Duty of Reasonableness in Administrative Law” (2003) 66 Saskatchewan Law Review 129. See also *Porter v Warner Holding Co* 328 US 395, 398 (1946), quoted by Justice Harlan in *Mitchell v De Mario Jewelry Inc* 361 US 288 (1960) at 292, cited in Thomas Rowe, Jr “No Final Victories: The Incompleteness of Equity’s Triumph in Federal Law” (1993) 56 Law and Contemporary Problems 105.

¹⁰⁹ Lowe (1988) 12 Australian Yearbook of International Law 54; LS Sealy “Fiduciary Relationships” (1962) Cambridge Law Journal 69; John Higginbotham (trans.) *Cicero on Moral Obligations* (Faber & Faber, London, 1976) bk. I, ch. 25, § 85, at 69; John Locke *Two Treatises of Government* (Legal Classics Library, London, 1994) bk. II, §§ 77-79, 107-09, 119-122, 136, 229-30; Clinton Rossiter (ed) *The Federalist Papers* (New American Library, New York, 1961) No. 46, at 294, and No. 65, at 397; Loughlin *Legality and Locality* Chapter 4, 204, 259.

¹¹⁰ See for example, *Jostens Canada Ltd v GIV* [1997] BCJ No 2637; *MV Ellis Fiduciary Duties in Canada* (Carswell, Toronto, 1993), cited in Donna Hall “The Fiduciary Relationship Between Maori and the Government in New Zealand” in Richard Bartlett and Larissa Behrendt *In Whom We Trust: A Forum on Fiduciary Relationships* (Irwin Law, Toronto, 2002) 123-149.

other relationships, such as partnerships and agency, also involve elements of trust.¹¹¹ Similarly, trust (*qua* subsidiarity) is part of the ethical dimension of the state-subject relationship,¹¹² and the problem of the commons.¹¹³ The subsidiarity principle is a principle of administrative law.¹¹⁴

Trust emerges as a way of coping with the task of governing under complexity. In relation to the political state, trust manifests itself either as a fiduciary or subsidiarity standard (see below). State-subject relations emerge as a delicate dialectic of trust and distrust, discretion and accountability, hard legal rules and soft social norms. The fiduciary and subsidiarity principles maintain the integrity of relationships perceived to be of importance in a society.¹¹⁵ As the perceptions of social interests and values change, so also can the ambience of these principles. In this, the true nature of the fiduciary and subsidiarity principles is revealed. They originate in public policy.¹¹⁶

The following section focuses on expounding power and trust as two competing paradigms in administrative law. The concept of trust and its relation to power is delineated further in section three. The fourth section elucidates the analysis in section three with an application to case law. The fifth section looks at the role of trust in constitutional law and subsidiarity. The last section concludes with some policy signals.

¹¹¹ LS Sealy, *supra* note 109; Maurice Gautreau “Demystifying the Fiduciary Mystique” (1989) 68 *Canadian Bar Review* 1.

¹¹² See generally Chantal Millon-Delsol “Le principe de subsidiarité: origines et fondements” (1990) 4 *Cahiers de l’Institut La Boétie* 4; Chantal Millon-Delsol *L’État subsidiaire: ingérence et non-ingérence de l’État, le principe de subsidiarité aux fondements de l’histoire européenne* (Presses Universitaires de France, Paris, 1992). See also Hans Stadler *Subsidiaritätsprinzip und Föderalismus* (Universitätsbuchhandlung, Freiburg, 1951).

¹¹³ See Elinor Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990); Elinor Ostrom “Coping with tragedies of the commons” (1999) 2 *Annual Review of Political Science* 493.

¹¹⁴ See Jean Marie Pontier “La subsidiarité en droit administrative” (1986) (novembre decembre) *Revue du droit public et de la science politique en France et d’étranger* 1515.

¹¹⁵ At 134.

¹¹⁶ PD Finn “The Fiduciary Principle” in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1 at 27.

2.2. Two competing paradigms

There are two competing paradigms of public law.¹¹⁷ The first is predicated on the concept of power,¹¹⁸ and its expression in (*inter alia*) sovereignty, parliamentary supremacy, the rule of law, and the doctrine of *ultra vires*. The second paradigm is based on the concept of trust, and its expression in principles such as subsidiarity and the fiduciary principle. The dominant view today is that the trust-based paradigm is inferior.¹¹⁹ The power-based paradigm seems to have triumphed because of its apparent rigidity which has allowed it more successfully to invoke the limits set out in acts of parliament.

To see public law as predicated on power rather than trust is misleading. The dichotomy between these paradigms is false. Both paradigms derive their rationale from the concept of trust (as a social construct). Power, unless absolute, is operative only on a platform of trust. Trust is the fundamental dimension of discretionary power.¹²⁰

Public law's trust foundations should not be dismissed as mere metaphorical rhetoric. The idea of parliament as a trustee of legal order has attracted the attention of respected British jurists for centuries.¹²¹

¹¹⁷ Stephen Gageler "Legitimate Expectations" (2005) 12 Australian Journal of Administrative Law 111; Paul Craig "Competing Models of Judicial Review" (1999) Public Law 42.

¹¹⁸ For a good introduction to the idea of power see SR Clegg *Frameworks of Power* (Sage Publications, London, 1989). See also H Arendt *The Human Condition* (University of Chicago Press, Chicago, 1958).

¹¹⁹ See for example JS Leary "Fiduciary Duties in Public Law" (LLB (Hons) Dissertation, University of Auckland, 1992).

¹²⁰ Evan Fox-Decent "The Fiduciary Nature of State Legal Authority" (2005) 31 Queen's Law Journal 259 at 299.

¹²¹ See Michael Patrick Nolan, Stephen Sedley and Geoffrey Philip Wilson *The Making and Remaking of the British Constitution* (Blackstone Press, London, 1997) at 85, cited in Evan Fox-Decent *Sovereignty's Promise: The State as Fiduciary* (PhD Thesis, University of Toronto, 2004) at 242. The works of John Locke and John Austin are particularly relevant here. For Locke, the concept of trust was as central to the social contract as the concept of power was for Hobbes. Locke, just like Rousseau, saw sovereignty as residing with the people. This conception of sovereignty means that parliamentary sovereignty is based on a fiduciary form of power:

"Though in a constituted commonwealth standing upon its own basis and acting according to its own nature—that is, acting for the preservation of the community, there can be but *one supreme power*, which is *the legislative*, to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the legislative act contrary to the trust reposed in them: for all *power given with trust* for the attaining an *end*, being limited by that *end*, whenever that end is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited* ..." (Emphasis in the original) [John Locke Two Treatises of Government (Whitmore & Fenn and C Brown, London, 1821) Chapter XIII, para 149, page 316.]

Public law increasingly draws upon fiduciary law's three foundational elements (entrustment, residual control, and fiduciary duty) as a conceptual framework for constraining public authority discretion and mediating relationships between the executive, legislative, and judicial branches.¹²² At its most abstract level, trust-based relationships exist between the state and each person subject to its power and authority.

Generally, there have been greater willingness to find a trust-based relationship in some jurisdictions more than others—in North America (the United States and Canada) more than in Oceania (Australia and New Zealand); reluctance is even more marked in England. Sceptics argue that a trust-based obligation on the state has conceptually problematic aspects which make it incompatible with the nature of central government.¹²³ Some argue that practical limitations prevent the extension from being made.¹²⁴ There is difficulty in defining and mediating between interests represented by government. The multitude of interests and the conflicting nature of these interests make it impossible for a trust-based obligation on the state. Sceptics see the power paradigm as superior to the trust paradigm because it focuses on legislation, hence giving recognition to the doctrine of parliamentary sovereignty and to parliamentary intention. It stops the judiciary from interfering with the political decisions of the power-holder (at least theoretically), because the judiciary are

Locke presents the concept of power (qua parliamentary sovereignty) and the concept of trust as compatible. Lockean trust represents popular sovereignty and symbolises the power given to parliament. Similarly, John Austin's conception of sovereignty (power) is based on trust between the party delegating power and the party discharging the trust:

“That a trust is imposed by the party delegating, and that the party representing engages to discharge the trust, seems to be imported by the correlative expressions *delegation* and *representation*.” (Emphasis in the original) [John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832) at 242]

For Austin, constitutional law (as positive morality) defines this relationship of trust. Although trust itself is not enforced by legal sanctions but by moral ones. Otherwise, “the positive law binding the representative body might be made by the representative body and not by the electoral” [John Austin *The Province of Jurisprudence Determined* (John Murray, London, 1832) at 242].

See also Julian H Franklin *John Locke and the Theory of Sovereignty* (Cambridge University Press, Cambridge, 1978); Michael Freeman and Patricia Mindus (eds) *The Legacy of John Austin's Jurisprudence* (Springer, London, 2013); and Ariel L Bendor and Zeev Segal “Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model” (2002) 17(4) *American University International Law Review* 683.

¹²² Criddle (2006) 54 *UCLA Law Review* 117 at 120.

¹²³ See for example, *New Zealand Maori Council v Attorney General* [2008] 1 NZLR 318, at [71] and [81]; Raybon Kan “Fiduciary Duties in Public Law” (LLM Thesis, Victoria U of Wellington, 1989) at 67.

¹²⁴ Brown (1993) 2 *Griffith Law Review* 161.

only required to ensure that the decision-maker remained within the ambit of the power conferred on it by parliament.¹²⁵

These objections are based on a false conception. The state trust-based obligation arises from the very nature of social relationships. The concept of power underpinning parliamentary supremacy is contingent on the existence of trust for its own survival. These points are developed further in the next section.

2.3. The calculus of trust

What distinguishes a fiduciary duty from a contractual duty or a duty of care based on the *Hedley Byrne* principle?¹²⁶ In each case the elements giving rise to the duty are the same, that is, a power to affect another's interest, an undertaking, reliance and knowledge of the reliance. Reasonable reliance on another's undertaking and, through it, vulnerability (resulting from risk-taking, as the inevitable outcome of discretionary power), is at the root of liability for breach of fiduciary duty just as it is at the root of liability for breach of contract or under the *Hedley Byrne* principle.¹²⁷

While the concept of trust is both ubiquitous and syncretic,¹²⁸ it has four core parameters.¹²⁹ The greater the homogeneity in a given group and the higher the connectedness of the social network, the higher the level of trust. On the other hand, the

¹²⁵ Leary (LLB (Hons) Dissertation, University of Auckland, 1992).

¹²⁶ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

¹²⁷ *Burns v Kelly Peters & Associates Ltd* (1987) 41 DLR (4th) 577, 600. See also Maurice Gautreau "Demystifying the Fiduciary Mystique" (1989) 68 Canadian Bar Review 1.

¹²⁸ See Mark Warren (ed) *Democracy and Trust* (Cambridge University Press, Cambridge, 1999); Francis Fukuyama *Trust* (Free Press, New York, 1995); Timothy Earle and George Cvetkovich *Social Trust: Toward a Cosmopolitan Society* (Praeger Publishers, Westport (CT), 1995) at 8; Bart Nooteboom and Frédérique Six (eds) *The Trust Process in Organizations* (Edward Elgar Publishing, Northampton (MA), 2003). See also JL Johns "A Concept Analysis of Trust" (1996) 24 *Journal of Advanced Nursing* 76 at 79; JD Lewis and A Weigert "Social Atomism, Holism and Trust" (1985) 26(4) *Sociological Quarterly* 455; JB Rotter "A new scale for the measurement of interpersonal trust" (1967) 35 *Journal of Personality* 651; JB Rotter "Generalized Expectancies for Interpersonal Trust" (1971) 26 *American Psychologist* 443; Robert Morgan and Shelby Hunt "The Commitment Trust Theory of Relationship Marketing" (1994) 58 *Journal of Marketing* 20; T Rea "Engendering Trust in Electronic Environments—Role for a Trusted Third Party" in C Castelfranchi and Y-H Tan (eds.) *Trust and Deception in Virtual Societies* (Kluwer Academic Publishing, Dordrecht, 2001) 221 at 222. See also Niklas Luhmann *Trust and power: Two Works by Niklas Luhmann* (John Wiley & Sons, New York, 1979) at 13.

¹²⁹ JD Lewis and A Weigert "Trust as a Social Reality" (1985) 63(4) *Social Forces* 967 at 980.

greater the size of a community, and the greater the social change in that community, the lower the level of trust. These parameters suggest a problem of scale: to enhance trust, there has to be a limit on the size of communities.¹³⁰

Trust can be formulated as follows: when x trusts y to do Z , this means that x has Z as an objective, and tries to achieve Z by using y .¹³¹ This trust is based on a calculus where the emphasis is on x 's information about y 's ability and willingness to do Z . It is x 's orientation (attitude) towards y from which trust emerges.¹³² Trust is based on x 's expectations about y . These expectations are inevitably blinded by informational asymmetries as to y 's behavioural options. Hence, trust is not simply a belief held by x that y will do Z . For trust to emerge, agency and rationality must be imbued with morality, as a technology to overcome the inherent informational asymmetries.¹³³ The belief held by x is an expectation of conformity to rules, and that the rules may be of significantly different types. In other words, x 's expectation is that, in given circumstances, y will do Z , and that exceptional circumstances (preventing y from doing Z) will not arise.¹³⁴

Given inherent informational asymmetries, trust involves reliance upon another to achieve a desired objective in a risky situation.¹³⁵ Risk is what distinguishes trust from confidence.¹³⁶ Risk arises from informational asymmetries x faces in relation to y 's willingness and ability to do Z . When this risk is irrelevant, trust turns into power—absolute

¹³⁰ See Gussen 24 (1) *Constitutional Political Economy* 19; Gussen (2013) (7)(1) *The Journal of Philosophical Economics*.

¹³¹ C Castelfranchi and R Falcone “Social Trust: A Cognitive Approach” in C Castelfranchi and Y-H Tan (eds.) *Trust and Deception in Virtual Societies* (Kluwer Academic Publishing, Dordrecht, 2001) 55.

¹³² Georg Simmel “The secret and the secret society” in KH Wolff (ed and trans) *The sociology of Georg Simmel* (The Free Press, New York, 1950) 307. For trust as an emergent property see Linda Weber and Allison Carter *The Social Construction of Trust* (Springer, New York, 2003) at 11.

¹³³ Weber and Carter *The Social Construction of Trust* at 146.

¹³⁴ See Andrew Johns “On the Concept of Trust” (2002) 33 *Decision Support Systems* 225 at 226. Others analyse trust through different constructs, for example as having two (none mutually exclusive) dimensions. Calculative trust is based on reason, while affective trust is based on emotions. See Rikard Larsson et al “The Interorganizational Learning Dilemma: Collective Knowledge Development in Strategic Alliances” (1998) 9(3) *Organization Science* 285; J David Lewis and A Weigert “Trust as a Social Reality” 63 *Social Forces* 967.

¹³⁵ Luhmann *Trust and power* at 24; K Giffin “The Contribution of Studies of Source Credibility to a Theory of Interpersonal Trust in the Communication Process” (1967) 68(2) *Psychological Bulletin* 104. Note however that there are situations where the goal component might not be present. See Andrew Johns, above n 134.

¹³⁶ See Weber and Carter *The Social Construction of Trust* at 2.

(coercive) power. When the power asymmetry between the parties is so high, the strong party in the relationship is not able to make credible commitments to engender trust.¹³⁷

In other (non-coercive) forms of power, when y has power over x to do W , this means that y has W as an objective, and tries to achieve W by using x . Power is like trust, a technology for reducing complexity.¹³⁸ It too reduces complexity through action. But the power calculus is dominated by information about y and his ability to have W as a goal, rather than x 's ability and willingness to do W . Power is "the ability of a person to get others to do what he/she wants, regardless if they want to do it or not".¹³⁹ Power is based on information about y and their ability to affect x 's behaviour through reward, authority, affiliation, or superior skills and knowledge.¹⁴⁰ Power is based on y 's ability to influence x 's behaviour by limiting x 's options. However, as this power is not absolute, for it to be effective, it takes into consideration expectations held by x . Trust on the other hand is dominated by information about y and their ability and willingness to do W .

Power and trust are not mutually exclusive, except where power is based on coercion. Trust, which emerges from constraints on power, is imperative for the stability of power on the long-run.¹⁴¹ Both power and trust are grounded in a form of cooperation. The calculus for this cooperation is dominated by x 's expectation in the case of trust, and by y 's expectations in the case of power. In most cases both expectations are taken into consideration but with one expectation dominating the other.

Given this mutual aid basis of both power and trust,¹⁴² one could theorise the auxilium principle: an overarching principle representing an evolutionary dialectic of both trust and power. It is evolutionary because, through time, it normalises the improbable,¹⁴³ and by

¹³⁷ Henry Farrell "Trust, Distrust, and Power" in Russell Hardin (ed) *Distrust* (Russell Sage Foundation, New York, 2004) Chapter 4.

¹³⁸ Luhmann, above n 135, at 119.

¹³⁹ Weber and Carter, above n 133, at 21.

¹⁴⁰ John French and Bertram Raven "The Bases of Social Power" in Dorwin Cartwright (ed) *Studies in Social Power* (University of Michigan Press, Ann Arbor, 1959).

¹⁴¹ See Max Weber *Economy and Society* (University of California Press, Berkeley, 1978).

¹⁴² See generally Jack Knight *Institutions and Social Conflict* (Cambridge University Press, Cambridge, 1992).

¹⁴³ Niklas Luhmann *Trust and power: Two Works by Niklas Luhmann* (John Wiley & Sons, New York, 1979) at 162.

doing so maximizes genetic fitness.¹⁴⁴ It is dialectic because it reduces complexity by resolving the tension between x 's and y 's expectations. The auxilium principle explains how both parties to the relationship help each other achieve their respective expectations. It is this 'help' which informs the coining of its name. Because it is based on help, auxilium takes x 's expectations, being the weaker party in the relationship, as the key consideration when analysing the dialectic between power and trust.

We can summarise the above discussion with the help of Figure 2.1 (below). Objective Z identifies a trust dimension between x and y , while objective W represents a power dimension. In both dimensions, y is the decision-maker. The dotted lines from Z and W explain the time delay required to meet these objectives. This role of decision-making emphasises the power asymmetry between x and y .

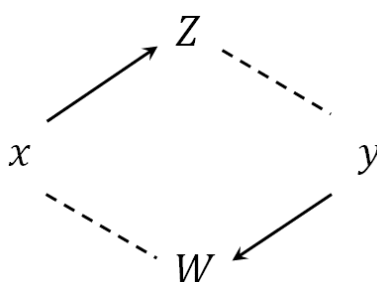


Figure 2.1: The auxilium core to the trust and power concepts

Both power and trust are based on the existence of Z and W . Both concepts relate to an auxilium core where the parties to the relationship expect help from each other in the form of Z and W . There is an expectation of reciprocity. For example, in a relationship between a patient and a doctor, the patient has the goal of healing based on his doctor's expertise (the patient's expectations arise from his belief about the role played by his doctor), while the doctor has the goal of treatment which would not be effective unless the patient carries out the doctor's instructions. There is a form of mutual aid between the two in achieving

¹⁴⁴ John Dickhaut and Kevin McCabe "Trust, Reciprocity, and Social History" (1995) 10 *Games and Economic Behaviour* 122 at 124.

healing and treatment. The analysis is not exclusive to the possibility of other incidental objectives that are contingent on this auxilium core.

The auxilium model is related to the doctrine of legitimate expectations. The rationale behind this doctrine is based on the concept of trust.¹⁴⁵ Without trust, governance “becomes a choice between chaos and coercion”.¹⁴⁶ The two basic ingredients of the doctrine are: (1) a promise by an official, and (2) trust reposed in that promise by a citizen.¹⁴⁷ The auxilium model is based on the expectations held by x (the citizen) towards the promise (Z) flowing from y (the official). But the auxilium model is a wider framework than legitimate expectations not only in that it goes beyond Z by explicitly including in the analysis the reciprocal promise made by the citizen (W), but because of its prophylactic inclinations.

Given the informational asymmetries inherent in this trust-power dialectic, there is a prophylactic need to reduce these asymmetries. This could be achieved either directly or indirectly. The direct route reduces asymmetries either by socialisation, where enough time passes for a strong bond to emerge between x and y , or by localisation, where y helps x assume the decision-making over objective Z . The indirect route limits y 's decision-making power through a number of standards based on x 's expectations.

In the context of state-subject relationships, the direct route furnishes a deconstruction of the concepts of sovereignty, parliamentary supremacy, and the rule of law. The concept of parliamentary supremacy suggests that the law-maker has absolute sovereignty, free from restraint. In its historical context, the rule of law emerged from European feudalism as a constraint on the absolute power of the monarch.¹⁴⁸ In the context of judicial review, the rule of law appears in the form of the doctrine of *ultra vires*. This in turn relates back to parliamentary supremacy and sovereignty (see section 2.4).

Sovereignty is an abstract notion of “the *relationship* between rulers and ruled for the exercise of political power [and] the independent status of the body politic on the

¹⁴⁵ Paul Reynolds “Legitimate Expectations and the Protection of Trust in Public Officials” (2011) Public Law 330. The more abstract principles of fairness and abuse of power are also cited as explaining the doctrine of legitimate expectations. See the dicta of Bingham MR in *Ex Parte Unilever Plc* [1996] STC 681, and the dicta of McCloskey J in *Board of Governors of Loreto Grammar School's Application* [2011] NIQB 30 at para 96.

¹⁴⁶ See William Wade and CF Forsyth *Administrative Law* (10th ed, Oxford University Press, Oxford, 2009) at 447.

¹⁴⁷ *Board of Governors of Loreto Grammar School's Application* at para 95.

¹⁴⁸ See Max Weber *Economy and Society* (University of California Press, Berkeley, 1978).

international stage” (emphasis added).¹⁴⁹ However, without constitutional safeguards, this relational basis continues to fray as sovereignty, through its economic rationale, enlarges the jurisdictional footprint of the state.¹⁵⁰ Today, sovereignty is embedded in a frame of constitutional constraints.¹⁵¹

Under the indirect prophylactic intervention, there are a number of behavioural standards. The fiduciary principle, reasonableness, good faith, and ‘breach of confidence’ are points on a continuum representing the auxilium core, and differ only in their remedies,¹⁵² due to differences in *x*’s expectations and their effect on how *y*’s power is constrained. The higher the power asymmetry, the more is the need to limit *y*’s behavioural options.

The ‘unconscionability standard’ accepts that *y* is entitled to act self-interestedly in his actions towards *x*. Yet in deference to *x*’s interests, the standard proscribes excessively self-interested conduct. The ‘good faith standard’ accepts that *y* is entitled to act self-interestedly, but qualified this by *positively* requiring *y* to have regard to the legitimate interests of *x*.¹⁵³ The ‘fiduciary standard’ requires *y* (the fiduciary) to act selflessly and with undivided loyalty to *x*. This standard applies where *y*’s function and purpose are related to acting in *x*’s interest.¹⁵⁴ Given the power asymmetries between the state and its subjects, the fiduciary standard becomes a necessity for the emergence of trust and the evolutionary fitness of the state.

Common to all three standards is a concern with the extent to which one party to a relationship is obliged to acknowledge and to *respect* the interests of the other.¹⁵⁵ These standards prescribe the constraints on the behavioural options available to the decision-

¹⁴⁹ Raia Prokhovnik “Spinoza’s Conception of Sovereignty” (2001) 27 *History of European Ideas* 289.

¹⁵⁰ For the economic basis of sovereignty see for example Charles Beard *The Economic Basis of Politics* (George Allen & Unwin, London, 1935).

¹⁵¹ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing, London, 2002) at 29.

¹⁵² PD Finn “The Fiduciary Principle” in TG Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1 at 11.

¹⁵³ Therefore the ‘good faith’ standard embodies unconscionability and fiduciary characteristics.

¹⁵⁴ It should here be evident that arguing for an overarching fiduciary obligation on the state limits its third source powers.

¹⁵⁵ Finn in TG Youdan (ed) *Equity, Fiduciaries and Trusts* at 11.

maker. These limits on power are intended to make auxilium an evolutionary *stable* strategy.¹⁵⁶ From this perspective, the public duties of fairness and reasonableness are also public fiduciary duties. This is so given that fairness and reasonableness are simply what loyalty is in cases where there are multiple beneficiaries with conflicting interests.¹⁵⁷ The fiduciary obligation requires the state to exercise its legal power in accordance with the innate dignity of the beneficiary, who on the basis of the trust that has been reposed in the state and the resulting dependency and vulnerability they feel towards the power that has been granted to the state, is justified in holding the state to an obligation to respect and promote their constitutionally guaranteed rights.¹⁵⁸ The ability of constitutional arrangements to endure, in other word evading the collapse of the political state, requires if only a modicum of trust to upholster the power conjugate.

It has been well accepted that there is a duty of fairness in administrative law,¹⁵⁹ as well as a duty of reasonableness.¹⁶⁰ Some, however, have condemned the use of fiduciary duty in public law as a means of widening the scope of *Wednesbury* unreasonableness, because it blurs the lines of responsibility between executive and judiciary.¹⁶¹ Nevertheless, reasonable exercises of fiduciary power that comply with the duty of fairness are consistent with the constraint of equal dignity. However, where fairness sets a limit on how the fiduciary may exercise power as between distinct classes of beneficiaries, reasonableness establishes a floor.¹⁶² Fairness coupled with reasonableness supply the legal framework necessary for the fiduciary to exercise discretionary authority in a way that permits him to

¹⁵⁶ For trust as an evolutionary stable strategy see K Arrow *The Limits of Organization* (Norton, New York, 1974) and J Hirshleifer “Economics from a Biological Viewpoint” (1977) 20 *Journal of Law and Economics* 1.

¹⁵⁷ See Evan Fox-Decent *Sovereignty’s Promise: The State as Fiduciary* (PhD Thesis, University of Toronto, 2004).

¹⁵⁸ *Equitable Life Assurance Society v Hyman* [2000] UKHL 39. Cited in George R Wray *Fiduciary Duties and Constitutional Rights: Constitutionalizing a Minimum Level of Well-Being under Section 7 of the Charter* (LLM Thesis, The University of Toronto, 2007) at 55.

¹⁵⁹ *Nicholson v Haldimond-Norfolk (Regional) Commissioners of Police* (1978) 1 SCR 311; *Cardinal v Director of Kent Institution* [1986] 2 SCR 643.

¹⁶⁰ *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817; *Equitable Life Assurance Society v Hyman* [2000] 2 All ER 331 (CA) aff’d [2000] HL at para 20 and 21. See also Sossin (2003) 66 *Saskatchewan Law Review* 129.

¹⁶¹ GJ Peiris “Wednesbury Unreasonableness: The Expanding Canvas” [1987] *Cambridge Law Journal* 53, 62; cited in Kan (LLM Thesis, VU of Wellington, 1989) at 8.

¹⁶² *Wewaykum Indian Band v Canada* [2002] 4 SCR 245 at para 97.

act as loyally as possible on behalf of each person subject to his authority. A similar interpretive principle affecting the exercise of official power is expressed in the United Kingdom as a ‘principle of legality’: a strong presumption that broadly expressed discretions are subject to the fundamental human rights recognised by the common law.¹⁶³

The seminal idea is this: a public body cannot exercise a power without the concomitant assumption of duties (such as fairness and reasonableness) arising from the auxilium core. These duties embody a commitment to loyalty, and therefore help to justify the legal authority to exercise power on behalf of each person subject to it.¹⁶⁴

2.4. An application of the auxilium model: *Roberts v Hopwood*¹⁶⁵

The auxilium principle is about reconciling the analytical dichotomy between power and trust. This section uses *Roberts v Hopwood* to elucidate this approach. The case marks the beginning of a tension between central and local government where the latter’s ability to use discretion in their decision-making has been progressively curtailed.¹⁶⁶ Our discussion of the case will also inform the arguments made in the following section on the implications of trust in constitutionalism.

The case arose from a decision by the London Borough of Poplar where the councillors won elections after voting was extended to those who were in receipt of poor law relief. They proceeded to apply the Labour Party’s principle of equal pay for equal work by paying an equal minimum wage to council’s male and female workers. Ratepayers (local industrialists), roughly half of whom lived outside the borough, were aggrieved by the

¹⁶³ *R v Lord Chancellor; Ex parte Witham* [1998] QB 575. See also RS French “The Equitable Geist in the Machinery of Administrative Justice” (Paper presented to an AIAL seminar on recent developments in Administrative Law, Sydney, 22 May 2003).

¹⁶⁴ Evan Fox-Decent “The Fiduciary Nature of State Legal Authority” (2005) 31 *Queen’s Law Journal* 259, 268.

¹⁶⁵ *Roberts v Hopwood* [1925] AC 578.

¹⁶⁶ Phil Fennell “Roberts v Hopwood: the Rule against Socialism” (1986) 13 (3) *Journal of Law and Society* 401.

increase in rates instituted to pay for these wages. They complained. The district auditor surcharged the Poplar councillors by the amount by which these wages exceeded what he thought to be reasonable. The councillors argued that their duty is to the electors and not the ratepayers who lived outside the district. The ratepayers argued that, as ‘shareholders’ of local government, the legal duties owed to them by the councillors prevailed over the moral duties that the councillors held towards the electorate. The councillors’ application for judicial review was refused in the Divisional Court of the King’s Bench Division. Later the House of Lord’s affirmed the decision. Eventually, legislation was introduced to allow the Minister of Health to remit surcharges in certain circumstances.

The court of first instance provides a good example of the dialectic between power and trust:¹⁶⁷

“...the council are in a fiduciary position, not merely towards the majority who have elected them, but towards the whole of ratepayers and therefore must confine the exercise of their discretion in regard to such payments within the limits imposed by law.”

The court recognises the trust component arising from the good governance of the borough (goal Z). This is the existential goal for the council. They also recognise the power component arising from the discretion to decide wage rates (goal W). However, according to the auxilium model, the court enlarged x beyond objective Z , which vitiates the trust dimension. See Figure 2.2. A large portion of the ratepayers (x'), given their domicile, do not subscribe to the social relationship that gives rise to objective Z . The introduction of the ratepayers to set x was a hangover from the way local government was conducted before the Municipal Corporations Act 1835, when x was dominated by privileged groups.¹⁶⁸

¹⁶⁷ *The King v Roberts ex parte Scurr and others* [1924] 1 KB 514 at 522.

¹⁶⁸ Phil Fennell “Roberts v Hopwood: the Rule against Socialism” (1986) 13 (3) *Journal of Law and Society* 401 at 407.

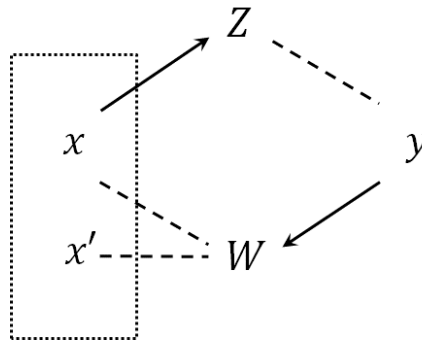


Figure 2.2: The auxiliary core in *Roberts v Hopwood*

Moreover, the court quickly shifted its analytical lens to deciding whether the increase in wages (W) was *ultra vires*. The emphasis was on the legality of the actions taken by the councillors. The auxiliary model suggests that the emphasis should be instead on x 's expectations. In the Court of Appeal, only Atkin LJ, who limited x to the local community, accepted councillors' argument that as long as they acted in good faith, the district auditor had no power to disallow their actions as illegal. This is more in line with the auxiliary model where the emphasis is placed on a limited definition of x , given that smaller communities enhance trust, and their expectations. Atkin LJ's dicta suggest an understanding of how the limits on the council's power (y 's power) are internal to the auxiliary model: they do not arise from an *ultra vires* argument where the powers are constrained by a party external to the *direct* relationship between x and y , including through reasonableness, but from x 's expectations on the options open to y in achieving Z .¹⁶⁹ The reasonableness test is rather subjective and emanates from the social relationship between x and y . In later cases, Lord Wilberforce saw as complementary the subjective reasonableness test arising from *Roberts v Hopwood* and the objective *Wednesbury* test.¹⁷⁰ They represent a continuum of restraints on the decision-maker that would gravitate towards the *Roberts v Hopwood* test at higher power asymmetries. No breach of parliamentary sovereignty would obtain given the need to induce trust into the relationship (through regard to x 's expectations) in order for sovereignty to endure.

¹⁶⁹ *R v Roberts ex parte Scurr* [1924] 2 KB 695 at 725 to 728.

¹⁷⁰ *Postmaster General v Kingsley* [1964] EGD 104.

In the House of Lords, all five Law Lords affirmed the decision of the court of first instance.¹⁷¹ Only Lord Buckmaster agreed that the discretion as to reasonableness resided with the council,¹⁷² although he too found for the ratepayers by arguing that the council's wage policy was one of standardising wages for adults rather than based on equal pay for equal work.¹⁷³ He found illegality not on reasonableness but on council's wages not being wages at all. Lord Sumner on the other hand suggested that only polycentric reasons prevented courts from interfering with the council's decision.¹⁷⁴

Since *Roberts v Hopwood* the law developed in a direction that confirmed a fiduciary duty owed by local government to ratepayers,¹⁷⁵ which affirms the ascendancy of the doctrine of *ultra vires* as the basis for judicial review. This approach would risk fraying the social relationship between local governments and their electorates. Emphasis in any power analysis should rather be on the expectations of this electorate, and the restraints on said power emanating from these expectations.

2.5. Implications of trust in constitutional law: The subsidiarity principle

This section furnishes a deconstruction of the concepts of sovereignty,¹⁷⁶ parliamentary supremacy,¹⁷⁷ and the rule of law.¹⁷⁸ It argues that these principles are based on the auxiliary core of social relationships. Given the interrelationship between sovereignty, parliamentary supremacy, and the rule of law, emphasis is placed on an exposition of

¹⁷¹ *Roberts v Hopwood* [1925] AC 578.

¹⁷² At 588.

¹⁷³ At 590.

¹⁷⁴ At 606.

¹⁷⁵ See for example *Prescott v Birmingham* [1955] 1 Ch. 210; *R v Greater London Council ex parte Bromley LBC* [1983] 1 AC 768; and *Pickwell v London Borough of Camden* [1983] 1 QB 962.

¹⁷⁶ For the history of sovereignty see generally Merriam *History of the Theory of Sovereignty since Rousseau*.

¹⁷⁷ For the classical view see AV Dicey *Introduction to the Study of the Law of the Constitution* (8th ed, Macmillan, London, 1915; reprinted Liberty Fund, Indianapolis (IN), 1982).

¹⁷⁸ See Pietro Costa and Danilo Zolo (eds) *The Rule of Law: History, Theory and Criticism* (Springer, Dordrecht, 2007); Richard Fallon, Jr "The Rule of Law' as a Concept of Constitutional Discourse" (1997) 97(1) *Columbia Law Review* 1.

sovereignty which would inform our understanding of the other two principles. The concept of parliamentary supremacy suggests that the law-maker has absolute sovereignty, free from restraint. On the other hand, the rule of law, whether formalist or substantive, demands that the law acts as a constraint on behaviour. The former approach would not be in opposition to parliamentary supremacy, while the latter would import a moral dimension that acts as a constraint on parliament. In the context of judicial review, the rule of law appears in the form of the doctrine of *ultra vires*. This in turn relates back to parliamentary supremacy and sovereignty.

Etymologically, the word ‘sovereign’ derives from the popular Latin for ‘above’ (*superānus*), as in ‘more powerful.’¹⁷⁹ The issues that arose in the early history of sovereignty were centred on the legitimization of this power by investigating its source and extent. Sovereignty “evolved from a judicial concept focusing on the fight to make laws domestically to a political-science definition focusing on power and a state’s independence from outside actors”.¹⁸⁰ For our purposes we define sovereignty as an abstract notion of “the *relationship* between rulers and ruled” (emphasis added).¹⁸¹ Based on this definition, sovereignty is relational, which imports trust, and hence small scale organisation. However, without any constitutional safeguards, this relational basis continues to fray as sovereignty, through its economic rationale, enlarges the jurisdictional footprint of the state. The economic basis of sovereignty can be extended to the wider area of constitutionalism. Hence, even the subsidiarity principle, which is the polar opposite of orthodox (unitary nation state) sovereignty, has an underlying economic rationale that keeps “the burden of the welfare taxes to be borne by citizens at a minimum”.¹⁸² The proper interpretation of this formulation of subsidiarity is based on a ‘meso’ social structure between the individual and the nation state.

Because sovereignty is relational, the power-trust dialectic involved is based on the auxilium core where prominence is given to the expectations of the weaker party. The

¹⁷⁹ The Oxford English Dictionary “Sovereign” (Oxford University Press, Oxford, 1989). See also the analysis of sovereignty in section 9.3.

¹⁸⁰ Scot Macdonald and Gunnar Nielsson “Linkages Between the Concepts of ‘Subsidiarity’ and Sovereignty: The New Debate Over Allocation of Authority in the European Union” in *Fourth European Union Studies Association (EUSA) Biennial Conference* (1995).

¹⁸¹ Raia Prokhovnik “Spinoza’s Conception of Sovereignty” (2001) 27 *History of European Ideas* 289.

¹⁸² Jürgen G Backhaus “Subsidiarity” in Jürgen G Backhaus (ed) *The Elgar Companion to Law and Economics* (Edward Elgar, Northampton (Mass), 1999) 136 at 137-138.

auxilium core suggests that sovereignty is about mutual aid between the individual and the law- (decision-) maker. Moreover, the trust component in the relationship demands a small-scale organisation to maintain high levels of trust. Absolute sovereignty is analogous to absolute or coercive power. This understanding would leave no place for trust or auxilium in the relationship between the ruler and the ruled. Today, however, sovereignty is understood in a relative sense. It is embedded in a frame of constitutionalism that requires constraints on its power. Once the power is relational (non-coercive), the dialectic between trust and power leads to an evolutionary fitness of the political state.

We can envisage auxilium between the individual and nested levels of government. In other words, we see an application of subsidiarity, which “explicitly contemplates intervention and assistance for the purpose of protecting human dignity”.¹⁸³ While sovereignty even if only implicitly give permanence to the national scale, the strong version of subsidiarity takes away that permanence: “[T]he nation-state itself must defend its legitimacy against claims from communities demanding greater control over decision making”.¹⁸⁴

Historically, there are two main formulations of the subsidiarity principle. One is economic, the other ethical. As Aristotle would remind us they are two faces of the same coin. In this section, however, we want to unpack the economic formulation. The ethical formulation is outlined in Section 4.2 (Chapter 4). One of the earliest economic articulations can be found in Christian Wolff’s *Principles of Natural Law*, first published

¹⁸³ Paolo G Carozza “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97(38) *The American Journal of International Law* 38 at 58. See also the literature on the norm of ‘responsibility to protect’ (R2P). For example see Hugh Breakey “The Responsibility to Protect and the Protection of Civilians in Armed Conflicts: Review and Analysis” (Griffith University, Nathan (Qld), 2011) < http://www.griffith.edu.au/__data/assets/pdf_file/0007/333844/Responsibility-to-Protect-and-the-Protection-of-Civilians-in-Armed-Conflict-Review-and-Analysis.pdf> . See also Cedric Ryngaert *Jurisdiction in International Law* (Oxford University Press, Oxford, 2015); AM Judson “Where is R2P grounded in International law?” (Master of Arts Thesis, University of Otago, 2012); Anne Peters “The Security Council’s Responsibility to Protect” (2011) 8(1) *International Organisations Law Review* 15; Anne Peters “Humanity as the A and Ω of Sovereignty” (2009) 20(3) *European Journal of International Law* 513; and Anne Orford *International Authority and Responsibility to Protect* (Cambridge University Press, Cambridge, 2011). On the role of subsidiarity in R2P see Eduarda P Hamann and Robert Muggah *Implementing the Responsibility to Protect: New Directions for International Peace and Security?* (IGARAPÉ Institute, Brasilia, 2013) < http://igarape.org.br/wp-content/themes/igarape_v2/pdf/r2p.pdf> (although the discussion on subsidiarity here is superficial as it does not see the dynamic aspects of the principle of subsidiarity) and Alistair DB Cook “Subsidiarity or Sites of Illegitimacy? Regional organisations and the Responsibility to Protect” (Paper presented at ISA Global South Caucus Conference, Singapore Management University, Singapore, January 2015).

¹⁸⁴ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing London, 2002) at 29.

in 1754.¹⁸⁵ In section 1022 the principle is formulated as integral to the creation of the welfare state: “In order to lead one’s life with decency ... [h]ouses ... are to be established ... [for] those ... *who have no relatives or friends who could take care of their needs ...*” (emphasis added). Subsidiarity keeps “the burden of the welfare taxes to be borne by citizens at a minimum”.¹⁸⁶ The state is only subsidiary to community relationships. The proper interpretation of subsidiarity is hence not based on individualism but on a ‘meso’ social structure between the individual and the nation state. From this it should be clear that the genesis of the welfare state as we see it today, i.e. under *normative individualism*,¹⁸⁷ did not arise until later on (under the ‘classical’ period of political economy). Even today, the analysis of what some commentators perceive as the ‘decline’ of sovereignty (which this author finds debatable) is also framed in reference to economic systems.¹⁸⁸

In summary, sovereignty was developed to furnish justification for ‘who’ holds supreme power. On the other hand, subsidiarity focuses on ‘how’ that supreme power is distributed, with emphasis on the lowest level of political organisation.

2.6. Conclusion: Towards a unifying theory of public law

This chapter introduces the auxilium model which explains the origins of public law as a dialectic between trust and power. The ability to maintain existing power structures (polities) requires a prophylactic intervention either in the form of subsidiarity (direct intervention) or through the fiduciary principle (indirect intervention) to ‘upholster’ the requisite social trust.

I have argued that a fundamental and statute-independent *legal* relationship exists between the state and each person subject to its authority. This overarching relationship is fiduciary in nature, and arises from the fact of sovereignty under the rule of law, with which

¹⁸⁵ See generally Jürgen G. Backhaus “Subsidiarity” in Jürgen G. Backhaus (ed) *The Elgar Companion to Law and Economics* (Edward Elgar Northampton (MA), 1999) 136.

¹⁸⁶ Backhaus in Backhaus (ed) *The Elgar Companion to Law and Economics* 136 at 137-138.

¹⁸⁷ Viktor Vanberg “The Status Quo in Contractarian Constitutionalist Perspective” 2004 15 *Constitutional Political Economy* 153 at 157.

¹⁸⁸ Immanuel Wallerstein “States? Sovereignty? The Dilemma of Capitalists in an Age of Transition” in David Smith et al (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 20 at 33.

comes the authority to establish legal order, and from which flow the power to legislate, administer, and adjudicate. This relationship has the general features of trust, authorization, and discretionary power that one *typically* finds in fiduciary relationships. The free-standing public duties of legality, (procedural) fairness, and reasonableness may be justified and understood as public fiduciary obligations.

Fiduciary relationships serve as an intermediary mechanism for producing institutionally-based trust. The fiduciary standard helps explain features of administrative law, such as fairness and reasonableness. Judicial recognition of the fiduciary responsibility of government and of its democratic underpinning has resulted in a metamorphosis in the equitable rules of secrecy as they apply to government's own information.¹⁸⁹

The substantive application of equitable doctrines is potentially problematic but open to future development towards a unifying paradigm in jurisprudence:¹⁹⁰ every relationship which involves an undertaking, reliance, and power (contractual or otherwise) could be classified as trust-based. The only difference is that in relations that we designate as fiduciary, the degree of power, reliance and vulnerability is generally greater than in the usual 'contract' or 'duty of care' situations with the result that a higher degree of ethical conduct and good faith is exacted from the fiduciary and more restrictive rules of behaviour are imposed on her. As a consequence of the higher standard demanded, wider and more advantageous (equitable) remedies are available. Here, the remedies go far beyond compensatory principles: e.g. account for profit and third party liability. In negligence and contract law the injured party is normally restricted to damages. But under fiduciary law restitution, rather than damages, is the normal remedy in fiduciary situations. This goes much beyond compensation, for the principal may have lost nothing.¹⁹¹

The auxilium model incorporates a family of doctrines. There is a need to identify the factors which determine the appropriateness of one rather than another to a given relationship. Notwithstanding, it should be stated that one of the key characteristics of the fiduciary obligation is that the law limits the freedom of fiduciaries by the imposition of *prophylactic* rules that prohibit more than just those activities that actually harm the

¹⁸⁹ For example per Mason J (as he then was) in *Commonwealth v John Fairfax & Sons Ltd* (1980) 32 ALR 485 at 492-493.

¹⁹⁰ RS French "The Equitable Geist in the Machinery of Administrative Justice" (Paper presented to an AIAL seminar on recent developments in Administrative Law, Sydney, 22 May 2003).

¹⁹¹ Finn in Cope (ed) *Equity: Issues and Trends*.

beneficiary.¹⁹² Another form of prophylactic intervention modifies the relationship between the vertical levels of government through the principle of subsidiarity.

¹⁹² Kathleen Clark (1996) *University of Illinois Law Review* 57.

3. Hayek, Kohr, Jacobs and the Complexity Ansatz

3.1. Introduction

This chapter offers an analytical model that represents societal crises as manifestations of ‘the problem of scale’. Through scale distortion or scale entanglement, or both, society fluctuates cyclically, which inevitably results in collapse.¹⁹³ ‘Scale distortion’ is when the relative size of societies (dynamic systems generally) grows to a critical level that precipitates crisis. This is related to population and jurisdiction growth. ‘Scale entanglement’ is what results from strong modalities of integration. Globalisation—at least the top-down approach espoused by nation states—is the archetype of such entanglement. To prevent this outcome, scale has to be corrected downwards. This can be done only if the state is reinvented as subsidiary to autonomous city-regions of limited jurisdictional footprint.

There are five parts to this chapter. The first furnishes an ansatz explaining the problem of scale. The next three parts follow closely the ansatz in Section 3.2. Section 3.3 zeroes in on the link between symmetry breaking and the production of scale. Section 3.4 focuses on the second link between the production of scale and complexity, while section 3.5 establishes the link between increased complexity and collapse. Section 3.6 elaborates on the central idea that autonomous city-regions, characterised by small jurisdictional footprints, mitigate the possibility of collapse.

3.2. A diagnostic ansatz

Figure 3.1 is a vignette constituting the problem of scale. The ansatz is built on four core concepts: symmetry, scale, complexity and collapse. Each concept has a technical meaning and their essential features are described following.

¹⁹³ As pointed out by one of the examiners to this thesis: “[Although] the cyclical theory has long been discounted in historical research, [lately] it has been resurrected by biologists (who are accustomed to cycling in phenomena such as predator-prey systems). These biologists have produced historical analyses that are questionable”. In this chapter, I set out to refute, if only partially, the argument presented in the last sentence of this quote.

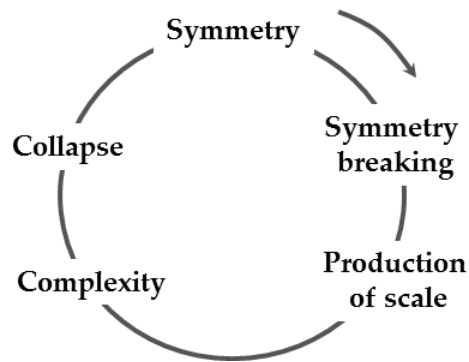


Figure 3.1: *The complexity ansatz*

‘Symmetry’ is simply “immunity to a possible change”;¹⁹⁴ it is the essence of equilibrium. Symmetry can also be thought of in relation to degrees of freedom: “local symmetry ... implies that certain degrees of freedom are absent”.¹⁹⁵ More generally, homogeneity can be thought of as symmetry. In particular, ‘homogeneity’ is a form of local symmetry in that it can occur in a system that does not exhibit global symmetry.

When systems have symmetry, “there is a good chance that the symmetry may break. When it does, very tiny asymmetries play a crucial role in selecting the actual outcome from a range of potential outcomes”¹⁹⁶—this is what is referred to as ‘symmetry breaking’. Symmetry is broken due to instabilities. When symmetry (*qua* equilibrium) is lost due to instabilities, random fluctuations can trigger a symmetry-breaking ‘bifurcation’. If the instabilities are endogenous to the system, symmetry breaking is said to be spontaneous—a natural sequence of internal instability. If instabilities are exogenous (i.e. shocks from the environment), symmetry breaking is said to be induced (from the outside). The division of labour is the symmetry-breaking anchor in the writings of Friedrich Hayek, Léopold Kohr

¹⁹⁴ Joe Rosen *Symmetry in Science* (Springer-Verlag, New York, 1995) at 2.

¹⁹⁵ See Bernard de Wit and J Smith *Field Theory in Particle Physics* (North-Holland, Amsterdam 1986) at 590.

¹⁹⁶ Ian Stewart and Martin Golubitsky *Fearful Symmetry: Is God a Geometer?* (Blackwell Publishers, Oxford, 1992) at 17.

and Jane Jacobs (HKJ). However, this does not mean that it is the only symmetry-breaking mechanism in economics.¹⁹⁷

While ‘symmetry’ is an ontological concept (related to existence), ‘scale’ is predominantly an epistemological one (related to our knowledge of symmetry).¹⁹⁸ Symmetry is independent of our knowledge of it (through an observer). In contrast, scale is said to depend on the way an observer can describe spatial and temporal relationships among distinct entities. ‘Scale’ is interpreted to mean the proportionality (relationship) of parts (to themselves and to their environment) as perceived by an observer and is said to be produced as a result of symmetry breaking, as will be illustrated in the writings of HKJ.

Symmetry breaking in the form of ‘division of labour’ brings about another dimension to society: interaction among the different types of agents. This interaction gives society an (holistic) identity. Complexity arises from this interaction. In this sense, ‘complexity’ is simply the operational ramification of scale production. Complexity to scale is what force is to momentum: scale is the relational field; complexity is the change of that field with (space) time.

However, to produce scale, asymmetry first needs to be introduced. It follows that by breaking symmetry—for example, through ‘division of labour’—we are ‘compensating’ for the loss of symmetry by increased interaction among the resulting different agent types. Complexity, and the produced scale on which it operates, is simply compensating for lost symmetry. In other words, by breaking symmetry, or unfreezing some degrees of freedom, a system (e.g. society) gains structure. As the dialectic between symmetry and symmetry breaking continues, the system becomes fractal: it evolves a structure at every scale. This structure manifests itself in spatial and temporal complexity.

What is essential for our discussion is the impact of how scale is produced on the nature of temporal complexity and, eventually, on the tendency of systems to collapse. Strong links that emerge among elements (or subsystems) are one form of scale production. This is a form of ‘impatient’ scale production. Such tight coupling in dynamical systems results

¹⁹⁷ As a starting point, see Ryuzo Sato and Rama Ramachandran *Conservation Laws and Symmetry: Applications to Economics and Finance* (Kluwer Academic Publishers, Boston, 1990) and Ryuzo Sato and Rama Ramachandran *Symmetry and Economic Invariance: An Introduction* (Kluwer Academic Publishers Norwell (MA), 1998).

¹⁹⁸ For a non-mathematical introduction to scale see Andrew Herod *Scale* (Routledge, London, 2011).

in chaotic behaviour. Alternatively, if systems are coupled neither too tightly nor too loosely, they will have complex attractors.¹⁹⁹

As to collapse, important insights can be gleaned from the reliability theory of ageing and longevity. In this theory, redundancy is at the centre of collapse, both for machines and organisms.²⁰⁰ From another angle, collapse can be seen as relief from the complexity condition. A system with a high level of complexity will usually have more than one (complex) attractor. The interaction (coupling) of these attractors leads to a restoration of the symmetry that was originally 'lost'. Hence, after several stages of symmetry breaking, the symmetry is 'resurrected' by a series of symmetry-creating collisions of chaotic attractors. This symmetry creation destroys the (spatial and/or temporal) structure gained earlier through symmetry breaking.

Complex attractors are especially useful for understanding how collapse can be mitigated, as these attractors are largely immune to cascading damage.²⁰¹ Collapse in complex systems is therefore a function of the level of coupling among the subsystems or elements of any given system. The higher the level of coupling among the elements, the wider the effect of any sudden changes on the system as a whole (hence, collapse is globalised). Of course, with no coupling among the elements, there will be no system; however, between these extremes, there is a region where a low level of coupling will localise the effects of collapse and provide a more robust system.²⁰² The key insight is that:²⁰³

“When major cascading damage occurs [i.e. global collapse], we often look for outside causal forces, or we attribute the damage to simple causal events. According to Complexity Theory, cascading damage is more often the result of normal internal dynamics [i.e. ageing process].”

¹⁹⁹ See Marion *The Edge of Organization: Chaos and Complexity Theories of Formal Social Systems* (Sage Publications London, 1999) at 155.

²⁰⁰ Leonid Gavrilov and Natalia Gavrilova “Why We Fall Apart” (2004) 41(9) *IEEE Spectrum* 30 at 32-35.

²⁰¹ See for example Marion *The Edge of Organization* at 157-158.

²⁰² The work by Mark Granovetter is useful here to explain further the nature of coupling. See Granovetter (1973) 78(6) *American J of Sociology* 1360 ; Granovetter (1983) 1 *Sociological Theory* 201 ; and Granovetter (1985) 91(3) *American J of Sociology* 481 .

²⁰³ See Marion *The Edge of Organization* at 158-159.

We have now completed the introduction on symmetry, scale, complexity and collapse. The remainder of this chapter will examine the writings of HKJ in relation to complexity to ascertain whether there are germinal arguments in support of the complexity ansatz outlined above.

3.3. Symmetry breaking and the production of scale

HKJ do not refer to ‘symmetry’ or ‘symmetry breaking’, but it can be shown that they discuss these concepts indirectly.

Hayekian Discourse

Hayek defines ‘complexity’ in the following terms:²⁰⁴

“The minimum number of elements which an instance of [a] pattern must consist in order to exhibit all the characteristic attributes of the [pattern] ...”

Earlier in the same chapter (on the Theory of Complex Phenomena), Hayek treats ‘regularity’, ‘recurring pattern’ and ‘order’ as synonyms. Moreover, he makes a link between ‘patterns’ and mathematics, in particular, geometry.²⁰⁵ For Hayek, hierarchy is also associated with “classes of patterns of a highly abstract character”. In everyday parlance, ‘pattern’ and ‘symmetry’ are used almost interchangeably.²⁰⁶ Mathematicians use ‘pattern’ informally and reserve ‘symmetry’ for the more precise technical concept. Hayek seems to use ‘pattern’ as a substitute for ‘symmetry’. This is more evident when he links ‘recurring pattern’, ‘regularity’ and ‘order’. In particular, Hayek seems to allude to temporal symmetry—the regularity that recurs through time.

²⁰⁴ Friedrich Hayek *Studies in Philosophy, Politics and Economics* (Routledge & Kegan Paul, London, 1967) at 25.

²⁰⁵ At 23-24.

²⁰⁶ Stewart and Golubitsky *Fearful Symmetry* at 2.

Hayek's discourse on complexity in terms of order is synonymous with symmetry. He elaborates that from order "we may learn from our acquaintance with some spatial or temporal part of the whole to form correct expectations concerning the rest".²⁰⁷ Hayek's 'order' and 'pattern' are hence synonymous with 'symmetry'. Moreover, Hayek's use of 'recurring patterns' as well as 'structure' suggests that he was alive to both temporal and spatial symmetry, respectively.

With regard to symmetry breaking, we need to look at the two types of 'order' that Hayek entertains. One is exogenous, producing 'made symmetry'; the other is endogenous, resulting in 'spontaneous symmetry'. These orders are not pure symmetry but represent a circular causation between symmetry and symmetry breaking. The 'spontaneous' ('made') nature of 'spontaneous order' ('made order') signifies a form of symmetry breaking that is endogenous (exogenous) to the system, and that results in a new symmetry group.

Another key mechanism through which symmetry is broken in Hayekian complexity is through interaction between these two types of order. This is where exogenous symmetry breaking induces endogenous symmetry breaking and *vice versa*.²⁰⁸ Hayekian symmetry breaking can also be seen in the process of adaptation to the environment through abstraction.²⁰⁹ Adaptation (symmetry breaking) results in abstraction (symmetry) in a cyclical form of causation. Here, abstraction is an endogenous mechanism that allows evolution to emerge in the form of new behaviour patterns. Abstraction is also a form of information management, filtering out enough information to produce scale. The genesis of the scale in its epistemological nature is where this abstraction process leads to a certain perspective from which (Kantian) scale is born. The same scale matures into a materialist (Marxist) existence evidenced in patterns of behaviour, but will inevitably suffer a Kohresque death (as will be discussed further on). Scale production, which is addressed next, emanates from this form of abstraction.

²⁰⁷ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 35-36. More generally, symmetry is used to simplify the analysis of complex problems. See Gordon Everstine "Symmetry" in H Kardestuncer and DH Norrie (eds) *Finite Element Handbook* (McGraw-Hill Company, New York, 1987) Part 4, Section 3.3, 4.183.

²⁰⁸ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 45.

²⁰⁹ Friedrich Hayek *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul, London, 1978) at 48-49.

For Hayekian complexity to fit into the ansatz, his definition of complexity must be linked to a form of scale production. Let us look again at Hayek's definition of complexity.²¹⁰ Two things can be argued here. First, Hayek sees scale manifesting itself in the (relative) size of the system. This is straightforward in Hayek's identification of 'the number of its elements' as part of the criterion for the degree of complexity. The second argument hinges on realising that Hayek is employing the language of systems theory.²¹¹ This suggests another manifestation of scale in Hayekian complexity, in that the scale of a system is manifested in the interaction among its elements. For Hayek, scale is in the form of the size of systems (number of elements) as well as the relationships among these elements; both are reducible to a quantum of information describing relative size and interaction.

In summary, Hayekian complexity is predicated on symmetry and symmetry breaking as well as on a 'size' and 'relationship' (informational) interpretation of scale. We now move to analyse Kohr's complexity discourse. Most of the discussion is based on Kohr's *The Overdeveloped Nations* (ODN).

Kohresque Discourse

Symmetry and symmetry breaking as well as the concept of scale, can be gleaned from Kohr's elaboration on Aristotle's conviviality theory, in which there is an inherent tension between the *summum bonum* condition (good life) and the scale of the state.²¹² The larger the state and the more interdependent its functional parts are, the less likely it will attain the objective of 'good life'.

The homogeneity of the original society can be interpreted as Kohr's idea of 'symmetry'. The size of such a society was small: less than 100 members. From this size handicap, we

²¹⁰ Friedrich Hayek *Studies in Philosophy, Politics and Economics* (Routledge & Kegan Paul, London, 1967) at 25.

²¹¹ There is evidence of intellectual cooperation between Hayek and Ludwig von Bertalanffy, the father of General Systems Theory. Hayek influenced von Bertalanffy's Theory. See for example, Bruce Caldwell *Hayek's Challenge* (University of Chicago Press, Chicago, 2004) at 278.

²¹² Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 14.

can see some congruence between Hayek's treatment of what he called 'primitive societies', and the Kohresque 'homogenous society'. Of course, Hayek reserved 'society' for spontaneous order, while relegating small societies such as the 'tribe' to an organised form of order.²¹³ This still allows a form of symmetry breaking when a tribe structure is established. In contrast, Kohr's homogenous societies are a pre-tribal formation. They are in the original state, still lacking any symmetry breaking.²¹⁴

The original Kohresque position, then, is a homogenous society with hardly any functional differentiation.²¹⁵ It is here that a symmetry breaking takes place in the form of 'division of labour' or specialisation. For Kohr, this symmetry breaking (through specialisation) will repeat at each stage where the society attains a larger size.

According to Kohr, the first symmetry breaking resulted in the emergence of an official who was more probably an inn- (or gathering place-) keeper rather than a president. However, the function of inn keeping is a full-time task that requires a new 'social contract' regulating how the innkeeper will provide for him or herself. Now this society's expenditures and revenues start to drift apart. The expenditure relates to the administrator's (innkeeper's) activities, while the revenue originates from members of the group. Kohr estimates that for a society to carry out such a function, it requires an optimal size of around 100 people.

In Kohr's discourse, scale is largely a Malthusian construct: the size or population (density) of society is the signifier for scale. As the symmetry-breaking process (more specialisation) is repeated, the society attains a higher scale.²¹⁶ However, as for Hayek, the fact that symmetry breaking results in an integrated whole that we refer to as 'society' means that the produced scale in the form of size will inevitably have a complementary interpretation in the form of relationships among the specialised members of society. Hence, when society was small and homogenous, there was little need for enduring relationships among members (other than for conviviality). However, once symmetry

²¹³ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 47.

²¹⁴ The comparison between Hayek and Kohr on the original society can be enriched by injecting some of the insights from Engels on the origin of the state. See Frederick Engels *The Origin of the Family, Private Property, and the State* (Pathfinder Press, New York, 1972).

²¹⁵ This is what Murray Bookchin calls 'organic societies', which are discussed in Chapter 6.

²¹⁶ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 15-19.

breaking starts, these members become interdependent. It is this dynamic that provides a full picture of Kohresque scale.

Kohr provides a scalar interpretation of history. For Kohr, changes in social size and interrelationships are the primary cause of historic change and human evolution. While there are other forces that influence historical development, Kohr suggests that these “exercise a significant role only in societies of sub-critical or optimum dimensions”.²¹⁷ ‘Size’ in Kohr’s discourse represents a dichotomy between ‘critical scale’ and ‘optimal scale’.

The problematised size is the ‘critical size’. When critical size is reached, governments are not able to predict market behaviour.²¹⁸ This encourages governments to attempt direct control of these markets, even though such control would be inutile in alleviating the problems faced by society. For whole economic systems, the critical size “sets in when social overgrowth begins to curtail the choice between alternatives, leaving only socialism viable, and even this only for a little while longer”.²¹⁹ However, Kohr explains that the optimum limit of society is not a rigid magnitude. Optimal scale is rather analogous to an elastic ribbon. The width of the ribbon “permits considerable stretching before it reaches the outer limit at which optimum size turns into critical size”.²²⁰

Next, we move to discuss symmetry, symmetry breaking and the production of scale through the writings of Jane Jacobs. Jacobs registers, albeit also indirectly, symmetry breaking and production of scale leading to complexity.

Jacobsian Discourse

While Kohr’s conviviality takes the form of Jacobsian ‘sharing’, for Jacobs, symmetry is approached through the concept of ‘generality’. Jacobs provides a gloss for Kohr’s transition from conviviality to exchange by suggesting an intermediate phase of

²¹⁷ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 10.

²¹⁸ At 9.

²¹⁹ At 9.

²²⁰ At 20-21.

(institutionalised) ‘sharing’.²²¹ However, it should be noted that the practice of ‘sharing’ would not be necessary in early society, unless there was functional differentiation. In this sense, Jacobs’ ideation of symmetry is closely related to Kohr’s, as both see symmetry as a form of homogeneity. However, while Kohr’s ‘generality’ or homogeneity is functional—based on the societal role its members are assigned, Jacobs’ ‘generality’ seems closer to Hayek’s ‘order’. Jacobsian symmetry is predicated on institutionalised social practices. For Jacobs, symmetry is process-based.

In Jacobs’ discourse, symmetry breaking takes the form of ‘differentiation’.²²² She identifies ‘sharing’ as a phase that preceded trading, since the latter ‘emerged’ from the former. This emergence registers a form of symmetry breaking leading to scale production: trading is based on exchange, which would not obtain unless there is ‘differentiation’. This differentiation is the result of heterogeneity (a form of symmetry breaking) replacing homogeneity (symmetry).

However, Jacobs, like Kohr, is also able to see the dialectic between symmetry and symmetry breaking.²²³ Hence, while trading is the result of symmetry breaking, it also functions as a form of symmetry from which further symmetry breaking can result. Jacobs also sees the link between this symmetry breaking process and Hayekian rules, both formally—“in the development of legal codes involving contracts, ownership, and liabilities”—and in “social codes involving long-distance cooperation and relationships with strangers”.²²⁴

This symmetry breaking is also seen in her analysis of ‘economic development’. In elaborating on ‘development’ as differentiation emerging from generality, Jacobs offers the solar system as an example of a continued process of symmetry breaking in the form of emerging differentiation resulting in production of scale that is now the solar system.²²⁵ This is again the same understanding we saw in Kohr’s discourse on the evolution of societies.

²²¹ Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 27.

²²² At 27.

²²³ At 27.

²²⁴ At 27.

²²⁵ At 16.

For Jacobs, the specific context of economic development is synonymous with ‘innovation’ as a form of symmetry breaking through a process of trial and error—a form of differentiation that moves from homogeneity to heterogeneity.²²⁶ However, according to Jacobs, this form of symmetry breaking has very specific characteristics. She emphasises ‘embeddedness’ or the ‘indigenous nature’ of true economic development. Here, we see a sign of scale problematisation in Jacobsian discourse. She gives Imperial Iran and Russia as instances when this indigenous nature was not taken into account.²²⁷

In summary, Jacobs illustrates how with every symmetry breaking, a new group of generalities emerges (symmetry groups). The interpretation of Jacobsian symmetry is tied to the concept of generality, while symmetry breaking is ‘qualitative change’, which, when discussed in the context of economic development, relates to the ideas of differentiation and improvisation or innovation.

While it could be argued that Jacobs was alive to the dialectic between symmetry and symmetry breaking, her perception of scale is different from that of Kohr. While Kohr is largely focused on scale distortion (scale manifesting itself in the form of ‘number of elements’ and size), Jacobs emphasises the problem of scale entanglement (in the ‘interaction of elements’ in the form of city-regions). Hayek, alternatively, seems to account explicitly for the potential of both scale distortion and entanglement—at least as stated in his definition of complexity—although he stops short of developing these into a problematisation of scale.

Jacobsian scale has its genesis in her criticism of the national scale, which is the ideological scale,²²⁸ as the anchor for economic analysis. Jacobsian problematisation of scale manifests itself in the detrimental effect of nation-centred economic development and economic expansion. Jacobs suggests that neoclassical economics proceeds on the (mercantilist) false assumption that the national economy provides the fundamental data for macroeconomic analysis.²²⁹ Citing a continuum of crises, especially on the path to economic development, a recent manifestation of which could include the Global Financial Crisis (GFC), Jacobs argues that national governments have failed on the economic front.

²²⁶ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 155.

²²⁷ At 135 and 139-140.

²²⁸ Herod *Scale* at 7.

²²⁹ Jane Jacobs *Cities and the Wealth of Nations* at 29.

She adds that this failure suggests a growing irrelevance of the nation state when it comes to economic activity.²³⁰

The most important observation relating to scale is that economic development as symmetry breaking occurs at the local (urban) scale: it is embedded in cities and their hinterlands. Economic development is a form of local (rather than global) symmetry breaking. This is the Jacobsian (evolutionary) meso (scale).²³¹

Jacobs suggests that the production of scale is exhibited in the process of bifurcation, which in turn produces complexity through feedback loops.²³² The production of scale in Jacobsian discourse is vivid in her analysis of economic expansion. Jacobs explains that development is ‘qualitative change’, while expansion is ‘quantitative change’. “The two are closely linked, but they aren’t the same thing”.²³³

In a way similar to her questioning of national aggregates, Jacobs is critical of the long-held belief in exports as the main drivers of economic expansion. Jacobs uses an energy calculus to explain the spurious nature of the exports-led rationale.²³⁴ For Jacobs, economic analysis should not be focused on exports and their possible ‘multiplier effect’ but on imports, which leads to identifying the practical link between economic development and economic expansion as economic diversity.²³⁵ Based on the energy-flow hypothesis, the neoclassical approach is fundamentally flawed. The production of scale flows from ‘diversity’, which is linked to economic development as a form of localised symmetry breaking.²³⁶

²³⁰ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 32.

²³¹ Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 32.

²³² At 103.

²³³ At 37.

²³⁴ At 51 to 56.

²³⁵ At 63.

²³⁶ At 106.

Summary Schema

Figure 3.2 summarises the way symmetry, symmetry breaking and the production of scale are discussed in the works of HKJ. The links should be interpreted as circular causations among scale production, symmetry breaking and symmetry.

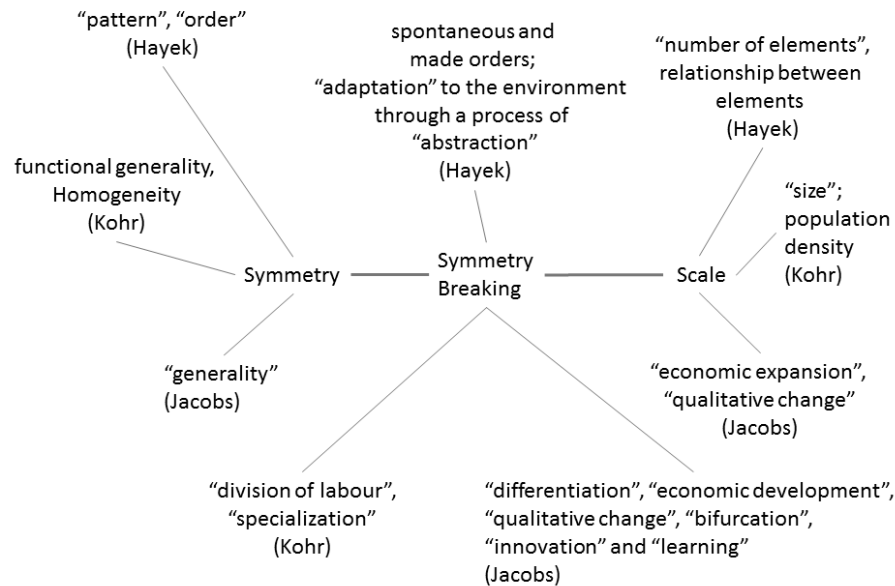


Figure 3.2: Signifiers of symmetry, symmetry breaking and scale in the discourse of HKJ

For Hayek, symmetry is signified by pattern and order. Spontaneous and made orders relate to endogenous and exogenous symmetry breaking, respectively. Hayekian symmetry breaking is discussed using the terms ‘adaptation’ and ‘abstraction’. Moreover, the interaction between spontaneous and made orders also induces symmetry breaking. Hayekian scale represents both the size of a given system calculated as its number of elements as well as interaction (relationships) among these elements.

Kohr sees symmetry in homogeneity and generality. Specialisation and the division of labour result in symmetry breaking. Kohr’s scale, while registering a relational construct, is largely related to (localised) size, especially (society’s) population density.

Symmetry and generality are synonymous for Jacobs. Economic development (in the form of innovation and qualitative change) leads, through bifurcation, into symmetry breaking. Scale production is seen in economic expansion and quantitative change.

3.4. The production of scale and complexity

This section elaborates on the way HKJ discuss complexity and how their formulations are related to the production of scale. It is argued that all three see the production of scale as a condition for complexity to emerge.

Hayekian Complexity

As previously discussed, Hayek's definition of complexity is a function of scale where scale represents relationships (of elements to each other and to their environment). For Hayek, this formulation of complexity as a function of scale is 'adequate' or sufficient for an 'unambiguous criterion'. The central concept in Hayek's complexity discourse is that of order, which we identified as symmetry. Hayek distinguishes two types of order. The first is described as 'taxis': an 'organisation' that is 'made' or 'artificial'. This type is created only by exogenous forces and is epitomised in 'government' as 'a directed social order'. In particular, "the organisation of society as a whole" refers to "what we now describe as socialism".²³⁷ According to Hayek, such order is "relatively *simple* or at least necessarily confined to such moderate degrees of complexity as the maker can still survey" (emphasis in the original).²³⁸

The way Hayek positions his two types of order on the dimension of complexity directly links to scale. Hayek argues that there can be spontaneous orders that are not complex, but not complex orders that are not spontaneous.²³⁹ Here, spontaneous order is a necessary

²³⁷ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 54.

²³⁸ At 38.

²³⁹ At 38 to 43.

condition for attaining a high degree of complexity. Hayek links the high degree of complexity with the way spontaneous orders form: through endogenous adaptation that leads to abstraction in the form of ‘certain rules’ in response to exogenous ‘immediate environment’ stimuli. Linking this to our discussion above, we can see the nexus between scale and complexity through this abstraction process.

When Hayek’s high complexity is examined, only spontaneous order can be seen. The high complexity of such order is the result of elements adapting to their immediate environment (within the system) independent of purpose. A primary example of this high complexity is ‘the structure of the modern society’. In any given society, micro-level entities such as families and companies, which are organisations, are integrated into ‘a more comprehensive’ (macro-level) spontaneous order.²⁴⁰ Here, we see a clear nexus between the production of scale and complexity. It is the emergence of the macro-level spontaneous order from an ensemble of micro-level made orders that creates complexity.

We have seen earlier how Hayek makes a connection between the concepts of ‘abstraction’ and ‘adaptation’. In relation to spontaneous order, the elements of such an order will often adapt to the environment through a process of abstraction. Through evolution (Darwinian natural selection), “a repertory of action type adapted to standard features of the environment. Organisms become capable of ever greater varieties of actions”.²⁴¹ Hayek also asserts that “the formation of a new abstraction seems never to be the outcome of a conscious process, not something at which the mind can deliberately aim, but always a discovery of something which *already* guides its operation” (emphasis in the original).²⁴² It is the determination of particular actions by various combinations of abstract properties that makes it possible for a causally determined structure of actions to produce actions it has never produced before and, therefore, to produce altogether new behaviour not commonly expected from what it usually described as a ‘mechanism’. Even a relatively limited repertory of abstract rules that can thus be combined into particular actions will be capable of ‘creating’ an almost infinite variety of particular actions.²⁴³

²⁴⁰ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 46.

²⁴¹ Friedrich Hayek *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul, London, 1978) at 42.

²⁴² At 46.

²⁴³ At 48-49.

Previously, we said abstraction is the first step in the production of scale. We also said that scale is born Kantian: as an epistemological construct. Abstraction is “*never ... the outcome of a conscious process*” (emphasis in the original).²⁴⁴ Thus, Hayekian scale results from an unconscious ‘spontaneous’ symmetry breaking through the process of abstraction. This then leads to “ever greater varieties of actions”, which then becomes synonymous with complexity.

Kohresque Complexity

While Kohr does not define complexity directly, like Hayek, he links scale and complexity. For Kohr, complexity is due to scale production in the form of ‘overgrowth’, more so than “the nature of ... things”.²⁴⁵ His complexity is manifested in ‘increasing ferocity of cyclical fluctuations’ that engenders crises resulting in increasing government intervention. He opines:²⁴⁶

“The problem is that when a field has grown too large, its natural tendency is, as in the case of a state having reached critical size, to diffuse and to fringe, creating thereby simultaneously a demand for integration and the very condition making it impossible.”

For a given system, Kohr suggests that the increase of scale beyond optimum size vitiates the relationship among its elements to the point that the system disintegrates—it is “not fused into an organic whole”.²⁴⁷ Compared with Hayek, for whom complexity is the result of integration of ‘made order’ into ‘spontaneous order’, Kohr’s complexity does not arise so much from the act of integration as from the impossibility of such integration. In this regard, Kohr is closer to understanding complexity as the manifestation of tension

²⁴⁴ Friedrich Hayek *New Studies in Philosophy, Politics, Economics and the History of Ideas* (Routledge & Kegan Paul, London, 1978) at 46.

²⁴⁵ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 5 and 63.

²⁴⁶ At 165.

²⁴⁷ At 165.

between two opposing fields: evolution, which vies for more differentiation and diversity, and gravitation, which strives for more integration (symmetry in the form of homogeneity).

Kohr employs scale primarily in the context of ‘social size’, which is the product of the “number of population, population density, the degree of its administrative integration, and the velocity of its movements”.²⁴⁸ In due course, the internal pressures of numerically larger societies are bound to produce, first, greater density, then greater integration and, finally, greater velocity. These stages can be said to correspond to the production of scale (greater density), complexity (greater integration) and collapse (greater velocity leading to cyclical fluctuations and distorted feedback).

‘Social size’ is then a function of density, a relative quality linking the magnitude of the number of a given population to the jurisdiction in which they live. Being a quantity of relative magnitude, density is a spatial attribute of scale. The same can be said of integration, being the ‘entanglement’ of different levels of spatial scale—for example the local urban scale and the national or global scale. However, Kohr’s concept of social size is also a function of temporal scale in the form of the velocity of a population’s movement.

For Kohr, the problems associated with complexity accelerate when a system reaches its critical scale, which he describes as “that mysterious social volume at which [war] breaks out spontaneously irrespective of the ideology, religion, leadership, culture, or economic system of the countries involved”.²⁴⁹ At this scale, “the survival requirements of society begin to increase at a faster rate than its productivity”.²⁵⁰ More and more output will now have to be diverted to ‘social use’ rather than to raising ‘personal living standards’.

Kohr emphasises that the harmony of proportions (which is the essence of scale) is vital in a self-regulatory system. It follows that balancing forces must be large in number and small in power. For Kohr, when this harmony is lost, a regulatory force must be introduced from outside—namely, through government. However, it is not sufficient that government is recalled. At the same time, its powers must be increased “to such an extent that none of the economic colossi surviving the competitive struggle can challenge its decisions”.²⁵¹ Thus, the purely economic sequence leading excessively large political units to inevitable

²⁴⁸ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 8.

²⁴⁹ At 7. Kohr uses spontaneous in the normal sense: to indicate that causation is endogenous.

²⁵⁰ At 5.

²⁵¹ At 55.

socialism seems quite clear. For Kohr, an economic system is determined by scale; if a community is too small or too large, the only economic system is socialism.²⁵²

Kohr suggests that the socialisation of uber-societies (societies at the critical size) is driven by four forces: military necessity, economic opportunity, physical density and rationalisation. This socialisation process distorts societal identity by taking away society's freedom to invent its own collective personality.²⁵³ The key assertion is that "Anything that is irrational qualifies as a tool for strengthening the social fabric [to produce yet further scale]".²⁵⁴ This identity distortion can be seen in the economic development of such societies where identity and the economic activities it produces are based on emotion (pathos) rather than rationality. At the critical scale, forging a united and separate identity is essential to the functioning of the state. It is the mechanism through which the last stage of socialisation, the fourth force, rationalisation, takes pace. Kohr summarises the irrationality creation process as:²⁵⁵

"[T]he protective application of a succession of bandages of manifestly irrational rituals, symbols, practices, gestures, costumes, sports, modes of behaviour and speech, to a fiercely irrational elemental nucleus—the conviction that membership in one's own group is the main source of human dignity, difference, and superiority."

To summarise, Kohr sees complexity resulting from the production of scale and its impossible demand for integration. Kohr identifies socialism and irrationality as integration technologies. Both require as a necessary and sufficient condition the production of scale in the form of increased population density or size of society.

²⁵² Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 51.

²⁵³ This is the usual process of production of scale where degrees of freedom are frozen (hence symmetry breaking) at lower scales to allow for the 'macro' to emerge.

²⁵⁴ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 133.

²⁵⁵ At 144.

Jacobsian Complexity

Jacobs' conception of complexity is closer to Hayekian than Kohresque complexity as far as her use of systems theory is concerned. In particular, Jacobs builds on an analogy between ecological and economic systems. She suggests economies (and the societies they are based on) are a form of organism. For Jacobs, complexity is a collapse-evading technology manifested in feedback loops and bifurcations.²⁵⁶ Put differently, Jacobs sees the dialectic between symmetry and symmetry breaking as the process that generates complexity.²⁵⁷

To explain the emergence of complexity through symmetry breaking and production of scale, Jacobs gives the example of an embryonic human being.²⁵⁸ A repeated process of symmetry breaking creates scale in the form of "diverse and complicated tissues and organs" from "a microscopically small fertilized egg". This is in line with our discussion of how the dialectic between symmetry and symmetry breaking leads to the production of scale. The fact that complexity has emerged from this form of circular causation is further captured by Jacobs' emphasis on 'co-development'.²⁵⁹

For Jacobs, the process of import replacing is the evolutionary defining moment in the transition from a settlement to a city.²⁶⁰ Jacobs also suggests a quantum nonlinear approach to such evolution.²⁶¹ Thus, in essence, economic growth from the perspective of import replacing at the city level "is by no means all net growth".²⁶² In large cities, import replacing plays a compensatory (rather than a growth) role. Jacobs identifies three causes for this form of depreciation: first, former customer cities 'take to replacing imports themselves', second, some well-established enterprises leave the city and move to distant places and, third, some older enterprises become obsolete.

²⁵⁶ Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 103.

²⁵⁷ At 17.

²⁵⁸ At 17.

²⁵⁹ At 19.

²⁶⁰ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 41.

²⁶¹ At 41 and 42.

²⁶² At 42.

Cities and potential cities have two fundamental economic needs. Cities need ample and volatile trade with one another. Large nations can serve this need because they can “eliminate gratuitous barriers in their domestic trade”.²⁶³ Nations can provide jurisdictional arbitrage so cities can trade with each other within a nation’s boundary. However, nation states hurt the second need, as, just like the players in a team, cities need to keep themselves up to scratch individually— nations distort this need owing to feedback flaws.²⁶⁴

Thus, Jacobsian complexity is based on the idea of diversity in ecosystems governed by a bifurcation process leading to feedback loops. The production of scale is the result of interaction between symmetry and symmetry breaking, which, in turn, gives rise to complexity (diversity).

Summary Schema

Figure 3.3 provides a synopsis of the analysis so far. The middle part of the complexity ansatz, connecting scale to complexity, is evident in the discourse of HKJ. In their conceptualisation of scale as the size of a system, Hayek and Kohr suggest increase in scale must result in higher complexity. Jacobs identifies complexity as the outcome of a bifurcation process that alters dynamic relationships among system’s elements through (positive and negative) feedback loops. Kohr’s analysis is more attentive to the problem of scale in two respects. First, he sees complexity-reducing options open for government intervention. Second, he identifies crisis under high complexity in the cyclical fluctuations (business cycles) produced by critical size. Jacobs’ analysis explains the entanglement resulting from the production of scale. The concept of ‘integration’ in one form or another seems to be the common denominator for HKJ’s complexity discourse. However, Kohr asserts the impossibility of such integration. Jacobs (as will be discussed below) also registered this impossibility in what she refers to as ‘transactions of decline’. Figure 3 shows the tension between the demand for and impossibility of integration, which leads to complexity. Of course, integration is predicated on relationships among elements of a given

²⁶³ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 208.

²⁶⁴ At 208-209.

system and the relationship of the system (the whole) to its environment. This then leads to a direct link between the production of scale and complexity.

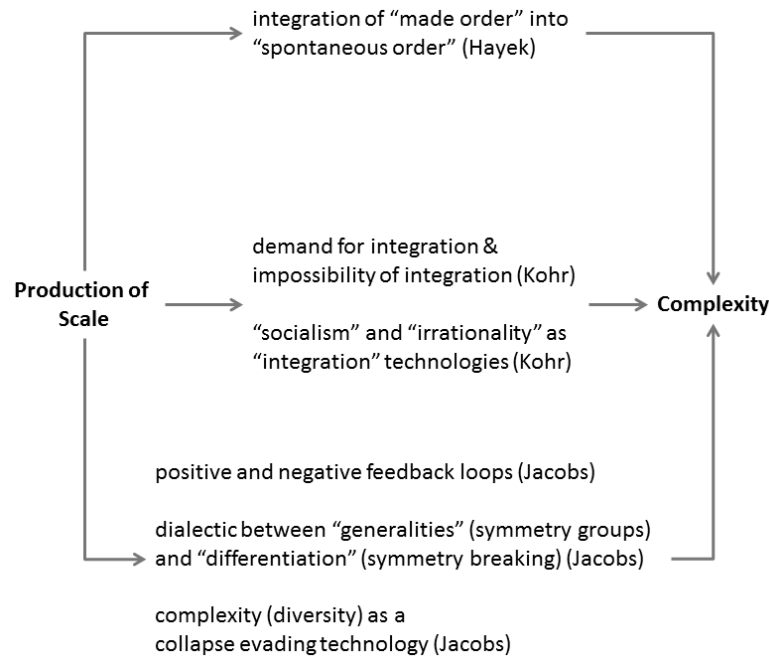


Figure 3.3: Signifiers of complexity in the discourse of Hayek, Kohr and Jacobs

However, did HKJ envisage crisis or 'ageing' (and eventual collapse) as an inevitable product of high complexity? This is what is investigated next.

3.5. Complexity and collapse

This part traces the concept of collapse in HKJ due to complexity. It is argued that all three make the link between complexity and collapse, although each places different emphasis on the consequences of collapse. Kohr and Jacobs seem more concerned about the terminal nature of collapse than Hayek.

Hayekian Collapse

Hayekian collapse can be studied through his trade cycle theory. Hayek's discourse can be described as an unlimited self-generating theory (of the spontaneous order). According to this interpretation, there is no terminal phase in the trade cycle. Hayek introduces this concept of collapse only indirectly:²⁶⁵

“The spontaneous order arises from each element balancing all the various factors operating on it and by adjusting all its various actions to each other, *a balance which will be destroyed if some of the actions are determined by another agency* on the basis of different knowledge and in the service of different ends.” (emphasis added)

Of course, destruction can be a form of symmetry breaking—another aspect of an ageing process. For collapse (*qua* death) to occur, a form of symmetry creation rather than symmetry breaking needs to be discerned. Again, the issue is dependent on scale. Death requires ‘global’ symmetry breaking—in other words, a breaking that annihilates localised symmetry breaking (localised structures) and leaves only temporal and/or structural symmetry. For Hayek, this symmetry creation can come in the form of government intervention (through monetary policy) but is also endogenous to the nature of cyclical fluctuations.²⁶⁶ Hayekian collapse is in the nature of the imbalance brought about through government intervention in the revision of spontaneous order rules.²⁶⁷ When the ‘agency’ determining the rules is endogenous to the spontaneous order, Hayek sees credit banking (as part of the economic system) as a mechanism leading to collapse. Collapse is brought about through the bust phase of cyclical fluctuations (trade cycles).

Hayekian collapse is summoned through cyclical fluctuations. This can be seen in his analysis of trade cycles and their origin in the form of national currencies and monetary

²⁶⁵ Friedrich Hayek *Studies in Philosophy, Politics and Economics* (Routledge & Kegan Paul, London, 1967) at 51.

²⁶⁶ Friedrich Hayek, *Monetary Theory and the Trade Cycle* (Jonathan Cape, London, 1933) at 184-185.

²⁶⁷ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 51.

policy.²⁶⁸ Starting from a position of equilibrium (symmetry),²⁶⁹ “the economic system always reacts to such changes by its well-known method of adaptation, i.e. by the formation of a new equilibrium”.²⁷⁰ Here, Hayek is referring to the dialectic between symmetry and symmetry breaking that results in the production of scale. Hayek emphasises that collapse in the form of symmetry creation comes about as an ‘inevitable reaction’.²⁷¹ Collapse manifests itself in the creation of some form of lag in the dialectic between symmetry and symmetry breaking. Instead of ‘immediate adjustment’, there will be a ‘sticky’ phase that postpones the inevitable reaction of symmetry creation (new equilibrium).

According to Hayek, the factor that brings about cyclical fluctuations is money.²⁷² Money brings about:²⁷³

“Certain deviations in individual price-relations occurring because changes in the volume of money appear at certain individual points ... Every disturbance of the equilibrium of prices leads necessarily to shifts in the structure of production, which must therefore be regarded as consequences of monetary change.”

For Hayek, trade cycles are fuelled by monetary policy, but there would be no monetary policy under a system of concurrent currencies. It is then the existence of a single national currency that abets cyclical fluctuations, which, in turn, results in collapse.²⁷⁴

Again, it should be emphasised that Hayekian collapse is not terminal. He identifies collapse as a recurring phase within trade cycles, exhibited in the bust phase leading to depression and unemployment. For Hayek, society (being a spontaneous order) is self-organising and self-generating. As such, it never reaches a terminal stage due to endogenous dynamics. Terminal collapse for Hayek would come (if ever) only through the

²⁶⁸ Friedrich Hayek, *Monetary Theory and the Trade Cycle* (Jonathan Cape, London, 1933) at 139-141.

²⁶⁹ For Hayek ‘equilibrium’ means ‘the general interdependence of all economic quantities, which has been most perfectly expressed by the Lausanne School of theoretical economics’. See Friedrich Hayek, *Monetary Theory and the Trade Cycle* (Jonathan Cape, London, 1933) at n 42.

²⁷⁰ Friedrich Hayek, *Monetary Theory and the Trade Cycle* (Jonathan Cape, London, 1933) at 43.

²⁷¹ At 182-183.

²⁷² At 44-45.

²⁷³ At 123.

²⁷⁴ Friedrich Hayek, *Denationalisation of Money* (Institute of Economic Affairs, London, 1976) 17 and 75.

exogenous intervention of government, especially as ‘made order’ imparting on spontaneous order.

Kohresque Collapse

Unlike Hayek, Kohr is very explicit about the inevitability of terminal collapse (although Kohr uses the word ‘collapse’ to mean implosion).²⁷⁵ Kohr is more worried about ‘organic’ or endogenous collapse from within the Hayekian spontaneous order. Kohr suggests that an uncontrolled ‘spontaneous order’ at the critical scale leads to business cycles that in turn precipitate government intervention.²⁷⁶ Kohr breaks away from Hayek’s unlimited self-generating theories by acknowledging depression as a terminal stage. Kohr then suggests that the business (trade) cycles brought about by the ‘critical scale’ necessitate at least a compensatory intervention by government. However, what is useful for Kohr is not intervention to counter trade cycles but intervention to counter scale cycles. Kohr asserts that the identification of scale cycles (manifested in size) as distinct from business cycles resolves the theoretical “basic error of the limited self-generating theories whose rationalisations dealt such a mortal blow to the defensibility of capitalism”.²⁷⁷

However, like Hayek, Kohr is also sceptical of the ability of control systems in the form of socialism (and mixed systems of socialism) to mitigate cyclical fluctuations caused by complexity.²⁷⁸ Growth beyond the optimum size increases societal complexities faster than humanity’s ability to manage them. In these post-optimum societies, the political function already curtails individual freedom to the point that it ceases to be compatible with *summum bonum*. The second stage in these societies is where culture is frozen: creative talent is now diverted to prevent society from collapse. In essence, the (individual) spirit of these societies becomes moribund. Society is now transformed to a welfare society, a military society and a divine society. The third stage is where growth is not through the biological way of splitting, duplicating and multiplying, but rather through the “cancerous way of

²⁷⁵ Léopold Kohr *The Breakdown of Nations* (Routledge Kegan & Paul, New York, 1986) at 98.

²⁷⁶ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 65.

²⁷⁷ At 67.

²⁷⁸ At 68.

expansion and integration”.²⁷⁹ The fourth and final stage is where the convivial function (the *raison d’être* of society) is paralysed by the increasing internal pressures of oversize and external pressures from equally large rival societies.

This post-optimum society now exists in the collective rather than having individual members. This is the stage signalling the emergence of uber-society, or society’s society, where a “new concept of optimum size which, unlike the individualistic optimum, can no longer be outgrown”.²⁸⁰ This is the genesis of the insatiable growth preached by neoclassical economics. Kohr prophesises that this uber-society at the limit gyrates towards “a mankind-embracing world state”.²⁸¹

Jacobsian Collapse

Jacobs states that “[a]ll dynamic systems are in danger of succumbing to instability, which is why they constantly need self-correction. If and when a dynamic system decisively loses stability, it either collapses into inertia or disintegrates”.²⁸² For Jacobs, the “essence of dynamic stability is constant self-correction”,²⁸³ where ‘dynamic stability’ is defined as ‘energetic steadiness’.²⁸⁴ Jacobs argues that “[d]iversity protects ecosystems against total devastation by diseases and abnormal weather that demolish one-crop plantations”.²⁸⁵ For Jacobs, (positive and negative) feedback loops create the complexity of ecosystems. Such loops are also related to self-organisation,²⁸⁶ which, using Hayekian constructs, leads to spontaneous order. In this sense, complexity emerges from endogenous control signals (relationships) that guide the spontaneous order.

²⁷⁹ At 32.

²⁸⁰ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 24.

²⁸¹ At 22.

²⁸² Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 85.

²⁸³ At 84.

²⁸⁴ At 84.

²⁸⁵ At 83.

²⁸⁶ At 103.

The genesis of Jacobsian collapse occurs in her critique of nations as economic units. She elaborates by identifying the economically unstable nature of nations.²⁸⁷ For Jacobs, collapse comes because of faulty feedback loops that create instability through ‘bizarre and unbalanced’ effects from scale entanglement. Jacobsian collapse becomes clearer in terms of ‘vicious circles’: “Positive-feedback ... can intensify ... destructive situations ... Then we call the loops ‘vicious circles’”.²⁸⁸ For Jacobs, “A vicious circle’s limit is not an achieved dynamic equilibrium but collapse”.²⁸⁹ Vicious circles are ‘dead-ends’,²⁹⁰ or, as Kohr would put it, they are terminal. However, if not disturbed, they die out: “[while] vicious circles are damaging [they are] self-terminating”.²⁹¹ Jacobs emphasises the role of government in subsidising vicious circles through “transactions of decline”.²⁹²

The subsidisation of vicious circles can be seen in government interference with economic expansion. According to Jacobs, the forces of economic expansion (a signifier of the production of scale), due to scale entanglement, grow ‘out of sync’.²⁹³ Jacobs also provides three other related collapse mechanisms. These mechanisms are all forms of faulty feedback signals, the second of which is the faulty feedback of national currency.²⁹⁴ Currencies are intended as feedback mechanisms on a local scale—the city-region. Having national or European Union (EU)-style single currencies can never improve the economy of such city-regions.

Jacobs’ third collapse mechanism identifies how nation states distort business cycles. Jacobs links business cycles to the idea of ‘emergence adaptations’. These adaptations address temporary instability. They are in response to instabilities that are only temporary

²⁸⁷ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 208.

²⁸⁸ Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 95-96.

²⁸⁹ At 101.

²⁹⁰ At 96.

²⁹¹ At 99.

²⁹² At 100.

²⁹³ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 47.

²⁹⁴ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 156-162; Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 12.

but may be devastating.²⁹⁵ Jacobs agrees with Hayek and Kohr that business cycles cannot be eliminated by government intervention.²⁹⁶ For Jacobs, nation states amplify business cycles through the synchronising effect of national currencies.²⁹⁷

In the fourth mechanism leading to collapse, Jacobs identifies what she refers to as ‘transactions of decline’ that are intended to prop up the Kohresque critical size.²⁹⁸ These transactions of decline fall into three main groups. They are similar to the three socialisation processes discussed by Kohr. The first policy is to engage in prolonged military production.²⁹⁹ The second is what came to be known as the ‘welfare state’.³⁰⁰ The third is that of ‘investments promoting trade’ between advanced and backward economies.³⁰¹ Jacobs concludes that “[t]ransactions of decline, no matter which guise they take, are not remedies for stagnation and don’t [sic] address causes of poverty, yet [they] are precisely what national governments have become well fitted to deliver”.³⁰²

Jacobs uses an analogy with earth’s crust to discuss how transactions of decline lead to collapse through discontinuities *qua* ‘bifurcations’, adding that “[w]hat all bifurcations have in common is that they are not first causes, but responses to prior accruing instabilities and stresses”.³⁰³ However, just like the outcome of a psychosis—something Kohr discusses in the context of group irrationality—nations continue to implement transactions of decline in the face of deep depression. Jacobs cites a group of Princeton political scientists who identified increased load and decreased capability as the causes for political disintegration “of sovereign political units—nations, empires, [and] confederations”.³⁰⁴ Loads include:

²⁹⁵ Jane Jacobs *The Nature of Economies* (The Modern Library, New York, 2000) at 115.

²⁹⁶ At 118.

²⁹⁷ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 210-211.

²⁹⁸ At 198.

²⁹⁹ At 190.

³⁰⁰ At 191-193. An interesting variation on this theme came recently under the GFC where governments bailed out collapsing private enterprises.

³⁰¹ At 196.

³⁰² At 204.

³⁰³ At 208.

³⁰⁴ At 212.

prolonged military commitments, substantial increases in political participation on the parts of populations—“which have been politically passive”³⁰⁵—regions or social strata that previously had been politically passive, and political awareness of ethnic or linguistic differences.

Jacobs then contemplates a Kohresque solution as a theoretical possibility to transactions of decline: “the division of the single sovereignty into a family of smaller sovereignties ... not after things had reached a stage of breakdown and disintegration, but long before while things were still going reasonably well”.³⁰⁶

Summary Schema

Figure 3.4 summarises collapse according to HKJ. All exhibit the logic of faulty feedback. The faultiness is endogenously induced by the scale calculus. Then, the government exogenously compounds these problems. Unless localised scale correction is implemented, global collapse must ensue.

³⁰⁵ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 212.

³⁰⁶ At 214-215.

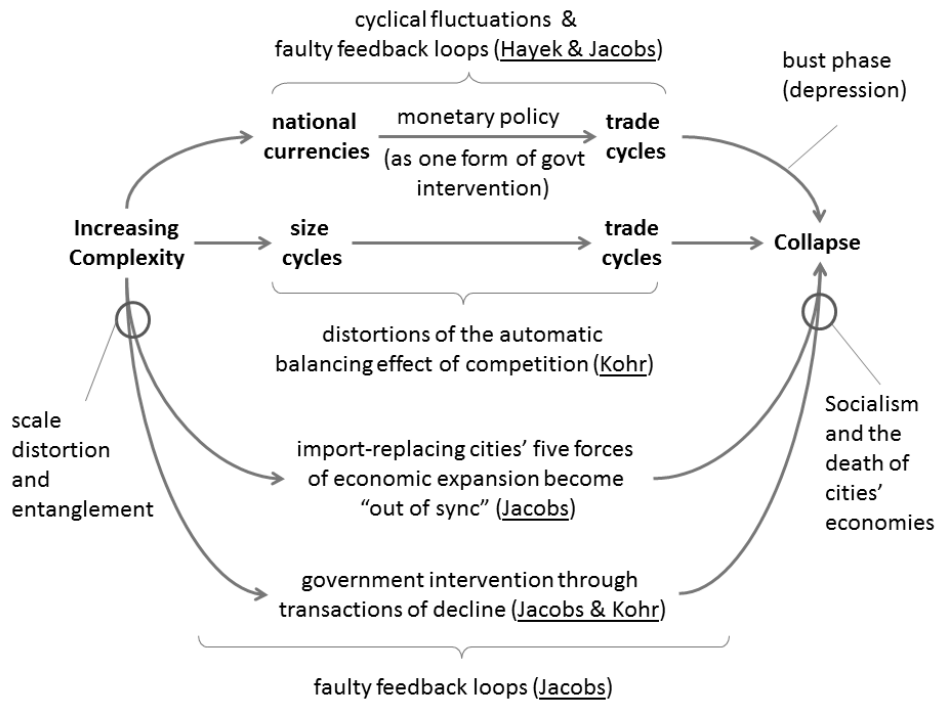


Figure 3.4: Signifiers of collapse in the discourse of Hayek, Kohr and Jacobs

3.6. Conclusion: Evading collapse

The main result of our analysis on complexity is that properly coupled systems (not too loose, not too tight) produce complex attractors. These attractors are capable of change but are immune to cascade collapse. In this part, we ‘excavate’ for this recipe in HKJ. The twin concepts of ‘jurisdictional footprint’ and ‘jurisdictional arbitrage’ are also introduced to guide the discussion.

The Hayekian Solution

Spanning the process leading from symmetry breaking to collapse (and symmetry generation), Hayek comes to his central conclusion: “To maintain that we must deliberately plan modern society because it has become so complex is ... paradoxical, and the result of

a complete misunderstanding”.³⁰⁷ The best solution is to allow the private sector to control the economic system (endogenously). This, even if it could result in faulty outcomes, is still preferred to the stagnation that government intervention brings.

For Hayek, scale reduction is not a viable option. He seems to set up a straw man whenever he gives ‘short shrift’ to the idea of scale reduction. For example, for Hayek, only tribes or clans qualify as made orders.³⁰⁸ More evidence of this inclination comes from his thesis on concurrent currencies. He asks whether, when there is competition between currencies, having local currencies would offer any benefit over and above that of having national currencies. His answer is no.³⁰⁹ At any rate, Hayek does not suggest a break up of sovereign states into smaller ones as a solution to assuage trade cycles or the effects of inflation and unemployment. Hayekian competition is always predicated on the existence of nation states within which the private sector should inherit ever more state monopolies.

The Kohresque Solution

Kohr suggests the logical method for evading collapse is to decentralise, devolve and dissolve existing nation states into a “loosely linked free-trading system based on common but regional markets composed of ... self-manageable small units”.³¹⁰ In defending his advocacy for *Kleinstaaterei* (proliferation of small states), Kohr presents three arguments.³¹¹ First, he suggests that in autarky the domestic market of ‘moderately sized countries’ will be large enough for optimum plant size. Second, under trade, Kohr emphasises the distinction between economic and political integration, which means that the size of a country is not the size of its markets. Third, Kohr points out to the higher bargaining power of small countries.

³⁰⁷ Friedrich Hayek, *Law Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (University of Chicago Press, Chicago, 1983) at 50-51.

³⁰⁸ At 47.

³⁰⁹ Friedrich Hayek, *Denationalisation of Money* (Institute of Economic Affairs, London, 1976) at 86.

³¹⁰ Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 125.

³¹¹ At 108-111.

Kohr is therefore critical of the EU. He argues that the development of the EU is not unprecedented; its success is not due to the act of ‘union’ either. Kohr explains that the claimed success of the EU is due to historical factors not predicated on the union experiment itself. All these factors can be traced to the rejuvenation of Europe post World War II. When this dissipates, the effects of critical scale will take hold. Based on this analysis, Kohr makes the ominous prediction that “there is no reason to assume that the [EU] should last”. While the EU continues to grow, “it is simply the swelling of a balloon”.³¹²

The Jacobsian Solution

For Jacobs, the logic for sovereign locality is in our ability to evade collapse. In advocating a return to locality, Jacobs continues her criticism of the idea of ‘nation’, hinting at the imperativeness of local autonomy.³¹³ Jacobs explains that “a chief advantage of ... [such a division] would be [the] multiplication of currencies”.³¹⁴ However:³¹⁵

“There is no magic in mere smallness or division of sovereignties per se ... [this] is no substitute for the volatile trade backward cities must develop with one another if they are to develop. Nor is it any substitute for the necessity of vigorous cities remaining creative.”

The conclusion Jacobs reaches is that there are no remedies at a city’s or a nation’s command, short of separation in the pattern of, for example, Singapore.³¹⁶

Conclusion: Solutions of Hayek, Kohr, Jacobs and Complexity Theory

³¹² Léopold Kohr *The Overdeveloped Nations: The Diseconomies of Scale* (Schoken Books, New York, 1978) at 123.

³¹³ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 162-163.

³¹⁴ At 215.

³¹⁵ At 216.

³¹⁶ At 180-181.

A summary of the findings is given in Table 3.1. Complexity theory, through the diagnostic ansatz (as illustrated in the writings of HKJ—especially those of Kohr and Jacobs) suggests societies should be reorganised as ‘sovereign’ city-regions that mimic the functionality of complex attractors. This provides the only insurance against global collapse.

System	Symmetry (breaking)	Scale	Complexity	Collapse
Hayek	Abstraction (adaptation)	Elements & their relationships	Integration of orders	Cyclical fluctuations
Kohr	Homogeneity (specialisation)	Size & population density	Impossibility of integration	Distorted balancing
Jacobs	Generality (differentiation)	Quantitative change	Collapse-evading technology	Out of sync expansion

Table 3.1: Summary of HKJ analysis

We have seen (from the analysis in the previous three parts) that Hayek focused mainly on the middle part of the ansatz, namely on scale and complexity. Hayek hardly discusses collapse in his writings, save for his intuition that interference of the ‘made order’ (e.g. government’s monetary policy) with the spontaneous order (the economic system) will result in trade cycles (of which the bust phase is interpreted as collapse).

Kohr and Jacobs formulate their solutions as a choice between *Kleinstaaterei* and the Tower of Babel syndrome (the existence of colossal states such as the BRICS, the United States or the EU). For both, only political separation can end stagnation.

Kohr and Jacobs saw their proposals as impractical as nation states would have to cease to exist completely. Hence, Kohr’s Chapter 11 in *The Breakdown of Nations* has only one word—‘no’—in response to the question about whether his call for *Kleinstaaterei* will ever become a reality. Similarly, in *Cities and the Wealth of Nations*, Jacobs is clear that her

proposition for the division of sovereignty is ‘theoretical only’.³¹⁷ It is respectfully submitted that a proposition to keep the nation state structure in parallel to the proposed sovereign city-regions (albeit in a subsidiary role) would overcome many of the practical difficulties envisaged by Kohr and Jacobs.

³¹⁷ Jane Jacobs *Cities and the Wealth of Nations: Principles of Economic Life* (Penguin Books, Ringwood (VIC), 1984) at 216.

PART III SUBSIDIARITY IN NEW ZEALAND

4. Subsidiarity as a Constitutional Principle in New Zealand

4.1. Introduction

New Zealand's political landscape up until the abolition of the provincial system in 1876 could be described as dominated by a tension between 'centralist' and 'provincialist' agendas.³¹⁸ 'Centralists' were not for centralising government, but against "an unbalanced constitution ... in which the provinces had too much power at the expense of the legitimate functions of the General [central] Government".³¹⁹ In essence, the issue was not "whether the state should be decentralised but ... how it should be decentralised".³²⁰

This chapter analyses this tension under the rubric of subsidiarity. The analysis illustrates that an affinity between the meta-rules of subsidiarity and the articles of the Treaty of Waitangi was later replaced with a shift in emphasis from subsidiarity (vertical separation of powers) to *trias politica* (horizontal separation of powers). This shift is evidenced by the constitutional experiment that brought about the provincial system in New Zealand, and the abolition of this system,³²¹ only 24 years later.

The chapter starts with a brief introduction to subsidiarity, followed by an analysis of the links between subsidiarity and our early constitutional instruments. Finally, the chapter looks at the relevance of subsidiarity today as a principle for constitutional design.

³¹⁸ GA Wood "The Political Structure of New Zealand, 1858 to 1861" (PhD Thesis, University of Otago, 1965) at 111 and following.

³¹⁹ At 353.

³²⁰ At 353.

³²¹ For a good introduction to the development of New Zealand's constitutional law see J Hight and HD Bamford *Constitutional History and Law of New Zealand* (Whitcombe and Tombs, Christchurch, 1914).

4.2. Subsidiarity: A rendition

The origins of the principle of subsidiarity can be traced back to ancient Greece.³²² The principle places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but to provide these lower levels with necessary support.³²³ One of the weaker versions of the principle can be found in the Tenth Amendment to the US Constitution where it states that “powers not delegated to the [federal government] by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people”.³²⁴ A more recent formulation was established in the Charter of Fundamental Rights of the European Union in December 2000.³²⁵ The principle is also central to the European Charter of Local Self Government (Articles 4(2) and 4(3)).³²⁶

The Economic and Ethical Bases of Subsidiarity

Historically, there were two main formulations of subsidiarity. One is economic, the other ethical.³²⁷ For the economic formulation please refer to Section 2.5. A clear statement of the ethical formulation can be found in the first papal encyclical on the ‘social question’, Leo XIII’s *Rerum Novarum* of 1891, where we see a principle of intervention (positive

³²² Millon-Delsol *L'État Subsidaire* at 15.

³²³ R Herzog “Subsidiaritätsprinzip” in *Historisches Wörterbuch der Philosophie 10* (Schwabe, Basel, 1998) 482; cited in Stefan Gosepath “The Principle of Subsidiarity” in Andreas Føllesdal and Thomas Pogge (eds) *Real World Justice: Grounds, Principles, Human Rights, and Social Institutions* (Springer, Dordrecht, the Netherlands, 2005) 157 at 157.

³²⁴ US Constitution 1787, Amendment X (1791).

³²⁵ Paolo Carozza “Subsidiarity as a Structural Principle of International Human Rights Law” (2003) 97(38) *The American Journal of International Law* 38.

³²⁶ For a critique of the principle of subsidiarity in the context of the European Union see Christian Kirchner “The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics” (1998) 6 *Tulane Journal of International and Comparative Law* 291.

³²⁷ While in the following discussion emphasis is on the religious formulation of the principle of subsidiarity, the ethical rationale for the principle can be traced back to normative ethics and sociological natural law. See Arthur Utz “The Principle of Subsidiarity and Contemporary Natural Law” (1958) 3 *Natural Law Forum* 170. See also Nicholas Aroney “Subsidiarity in the Writings of Aristotle and Aquinas” in Michelle Evans and Augusto Zimmermann (eds) *Global Perspective on Subsidiarity* (Springer, New York, 2014) 9-28; Ken Endo “The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors” (1994) 44(6) *Hokkaido Law Review* 552 < <http://hdl.handle.net/2115/15558> > .

dimension) but not interference (negative dimension) based on the ethical objective of “remedy of the evil or the removal of the mischief”.³²⁸ A stronger and more precise version of the ethical formulation is contained in s 79 of Pius XI’s 1931 papal encyclical paper, *Quadregesimo Anno*.³²⁹ This formulation emphasises the ethical constraint on larger (political) entities, preventing them from usurping duties that can be reasonably discharged by smaller entities. The justification for such a constraint is derived directly from ‘the principle of justice’.³³⁰

Subsidiarity and Federalism

The difference between decentralisation and subsidiarity is that the latter includes an ethical rationale that goes beyond the economic ‘efficiency’ objectives inherent in decentralisation theories.³³¹ Conventional public economics is predicated on a decentralisation theorem that models incomplete contracts under uniformity and homogeneity assumptions where the central government can replicate the public goods supplied by local governments. Subsidiarity on the other hand introduces ethical considerations that provide a signal as to the appropriate scale of political organisation. Subsidiarity is hence a decentralisation modality that takes into account the political forces of existing social structures.

Subsidiarity is a wider concept than federalism. Unlike federalism, subsidiarity is about sharing sovereignty rather than dividing it. Federalism is one way of limiting sovereignty through dividing it between different levels of government and then attempting to centralise some of the functions at the federal level. Under subsidiarity, sovereignty is limited by local

³²⁸ Leo XIII “Rerum Novarum: Encyclical Letter on Capital and Labor” (May 15, 1891) in Claudia Carlen (ed) *The Papal Encyclicals 1878–1903* (Consortium, New York, 1990) vol 2 241 at 250–251, para 36.

³²⁹ Pius XI “Quadregesimo Anno: Encyclical Letter on Reconstruction of Social Order” (May 15, 1931) in Claudia Carlen (ed) *The Papal Encyclicals 1903–1939* (Consortium, New York, 1990) vol 3 421 at paras 79–80.

³³⁰ For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Kent Van Til “Subsidiarity and Sphere-Sovereignty: a match made in ...?” (2008) 69(3) *Theological Studies* 610.

³³¹ See Albert Breton, Alberto Cassone, Angela Frascini “Decentralization and Subsidiarity: Toward a Theoretical Reconciliation” (1998) 19 *U Pa J Int’l Econ L* 21.

autonomy in a ‘quasi federal’ arrangement where the central (federal) government continues to ‘succour’ lower levels of government.³³²

Moreover, under subsidiarity there is a political exchange (see below) that weaves local autonomy into multi-level governance structures. Under subsidiarity the emphasis is on municipalities. Under federalism there need not be emphasis on municipalities, and such emphasis would result only where the states making up the federal polity are relatively small, for examples the cantons of Switzerland.³³³

Due to the nature of subsidiarity’s relationship to sovereignty, its role as a cornerstone in constitutional architecture straddles both unitary and federal states. For example, (the English translation of) the preamble of the 1997 Polish Constitution states that the Constitution is based “on the principle of subsidiarity in the strengthening [of] the powers of citizens and their communities”. At the same time, art3 of the Constitution states that “[t]he Republic of Poland shall be a unitary State”. On the other hand, (the official English translation of) art5a of the 1999 Swiss Federal Constitution states that “[t]he principle of subsidiarity must be observed in the allocation and performance of state task”, while art1 declares Switzerland as a Confederation.³³⁴

In summary, subsidiarity looks at limiting sovereignty. Federalism is only one mode of achieving the same, through dividing sovereignty between two (and only two) tiers of government.³³⁵ Under subsidiarity there is a political exchange that sees a wide margin of local autonomy weaved into multi-level governance structures.

³³² See also Mark Friesen “Subsidiarity and Federalism: An Old Concept with Contemporary Relevance for Political Society” (2005) 2(1) Federal Governance.

³³³ This explains why the US and Australia constitutions do not purvey local government.

³³⁴ The above observations should not be taken to make any value judgments about the successful implementation of subsidiarity in these countries.

³³⁵ This explains why the US and Australia constitutions do not purvey local government.

Subsidiarity and Constitutional Economics³³⁶

Defined broadly, constitutional economics embraces the economics of property rights, law and economics (economic analysis of the law), political economy of regulation, new economic history and public choice (application of economics to political science).³³⁷ The starting point for constitutional economics, emerging from public choice, is the 1960s tome *The Calculus of Consent*.³³⁸ While public choice was interested in choices within rules, constitutional economics was interested in choices *among* rules.

Constitutions are heavily influenced by economic considerations.³³⁹ The abolition of our provincial system is an example of how economics shapes constitutions. It is generally accepted that the main cause for the abolition was the budget deficits the provinces faced. It is conceded that one reason that precipitated the budget deficits was the provinces' large-scale borrowing.³⁴⁰ However, there was also a tendency to squeeze out provincial powers by increasing decentralisation to a complex system of local government that included Municipal Councils, Road Boards, River Boards and Harbour Boards. In essence, the provincial system was supplanted by other local institutions through the Municipal Corporations Act 1867. These municipalities were placed in a position virtually independent of provincial legislation, and removed the need for the 'meso' tier of provincial government, as the General Government could govern these institutions directly.

³³⁶ See also Charles Tiebout "A Pure Theory of Local Expenditure" (1956) 64(5) J Pol Econ 416, and Vincent Ostrom, Charles Tiebout and Robert Warren "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry" (1961) 55 American Political Science Review 831.

³³⁷ James Buchanan "Constitutional Economics" in *The New Palgrave* (Macmillan, London, 1987) at 585; also see Helmut Leipold "Neoliberal Ordnungstheorie and Constitutional Economics: A Comparison between Eucken and Buchanan" (1990) 1(1) Constitutional Political Economy 47.

³³⁸ Buchanan and Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962).

³³⁹ See the pioneering work by Beard *The Economic Basis of Politics* at 67.

³⁴⁰ There is also an argument to be made regarding the General Government role in this financial instability. When the General Government intervened, through the Provincial Audit Act 1866, to take a more active role in regulating provincial borrowing and expenditure, it left many provinces dependent upon its hand-outs. A closer look at provincial finances shows that financial difficulties were rather due to the General Government's borrowing policy that incentivised land-gambling which increased private debts. See JB Condliffe *New Zealand in the Making: A Study of Economic and Social Development* (George Allen & Unwin, London, 1959). Moreover, the abolition was not a panacea for the financial difficulties New Zealand was facing at the time. In particular, it did not result in the promised savings nor changed the need for subsidies to local bodies. See WP Morrell *The provincial system in New Zealand, 1852-76* (Longmans, Green and Co, London, 1932) at 252. See also Bernard Attard "Making the Colonial State: development, debt, and warfare in New Zealand, 1853-76" (2012) 52(2) Australian Economic History Review 101.

It does not take a huge leap of faith to see how what came to be known as ‘economic development’ is an extension of colonisation.³⁴¹ Both look to grow the economic activity in a given locale to improve its standard of living. Both require empowering ‘meso’ political organisation to modulate the power between the individual and the nation state. To see this we turn to constitutional economics.

James Buchanan, the father of constitutional economics, argued that the analysis of the market as an evolutionary selection process can be extended to politics.³⁴² The analogy between markets and politics imports a third dimension in addition to *homo economicus* and the exchange process, namely competition. In order for markets to function properly one needs to ensure a level of competition in the provision of goods and services. An analogy with politics would see this completion reflected in the provision of public goods through competing jurisdictions.³⁴³

According to Buchanan and Tullock, there are two separate and distinct elements in the expected costs of any human activity.³⁴⁴ The first are ‘external costs’ that an individual is expected to endure as a result of the actions of others (within his political group) over which he has no direct control. As the size of the political group increases, these external costs decrease, since³⁴⁵

“[w]hen unanimous agreement is dictated by the decision-making rule, the expected costs on the individual must be zero since he will not willingly allow others to impose external costs on him when he can effectively prevent this from happening.”

³⁴¹ See E Wayne Nafziger *Economic Development* (Cambridge University Press, Cambridge, 2012). For a classic monograph on economic development, see John Kenneth Galbraith *Economic Development* (Harvard University Press, Cambridge (MA), 1964). For economic development at the local scale, see John P Blair and Michael C Carroll *Local Economic Development: Analysis, Practices, and Globalization* (Sage Publications, Los Angeles, 2009).

³⁴² James Buchanan “Public Choice After Socialism” (1993) 77 *Public Choice* 67 at 69. This particular extension is difficult to accommodate with some of Buchanan’s other constructs, especially his rejection of the state as an organism. See also Buchanan *The Economics and the Ethics of Constitutional Order* (The University of Michigan Press, Ann Arbor, 1991) at 31.

³⁴³ James Buchanan *Europe’s Constitutional Future* (Institute of Economic Affairs, London, 1990) at 2.

³⁴⁴ Buchanan and Tullock *The Calculus of Consent* 43–44.

³⁴⁵ At 61.

The second element is ‘decision-making costs’, which the individual expects to incur as a result of his participation in organised activity. These costs are upward sloping, since³⁴⁶

“[i]f two or more persons are required to agree on a *single* decision, time and effort ... costs will increase as the size of the [political] group required to agree increases.”
(Emphasis in the original)

The objective of political organisation is to minimise these costs (see also Section 5.2). In the authors’ final analysis, they reach the following decision: “if the organisation of collective activity can be effectively decentralized, this decentralization provides one means of introducing marketlike [sic] alternatives into the political process”.³⁴⁷ Therefore, “[b]oth the decentralization and size factors suggest that, where possible, collective activity should be organized in small rather than large political units”.³⁴⁸ Under subsidiarity, with its ethical dimension, this decentralisation would take the shape of legislative powers at the municipal or provincial levels. In other words, subsidiarity places decentralisation within existing geo-social structures.³⁴⁹

³⁴⁶At 65.

³⁴⁷At 109.

³⁴⁸At 110.

³⁴⁹ Other salient models leading to similar conclusions include Robert Dahl and Edward Tufte *Size and democracy* (Stanford University Press, Stanford, 1974); Vincent Ostrom, Charles Tiebout and Robert Warren “The Organization of Government in Metropolitan Areas: A Theoretical Inquiry” (1961) 55 *American Political Science Review* 831; and Charles Tiebout “A Pure Theory of Local Expenditure” (1956) 64(5) *Journal of Political Economy* 416. For the closely connected principle of polycentricity see Paul Aligica and Vlad Tarko “Polycentricity: From Polanyi to Ostrom, and Beyond” (2012) 25(2) *Governance* 237.

Typologies of Subsidiarity

This part discusses two taxonomies of subsidiarity.³⁵⁰ The first taxonomy can be grouped under three headings: liberty (non-intervention), justice (transfer of competencies), and efficiency (assistance in the form of limited intervention).³⁵¹

Under the liberty taxonomy of subsidiarity there are two main schools of thought. The first is that of Johannes Althusius who adopted a territorial interpretation of subsidiarity (inspired by orthodox Calvinism).³⁵² In this school we also find a consociational (community-based) version,³⁵³ where emphasis is on functionality rather than on territoriality. While Althusius builds his subsidiarity on existing geo-social entities such as cities, consociationalism builds its subsidiarity on a functional organisation of political units. The second school under liberty is confederal subsidiarity, which adopts methodological individualism rather than collectivism (as under Althusius).³⁵⁴ This school also requires local government to be able to veto any intervention from the central government in its affairs, including the right to exit from any confederal arrangements, even by force if necessary. Because both schools, Althusian/Consocial and confederal, see

³⁵⁰ See also Aaron Martin “The Principle of Subsidiarity and Institutional Predispositions” (July 2010) CAP Research Group on European Affairs <<http://www.cap.lmu.de/download/2010/CAP-WP-Martin.pdf>> at 5 and 8.

³⁵¹ See Andreas Føllesdal “Competing Conceptions of Subsidiarity” in James E Flemming and Jacob T Levy (eds) *Federalism and Subsidiarity* (New York University Press, New York, 2014) 214-230; Andreas Føllesdal “Subsidiarity” (1998) 6(2) *The Journal of Political Philosophy* 118; Andreas Føllesdal “The Principle of Subsidiarity as a Constitutional Principle in International Law” (2013) 2(1) *Global Constitutionalism* 37.

³⁵² Althusius was part of the Calvinist political thought on liberty (inspired by the ‘city fathers of Geneva’). Calvinist resistance theory seized the language of liberty and framed it in the biblical Exodus narrative. The theory was presented as fighting for freedom from civil and ecclesiastical bondage. Althusius followed this tradition in arguing for popular self-government, emphasizing republican liberty and equality; “Althusius saw the absolute liberty of conscience as the natural corollary to the absolute sovereignty of God, a doctrinal staple of Calvinism”: John Witte, Jr “Natural Rights, Popular Sovereignty, and Covenant Politics: Johannes Althusius and the Dutch Revolt and Republic” (2010) 87 *University of Detroit Mercy Law Review* 565 at 592. On this point refer to John RD Coffey “The language of liberty in Calvinist political thought” in M van Gelderen and Q Skinner (eds) *Freedom and the Construction of Europe* (Cambridge University Press, Cambridge, 2013) vol 1: 296-316.

³⁵³ For an introduction on consociationalism see Brian Barry “The Consociational Model and its Dangers” (1975) 3 (4) *European Journal of Political Research* 393.

³⁵⁴ The phrase ‘*methodische Individualismus*’ was coined by Max Weber’s student, Joseph Schumpeter, in 1908. Under methodological individualism, only individuals choose and act. Jean-Jacques Rousseau’s conception of sovereignty would be within methodological individualism as his sovereignty is based on the collective of the people (as individuals).

subsidiarity as a mechanism to ensure the liberty of citizens from interventions by a central government, there is no emphasis on the need for central government intervention.

Under justice, there are also two schools. The first is embedded in Catholic teachings where the state has to maintain respect for the individual and the family. The second comes from liberal contractarianism where civil deliberations between individuals (methodological individualism) lead to a just (and legitimate) organisation of society. Both schools emphasise prescriptive subsidiarity.

The third strand, efficiency, has one main school of thought, fiscal federalism. Both models presented in Part II of this thesis, namely the auxilium model and the complexity ansatz, are part of this efficiency strand. The difference between these models and fiscal federalism is that the latter uses an explicit cost-benefit analysis to determine the most efficient level of government for decision-making. Based on such efficiency tests, fiscal federalism provides strong prescriptive signals for central government intervention.

Under the second taxonomy,³⁵⁵ subsidiarity is either instrumental or intrinsic. If instrumental, it could be based on methodological individualism, resulting in economy-oriented subsidiarity, or it could be based on methodological collectivism, which gives politically-oriented subsidiarity. The latter is an integration of objectives from the economy and the community. Alternatively, if subsidiarity is intrinsic, it could be civil-society oriented or communal, similar to Catholic individualism, or transparency oriented (based on collectivism). The transparency oriented strand is comprehensive in that it integrates the three spheres present in the other strands: the economic, the political and the communal.

The above typologies can be integrated into three core principles of subsidiarity, as delineated in the following section. These sub-principles inform the analysis in section 4.3, of the Declaration of Independence 1835 and the Treaty of Waitangi 1840.

The Core Principles of Subsidiarity³⁵⁶

While a *polysemous* principle in its classical formulation, the principle of subsidiarity's core could be decomposed into three interrelated sub-principles. The first is a positive 'rule

³⁵⁵ Neil MacCormick "Democracy, Subsidiarity, and Citizenship in the 'European Commonwealth'" (1997) 16(4) Law and Philosophy 331.

³⁵⁶ See generally Gosepath in Føllesdal and Pogge (eds) *Real World Justice* 157 at 162, and Peter Floriani *Subsidiarity* (Penn Street Productions, Reading (PA) 2012) at 82-83.

of assistance' requiring the central government to support local communities where they cannot perform the functions of governance. The rule is based primarily on the objective of efficiency and corresponds to economy-oriented subsidiarity. This rule would be violated where for example the central government refuses to assist upon the appeal of a local government, or when a local government fails to appeal to the central government when aid is required.³⁵⁷ This sub-principle resonates with the duty to protect subjects and a reciprocal duty of obedience.

The second sub-principle is a 'ban on interference', where the central government is prohibited from interfering in the affairs of local government. The rule is based on the liberty objective delineated above and corresponds to politically-oriented subsidiarity. This rule would be violated for example when the central government interferes with the work of a local government. This non-intervention rule parallels the concept emanating from the humanitarian movement of the 1820s and 1830s which recognises the sovereignty and independence of 'indigenous peoples'.

The third sub-principle derives from the first two and limits the legitimate support of higher levels of government to 'helping local governments help themselves'. This is a dynamic rule related to the justice objective and community-oriented subsidiarity, enabling local governments to compete with each other and accumulate competencies. This rule is violated where the positive rule is broken, for example where the federal government fails to correct a state government who fails to respond to an appeal for assistance from a local government. This third sub-principle is also violated when the negative rule is broken, for example, when the federal government fails to stop a state government from interfering with the work of a local government.

³⁵⁷ Note that subsidiarity is not limited to any particular number of levels of government.

4.3. Subsidiarity as the *hypostasis of Te Tiriti o Waitangi*

The essence of the Treaty of Waitangi is subsidiarity.³⁵⁸ On a teleological reading, as shown below, the Treaty is an instance of all three subsidiarity sub-principles (above).³⁵⁹

The preamble to the English text of the Treaty deems it necessary to recognise the British monarch as the New Zealand sovereign. This is “to protect [the] just Rights and Property [of Māori] and to secure them the enjoyment of Peace and Good Order” and “to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions”. Article 1 of the Treaty cedes the sovereignty as envisaged in the preamble, while art3 confirms that the sovereign “extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects”.

This is an instance of a political exchange analogous to exchanges in markets, as envisaged by constitutional economics. The exchange is evident in the wording of art3 where it starts with the words ‘[i]n consideration thereof’. There is in effect an exchange of sovereignty for a bundle of rights and privileges.

In art2, the sovereign

“guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess.”

The Māori text suggests that the purpose was to provide a government while securing tribal autonomy. Under art1, Māori leaders gave the Queen ‘tekawanatangakatoa’, or complete government over their land. Article 2 states that Māori were guaranteed ‘tetinorangatiratanga’, or the unqualified exercise of their chieftainship over their lands, villages and all their property and treasures. Article 3, similar to the English text, assures Māori of the Queen’s protection and all the rights (tikanga) accorded to British subjects. This Article is usually interpreted as expressing the ultimate goal of British Māori policy

³⁵⁸ Treaty of Waitangi is only one of many similar treaties that were entered into by the British Crown in the 19th century. For a discussion of the similarities and differences see Paul Moon *Hobson: Governor of New Zealand 1840-1842* (David Ling Publishing Limited, Auckland, 1998) at 77-82.

³⁵⁹ This analysis takes a wide interpretation of Māori as representing all local communities in New Zealand. See BF Gussen (2012) 16 NZJEL167.

as the assimilation and eventual amalgamation of the Māori with British settlers as one people,³⁶⁰ or in the words of Captain William Hobson upon signing the Treaty, ‘*he iwi tahi tatou*’ (we are now one people).³⁶¹ This amalgamation opens ‘self-governance’ to encompass not only Māori but also the British settlers. The Article was an expression of an ideal of early Victorian humanitarianism: racial equality (between Māori and the settlers)—an extension of efforts leading to the emancipation of slaves, the abolition of apprenticeship, and the 1837 House of Commons Committee of Aborigines in British Settlements Report.³⁶² The updating of this ideal points to “the emerging doctrine of global humanitarian government and the transformation of sovereignty on the basis of a humanitarian rationale”, which leads directly to subsidiarity as a ‘fall back responsibility’ where “the failure of a state to provide basic security to its population opens the possibility of an external intervention ...”³⁶³

The Treaty can be understood as emanating from the core of subsidiarity.³⁶⁴ The transfer of sovereignty to the British monarch would negate the possibility of territorial divisions enjoying state-like autonomy. However, this does not eliminate the possibility of subsidiarity as understood through its three sub-principles. The Treaty refers to the ‘rule of assistance’ in the preamble and in arts 1 and 3. The Treaty intended first to establish a central government that could “avert the evil consequences which must result from the absence of the necessary Laws and Institutions” and that could then provide protection and enjoyment of peace and order. In this sense, the Treaty assists local communities. The ‘ban on interference’, is seen in art 2, where ‘full exclusive and undisturbed possession’ and unqualified exercise of chieftainship is imparted to the Māori. The qualifier ‘undisturbed’ is a clear indication of the ban on any interference in the affairs of local communities. The third sub-principle, ‘helping local governments help themselves’, can also be seen

³⁶⁰ Peter Adams *Fatal Necessity: British intervention in New Zealand 1830-1847* (Auckland University Press, Auckland, 1977) at 15.

³⁶¹ Alan Ward *A Show of Justice: racial ‘amalgamation’ in nineteenth century New Zealand* (Auckland University Press, Auckland, 1995) at 42.

³⁶² Peter Adams *Fatal Necessity* at 57.

³⁶³ Nicolas Guilhot “The Anthropologist as Witness: Humanitarianism between Ethnography and Critique” (2012) 3(1) *Humanity* 81 at 82.

³⁶⁴ Subsidiarity is also evident in Treaty of Waitangi jurisprudence. The principles that emanated from *New Zealand Māori Council v Attorney-General* [1987] 1 NZLR 641 all emerge from the principle of subsidiarity. We do not pursue this point in detail in this paper, preferring instead to leave this to future enquiry.

simultaneously in the operation of arts 1 and 2. The Treaty envisages putting in place laws and institutions to help the Māori to help themselves in their ‘exclusive and undisturbed possession’ and their exercise of their chieftainship.

The subsidiarity interpretation of the Treaty reconciles the differences between the English and Māori texts. The possibility of ceding sovereignty to the British monarch does not distract from the intended subsidiarity platform. While it could be possible to have subsidiarity where the constitutional design envisages a divided sovereignty, it does not follow that where sovereignty is otherwise, there could be no subsidiarity. Through subsidiarity, the difference between the English and Māori texts becomes one between a weak and a strong version of subsidiarity.

The above subsidiarity-centred hermeneutic translation chimes with historical facts leading to the Treaty. Both missionaries and humanitarians (such as members of the Aborigines Protection Society) proposed, on ethical grounds, British intervention. This was calculated to replace internecine wars by dialogue as the method for resolving social conflict among Māori and between Māori and the settlers.³⁶⁵ These ethical themes resonated at the Colonial Office through an intellectual connection with the concepts of trusteeship and humanitarianism. These concepts gathered momentum since Edmund Burke’s 1783 doctrine that every polity was a trust,³⁶⁶ and “became a powerful political ideology in the first half of the nineteenth [century]”.³⁶⁷

Similarly, James Busby, the British resident in the Bay of Islands, who played a decisive role in the Declaration of Independence of 1835, envisaged “a congress or a General Assembly of [Māori] Chiefs under the ‘fostering power’ of the [British] governor”.³⁶⁸ James Stephen, the permanent under-secretary at the Colonial Office was interested in establishing legal authority in New Zealand rather than British sovereignty *per se*.³⁶⁹ Stephen’s intention was to “authorise the explicit recognition or codification of Māori

³⁶⁵ Ward *A Show of Justice* at 32-33.

³⁶⁶ Edmund Burke (and Friedrich Hayek later on) represented the (Old) Whig opinion that could be traced back to as early as 1610. See for example Linda C Raeder “The Liberalism/Conservatism of Edmund Burke and F. A. Hayek: A Critical Comparison” (1997) 10(1) *Humanitas* 70.

³⁶⁷ Peter Adams *Fatal Necessity: British intervention in New Zealand 1830-1847* (Auckland, Auckland University Press, 1977) at 57.

³⁶⁸ Ward *A Show of Justice* at 28.

³⁶⁹ At 31.

customs which would have the force of law in Māori districts”.³⁷⁰ This is a clear signal of an intention to distribute legislative power within New Zealand. However, Lord John Russell, the Secretary of State for Colonies from September 1839 to September 1841, diluted Stephen’s suggestion of a declaratory law ‘recognising’ Māori customs to one “authorising the Executive to tolerate” them.³⁷¹ Nevertheless, it was humanitarian concerns that were emphasised in the instructions to negotiate a cession of sovereignty, given to Captain William Hobson, the then Lieutenant Governor of New Zealand, by Lord Russell’s predecessor, Lord Normanby, in August 1839.³⁷²

4.4. Subsidiarity and the New Zealand Constitution Acts of 1846 and 1852

There have been attempts to provide a decentralised system of governance in New Zealand since *Te Tiriti* was signed in 1840.³⁷³ One of the early examples was in Wellington where the settlers were “anxious to secure the advantages of a Municipal Corporation”.³⁷⁴ However, what came to be known as the ‘Wellington Republic’ was ended by a detachment of troops sent by the newly declared Lieutenant-Governor William Hobson.³⁷⁵ The demand for self-government could also be seen in the Constitutional Associations of the 1850s.³⁷⁶ In a letter to Lord Grey dated 19 February 1852, the Otago Settlers’ Association accentuated the fact that each settlement possessed “an individual life and attributes of its

³⁷⁰ At 38.

³⁷¹ At 38.

³⁷² Adams *Fatal Necessity* at 59. See also Normanby to Hobson, 14, 15 August 1839, in Robert McNab (ed) *Historical Records of New Zealand* (Wellington, Government Printer, 1908) vol 1 at 729.

³⁷³ As we discuss later in the case, these attempts were largely inspired by the principle of subsidiarity inherent in the Treaty itself.

³⁷⁴ Edward Wakefield *Adventure in New Zealand, from 1839 to 1844 : with some account of the beginning of the British colonization of the islands* (J Murray, London ,1845) at 342.

³⁷⁵ At 378. See also JC Beaglehole *Captain Hobson and the New Zealand Company* (Northampton, Mass, 1928) Chapters 6 and 7.

³⁷⁶ Department of Justice (1986) “Appendix A. The electoral law of New Zealand: A brief history” in *Report of the Royal Commission on the Electoral System: Towards a better democracy* (The Royal Commission on the Electoral System, Wellington, 1986) <www.elections.org.nz/sites/default/files/bulk-upload/documents/appendix%20a.pdf>

own” which “gives each an equally strong title, to conduct its own affairs”.³⁷⁷ Notwithstanding, in the early 1850s some important local politicians were dismissive of provincial councils. Some, like David Monro of Nelson, preferred to see them as glorified parish councils – a minimalist view. Others however, like James Macandrew of Otago, had an exalted view.³⁷⁸ But even those in favour of a unitary government, such as JP Godley, recognised the independence instincts that prevailed in the 1840s and 1850s.³⁷⁹

The agitation by the settlers persuaded the United Kingdom Parliament to pass the New Zealand Constitution Act 1846, which established our first provincial system with two provinces, ‘New Ulster’ and ‘New Munster’. By cl 5 of the 1846 Bill, these provinces were empowered to “enact laws, statutes and ordinances for the peace, order and good government”.³⁸⁰

This Act was superseded by the New Zealand Constitution Act 1852. The 1852 Act gave New Zealand a settled, semi-federal system of government.³⁸¹ This provincial system has since been described as ‘quasi-federal’.³⁸² The ‘quasi’ qualifier is necessary as there was no formal division of sovereignty, and “the provinces were financially very much dependent on the General Assembly”.³⁸³ It could even be argued that the Constitution was ‘quasi-federal’ in a way not very different from the British North America (BNA) Act 1867, which evolved into the Canadian federal system we know today.³⁸⁴ Under the 1852 Act, however, the provincial governments were not represented in the General Assembly, nor

³⁷⁷ WP Morrell *The provincial system in New Zealand, 1852-76* (Longmans, Green and Co, London, 1932) at 15.

³⁷⁸ Notes from the anonymous review report to a previous draft of this paper.

³⁷⁹ Morrell *The provincial system* at 15.

³⁸⁰ The Act itself, however, did not have this provision. This clause provides an insight into how the constitutional plans for New Zealand were influenced by the principle of subsidiarity where the legislative function is entrusted to the provinces rather than a central government.

³⁸¹ Hocken Collection, Bulletin 31 (March 2000).

³⁸² At 2; David Herron “The Structure and Course of New Zealand Politics, 1853–1858” (PhD Thesis, University of Otago, 1959) at 1; Ron Watts “Federalism Today” (paper presented at the International Conference on Federalism 2002, Saint Gallen, 2002). According to Watts, quasi-federalism is where “the overall structure is predominantly that of a federation but the federal or central government is constitutionally allocated some overriding unilateral powers akin to those in unitary systems that may be exercise in certain specified circumstances” at xx.

³⁸³ Morrell *The Provincial System* at 55–57.

³⁸⁴ See for example JR Mallory “The B.N.A. Act: Constitutional Adaptation and Social Change” (1967) 2 RJT ns 127.

was there any such element of federalism in the Legislative Council (as there was, for example, in Canada under the BNA Act 1867).

Under the 1852 Act, s 2, the country was divided into six provinces: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago. Section 3 of the Act (which determined the structure of the provincial legislatures) was entrenched.³⁸⁵ However, under s 19, these provinces were given only restricted legislative powers. Nevertheless, there was a vertical division of power, both regarding the executive and legislative branches of government, the latter being a trademark of federal states. The Act ensured that the provinces were kept under the legislative and financial control of the General Government.³⁸⁶ Section 32 established a General Assembly constituted of the Governor, an upper house (the Legislative Council) and the House of Representatives. The Council's absence of provincial politicians made it more centralist than the House of Representatives.³⁸⁷ The General Assembly was now entrusted with making "laws for the peace, order, and good government of New Zealand ..."³⁸⁸ The provinces had the authority to pass legislation,³⁸⁹ although the Governor had a reserve power to veto such legislation,³⁹⁰ and the Crown's right to disallow provincial Acts within two years of their passage was preserved.³⁹¹ Provincial councils would manage such things as providing public works (including railways) and immigration. Courts, crime, customs, coinage, ports, weights and measures, banking, shipping, Crown lands, marriage and wills were the responsibility of the General Assembly (the national government).³⁹² Social welfare (in the fields of health and education) was carried out by the provinces.³⁹³ The key point is that the "role of national organisations whether private or public was less important than it is today".³⁹⁴

³⁸⁵ At 13.

³⁸⁶ At 286.

³⁸⁷ At 62 and 66.

³⁸⁸ Section 53.

³⁸⁹ Section 18.

³⁹⁰ Section 29.

³⁹¹ Section 58.

³⁹² Section 19.

³⁹³ Morrell *The Provincial System* at 75.

³⁹⁴ Wood (PhD Thesis, University of Otago, 1965) at 359.

An important feature of the 1852 Act is s 71, which provides a nexus with the Treaty of Waitangi. This section states that “particular districts should be set apart within which [Māori] laws, customs, [and] usage should be ... observed”, provided that “such laws, customs, and usages ... are not repugnant to the general principles of humanity”. The reference to ‘general principles of humanity’ is reminiscent of international law, which today, as discussed later in this chapter, is becoming more and more relevant to how the jurisdiction of local government is decided.

The Constitution Act 1852 provided for the creation of additional provinces, and when the spread of European settlements between the original centres of provincial government and the outlying settlers grew, the General Assembly passed the New Provinces Act 1858. As a result, Hawke’s Bay Province separated from Wellington on 1 November 1858, Marlborough Province from Nelson on 1 November 1859 and Southland Province from Otago on 1 April 1861. New Plymouth also changed its name to Taranaki under the same Act. Stewart Island, which had not been part of any province since 1853, was annexed to the Southland Province on 10 November 1863. By creating smaller outlying provinces, the Act weakened the whole provincial system.

The last straw came when Sir Julius Vogel, then the Premier, attempted to create a major afforestation plan which encountered hostility from provinces unwilling to transfer lands to the General Government. As a result, Vogel supported the abolition of the provinces and public opinion (of mainly new immigrants) sided with him. The abolition was debated in the General Assembly as early as 1871, and finally passed under the Abolition of Provinces Act 1876.

Competing Constitutional Designs

There were two competing designs of the 1846 and 1852 Acts: the first was in the spirit of subsidiarity in the form of municipalities or provinces with wide legislative powers. The other suggested that legislative power should remain the domain of a central government.

In 1845, the then British Prime Minister, Sir Robert Peel, was of the opinion that “the best plan would be the formation of municipal government, with extensive powers of local taxation, and of meeting all local demands”.³⁹⁵ In particular, he added that “a system of

³⁹⁵ (19 June 1845) 81 GBPD HC 950.

proprietary government, which implies control over the local Government, to be divided with the Crown, would be one from which no good could arise”.³⁹⁶ Sir Robert Peel was of the opinion that.³⁹⁷

“in the present state of society in New Zealand, looking at the dispersion of its inhabitants, and the distance of its settlements from each other ... it would be exceedingly difficult at once to give effect to the principle of representative government, if, by representative government you mean a popular assembly with extensive powers of general legislation and taxation”.

Similarly, Lord John Russell (1st Earl Russell) opined that “one of the primary measures should be the establishment of municipal government”.³⁹⁸ Lord John Russell referred to the instructions given in December, 1840, to the Governor of New Zealand to promote, as far as possible, the establishment of municipal and district governments for the conduct of local affairs.³⁹⁹

The other view was articulated by John Arthur Roebuck (MP):⁴⁰⁰

“New Zealand should govern itself, not by giving to it municipal powers ... [but by keeping] the country one, with one central government, with a county administration, with no municipal, that is to say, with no legislative powers, then there would be a chance of governing the country well, and of rendering it prosperous.”

Eventually, the 1846 Act provided for municipal corporations but only with the powers of English boroughs. By 1848, Westminster passed a Suspending Act under which those parts of the 1846 Constitution dealing with establishment of provincial assemblies and the General Assembly were not to come into force for another five years. This was due to the instigation of the then Governor of New Zealand, Sir George Grey, who argued that the

³⁹⁶ (19 June 1845) 81 GBPD HC 952.

³⁹⁷ (23 July 1845) 82 GBPD HC 998.

³⁹⁸ (19 June 1845) 81 GBPD HC 934.

³⁹⁹ (23 July 1845) 82 GBPD HC 1015.

⁴⁰⁰ (30 July 1845) 82 GBPD HC 1236.

Act would undermine Māori interests. The Earl of Lincoln provides further explanations of the constitutional design.⁴⁰¹

“[W]hen I speak of municipal institutions, I do not wish it to be understood that I mean such municipal institutions as were given by the noble Earl (Earl Grey) in 1846. They were mere copies of municipal institutions in this country, without any regard to the enormous difference between Great Britain and New Zealand ... I consider that the right hon. Member for Coventry, and the right hon. Baronet then at the head of Her Majesty’s Government, never intended what they called municipal institutions to [merely form] the machinery for paving and lighting; they meant something of *a more comprehensive character—something which should in reality be the foundation of representative government.*” (Emphasis added)

The suspension provoked resistance from the settlers which self-organised into Constitutional Associations. The first was launched in Wellington in December of 1848. Soon after, advocates of these Associations left for Britain. These included Charles Clifford of Wellington, FA Weld also of Wellington, Henry Sewell of Canterbury, and William Fox, the official representative of the Associations in Britain. These advocates united in England with Edward Gibbon Wakefield (the Director of the New Zealand Company) to attempt to lobby the British Government. The 1852 Act is likely to have been drafted at the home of Sir Charles Adderley by him, Wakefield, and these advocates.⁴⁰²

Sir John Pakington (1st Baron Hampton) explains the 1852 constitutional design options that were on the table in these terms:⁴⁰³

“[There were] three alternatives ... [First:] giving Provincial Legislatures, [Second:] follow the precedent of the Australian Government Act of 1842 [sic], and give ... municipal bodies with enabling Clauses to legislate on certain subjects, and that they should be restricted from legislating on all subjects beyond those specified ... [Third:] ... [to leave]

⁴⁰¹ (14 Feb 1848) 96 GBPD HC 582-583.

⁴⁰² Department of Justice (1986) “Appendix A. The electoral law of New Zealand: A brief history” in *Report of the Royal Commission on the Electoral System: Towards a better democracy* (The Royal Commission on the Electoral System, Wellington, 1986) <www.elections.org.nz/sites/default/files/bulk-upload/documents/appendix%20a.pdf>

⁴⁰³ (4 June 1852) 122 GBPD HC 18.

to the Central Legislature, when formed, to provide for the municipal government of these separate districts in such manner as they might think best ... the House would see that between the [first and second alternatives] the distinction was ... one of name than of fact. *[The Bill's] intention was that ... Provincial Legislatures should, in fact, be municipal ...*" (emphasis added).

The issue could be formulated as one of tension between federal and unitary government. WP Morrell correctly identifies the evolutionary aspects of this tension:⁴⁰⁴

"True the provincial system was not in form a federal system, but in the long run it could only continue if the people wished the general idea of federalism to influence the institutions of the country."

In an evolution similar to that in Canada under the British North America (BNA) Act 1867, Sir George Grey pursued a policy of revenue localisation that transferred power from the central government to the provinces.⁴⁰⁵ The provinces "passed most of the legislation of New Zealand ...";⁴⁰⁶ through the 'compact of 1856', all the revenue from the sale of Crown land was allocated to the provinces, as well as three-eighths of the customs revenue. This revenue allowed the provinces to carry out colonisation, which involved organising immigration and public works, notably roads (and later railways) and land settlement.

But in the 1850s New Zealand was suffering from a 'governance problem' from the lack of sufficient settlers able and willing to make politics a profession,⁴⁰⁷ as well as from the changing nature of New Zealand's social fabric:⁴⁰⁸

"[t]he early settlers ... were interested in [questions of pure politics] and [were] prepared to give them as much time and thought as they could spare. The newer arrivals, the gold seekers and assisted immigrants, tended to relegate politics to a subordinate position ..."

⁴⁰⁴ Morrell *The Provincial System* at 261.

⁴⁰⁵ At 64.

⁴⁰⁶ At 80.

⁴⁰⁷ Wood (PhD Thesis, University of Otago, 1965) at 64–65.

⁴⁰⁸ Morrell, above n 404 at 263.

Given this demographic change, the concept of provincialism became insufficiently rooted in, and supported by, the settlers, and soon afterwards, the public developed a strong sentiment that the provinces should be abolished.⁴⁰⁹

These demographic changes also fermented a third dimension of the ‘governance problem’ in the form of a (perceived) risk of political fission.⁴¹⁰

Structural Analysis of the Acts

As a starting point, the structure of the 1846 and 1852 Acts suggests a legislative intent in the spirit of subsidiarity. The emphasis in both Acts is on the provinces rather than central government. This resulted in the provinces assuming the lead in political life.⁴¹¹ Sections relating to the central government appear much later in the Acts, only after an anatomy of the provincial system is provided. Both Acts start by delineating the provincial system’s structure and operation, which suggests that the provinces are the main scale of governance. The ‘centre of gravity’ of both Acts is the vertical separation of powers between the provinces and the central government.

The New Zealand Constitution Act 1846 combined provincial and municipal ideas. Municipalities were combined into two provinces: New Ulster in the North and New Munster in the South.⁴¹² In the Act, provinces are created under s 3. A ‘General Assembly’ is established only later on, in s 5. This assembly was constituted from the provincial governments. Moreover, later sections confer extensive powers on the governors of these provinces, such as issuing proclamations dividing the provinces into counties,⁴¹³ making

⁴⁰⁹ (23 July 1875) 17 NZPD HC 50.

⁴¹⁰ Wood (PhD Thesis, University of Otago, 1965) at 29.

⁴¹¹ At 2.

⁴¹² Morrell *The Provincial System* at 22.

⁴¹³ Section 13.

grants of wastelands,⁴¹⁴ appointing judges,⁴¹⁵ administering civil as well as military officers⁴¹⁶ and granting free and unconditional pardon to convicted offenders.⁴¹⁷

Similarly, the 1852 Act established provinces in s 2. The ‘General Assembly’ is established only in s 32. Now, however, provincial governors are referred to as ‘Superintendents’, suggesting intent to shift power from the provinces towards the General Government. Notwithstanding, s 18 gave Superintendents and Provincial Councils powers to make law for the “peace, order, and good government” of their respective provinces. Section 53 confers similar power on the General Assembly to make laws for the “peace, order, and good government of New Zealand”. The same section gave the General Assembly *power to control and supersede* any provincial laws found repugnant to the laws made by the General Assembly. The Act conferred wide law-making powers on the provinces, limited only in 13 areas reserved for the General Government.⁴¹⁸ Moreover, the House of Representatives was now constituted through direct elections rather than through the provinces.⁴¹⁹

There are important similarities between the structure of the New Zealand 1846 and 1852 Acts, and constitutional Acts from other jurisdictions. In fact, these other Acts seem to suggest that the role of local government would have been emphasised more in the New Zealand Act, probably due to influences from the Treaty of Waitangi.⁴²⁰ For example, the British North America (BNA) Act 1867, which created a federal dominion in Canada, starts with sections creating the provinces.⁴²¹ However, the BNA moves directly to accentuate the powers of the Governor General and the central government. Hence, pts III and IV of the Act are dedicated to the horizontal separation of powers at the federal level. Only in pt V does the Act continue discussing the vertical separation of powers between the provinces

⁴¹⁴ Section 14.

⁴¹⁵ Section 16.

⁴¹⁶ Section 18.

⁴¹⁷ Section 19.

⁴¹⁸ Section 19.

⁴¹⁹ Section 41.

⁴²⁰ It should be noted however that the BNA Act 1867, the Commonwealth of Australia Act 1900, and the South Africa Act 1909 were creating federal entities out of a number of substantial existing polities—at least to an extent greater than in New Zealand. Similarly, the political identities of the Swiss cantons are of very long standing.

⁴²¹ Sections 5 and 6.

and the central government. Sections 91 and 92 of the BNA perform a role similar to ss 18 and 19 in the New Zealand Constitution Act 1852 (giving the Provinces limited legislative powers).

The South Africa Act 1909 and the Commonwealth of Australia Constitution Act 1900 also have a similar structure.

Even the Federal Constitution of the Swiss Confederation of 1999 has a similar structure to New Zealand's 1852 Constitution. While Switzerland has federal, cantonal and municipal levels of governments, in New Zealand we had the General Assembly, the provinces and municipalities. The Swiss Federal Constitution starts with listing the cantons constituting the federation.⁴²² The sovereignty of cantons is limited by the Federal Constitution.⁴²³ However, in a fundamental difference, the Federal Constitution was amended to include art 5a: "The principle of subsidiarity must be observed in the allocation and performance of state tasks". This provision was adopted by a popular vote on 28 November 2004 and came into force on 1 January 2008. Federal authorities are discussed in detail only at the end, in Title 5. Both New Zealand Constitution Acts of 1846 and 1852 have a similar contemplation of subsidiarity, where sections constituting the provinces are given precedence over those that deal with the General Government. Compare this with the New Zealand Constitution Act 1986, where the emphasis is exclusively on the central government and the horizontal separation of its powers.

⁴²² Article 1.

⁴²³ Article 3.

4.5. Conclusion: Subsidiarity and New Zealand’s constitutional arrangements

Some suggest the provinces were simply a pragmatic interim solution for the difficulties associated with establishing municipal governments at an early stage of colonisation.⁴²⁴ In addition to the ‘governance problem’ discussed above, technological advancement could hence be seen as precipitating the abolition of the provincial system.⁴²⁵ Improvements in communication, partly due to the Public Works Policy carried out by the provinces and later on by the General Government—but also due to technological innovation ushering the advent of the steam engine and the telegraph—made the provincial system less of a necessity than in previous years.

Notwithstanding, the abolition has been described in the New Zealand Parliament as a ‘revolution’.⁴²⁶ Some commentators suggest that the abolition “was perhaps inevitable, but the failure to develop in their place a satisfactory system of local government is profoundly regretted now by most students of New Zealand history”.⁴²⁷ Even today, some argue that the Local Government Act 2002 fails to put into practice the transfer of power that was originally envisaged.⁴²⁸

Today, New Zealand has a three-tier governance structure under the Local Government Act 2002 and its amendments, where regions are created by the authority of the central government. Local government in New Zealand has only the powers conferred upon it by Parliament.⁴²⁹ These powers have traditionally been distinctly fewer than in some other countries. For example, police and education are run by central government, while providing low-cost housing is optional for local councils. Many used to control gas and electricity supply, but nearly all of that was privatised or centralised in the 1990s.

⁴²⁴ See the discussion in Morrell *The provincial system* at 22.

⁴²⁵ Wood (PhD Thesis, University of Otago, 1965) at 37; Herron (PhD Thesis, University of Otago, 1959) at 389.

⁴²⁶ (23 July 1875) 17 NZPD HC 49.

⁴²⁷ JB Condliffe *New Zealand in the Making* at 33.

⁴²⁸ See, for example Philip McDermott “A View from the Antipodes: Comparing the Lombard and New Zealand ways of Governance” in Alessandro Colombo (ed) *Subsidiarity Governance: theoretical and empirical models* (Palgrave Macmillan, New York, 2012) 73 at 92.

⁴²⁹ See Part 2 of the Local Government Act 2002.

The pragmatic aspects of the New Zealand experiment with subsidiarity need to be emphasised. Today, sovereignty is limited by increasing global economic integration. States are no longer able to protect themselves from the negative actions of other states or outside groups.⁴³⁰ Today, “[e]merging forms of ‘complex sovereignty’ [lead to the] emergence of polycentric centers of power within the state”.⁴³¹ This institutional jurisprudence⁴³²

“became the jurisprudence of a fracturing state, characterized by polycentric centers of power ... the point is not the retreat of the state but its internal transformation from the political constitutionalism associated with legal positivism to the economic constitutionalism that supports many of the governance structures of the new global economic order.”

Conversely, some argue that “[t]he claim that globalization is undermining sovereignty is exaggerated and historically myopic”.⁴³³ Instead, while globalisation “has highlighted some tensions between norms and behavior ... there is no evidence that this is leading to some transformation of the international system”.⁴³⁴ The argument suggests that, historically, states never enjoyed complete sovereignty. Moreover, the concept of sovereignty itself is too chameleonic to suggest that sovereignty *per se* is undermined. A more realistic understanding of the history of states suggests limitations all states have faced at all times. The claimed undermining by globalisation is usually asserted through an analysis of its effect on Westphalian sovereignty as a benchmark. In particular, the claim is that the universality of the human rights discourse promoted by globalisation has brought the Westphalian system under unprecedented assault by excluding external authority. However, historically (from the middle of the 17th century to the first part of the 19th century) such external scrutiny is evidenced through factors such as concerns about religious toleration. In fact, the Treaty of Osnabrück—part of the Peace of Westphalia in

⁴³⁰ Steven Lee “A Puzzle of Sovereignty” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate, Aldershot 2006) 29 at 29.

⁴³¹ Kanishka Jayasuriya “Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate, Aldershot, 2006) 367 at 367.

⁴³² At 372.

⁴³³ Stephen D Krasner “Globalization and Sovereignty” in David Smith and others (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 34 at 34.

⁴³⁴ At 49.

1648—was intended to end a series of religious (and other conflicts) within the Holy Roman Empire. Later on,⁴³⁵

“[b]eginning with the Treaty of Vienna and much more forcefully in a series of agreements associated with the Balkans in the nineteenth century and with the Versailles peace after the First World War, the primary focus of international attention was with ethnic minorities.”

Others argue that the effect of globalisation on sovereignty is part of a cyclical process. The argument is that “advocates of the globalization thesis concur with critics in seeing present transformations as not novel except for their scale, scope and complexity”.⁴³⁶

The evolving global importance of local governments “manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries”.⁴³⁷ Localities are now given domestic jurisdiction based on international law instruments.⁴³⁸ Subsidiarity is promoted by international organisations such as the World Bank, and by supra-national entities such as the European Union (EU). We are now evolving towards a new world order where local governments are becoming key actors on the ‘international’ stage.⁴³⁹ This trend is increasing the need for coordination between localities and suggests a growing need for local governments to have a say in creating and adjudicating ‘international norms’.⁴⁴⁰ The question now is “who will grant [localities] the global ‘charter’ to incorporate, and under what conditions”.⁴⁴¹ The principle of subsidiarity provides the platform for answering this question.

The trend towards global governance resurrects the principle of subsidiarity as a platform for constitutional design. Localities are taking the lead in this emerging world

⁴³⁵ At 43.

⁴³⁶ Giovanni Arrighi “Globalization, State Sovereignty, and the ‘Endless’ Accumulation of Capital” in David A Smith, Dorothy J Solinger and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 53 at 55.

⁴³⁷ Yishai Blank “Localism in the New Global Legal Order” (2006) 47(1) *Harv Int L J* 264 at 263–264.

⁴³⁸ See *Ltée v. Hudson (Ville)* [2001] 2 SCR 241, where the Supreme Court of Canada inferred jurisdiction of the municipality to act on environmental protection based on international environmental law.

⁴³⁹ Blank, above n 437, at 269.

⁴⁴⁰ At 272–273.

⁴⁴¹ At 278.

order, where nation states still have an influential role to play, but where local governments are becoming increasingly influential.

Today, there is a growing emphasis on local autonomy. In the context of New Zealand's dynamic subsidiarity, this suggests giving increasing power to local governments. I argued that the introduction and abolition of the provincial system was driven by external considerations. The whole experiment exemplified a pragmatic approach to constitutional change. If this proposition is correct, a re-actualisation of this constitutional tradition would see New Zealand heading to another constitutional change driven by external considerations. This time, globalisation would see a shift of power towards municipal governments, resulting in an arrangement not very different from that envisaged under the *original* 1852 constitutional design.

5. Lessons from the Constitutional Morphogenesis of New England and New Zealand

5.1. Introduction

This chapter provides a comparative analysis of the constitutional instruments that prevailed in New England and New Zealand in the 17th and 19th centuries respectively. These constitutional choices had a lasting impact on economic development (*qua* economic complexity) in these jurisdictions. The analysis is grounded in the historical context of New England and New Zealand, and should not be interpreted as providing any general results. It elaborates normative signals from James Buchanan (and Gordon Tullock) on the size of polities, and uses the economic complexity index and the effect of globalisation on local governance, to advocate for subsidiarity as a guiding principle for constitutional designs in New Zealand.

New Zealand's early constitutional instruments were inspired, if only partly, by the New England colonies:⁴⁴²

“[The New Zealand Company] believed the principle of individuality of settlement to be an important element in successful colonization. In New England, the greatest colonizing achievement of the Old Empire, which in many ways [the Company] took as their model, there had been at least five independent colonies ... and the social unity to which the [Company], like the Puritans of New England, attached great importance was merely another aspect of this principle of individuality.”

This principle of individuality is closely related to the principle of subsidiarity, as both are forms of bottom up decentralisation through existing geo-socio-political governance structures. This is especially relevant to the colonisation of both New England and New Zealand. Moreover, an analogy with New England helps understand the rationale for introducing and abolishing our quasi-federal provincial system. Over time, the New England colonies evolved into states (subdivided into municipalities) under the (loose) control of a central council. This evolution was also envisaged for the New Zealand colonies, at least by the New Zealand Company, as an optimal vehicle for systemic colonisation, and hence economic development.

⁴⁴² Morrell *The Provincial System* at 6.

This analogy is strengthened not only by the relative similarity in size between New Zealand (268,000 square kilometres) and New England (187,000 square kilometres),⁴⁴³ but also in the way their constitutional choices were influenced by Great Britain. In 1686, King James II instituted the office of a Governor General of what he termed ‘the Dominion of New England’, which dispossessed the New England colonies of their colonial legislatures and placed total power in the hands of the Governor General. However, these actions led to a rebellion ending the Dominion only three years after it was introduced (1686–1689). Given the separatist movements in New Zealand,⁴⁴⁴ it is reasonable to suggest abolishing the provincial system was to ensure a similar scenario would not materialise.

Early New Zealand constitutional instruments illustrate a clear commitment to localising legislative powers, at least within provinces. Later there was a shift towards centralisation. In New England, a similar shift was only short-lived. This commitment to local autonomy helps explain the differential in economic development, measured in terms of economic complexity, between the two polities.⁴⁴⁵

The chapter is structured as follows. Section 5.2 introduces the analytical lens used to compare the constitutional designs. The following section canvases these designs. The economic implications are delineated further in section 5.4. The paper ends with a call for making local autonomy a constitutional priority in the New Zealand context.

5.2. Insights from Buchanan’s constitutional political economy

This section furnishes a signal on how states are *ought to be* constituted. For the purposes of this chapter, focus is on insights from Buchanan on how polities *should be* constituted (see also section 4.2). Later in the chapter, I use these insights to analyse the constitutional evolution of New England and New Zealand between unitary and (quasi) federal choices.⁴⁴⁶

⁴⁴³ The North Island alone is around 114,000 square kilometres, while the South Island is around 150,000 square kilometres.

⁴⁴⁴ Wood (PhD Thesis, University of Otago, 1965) at 29; Herron (PhD Thesis, University of Otago, 1959) at 367.

⁴⁴⁵ For the nexus between economic development and economic complexity see Ricardo Hausmann, Cesar Hidalgo et al *The Atlas of Economic Complexity* (Puritan Press, Cambridge MA, 2011).

⁴⁴⁶ My reference to CPE should be limited to the works discussed in this paper, saliently the works by James M Buchanan.

Constitutional Political Economy (CPE), the normative strand of Constitutional Economics, is based on an analogy between markets and politics.⁴⁴⁷ The exchange component of this analogy carries ‘relational’ tones. In a Foucauldian sense, power (and hence politics) is relational.⁴⁴⁸ In markets, such relational tones are reserved to meso communities (beyond the micro of the individual or very small groups).⁴⁴⁹

Sovereignty, one possible form of power relations, is at the centre of CPE discourse.⁴⁵⁰ CPE (à la Buchanan) does not accept the Hobbesian assumption of absolute sovereignty.⁴⁵¹ Nor does it accept the German tradition emphasizing the organic nature of the state.⁴⁵² Instead CPE follows the Roman model where the state never has a distinct personality.⁴⁵³ This is the Wicksellian ideation at the foundation of CPE where the state is the sum of its

⁴⁴⁷ See also Buchanan *The Economics and the Ethics of Constitutional Order*, Buchanan *Europe's Constitutional Future*. Also of interest is Hayek *Denationalisation of Money* (Institute of Economic Affairs, London, 1976), Michael Wiebe “Toward an Anarchist Constitutional Political Economy” 2010 The Southern Economic Association Annual Meetings, Atlanta, November 20-22, RT Long “Market Anarchism as Constitutionalism” in RT Long and TR Machan (eds) *Anarchism/Minarchism: Is a Government Part of a Free Country?* (Ashgate Aldershot, 2008) 133, and J Wiseman “Principles of Political Economy: An Outline Proposal, Illustrated by Application to Fiscal Federalism” 1990 1(1) Constitutional Political Economy 101 at 110. There are important insights on the scalar anchor in Buchanan’s works from his Clubs Theory. These however will need to be addressed in a separate tome. For my purposes here I focus on his contribution to constitutional economics. For a review article on Club Theory see Todd Sandler and John Tschirhart “Club Theory: Thirty Years Later” 1997 93(3/4) Public Choice 335, and Buchanan “Public Choice After Socialism” 1993 77 Public Choice 67 at 69.

⁴⁴⁸ Michel Foucault *Power* (New Press New York 2000) at 324.

⁴⁴⁹ George Silberbauer “Ethics in Small-Scale Societies” in Peter Singer (ed) *A Companion to Ethics* (Blackwell, Cambridge, Massachusetts 1994) 14 at 17-18.

⁴⁵⁰ See also Scot Macdonald and Gunnar Nielsson “Linkages Between the Concepts of ‘Subsidiarity’ and Sovereignty: The New Debate Over Allocation of Authority in the European Union” (paper presented at the Fourth European Union Studies Association (EUSA) Biennial Conference, 1995). See Jeremy Rabkin *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, 2005) at 38 and 51.

⁴⁵¹ Geoffrey Brennan and James Buchanan *The Power to Tax* (Liberty press Indianapolis 2000) at 13-14.

⁴⁵² Buchanan and Tullock *The Calculus of Consent* at 12. See generally Chapter 2. See in contrast Lars Udehn *Methodological Individualism: Background, History and Meaning* (Routledge New York, 2001) at 100, and Max Weber “Essay on Some Categories of Interpretive Sociology” (1981) 22 The Sociological Quarterly 145 at 159. See also J Bodin *Lex Six Livres de la Republique* MJ Tooley (trans) (Blackwell, Oxford, 1955 [1576]) IV, 6. Contrast with the work by Vincent Ostrom where not every decision by the individual is voluntary; where in the post-constitutional phase ‘self-governing institutions can exercise authority over members’. See for example Roberta Herzberg “Commentary on Richard Wagner’s ‘Self-Governance, Polycentrism, and Federalism: Recurring Themes in Vincent Ostrom’s Scholarly Oeuvre’” 2005 57(2) Journal of Economic Behavior and Organisation 189 at 191. Also refer to James Buchanan *The Economics and the Ethics of Constitutional Order* at 40 (ft 13).

⁴⁵³ James Buchanan *The Economics and the Ethics* at 109.

citizens.⁴⁵⁴ Note that this Wicksellian notion of the state is different from that found in the scholarship of Jean-Jacques Rousseau. While Rousseau anticipates Wicksell's argument for the need of consensus in the constitutional phase,⁴⁵⁵ the former conceived of the state as an organism greater than the sum of the parts.⁴⁵⁶ In particular, "Rousseau conceived of sovereignty as a property of a people as distinguished from a mere aggregate".⁴⁵⁷ The Rousseauvian ideal recognises an absolute sovereign, even though it is embedded in the people as opposed to the ruler (under Hobbes):⁴⁵⁸

"It is contrary to the nature of the body politic for the sovereign to impose upon itself a law it cannot break ... There is not, nor can there be, any kind of fundamental law that is obligatory for the body of the people, not even the social contract."

For Rousseau, the state and the sovereign are created simultaneously, just like under the Hobbesian model. Under Rousseau, the seat of sovereignty shifted from classes to 'the people', the collective of all the individual members of the state. This was the genesis of the doctrine of absolute (and abstract) political equality, and the beginning of universal suffrage. Moreover, Rousseau's 'general will' is in direct contrast with CPE's methodological individualism. The latter was earlier supported by Johannes Althusius among others. The difference is that the 'general will' imports a Hegelian conception of the state where it is an organism capable of action beyond that taken by its constituent

⁴⁵⁴ See K Wicksell "A New Principle of Just Taxation" in Richard Musgrave and Alan Peacock (eds) *Classics in the Theory of Public Finance* (Macmillan and Company New York 1994) 72 at 77.

⁴⁵⁵ Jean-Jacques Rousseau *Political Writings: Containing the Social Contract, Considerations on the Government of Poland, Constitutional Project for Corsica* F Watkins (ed and trans) (University of Wisconsin Press, Madison WI, 1986) part I at 215.

⁴⁵⁶ See Dusan Pavlovic "Rousseau's Theory of Sovereignty" (Master of Arts Thesis, Central European University, 1997) at 11-12.

⁴⁵⁷ See John B Noone, Jr "The Social Contract and the Idea of Sovereignty in Rousseau" (1970) 32(3) *The Journal of Politics* 696 at 697.

⁴⁵⁸ Jean-Jacques Rousseau *Jean-Jacques Rousseau The social contract and The First and Second Discourses: Rethinking the Western tradition* (Yale University Press, New Haven, 2002) Book I, Chapter VII at 165. See also the discussion in CE Merriam *History of the Theory of Sovereignty since Rousseau* (Batoche Books, Kitchener, 2001) at 18 and 19. It should however be stated that Rousseau repeats Hobbes' automatism and absolutism, only in a refined manner. Rousseau "made each individual both a potential despot and a victim of a collective totalitarian despotism which he confounded with democracy" [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 99]. See chapter 6 for a delineation of these points.

members. The ‘natural rights’ theoretical basis culminated in the writings of Jean Jacques Rousseau where in the original contract “each surrenders all to all and the product of the process is the body politic, which when passive is called the State, when active is termed the sovereign”.⁴⁵⁹ Under this French formulation indivisibility remained a characteristic of the sovereign power. Rousseau’s sovereignty was absolute, infallible, and inalienable. In the hands of the French Revolution “the principle of all sovereignty resides essentially in the nation”.⁴⁶⁰ It follows that “placing Rousseau within the Constitutional [sic] theory of sovereignty is impossible”.⁴⁶¹ In CPE, however, the state is simply a mechanism that cannot be larger than the sum of its (individual-based) parts.

To understand Buchanan’s form of sovereignty we need to look at the scalar calculus involved. There is a relationship between the scale of a polity and its ability to afford its members choice in the decision-making process.⁴⁶² In particular, there are two separate and distinct elements in the expected costs of any human activity (see also Section 4.2).⁴⁶³ The first are ‘external costs’ that an individual is expected to endure as a result of the actions of others (within his political group) over which he has no direct control.⁴⁶⁴ The second element in the expected costs of any human activity is ‘decision-making costs’ which the individual expects to incur as a result of his participation in organised activity.⁴⁶⁵ The objective of political organisation is to minimize these costs. These costs are shown in Figure 5.1 below. As the group size increased to N the cost curve is as shown in Figure 5.1 Panel I. When the size is increased to \bar{N} , the limit cost (dotted line) will be higher than that for the group of size N . However, the rise of the curve for the \bar{N} group will be less steep. The rationale for this is the increased choices (options) from which a consensus of

⁴⁵⁹ CE Merriam History of the Theory of Sovereignty since Rousseau (Batoche Books, Kitchener, 2001) at 33.

⁴⁶⁰ See art3 in the 1789 “Declaration of the Rights of Man and of the Citizen”.

⁴⁶¹ Dusan Pavlovic “Rousseau’s Theory of Sovereignty” (Master of Arts Thesis, Central European University, 1997) at 7. One of the main features of the ‘Constitutional theory of sovereignty’ is that sovereignty can be divided. See Pavlovic at 6.

⁴⁶² See BF Gussen “On the problem of scale: Hayek, Kohr, Jacobs and the reinvention of the political state” (2013) 24 (1) Constitutional Political Economy 19, Jeffrey Friedman “Methodological vs. Normative Individualism” 1990 4(1/2) Critical Review 5, and Kohr *The overdeveloped Nations* at 59.

⁴⁶³ Buchanan and Tullock *The Calculus of Consent* at 43-44, 62, and 107.

⁴⁶⁴ At 61.

⁴⁶⁵ At 65.

N members of the group can be made. Hence, at N we find a lower cost under the larger group.

The external cost curves are also shown in Figure 5.1. The reason for the upward shift in these curves is similar to that for the decision costs, namely the increase in uncertainty due to the larger number of possible combinations (choices) at each group size.

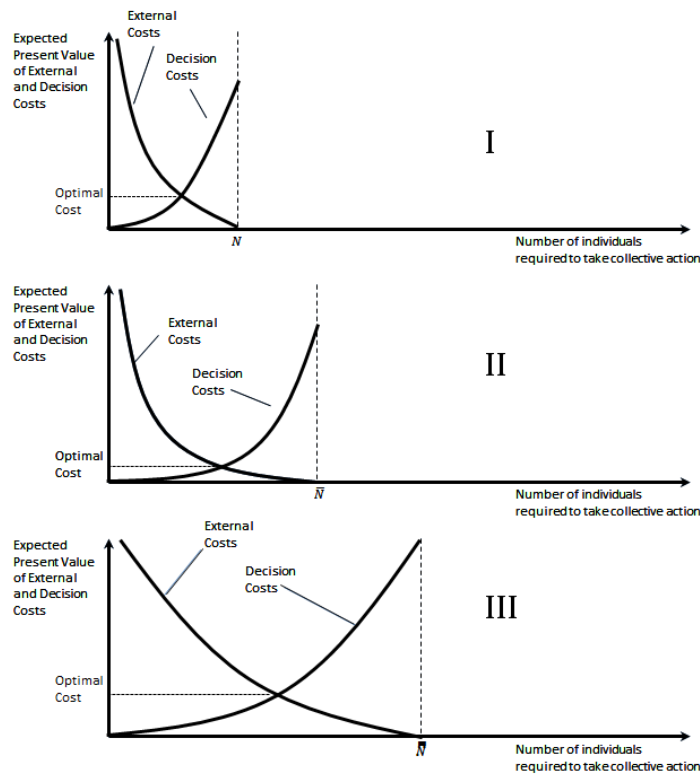


Figure 5.1: The external costs and decision-making costs functions.

As shown in Figure 5.2, these two effects produce a ‘smile’ curve which suggests that there is an optimal scale at which the expected present value of total costs is minimized. This will be referred to as the ‘optimal size’ for the political group.

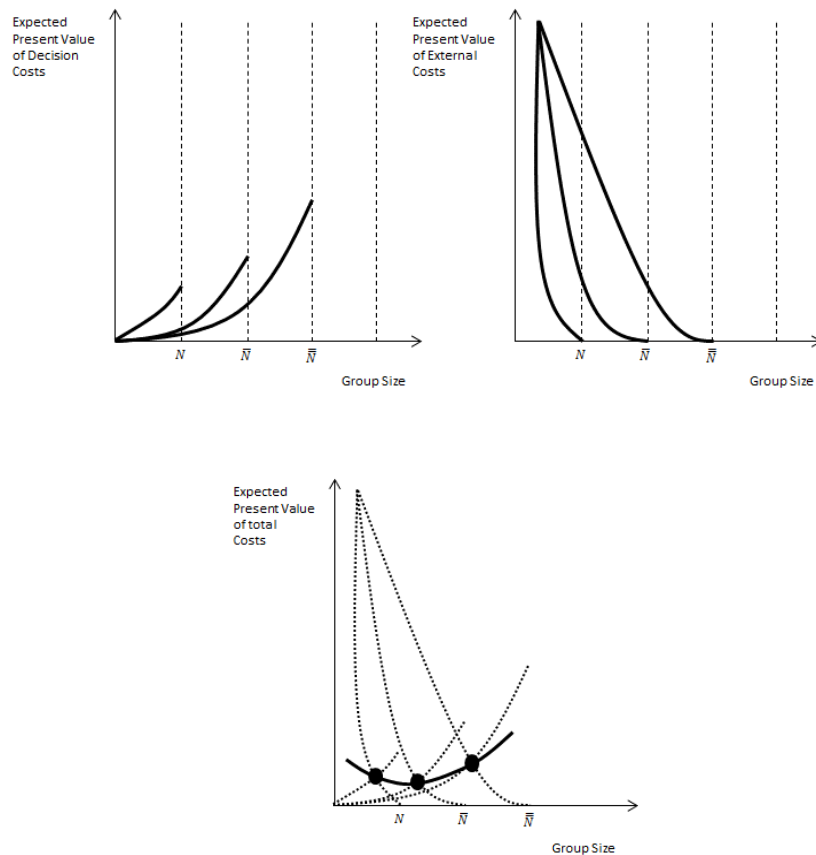


Figure 5.2: The external cost decision-making cost curves as a function of group size

In the final analysis, the following is reached: “if the organization of collective activity can be effectively decentralized, this decentralization provides one means of introducing

marketlike [sic] alternatives into the political process”.⁴⁶⁶ Therefore, “[b]oth the decentralization and size factors suggest that, where possible, collective activity should be organized in small rather than large political units”.⁴⁶⁷

CPE endorses the sovereignty of Spinoza.⁴⁶⁸ Unlike Hobbesian sovereignty, Spinoza’s rendition envisages a relative (rather than an absolute) sovereignty.⁴⁶⁹ Buchanan identifies the reality of the *Leviathan* state today with constitutional failure.⁴⁷⁰ He explains his idea of federalism as “diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority” (emphasis in the original.)⁴⁷¹ His use of ‘shared sovereignty’ rather than ‘divided sovereignty’ is closer to subsidiarity than federalism.⁴⁷²

To inhibit the overextension of government, others also suggest separate jurisdictions with some protected powers within a constitutional federation.⁴⁷³ Where migration is facilitated between such separate jurisdictions, there are tangents with the Tiebout model in relation to sorting individuals according to their preferences.⁴⁷⁴ Parallels can also be seen in the scholarship of Elinor and Vincent Ostrom (the nesting and polycentricity principles

⁴⁶⁶ At 109.

⁴⁶⁷ At 110.

⁴⁶⁸ See BF Gussen “On the problem of scale: Spinozistic sovereignty as the logical foundation of constitutional economics” (2013) 7 (1) *The Journal of Philosophical Economics*. Refer also to Baruch Spinoza *A Treatise on Politics* (Holy-Oake, London, 1854), and Buchanan and Tullock *The Calculus at* 297-298.

⁴⁶⁹ See Chapter 9 for a delineation of this point.

⁴⁷⁰ Buchanan, *Europe’s Const. Future* at 2.

⁴⁷¹ Buchanan, above n 470, at 3-4.

⁴⁷² See also RE Wagner “Complexity, Governance and Constitutional Craftsmanship ” (2002) 61(1) *American Journal of Economics and Sociology* 105 at 115 and 120. On the mutual exclusivity between liberal and social democracies refer to 116. See also Augustine *City of God* (Image Books, New York, 1958); Hayek *Law Legislation and Liberty* at 46; RE Wagner and JD Gwartney “Public Choice and Constitutional Order ” in JD Gwartney and RE Wagner (eds) *Public Choice and Constitutional Economics* (JAI Press London 1988) 29 at 32 and 35. Jane Jacobs suggests city-regions as the appropriate territorial footprint. See generally Jacobs *Cities and the Wealth of Nations*, and Hayek *Studies in Philosophy, Politics and Economics*.

⁴⁷³ Ludwig Van den Hauwe “Constitutional Economics” in Jürgen Backhaus (ed) *The Elgar Companion to Law and Economics* (Edward Elgar Northampton, MA, 1999) at 112.

⁴⁷⁴ Tiebout (1956) 64(5) *Journal of Political Economy* 416.

respectively).⁴⁷⁵ However, these models have a strong functional ‘taste’ divorced from the power calculus at the heart of divided sovereignty, i.e. from capping jurisdictional footprints in a framework of non-contiguous states.

5.3. Subsidiarity in New England and New Zealand

This section considers the New England and New Zealand constitutional designs that were based on the normative signal discussed earlier. These are the constitution of the New England Confederation and the Treaty of Waitangi. A historical reconstruction of these designs expounds their relevance to the principle of subsidiarity.

The United Colonies of New England (1643-1684)

The first experiment in supranational integration in America was a loose confederation of four New England colonies (Plymouth, Massachusetts, Connecticut, and New Haven), created in 1643 under the name ‘The United Colonies of New England’. The creation of the Confederation was no less than an act of absolute sovereignty on the part of the colonies.⁴⁷⁶ The Confederation originated in Plymouth and was probably inspired by the ‘Republic of the Seven United Netherlands’ which dominated world trade in the 17th century.⁴⁷⁷ The latter lasted from 1581 to 1795 when Napoleon set up a puppet state later becoming the Kingdom of Holland. Each province had its own legislative body and functioned independently. The supranational government (*Staten-Generaal*) consisted of

⁴⁷⁵ See MA McKean “Nesting institutions for complex common-pool resource systems” in J Graham, IR Reeve, and DJ Brunckhorst Proceedings of the 2nd International Symposium on Landscape Futures (Institute for Rural Futures and University of New England, Armidale, 2002) at 8, cited in Graham Marshall (2008) “Nesting, Subsidiarity, and Community-Based Environmental Governance Beyond the Local Level” 2(1) International Journal of the Commons 75 at 80. See also E Ostrom *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge University Press, Cambridge, 1990), and Ostrom et al (1961) 55 American Political Science Review 831; RE Wagner (2005) “Self-Governance, Polycentrism, and Federalism: Recurring Themes in Vincent Ostrom’s Scholarly Oeuvre ” 57(2) Journal of Economic Behavior and Organisation 173.

⁴⁷⁶ John Gorham Palfrey *History of New England during the Stuart Dynasty* vols. 1-3 (Little, Brown, and Company, Boston, MA, 1865) 1: 618.

⁴⁷⁷ John Quincy Adams *The New England Confederation of 1643* (Charles C Little and James Brown, Boston, 1843) at 31.

representatives of the seven provinces and was responsible for the common lands which constituted only one fifth of the Republic's territory.⁴⁷⁸

However, unlike the Dutch Republic, the chief purpose of the New England Confederation was security rather than trade; the ability to respond militarily to external threats from the French and the indigenous population. The Articles of Confederation stipulated for a “perpetual league ... for offence and defence, mutual advice and *succor* upon all just occasions both for preserving and propagating the truth and liberties of the Gospel and for ... mutual safety and welfare” (art2; emphasis added). The objective was military cooperation in proportion to each colony's capabilities. The confederation also dealt with the extradition of runaway criminals and servants (art8).

It could also be argued that the Confederation had its origins in Puritan theology,⁴⁷⁹ and that the Confederation was a new version of the historical Puritan covenant doctrine.⁴⁸⁰ On this view there are parallels between the logic of this union and the principle of subsidiarity, with its origins in similar ethical considerations.⁴⁸¹ Support for this argument can be found in the writings of Johannes Althusius (1557-1638) both on subsidiarity (in its territorial interpretation) and the covenant doctrine.⁴⁸² Support for this argument could be also found in the Articles of Confederation. These Articles are in the spirit of subsidiarity as envisaged by CPE (section 5.2). A rule of assistance can be discerned in the Preamble: “to enter into a present Consociation amongst ourselves, for mutual help and strength in all our future concernments”. Similarly, art2 stipulates for “mutual advice and succor”.⁴⁸³ Each colony

⁴⁷⁸ See Jonathan Israel *The Dutch Republic: Its Rise, Greatness, and Fall 1477–1806* (Clarendon Press, Oxford, 1995) at 276.

⁴⁷⁹ Omer Perue “The New England Confederation: Its Origins in Puritan Covenant Theology” (PhD Thesis, Graduate College Union Institute and University, Cincinnati, Ohio, 2004).

⁴⁸⁰ Perry Miller *New England Mind in the Seventeenth Century* (Beacon Press, Boston, 1961) at 478.

⁴⁸¹ For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Kent van Til “Subsidiarity and Sphere-Sovereignty: a match made in ...?” (2008) 69(3) *Theological Studies* 610-636.

⁴⁸² For Althusius' ideas on subsidiarity refer to Section 4.2 (pages 102 to 103) of this thesis. See also Carl Joachim Friedrich *Politica Methodica Digesta of Johannes Althusius* (Harvard University Press, Cambridge, 1932). See also the subsidiarity taxonomy provided by Føllesdal (1998) 6(2) *The Journal of Political Philosophy* 118. See also Ken Endo “The Principle of Subsidiarity: From Johannes Althusius to Jacques Delors” (1994) 44(6) *Hokkaido Law Review* 552 < <http://hdl.handle.net/2115/15558> > .

⁴⁸³ Francis Newton Thorpe (ed) *The Federal and State Constitutions Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America* (Government Printing Office, Washington DC, 1909).

maintained its independence in managing internal affairs. The colonies were willing to give up a limited amount of autonomy in exchange of improved security.

This Confederation was an evolutionary progression of *de facto* self-governance.⁴⁸⁴ Isolated from England, New England colonies evolved representative governments through town meetings and deputy houses. Under the written constitution of the Confederation, each colony retained its local government. A rule of non-interference is evident in art3 of the Confederation:

“It is further agreed that the Plantations which at present are or hereafter shall be settled within the limits of the Massachusetts shall be forever under the Massachusetts and shall have peculiar jurisdiction among themselves in all cases as an entire body, and that Plymouth, Connecticut, and New Haven shall each of them have like peculiar jurisdiction and government within their limits”.

As discussed in the previous section, CPE suggests a similar arrangement where jurisdiction is preserved at the local scale. Each of the six colonies has its own legislative powers and was sovereign in relation to internal affairs.

The Confederation was run by a commission of eight men, two from each colony. A vote of six was required to carry a measure, and their vote was final.⁴⁸⁵ The commission functioned as a legislative body although its powers did not develop beyond the point of recommendation and oversight of administration. The ultimate power remained in the hands of the general courts leaving the commission with no prospects of evolving legislative powers.⁴⁸⁶ This design is also in line of what CPE envisages as to the bottom up approach to governance and the subsidiary role of central government (the commission).

⁴⁸⁴ Herbert Osgood “England and the American Colonies in the Seventeenth Century” (1902) 17 Political Science Quarterly 206.

⁴⁸⁵ For a detailed account of the Confederation see Henry William *History of the United States of America* (The MacMillan Company, New York, 1904).

⁴⁸⁶ Harry Ward *The United Colonies of New England 1643-90* (Vantage Press, New York, 1961) at 60.

The United Tribes of New Zealand (1834) and the Treaty of Waitangi (1840)

This section analyses the New Zealand Confederation of 1834 and the Treaty of Waitangi through the lens of autonomy. The analysis illustrates a commitment to distributed legislative powers in relation to the aboriginal population of New Zealand: the Māori.

The Confederation was a union between Māori tribes in the North Island of New Zealand. Just like the New England Confederation, it too was instigated by security. Similar to the New England context, the French were eying the northern part of the North Island for colonial expansions. In 1831, Ngāpuhi (a northern Māori tribes) petitioned William IV to protect them from other powers. With the help of the British Resident, James Busby, thirty four northern tribes signed a Declaration of Independence (*He Wakaputanga o te Rangatiratanga*) in 1835. They too, just like the New England colonies, were declaring themselves to be sovereign. William IV recognized the Confederation in 1836.

The English text of the Declaration starts with art1 where the tribes declare their independence and the independence of their state. The second Article assigns “[a]ll sovereign power” to the Confederation exclusively. Article 2 explicitly states that the Confederation:

“will not permit any legislative authority separate from themselves in their collective capacity to exist, nor any function of government to be exercised within the said territories, unless by persons appointed by them, and acting under the authority of laws regularly enacted by them in Congress assembled.”

Article 3 elaborates on the functions of the Congress, which include “the preservation of peace and good order” and “the regulation of trade”. This Article also invites the Southern tribes to join the Confederation. Article 4 goes on to request William IV to acknowledge the Confederation and its flag, and to become its “Protector from all attempts upon its independence”. These two Articles served as the kernel for the Treaty of Waitangi. The Treaty expounded the inclusion of the southern tribes, and the protection provided by the English monarch. Nevertheless, after the signing of the Treaty of Waitangi, due largely to power imbalances between the tribes and the British settlers, the Confederation was

assimilated into the settlers' government. Notwithstanding, the Declaration helps reconstruct the subsidiarity dimensions flowing from the Treaty.⁴⁸⁷

The Declaration of Independence of 1835 played in the New Zealand context the same role as the Articles of Confederation of 1643 in the New England context. Both were precursors to supra-national constitutional arrangements in the form of the Treaty of Waitangi of 1840 and the Declaration of Independence of 1776. The Articles of Confederation were a first step towards imagining a new American identity beyond the regional confines of New England.⁴⁸⁸ The Treaty of Waitangi was a similar extension of a novel national identity towards Māori tribes in the South Island. It provides a refinement of art3 and art4 of the Declaration by delineating the architecture of New Zealand governance.⁴⁸⁹

The Treaty affords Māori wide legislative powers, in line with the Declaration of Independence of 1835. The praxis of this autonomy is an instance of subsidiarity (section 4.3). This rationale flows through the design of the 1846 and 1852 constitutions.

⁴⁸⁷ See in particular the analysis by Paul Moon *Te Ara Ki Te Tiriti: The Path to the Treaty of Waitangi* (David Ling Publishing Ltd, Auckland, 2002).

⁴⁸⁸ See generally Joseph A Conforti *Imagining New England: Explorations of Regional Identity from the Pilgrims to the Mid-Twentieth Century* (University of North Carolina Press, Chapel Hill (NC), 2001).

⁴⁸⁹ The nature of the relationship between the Treaty and the Declaration has been under review by the Treaty of Waitangi Tribunal, under the *Te Paparahi o te Raki inquiry* (Wai 1040), filed by Nga Puhū iwi of Northland in 2010. In this inquiry, the Tribunal explained 'sovereignty' as 'the power to make and enforce laws'. The Tribunal clarifies by adding:

"In describing sovereignty in this manner, we need to be clear that for our purposes 'law' does not refer only to English law made by Parliament and the courts." [Waitangi Tribunal *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 9.]

The Tribunal goes on to conclude that:

"...Māori did not cede sovereignty in February 1840." [Waitangi Tribunal *He Whakaputanga me te Tiriti / The Declaration and the Treaty: The Report on Stage 1 of the Te Paparahi o Te Raki Inquiry* (Wai 1040, 2014) at 527.]

Rather Māori agreed to "share power and authority" (emphasis added) (ibid). While the Wai 1040 report does not use the term 'subsidiarity' explicitly, it resonates with the proposals made in this thesis. This understanding is in line with the idea of shared sovereignty, proposed in the thesis.

5.4. Centralisation in New England and New Zealand

In 1643, delegates from Plymouth, Massachusetts Bay, Connecticut, and New Haven, met in Boston and formed a confederation intended as a defence alliance. The Confederation was dissolved after the revocation of the Massachusetts charter in 1684. In 1686, the Crown created a highly unpopular ‘Dominion of New England’. By 1689, the advent of the Glorious Revolution, *inter alia*, ended the dominion. By 1754, another exigency for defence, the French and Indian War, would see these colonies give consideration to the Albany Plan of Union, a proposal for a federated colonial government. This eventually led to the American Revolution. The following analysis traces local autonomy through the shift from confederation to dominion.

The New England Dominion (1686-1689)

Just before the 1689 Glorious Revolution, the English government under James II believed its colonies had been given far too much freedom when it came to observing the Navigation Laws passed in 1662 under Charles II (from the original ordinance of 1651). These laws restricted the use of foreign shipping for trade between England and its colonies. Under these laws, the colonies were allowed to trade only with England or other English possessions. The laws also prohibited the colonies from manufacturing goods produced in the mother country. For England, lack of enforcement of these laws resulted in lost taxes and higher prices. The continuing military threat posed by the other European powers (especially France) was an additional reason to tighten control of the colonies.

To rectify the situation, James II supported a ‘royalisation’ of New England. England opted for a dominion inspired by the French administrative model, an instrument for a *Leviathan*-style absolute sovereignty. The Massachusetts charter was annulled in 1684, practically disestablishing the New England Confederation. In 1686, all of New England was joined in an administrative merger. Joseph Dudley served briefly as the first president of the Dominion (from May to December 1686). He was later replaced by Sir Edmund Andros. In 1688, New York, East Jersey, and West Jersey were also added to the New England Dominion. The Dominion established a large jurisdictional footprint (territory), from the Delaware River in the south to Penobscot Bay in the north—in violation of the small scale normative signal discussed earlier in the chapter. With the addition of New

York and the New Jerseys, the Dominion was almost the size of the Federal Republic of Germany (around 350,000 square kilometres) and double the size of the disestablished Confederation.

The royal Governors wanted to centralise the legislative powers which were in the hands of locally elected officials. The Dominion was to be governed with the assistance of an appointed council which was to replace the colonial assemblies. The colonies resisted this usurpation of their independence and liberties. As a result the Dominion was unsuccessful in its administrative consolidation efforts. Dudley was unable to raise revenues due to the repeal of existing revenue laws by the colonies in anticipation of the revocation of their charters, and his inability of introducing new revenue laws.⁴⁹⁰ Similarly, the lack of funding proved fatal to Andros' efforts to unify colonial military responses.

The impact of the Dominion on economic growth in New England was disastrous. Between 1650 and 1680, there was a rapid increase in real wealth per capita (which results primarily from increases in productive capacity). Accumulated savings were on the rise. However, the last three decades of the 17th century showed little or no growth.⁴⁹¹ Given that the first step towards establishing the Dominion was in 1683, with the legal proceedings towards vacating the Massachusetts charter, and given the fact that another charter for Massachusetts began operating only in 1692, would suggest that the Dominion had a central role in slowing economic activity in New England. The 1680s saw the per capita in New England drop to 25.5 English pounds sterling, compared to 39.5 in the motherland.⁴⁹²

However, external forces soon ushered the end of the Dominion. James II wanted to return England to Catholicism. When his queen gave birth to a potential Catholic heir in 1688, his government invited Protestant Holland's leader William of Orange, who was married to James' own daughter, to invade England and force James off the throne. The Revolution in England legitimised the overthrow of the Dominion. The Dominion collapsed with the removal of James from the throne in the bloodless revolution of 1688-

⁴⁹⁰ VF Barnes *The Dominion of New England: A Study in British Colonial Policy* (Frederick Ungar, New York, 1960 [1923]) at 59-61.

⁴⁹¹ Terry Anderson "Wealth Estimates for the New England Colonies, 1650-1709" (1975) 12 *Explorations in Economic History* 151 at 171. See also Terry Anderson "Growth in Colonial New England: Statistical Renaissance" (1979) 39(1) *The Journal of Economic History* 243 and the references therein.

⁴⁹² Terry Anderson "Wealth Estimates for the New England Colonies, 1650-1709" (1975) 12 *Explorations in Economic History* 151 at 171.

1689 and the ensuing Puritan rebellion. The same Puritan ideals formed the intellectual heritage that imbued the American revolutionary era in the 18th century. The revolution that brought about the American constitution had its genesis in New England. It was constitutional acknowledgement of the importance of regionalism that brought about what came to be known as the United States.⁴⁹³

In summary, the Confederation was a bottom up constitutional design: it emerged from its constituent parts to be only as dominant as the parts were willing to allow it to be. The Dominion was a top down design that was imposed externally to strip the colonies of autonomy and independence. Only the Confederation embodies the constitutional design signals we have encountered in the previous section.

While the colonial governments displaced by the Dominion returned to power, they were not to be formally united again until 1776, when they declared themselves independent states in a larger (but not yet federalist) union called the United States. England never again attempted a large scale unification experiment in the American colonies.⁴⁹⁴ However, a similar consolidation in New Zealand endured since 1876. The following elaborates on this experiment.

The New Zealand Provincial System (1852-1876)

The 1846 and 1852 Constitution Acts were intended to furnish a constitutional design in the spirit of the Treaty of Waitangi. Local autonomy, in the form of municipal corporations with wide legislative powers, was appealed to by those who shaped the Constitution Acts of 1846 and 1852.⁴⁹⁵ Moreover, strong sentiments for autonomy can also be discerned in New Zealand in the 1850s.⁴⁹⁶ Instead, the Acts provided a ‘quasi-federal’ constitutional architecture for New Zealand, which was later abolished in 1876 (see section

⁴⁹³ See Joseph Conforti *Imagining New England: Explorations of Regional Identity from the Pilgrims to the Mid-Twentieth Century* (The University of North Carolina Press, Chapel Hill (NC), 2001) at 57-59.

⁴⁹⁴ Guy Miller “Rebellion in Zion: The Overthrow of the Dominion of New England” (1968) 30(3) *Historian* 439 at 459.

⁴⁹⁵ Morrell *The provincial system* at 22. See also the views of Sir Robert Peel and Lord John Russell (19 June 1845) 81 GBPD HC 934 and 950, and Sir John Pakington (2nd Baronet) (4 June 1852) 122 GBPD HC 18.

⁴⁹⁶ Morrell at 15.

4.4). In 1907 by Royal Proclamation, New Zealand changed its name to reflect its dominion status. The royalisation process was completed in 1953 when the British monarch proclaimed a separate Royal Title for use in New Zealand.⁴⁹⁷

While today there are no accurate figures on the real wealth per capita in New Zealand before and after the abolition, we can glean the effect from the following excerpt describing how one of the most prosperous provinces at the time, Otago (in South Island) would be affected:⁴⁹⁸

“... Provinces which have been making the greatest strides in prosperity ... will be checked, and brought to a stand-still in their career. Otago will be by far the greatest sufferer ... till now it stands far before any of the rest, both as regards population, revenue, commerce, productions, industries, and institutions, so that by the entire removal of its own affairs from its own territory to a distant and jealous centre, there will be a re-action on its prosperity to a greater extent than on any other of the Provinces.”

In 2013, the nominal per capita figure for Otago was around NZD 45,000,⁴⁹⁹ below the national average of around NZD 47,000. The regions that had the highest per capita were in the North Island, the highest being Taranaki at NZD 74,000.

5.5. The economic evidence today

The reason why the New England Dominion was created has strong parallels with the abolition of the New Zealand Provinces—even with the New Zealand we know today:⁵⁰⁰

“A trend toward a closer control of [New England] by England appeared in the Revenue Act of 1673 ... A single government ... would be far less expensive to England than the maintenance of six or eight separate colonies ... if England established a uniform, all-

⁴⁹⁷ Royal Titles Act 1953.

⁴⁹⁸ James McIndoe “A Sketch of Otago from the Initiation of the Settlement to the Abolition of the Province” The Pamphlet Collection of Sir Robert Stout (Victoria University of Wellington Library, Wellington, 1873-1877) vol 32 <<http://nzetc.victoria.ac.nz>>

⁴⁹⁹ Statistics New Zealand figures. See <www.stats.govt.nz>.

⁵⁰⁰ Curtis Nettels *The roots of American civilization; a history of American colonial life* (Appleton-Century-Crofts, New York, 1963) at 297. See also Barnes *The Dominion of New England* at 29.

powerful government over [New England,] its resources might be developed so as to divert the people from manufacturing and foreign trade. They might develop lead and copper mines and produce hemp and naval stores, thus obtaining staple raw materials that could be exchanged directly for English manufactures.”

This explains, if only partially, why New Zealand never excelled in manufacturing. The New Zealand colonies carried independent trade with Great Britain and had little trade between them.⁵⁰¹ Their trade was largely in whaling, sealing and timber.⁵⁰² For the period from 1853 to 1873, 95 percent of total exports came from forestry, agriculture, gold mining and pastoral development. Gold mining alone accounted for 60 percent of the exports, while pastoral land accounted for 30 percent.⁵⁰³ To this day, machinery constitutes less than two percent of all New Zealand exports.⁵⁰⁴ In contrast, New England exports consist mainly of weapons and machines.⁵⁰⁵

Today New England has a nominal GDP of around one trillion US dollars, compared to around USD 200 billion for New Zealand. The New England per capita is around USD 66,000 compared to USD 35,000 for New Zealand (nominal). In terms of the Economic Complexity Index (ECI), New Zealand is ranked 42nd (in 2012), below Turkey and above Bosnia and Herzegovina.⁵⁰⁶ On the other hand, being a microcosm of the US economy, New England ranks twelfth in the world in terms of economic complexity.⁵⁰⁷

The constitutional designs in New England and New Zealand were promoted by external factors. Today globalisation (economic integration) is ushering a new era of local

⁵⁰¹ Morrell *The Provincial System* at 13.

⁵⁰² Condliffe *New Zealand in the Making* at 16.

⁵⁰³ At 516.

⁵⁰⁴ Hausmann and others *The Atlas of Economic Complexity* at 259.

⁵⁰⁵ US Department of Commerce “Background on the New England Economy (Archived)” (2002) US Commercial Service.
<<http://web.archive.org/web/20020919185248/http://www.buyusa.gov/newengland/background.html>>. See also Peter Temin *Engines of Enterprise: An Economic History of New England* (Harvard University Press, Cambridge, 2000), and Margaret Ellen Newell *From Dependence to Independence: Economic Revolution in Colonial New England* (Cornell University, Ithaca (NY), 1998).

⁵⁰⁶ Hausmann and others *The Atlas of Economic Complexity: Mapping Paths to Prosperity* (Centre for International Development, Cambridge (MA), 2011).

⁵⁰⁷ *Ibid.*

autonomy.⁵⁰⁸ Globalisation encompasses a complex array of factors that include economics, technology, cultural convergence, and indigenous renaissance. But it carries a common denominator of increased mobility and interdependence across the globe. The 2008 Global Financial Crisis (GFC) attests to this dynamic of complex interrelations between nation states. Decision-making is migrating towards supranational organisations. The conviction today is that nation states are unable to tackle issues that have ramifications on a global scale; climate change being a prime example. Globalisation hence provides a normative signal on weakening national sovereignty.⁵⁰⁹ This increased integration is proceeding through nodes of urbanisation—alpha and beta cities that are functioning as connectors in a global network,⁵¹⁰ and where citizens are countering with emphasis on embedding decision making in local structures. A new conception of the nation state has emerged: the state as a network.⁵¹¹ Here the emphasis is on maximizing constitutional options rather than deciding among constraints.⁵¹²

Such non-contiguous states are at the centre of Spinoza’s discourse.⁵¹³ Buchanan echoes Spinoza when he explains his idea of *federalism* as “diversity among separate co-operative

⁵⁰⁸ See for example Saskia Sassen *A Sociology of Globalization* (WW Norton and Co, London, 2007).

⁵⁰⁹ Steven Lee “A Puzzle of Sovereignty” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate, Aldershot, 2006) 29 at 29. See also John Andrew *Globalization and Sovereignty* (Rowman & Littlefield Publishers, Plymouth, UK, 2009), and Jean Cohen *Globalization and Sovereignty* (Cambridge University Press, Cambridge, 2012). Jayasuriya in Walker (ed) *Relocating Sovereignty* 367 at 367, and 372. See also Arrighi in Smith et al (eds) *States and Sovereignty in the Global Economy* 53.

⁵¹⁰ See Saskia Sassen *The Global City* (Princeton University Press, Princeton, 1991). See also “2014 Global Cities Index” (14 April 2014) AT Kearney < <http://www.atkearney.com>>

⁵¹¹ Kenichi Ohmae *The End of the Nation State: The Rise of Regional Economies* (HarperCollins London 1995). See also Jean-Marie Guéhenno *The End of The Nation-State* (University of Minnesota Press, Minneapolis 1995), Daniel Chernilo *A Social Theory of The Nation-State* (Routledge, London, 2007), and Smith et al (eds) *States and Sovereignty in the Global Economy*. See also Buchanan and Tullock *The Calculus*. But also see Hayek *Law Legislation and Liberty* vol II. See also TW Bell “Polycentric Law” 1991 7(1) *Institute of Humane Studies Review*. RE Barnett *The Structure of Liberty: Justice and the Rule of Law* (Clarendon Press Oxford 1998) especially Chapter 14. See J Agnew and S Corbridge *Mastering Space: Hegemony, Territory, and International Political Economy* (Routledge, New York, 1995) at 89. Cited in Herod *Scale* at 200. Also see J Allen and A Cochrane “Beyond the Territorial Fix: Regional Assemblages, Politics and Power” (2007) 41(9) *Regional Studies* 1161. Cited in Herod *Scale* at 201-202. Hopkins *Devolution in Context*. K Morgan “The Polycentric State: New Spaces of Empowerment and Engagement?” 2007 41(9) *Regional Studies* 1237 at 1238.

⁵¹² See, for example BS Frey, and R Eichenberger *The New Democratic Federalism for Europe: Functional, Overlapping and Competing Jurisdictions* (Edward Elgar, Cheltenham, UK, 1999).

⁵¹³ Prokhovnik (2001) 27(3) *History of European Ideas* 289 at 300-301. Refer to Baruch Spinoza *A Theologico-Political Treatise / A Political Treatise* (Dover, New York, 1951) at 347-348, 356-357, 370, 383, and 384. Also see Prokhovnik “From Democracy to Aristocracy: Spinoza, Reason and Politics” 1997 23(2-4) *History of European Ideas* 105 at 107.

communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the *limits on* such authority”⁵¹⁴ (emphasis in the original). In the European context, Buchanan envisaged a “federal union within which members of separate units cooperate ...” and share sovereignty, where constitutional requirements guarantee free trade, and with a monetary constitution based on competing national currencies. Buchanan was clear that the European Union should not follow the centralised US model in the post-Lincoln era.⁵¹⁵ Specifically, Buchanan warned that “[e]xcessive Europe-wide regulations, controls, fiscal harmonization, fiat-issue monopoly ... would ... destroy much of the gain that economic integration might promise”.⁵¹⁶

The principle of subsidiarity and Spinoza’s rendition of sovereignty could provide the platform for reinventing the state in the 21st century.

5.6. Conclusion: New England as inspiration for New Zealand subsidiarity

The chapter advocates local autonomy as a backbone for constitutional design based on economic considerations, as delineated in the constitutional evolution of New England and New Zealand.

Normative signals from constitutional economics endorse small jurisdictional footprints (territories) where sovereignty is shared in an Althusian strand of subsidiarity based on existing geo-political communities. Indicia of these signals can be seen in the Articles of Confederation of 1643 and the Declaration of Independence of 1835. The Declaration played a role in New Zealand analogous to that played by the Articles of Confederation in the United States. Both instruments led to imagining new supra-national identities in the form of the Treaty of Waitangi of 1840 and the Declaration of Independence of 1776.

Unfortunately, in New Zealand, a semi-federal provincial system was abandoned in 1876 in favour of a unitary state, while a similar attempt for centralisation was successfully resisted in New England (1689). The economic ramifications can be ascertained in that historical context, but more so today. A comparison between the economic complexity of

⁵¹⁴ Buchanan *Europe's Constitutional Future* at 3-4.

⁵¹⁵ At 6 and 17.

⁵¹⁶ At 18.

New England and New Zealand (as a proxy for economic development) provides evidence as to the devolutionary effect of the dominion option followed in New Zealand.

PART IV EVOLUTIONARY IMPLICATIONS OF SUBSIDIARITY

6. Subsidiarity and the Morphogenetic Foundations of Economic Change

6.1. An analogy with organisms

This chapter follows in the footsteps of Adam Smith, Alfred Marshall, Joseph Schumpeter, W Brian Arthur and other prominent economists in modelling economic change through biological metaphors.⁵¹⁷ In particular, constructs from evolutionary biology provide policy signals apt for the complexity inherent in economic processes and economic change, especially when the latter is embedded in their wider social context.⁵¹⁸ There is hence a biological analogy that runs throughout the chapter. The analogy builds on physiological (functional) and morphological (structural) parallels between social organizations (including polities) and biological organisms. While one strand of evolutionary economics, which could be traced back to Thorstein Veblen and Armen Albert Alchian, opted to model social evolution along Darwinian ‘natural selection’, this chapter opts for an approach that understands evolution through complexity theory. The Veblen-Alchian approach fitted well mainstream (neo-classical) economics with its emphasis on the Hobbesian automatism of *homo sapiens* (see below), and the resulting survivor-selection view of economic ‘natural selection’.⁵¹⁹ However, current advances in biology suggest that this narrow emphasis (on ‘natural selection’ and hence on competition) has distorted the nature of evolution, and hence distorted the analogy between organisms and organisations. I expound this point by tracing a scalar calculus in the writings of Peter Kropotkin, Lewis Mumford, Kenneth Boulding, Murray Bookchin and Ernst Schumacher (among others) to the end of synthesizing their critique of modernity into a coherent school of thought. In particular, I demonstrate their rejection of the nation state as the seat of analysis, an assumption which

⁵¹⁷ For an account of this approach see Danny García Callejas “Biology and Economics: Metaphors that Economists usually take from Biology” (2007) 24 *Ecos de Economía* 153.

⁵¹⁸ Kenneth Boulding *Evolutionary Economics* (Sage Publications, London, 1981) at 169.

⁵¹⁹ See Thorstein Veblen “Why is Economics not an Evolutionary Science?” (1898) 12 *Quarterly Journal of Economics* 373; Armen Alchian “Uncertainty, Evolution and Economic Theory” (1950) 58 *Journal of Political Economy* 211.

has been dominating economics since the Mercantilists and the Physiocrats,⁵²⁰ and their use instead of the city as the natural scale of analysis. The chapter is intended to show how an alternative interpretation of history emerges from this (largely) forgotten school of economic thought. An interpretation that puts subsidiarity (of free cities) at the centre of successful efforts to mitigate ecological (and other socio-economic and political) crises (see Chapter 1).

There are more similarities than differences between social organisations and organisms to justify considering the former as analogous to a biological organism. In (Darwinian) biology, the agents are individual organisms, feedback is provided by ‘natural selection’, and steady improvement is called evolution. In organizations, agents are individual humans, feedback comes from experience, and improvement is called learning.⁵²¹ Both organizations and organisms are behaviour systems.⁵²² Both biological and human systems are dissipative structures that self-organise towards higher complexity.⁵²³ They are dissipative in that their (multidimensional) volumes in phase-space continue to decrease. This complexity is reflected in the richness of (self-organising) interactions between independent agents.⁵²⁴ In other words, interactions that do not require any central control.

⁵²⁰ See PW Buck *The politics of mercantilism* (Henry Holt, New York, 1942); Ronald L Meek *Economics of Physiocracy* (Routledge, London, 1962); Warren J Samuels “The Physiocratic Theory of Economic Policy” (1962) 76(1) *The Quarterly Journal of Economics* 145; Gurutz Jáuregui Bereciartu *Decline of the Nation State* (University of Nevada Press, Reno, 1986); Colin Flint and Peter Taylor *Political geography: world-economy, nation-state, and locality* (Pearson Education, London, 2007); Björn Hettne “Neo-mercantilism: the pursuit of regionness” (1993) 28(3) *Cooperation and Conflict* 211.

⁵²¹ M Mitchell Waldrop *Complexity: The Emerging Science at the Edge of Order and Chaos* (Simon & Schuster, New York, 1992) at 179.

⁵²² Kenneth Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport, 1984 [1953]) at xvii. Note that there are five main categories of modern behaviour theories. These are: pure psychiatry or Freudianism (human mind is conditioned by parents and traumatic experiences), behaviourism (human mind is conditioned by mechanical responses to environments), cognitive psychology (human minds analogous to computer programs which response to inputs), evolutionary psychology (human minds is conditioned by evolutionary needs), and evolutionary-complexity psychology (human mind is conditioned by available behavioural options). See Sean Gould *The Theory of Options: A New Theory of the Evolution of Human Behaviour* (revised ed, Universal Publishers, Boca Raton (FL), 2007) at 63.

⁵²³ Dissipative systems are out-of-equilibrium (open) dynamical system that exchange energy and matter with their environment. Living organisms are a prime example of dissipative systems. Dissipative systems exhibit spontaneous symmetry breaking (see Chapter 3). For an introduction on these systems see Kunihiko Kaneko *Life: An Introduction to Complex Systems Biology* (Springer, New York, 2006). As to self-organisation, or autopoiesis, it is the process through which dissipative systems achieve order through fluctuations. For more on self-organisation refer to Chapter 7. See also Gregoire Nicolis and Ilya Prigogine *Self-organization in Nonequilibrium Systems: From dissipative structures to order through fluctuations* (Wiley, New York, 1977).

⁵²⁴ For a discussion of complexity refer to Chapter 3 and the ‘complexity ansatz’.

These behaviour systems are not only complex and self-organizing but also adaptive: they try to turn events around them into their own advantage.⁵²⁵

In addition, in biological production, energy, time and space determine the nature of ecosystems and the species that can survive in them. However, only space becomes a limiting factor once the nature of the system is determined. A similar logic seems to be present in organisations. For example, Boulding introduces five principles of structural organization (morphology) that illustrate how growth creates form and how form limits growth. One of the key insights that Boulding makes is that the “character of a system frequently has to change not merely because it gets big, but because it stops growing”.⁵²⁶ There are two reasons why ‘behaviour systems’ (such as organisms and organizations) stop growing: either the environment turns less favourable (the principle of increasingly unfavourable environment), or the internal structure becomes less favourable (the principle of increasingly unfavourable internal structure).⁵²⁷ In essence, “as the size of an organization or organism increases, it is impossible to maintain the proportional structure of the organism intact”.⁵²⁸ While technological change extends the size limits for social organizations, such as improvement in the communication or transportation systems, such mechanical aids are not enough. There is also a need for changing the internal structure to push outward the envelope of change.⁵²⁹ In particular this is achieved by new methods of specialization (division of labour). But the increasing size “is possible only at the cost of increasing complexity of structure”.⁵³⁰

However, like every analogy, ours has its limitations. Imposing on human systems a hierarchy similar to the one governing cells, tissues, organs and organisms, is oversimplifying. Unlike cells, individual human beings participate in multiple sub-systems, in which role-playing within societies (such as division of labour) leads to higher

⁵²⁵ Ecosystems are the quintessential example of adaptive systems. For more background information see Iven Mareels and Jan Willem Polderman *Adaptive Systems: An Introduction* (Springer, New York, 1996).

⁵²⁶ Kenneth Boulding *Beyond Economics* (University of Michigan Press, Ann Arbor, 1968) at 81.

⁵²⁷ Kenneth Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport, 1984 [1953]) at 22-23.

⁵²⁸ At 23.

⁵²⁹ At 26.

⁵³⁰ At 27.

complexity. There are hence important differences in reproduction and consciousness between biology and human organisations. For example, organisations must deal with the problem of consent; in organisations, expectations are a determinant part of behaviour.⁵³¹

Moreover, human systems, unlike biological ones, are capable of mutating at negligible time spans:⁵³²

“Over billions of years, of ages of fish, reptiles, and mammals, evolution ‘searches out’ the easy ways by which organisms can adapt. Fitness refines adaptation to where biology adapts at the maximum rate. Once life evolves to advanced primates, the only way to adapt faster is by culture and learning. So humans are motivated by psychology, because in a universe of easy and hard to alter properties it is easier, and ultimately fitter, to adapt behavior by altering psychology rather than altering hard biology.”

Biology evolves towards a saturated state. Beyond this, evolution shifts to attributes that are easier and faster to adapt. These include behaviour (other attributes include intelligence, learning and emotions). Human behaviour maximizes options by testing these options through praxis: by a trial and error process that generates a large variety of options. This tendency to increase options explains the dynamics inherent in social (and economic) change through the construct of emergence,⁵³³ which leads directly to complexity theory (see below). During emergence, an interaction of biological and cultural evolution leads to higher levels of self-organisation where organisms *coevolve*: they adapt to each other.⁵³⁴ This is a form of an evolutionary game between or within species. For example, in biology, bees fly from flower to flower to gather their food. By doing so, bees also pollinate these flowers by transmitting pollen that gets stuck on their hairy bodies from one flower and that rubs off on the next. An example of coevolution in human societies is how people made their urban ecosystems fit their social system, and how they adjust their social system to fit

⁵³¹ See Kenneth Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport, 1984 [1953]) at xxix to xxxi.

⁵³² Sean Gould *The Theory of Options: A New Theory of the Evolution of Human Behaviour* (revised ed, Universal Publishers, Boca Raton (FL), 2007) at 46.

⁵³³ Life is an instance of emergence. It occurs due to self-organisation in complex systems which leads to the production of higher scales. See the discussion in Chapter 7.

⁵³⁴ There are two types of coevolution: mutualistic where organisms benefit from each other, or competitive where coevolution has negative effects organisms. For the seminal article on coevolution see Paul A Ehrlich and Peter H Raven “Butterflies and Plants: A Study in Coevolution” (1964) 18(4) *Evolution* 586.

with their urban ecosystems. In particular, the transformation of agriculture after the Industrial Revolution illustrates coevolution of the social system with ecosystems.⁵³⁵

“Before the Industrial Revolution, people were very much aware of environmental limitations. Their culture, values, knowledge, technology, social organization and other parts of their social system were by necessity closely adapted to nature. Most people were small-scale subsistence farmers; most of the agricultural production was for home consumption ... Most farmers used polyculture - a mixture of several crops together in the same field ... Agriculture changed in Europe when the Industrial Revolution made it possible to use machines instead of human and animal labour for work such as ploughing fields and harvesting crops ... Machines gave farmers the ability to cultivate larger areas of land ... One of the main changes in the ecosystem was from polyculture agriculture to monoculture. With mechanization, farmers stopped mixing crops together because farm machines work best with single crops ... The change from polyculture to monoculture led to many other changes. Monoculture did not protect the soil from erosion or maintain soil fertility as well as polyculture did. Risks of crop failure due to bad weather or pest attacks were also greater with monoculture because ‘all the eggs were in one basket’. As a result, it was important to make agriculture more independent of the environment by means of irrigation, chemical fertilizers and pesticides - all of which were possible with new developments in science and energy from fossil fuels.”

Human evolutionary emergence has four types of selection graduating from slow to fast time scales: Darwinian selection, adaptation of behaviour rather than biology, partner selection based on consent rather than brute force, and by cladogenesis where human population is differentiated through split up (migration) into competing groups. This split up is behavioural, and explains the inclination to maximize options. This maximisation

⁵³⁵ Gerald G Marten *Human Ecology: Basic Concepts for Sustainable Development* (Earthscan Publications, New York, 2001) at 100-102.

could be understood through the principle of ‘order through fluctuation’,⁵³⁶ hence providing a unifying evolutionary platform for physical, biological and social systems.⁵³⁷

However, both behaviour systems could be understood through the process of exchange. A direct result from such an analogy is the assertion that evolution cannot depend on exhaustible resource: “social system which thrives on the exploitation of exhaustible resources does not have a long expected life”.⁵³⁸ Another result is the extension of the idea of catastrophe from organisms to organisations: pushing organisations beyond their ‘proper size’ inevitably results in their breakdown.⁵³⁹ I delineate this point later in this chapter.⁵⁴⁰

The analogy between evolutionary economics and evolutionary biology requires an analytical regime grounded in complexity theory, rather than chaos theory.⁵⁴¹ Chaos (*qua* non-linear systems theory) does not explain the mechanisms leading to order and disorder. In order to account for dynamics leading to catastrophe, and to provide policy signals

⁵³⁶ Dissipative systems are associated with ‘order through fluctuation’. Such structures arise from the amplification of fluctuations resulting from instabilities which, in the case of the world system, for example, are perceived as orderly planetary policy-making and global programme management. In particular, fluctuations drive dissipative system to new a macroscopic state with a different spatio-temporal structure. See Erich Jantsch and C H Waddington (eds) *Evolution and Consciousness: Human Systems in Transition* (Addison-Wesley, New York, 1976) at 83 to 96. In other words, dissipative structures are giant fluctuations whose evolution over time contains an essentially stochastic element ... Fluctuations play this critical role in macroscopic systems in the neighbourhood of bifurcations where the system has to ‘choose’ between alternatives. See Ilya Prigogine *From Being to Becoming: Time and Complexity in the Physical Sciences* (Freeman, San Francisco, 1980) at 132. See also Anthony Judge “Development as Discontinuous Societal Learning: Cyclic Transformation of the Global Answer Economy” (Integrative Working Group B meeting of the Goals, Processes, and Indicators of Development (GPD) project of the Human and Social Development Program of the United Nations University (UNU), Colombo, 1982) <<http://www.uia.org/archive/da/about>> .

⁵³⁷ Erich Jantsch *Design for Evolution: Self-Organization and Planning in the Life of Human Systems* (George Braziller, New York, 1975) at xvi, 35, 37, 56-58, and 61; Sean Gould *The Theory of Options* (Universal Publishers, Boca Raton (FL), 2007 [2000]) at 24, 39, 56, 60, 63, 65, 72-75, 78 and 91; Waldrop *Complexity* at 259 and 288. See also P Glansdorff and Ilya Prigogine *Thermodynamic Theory of Structure, Stability, and Fluctuations* (Wiley-Interscience, New York, 1971), Ilya Prigogine, Gregoire Nicolis, and Agnès Babloyantz “Thermodynamics of Evolution I” (1972) 25(11) *Physics Today* 23, and Prigogine et al “Thermodynamics of Evolution II” (1972) 25(12) *Physics Today* 38.

⁵³⁸ Kenneth Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport, 1984 [1953]) at xxi.

⁵³⁹ At 78.

⁵⁴⁰ Kenneth Boulding *The Organizational Revolution: A Study in the Ethics of Economic Organization* (Greenwood Press, Westport, 1984 [1953]) at xvii, xix, xxi, xxv, xxix, xxxi, 53 and 78; Margret Archer “Social Morphogenesis and the Prospect of Morphogenetic Society” in Margret Archer (ed) *Social Morphogenesis* (Springer, New York, 2013) 1 at 4. This, therefore, provides a link to constitutional economics through the extension of this exchange regime to politics.

⁵⁴¹ For background information on Chaos Theory see L Douglas Kiel and Euel W Elliott (eds) *Chaos Theory in the Social Sciences: Foundations and Applications* (University of Michigan Press, Ann Arbor, 1996).

enabling sustainability, the analysis needs to move from a reductionist approach to one that engages different spatiotemporal scales. Chaos theory provides a regime of analysing order and disorder. On the other hand, complexity theory, through the construct of emergence, explains the mechanisms leading to order and disorder. Chaos does not by itself explain the structure of complex systems. The evolution of complexity increases the rates of adaptability.⁵⁴² Complexity enables order for a low cost and a short time span. Evolution exhibits increasing complexity, of more structured organisms. In a way, organisms and organisations are moved along the edge of chaos to greater complexity. Or in other words, natural selection is a law of motion that moves emergent, self-organising systems towards the edge of chaos. Evolution leads to the edge of chaos.⁵⁴³

Therefore, in order for us to understand evolution we need to understand development, and to understand development we need to understand the trail left by development, namely morphology. Morphology is focused on the analysis of form and structure. Form is an envelope that describes spatial qualities such as size. Structure is about scale: the relationships between entities which define physiology or functionality.⁵⁴⁴ A form could be the product of many structures, but a structure is more likely to have only one form. Form could linger even after structure has changed. Hence, emphasis on form as a proxy for functionality risks assuming stability of forms when there is none. Morphology on the other hand, puts emphasis on scale.⁵⁴⁵

While Darwinian evolution (through natural selection and adaptation) suggests that all states of a dynamical system are potential equilibria, morphological fields have attractors to which the system settles. These attractors are structures that are intrinsically robust. Complexity leads to a non-equilibrium understanding of evolution where emphasis is on transformation and change. This emphasis can be seen in positive feedback loops that lead

⁵⁴² Sean Gould *The Theory of Options: A New Theory of the Evolution of Human Behaviour* (revised ed, Universal Publishers, Boca Raton (FL), 2007) at 60.

⁵⁴³ Mario Giampietro “Using Hierarchy Theory to Explore the Concept of Sustainable Development” (1994) 26(6) *futures* 616 at 624; Sohail Inayatullah “Life, the universe and emergence” (1994) 26(6) *Futures* 683 at 684; Edward N Lorenz *The Essence of Chaos* (University of Washington Press, Seattle, 1993) at 22. Gould *Theory of Options* at 60; Brian Goodwin *How the Leopard Changed its Spots: The Evolution of Complexity* (Weidenfeld & Nicolson, London, 1994) at 92; Waldrop *Complexity* at 12, 21, 42, 66, 295, 296 and 301.

⁵⁴⁴ Structure is taken to mean relationships rather than rules, and hence maintaining the ontological divide between structure and agency. See Douglas V Porpora “Morphogenesis and Social Change” in Margret S Archer *Social Morphogenesis* (Springer, New York, 2013) 25 at 26.

⁵⁴⁵ Roger Lewin *Life at the Edge of Chaos* (Collier Books, New York, 1992) at 36.

away from equilibrium. These positive feedback loops are associated with cooperation,⁵⁴⁶ while negative ones are associated with competition.⁵⁴⁷ Complexity theory, in particular emergent complexity, would also open the door for modelling the economy as an ecosystem where resilience, hierarchy theory, and the theory of dissipative structures help explain economic change. Ordinary complexity involves structure and self-organisation (implying some teleology) where behaviour can be explained by mechanistic models with functional growth and survival. In such ordinary complexity, competition and cooperation are complementary. In contrast, in emergent complexity, there is oscillation between competition and cooperation. The focus is on the evolution of structure, i.e. on morphogenesis. Note however that morphology (structure and form) and physiology (functionality) are interrelated; the question is one of emphasis. Machines, given their static structure, are more about functionality while organisms of emergent complexity are more about morphology.⁵⁴⁸

Humans evolve along a pathway that maximises the options of behaviour for the least cost to adapt. This is so given that hominid evolution started when primate phylogenies (core designs or exclusive sets of attributes) had already saturated their possibilities for further *rapid* adaptation. When phylogenies saturate, hard-to-alter traits accumulate. A phylogeny identifies a level of organisational complexity. If there is no cost-efficient way to evolve complexity, a given population can avoid extinction only by paying the fitness cost of radical change. Human homology (homogenous structures), similar to other species, became frozen once they radiated (increased their morphological disparity).⁵⁴⁹

The analogy propounded in this chapter is therefore a critique of the orthodox view of evolution, which emphasises competition over cooperation. Evolution cannot be based on

⁵⁴⁶ Which could be also interpreted as solidarity or mutual aid.

⁵⁴⁷ A model of economic change based on self-organisation would mean that there would be no externalities since all would be part of the system, and structures would be constantly changing.

⁵⁴⁸ Roger Lewin *Life at the Edge of Chaos* (Collier Books, New York, 1992) at 72 and 88; Goodwin *How the Leopard Changed its Spots* at 125 and 132; Inayatullah 26(6) *Futures* 683 at 683, 687 and 691; CS Helling "Simplifying the Complex: the paradigms of ecological function and structure" (1994) 26(6) *Futures* 598. See also Brian Arthur *Increasing Returns and Path Dependence in the Economy* (Michigan University Press, Ann Arbor, 1994); Silvio Funtowicz and Jerome Ravetz "Emergent Complex Systems" (1994) 26(6) *Futures* 568 at 570; Peter Allen "Coherence, Chaos and Evolution in the Social Context" (1994) 26(6) *Futures* 583.

⁵⁴⁹ Gould *Theory of Options* at 4, 38, 51, 54, 58, 59.

keen competition alone.⁵⁵⁰ According to Kropotkin, there are two laws of nature: mutual struggle or competition, and mutual aid or cooperation.⁵⁵¹ Mutual aid is a law of nature and the chief ‘factor of evolution’ (link to the auxilium model in Chapter 2). Coevolution (above) is based on this dialectic of competition and cooperation. Cooperation is the salient characteristic of life in societies: the concept of culture. Note however, that cooperation does not have to be symmetric. There is no need to assume that humans cooperate to gain a mutual benefit. Humans could be selfish and still choose to cooperate. Power imbalances are one reason why a weaker social group chooses to cooperate with a stronger one. Stronger groups also have a selfish motive to cooperate: they force the weaker group to adapt and hence externalise the cost of change, while still reaping the benefits of that change.⁵⁵²

This understanding of evolution as an oscillation between competition *and* cooperation leads to a critique of the necessity of a strong central government, particularly as advocated by Thomas Hobbes. Hobbes’ *Leviathan* turns men into machines, hence removing to a sovereign all decision making powers.⁵⁵³ *Leviathan* reveals the ultimate tendency of despotic governments, namely automatism. This automatism signalled the rise of the machine. The ‘aesthetic principle’ of the machine is the ‘economic principle’, where (by design) all redundancies are eliminated (hence inducing collapse). The ethics of cooperation was thus being replaced by that of the machine, in a deliberate effort to centralise power rather than achieve efficiencies. Hobbes’ emphasis on power translated into the need for a centralised state to establish law and order. The goal of this power system is progress measured in quantitative units, leading to a perpetual effort to increase size.

⁵⁵⁰ One of the prime examples of the interaction of competition and cooperation in economics is the Prisoners’ Dilemma. See Robert Axelrod *The Complexity of Cooperation: Agent-Based Models of Competition and Cooperation* (Princeton University Press, Princeton, 1997).

⁵⁵¹ Peter Kropotkin *Mutual Aid: A Factor of Evolution* (William Heinemann, London, 1904) at 76.

⁵⁵² Peter Kropotkin *Mutual Aid: A Factor of Evolution* (William Heinemann, London, 1904) at ix, x, xii, 5, 6, 40, 46, 52, 57, 58, 61, and 300. See also Robert Axelrod *The Evolution of Cooperation* (Basic Books, New York, 1984) and the ‘tit for tat’ interaction as the origin of cooperation; Goodwin *How the Leopard Changed its Spots* at 166; Waldrop *Complexity* at 262 and 288; Gould *Theory of Options* at 41 and 72; Murray Bookchin *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (California Cheshire Books, Palo Alto, 1982) at 361.

⁵⁵³ Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996); Kropotkin *Mutual Aid* at 78 and 79; Gould *The Theory of Options* at 23; Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 98, 99, 100-102, 167, 173, 176, 274, and 287; Lewis Mumford *Technics and Civilization* (Routledge & Kegan Paul, London, 1934) at 321, 322, 352, 357, and 365.

Technology made every part of this system undergo rapid change, but the system as a whole became rigid. Under this Hobbesian existence, the purpose of life is quantitative increase to ensure domination. This Hobbesian model lacks any ethical content.⁵⁵⁴ It has no

⁵⁵⁴ The ‘ethical content’ in the philosophy of Thomas Hobbes is controversial. Some suggest that ‘the law of nature’ and ‘the rule of law’ played a major role in Hobbes’ ideas. See for example SA Lloyd *Morality in the Philosophy of Thomas Hobbes: Cases in the Law of Nature* (Cambridge University Press, Cambridge, 2009). Others however doubt these assertions. See Rosamond Rhodes “Taking Hobbes at His Word: Comments on Morality in the Philosophy of Thomas Hobbes by SA Lloyd” (2010) 23 *Hobbes Studies* 170. This author is of the opinion that Hobbes’ ‘state of nature’ were “warre ... of man, against every man” [Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996) at 88] is not just erroneous, but devoid of morality. To see this, we need to consider the outcome of Hobbes’ ‘social contract’, together with its theoretical justifications. It would suffice to read the very few first lines from *Leviathan*:

“NATURE (the Art whereby God hath made and governes the World) is by the *Art* of man, as in many other things, so in this also intimated, that it can make an Artificial Animal. For seeing life is but a motion of Limbs, the beginning whereof is in some principal part within; why may we not say, that all *Automata* (Engines that move themselves by springs and wheeles as doth a watch) have an artificial life? For what is the *Heart*, but a *Spring*, and the *Nerves*, but so many *Strings*; and the *Joints*, but so many *Wheeles*, giving motion to the whole Body, such as was intended by the Artificer? *Art* goes yet further, imitating that Rationall and most excellent work of Nature, *Man*.” [Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996) at 9] (Emphasis in the original).

As suggested by Kropotkin, “[t]he chief error of Hobbes ... was to imagine that mankind began its life in the shape of small straggling families” [Peter Kropotkin *Mutual Aid: A Factor of Evolution* (William Heinemann, London, 1904) at 78]. Kropotkin is careful to explain that “[f]ar from being a primitive form of organization, the family is a very late product of human evolution” (ibid at 79). Similarly, for Mumford, Hobbes starts his analysis from two contradictory positions: while he sees men as virtual machines, he also sees them in constant conflict until they surrender to an external sovereign. Surrender is analogous to the behaviour of automata, which are artificial organisms, making man’s life no more than “a motion of the limbs” [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 100]. For Hobbes, life is a “constant struggle for power motivated by fear” (ibid at 102). This understanding later resulted in the Malthus–Darwin “struggle for existence”, which emphasises competition to the point of “exterminat[ing] all rival groups or species” (ibid at 102). Mumford sees Hobbes’ *Leviathan* as

“the political order that would deliberately turn men into machines, whose spontaneous acts could be regulated and brought under control, and whose natural functions and *moral choices* would all be channelled through a single responsible centre—the sovereign ruler or, in the bureaucratic jargon of our own day, the Decision Maker” [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 98] (Emphasis added).

For Mumford, *Leviathan* reveals the ultimate tendency of despotic governments, namely automatism [Lewis Mumford *The Condition of Man* (Harcourt, Brace and Company, New York, 1944) at 176]. The ethics of cooperation was thus being replaced by that of the machine. The machine “in its esthetic manifestations [has] the same effect that a conventional code of manners has in social interactions” [Lewis Mumford *Technics and Civilization* (Routledge & Kegan Paul, London, 1934) at 357]. This transformation was the result of “deliberate efforts to achieve a mechanical way of life: the motive ... was not technical efficiency but ... power over other men” (ibid at 365). Mumford sees Hobbes’ logic as enforcing the role of power “as the source of all other goods”, which in turn emphasises the “state and the machine, in their dual efforts to establish law, order, and control, and to widen the whole system by further conquests of nature and other human groups” [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 101]. The goal of this power system is progress: “more power, more profit, more productivity, more paper property, more publicity—all convertible into quantitative units” [ibid at 167]. There was now “only one efficient speed, faster; only one attractive destination, farther away; only one desirable size, bigger; only one rational quantitative goal, more” (ibid at 173). Under this Hobbesian existence, the purpose of life “is to furnish and process an endless quantity of data, in order to expand the

anthropological concerns. It is limited to biological needs. Only through limiting mankind's existence to biological needs would totalitarian states be possible.⁵⁵⁵

In summary, there are more similarities than differences between social organisations and organisms to justify considering the former as analogous to the latter. Both are behaviour systems. Still, important differences exist in reproduction and consciousness. Organisations must deal with the problem of consent. Hence, in organisations, expectations are a determinant part of behaviour. However, both behaviour systems could be understood through the process of exchange. This leads to an understanding of evolution based on

role and ensure the domination of the power system" [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 274]. In essence, Hobbes' 'zoömorphism', where animal attributes are passed to human beings, led to distortion greater than the 'anthropomorphism' it reacted against [Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1970) vol 2 at 99].

Bookchin is also critical of Hobbes' notion of the state

"What is more important than Hobbes' notion of the State is the extent to which he divests nature of all ethical content. Even more unerringly than Kepler, who marvelled at the mathematical symmetry of the universe, Hobbes is the mechanical materialist *par excellence*. Nature is mere matter and motion, blind in its restless changes and permutations, without goal or spiritual promise. Society, specifically the State, is the realm of order precisely because it improves the individual's chances to survive and pursue his private aims. It is not far-fetched to say that Hobbes' ruthless denial of all ethical meaning to the universe, including society, creates the intellectual setting or a strictly utilitarian interpretation of justice. To the degree that liberal ideology was influenced by Hobbes' work, it was forced to deal with justice exclusively as a means to secure survival, felicity, and the pragmatics of material achievement." [Murray Bookchin *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (California Cheshire Books, Palo Alto, 1982) at 162] (Emphasis in the original).

Bookchin indicates that in "regions with small farmers, it was difficult to establish totalitarian states. Where their position was weakened, or where large labor surpluses were readily available, centralized states were much more possible and often developed" (ibid at 248). Bookchin argues that "anthropology and a clear reading of history present an image entirely antithetical to that of a grasping, Hobbesian type of humanity" (ibid at 348).

Schumacher also points out Hobbes' error in limiting mankind's existence to biological needs, which inevitably attracts a miserable life. Instead, for Schumacher, "man is *capax universi*, capable of bringing the whole universe into his experience" [Ernst F Schumacher *A Guide for the Perplexed* (Cape, London, 1977) at 45–46].

The reason then for the assertion that Hobbes' model lacks any ethical content is that he reduces human beings to automata, governed by the sovereign who is the 'soul' of the leviathan (the state): Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996) at 9. This rendition of mankind leaves little room for free choice or therefore the need for any principles of behaviour.

⁵⁵⁵ Murray Bookchin *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (California Cheshire Books, Palo Alto, 1982) at 162, 248 and 348. See also EF Schumacher *A Guide for the Perplexed* (Cape, London, 1977) at 45-46.

emergent complexity which requires both competition and cooperation. This in turn leads to questioning the need for strong central governments.

6.2. Economic change as morphogenesis

Morphological analysis is a technique that identifies the dimensions of complexity over a number of constructs and analyses the resulting structures from a variation in each dimension.⁵⁵⁶ An example of such an analysis is the morphological matrix provided in Table 6.1 below, which analyses policy constructs based on four dimensions: freedom, morality, support, and policy focus.

Policy choices with A1 (where freedom is given) are based on a static structure, while A2 policy choices are change-seeking dynamic structures. Entropy (disorder) is high in A1 systems and low in A2 systems. A1 systems, especially those with a large jurisdictional footprint, tend to create a mechanomorphism that transforms human systems into mechanical ones. A2 configurations tend naturally to their A1 counterparts. For example, the democratic ideal tends over time to the welfare state. There is a basic equivalence between these A1 rigid structures and entropy or disorder.⁵⁵⁷

Another point flowing from Table 6.1 is the effect of scale. Out of all the possible policy configurations, only the –B2-C1-D1 combination results in a small jurisdictional footprint (countries with small territories). But over time, driven by the production of scale, this combination will also mutate to one of the other 14 possible combinations, and will end up with an A1 policy choice that ensures mechanomorphism. The mechanism leading to this mutation is discussed below.

When economic change is analysed as morphogenesis, emphasis is placed on structure.⁵⁵⁸ One of the most dominant structures is that of the political state, with political borders being one of the key structural elements of the state. The bigger the country, the greater is the need for internal structure to support its size. The internal structure can be achieved only through modalities of decentralisation. By extension, democracy is a small

⁵⁵⁶ See for example Fritz Zwicky *Discovery, Invention, Research* (Macmillan, New York, 1969).

⁵⁵⁷ Jantsch *Design for Evolution* at 14, 15, and 63.

⁵⁵⁸ EF Schumacher *A Guide for the Perplexed* (Cape, London, 1977) at 20 and 23; Schumacher *Small is Beautiful: Economics as if People Mattered* (Vancouver, Hartley & Marks, 1999) at 50, 148.

scale phenomenon. As soon as large numbers are involved, there would be either external control to coordinate the large structure of the state, or the practically impossible delegation of authority to a cooperative organisation.⁵⁵⁹

Morphological Matrix

A. Freedom is:	1. Given	2. To be build
B. Man's role is:	1. Amoral	2. Moral
C. Design/support task is:	1. Collective	2. Individual
D. Policy focus is:	1. Holistic	2. Atomistic

Examples:

A1-B1-C1-D1	Self-regulation
A1-B1-C1-D2	Anarchist ideal (communist ideal)
A1-B1-C2-D1	Totalitarianism (socialism in our time)
A1-B1-C2-D2	Rousseauvian ideal, capitalist ideal ⁵⁶⁰
A1-B2-C1-D1	Urban government (medieval city)
A1-B2-C1-D2	Welfare state
A1-B2-C2-D1	Absolutism (enlightened dictatorship)
A1-B2-C2-D2	Paternalism, feudalism
A2-B1-C1-D1	Maoist ideal (socialist egalitarianism)
A2-B1-C1-D2	Marxist (revolutionary) ideal
A2-B1-C2-D1	Technocracy
A2-B1-C2-D2	Meritocracy
A2-B2-C1-D1	Modern communes, kibbutzim (socialist ideal)
A2-B2-C1-D2	Democratic ideal
A2-B2-C2-D1	Leadership, elitism
A2-B2-C2-D2	Original Christian ideal

⁵⁵⁹ Schumacher *Small is Beautiful* at 51 and 148; Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1967) vol 1 at 236.

⁵⁶⁰ Both the Rousseauvian and capitalist ideal societies share the same morphological factors: given freedom (civil liberty), amoral role of man (individuals are moral only as a collective body), methodological individualism (which then aggregates to a general will) and atomistic policy (interested in the wellbeing of the individual). The capitalist ideal endeavours to extend as far as possible private property. Similarly, for Rousseau individuals should enjoy property rights that are subordinated only to the right of the community. See Jean-Jacques Rousseau *The social contract and The First and Second Discourses: Rethinking the Western tradition* (Yale University Press, New Haven, 2002). Book I, Chapter 9 at 169.

Table 6.1: A morphological analysis of policy choices.⁵⁶¹

Given the dominance of structure, emphasis in economics should be on morphogenesis. The real world is not epistemologically homogenous.⁵⁶² In particular:⁵⁶³

“[A]ggregates like ‘the national income,’ or ‘the level of employment,’ or ‘the price level’ are ... not simple aggregates but have a complex structure which may well be relevant ... This ‘fallacy of aggregation’ is a common one, it is at the root of most of the fallacies of Marxism, with its assumption of homogenous classes; of Nationalism, with its assumption of homogenous nations; and it even accounts for the spectacular lack of prophetic success among the brighter young economists.”

Such aggregation is in danger of neglecting the internal structure of economic systems and concentrating on form: on aggregate size. This ‘fallacy of aggregation’ has been a common denominator in the history of social (and economic) thought.⁵⁶⁴ This is where the idea of macroeconomic analysis comes in: a halfway house that reduces aggregates into smaller ones such that these smaller ones are not too many in number, and hence easy to manipulate, but their heterogeneity would not negate their aggregation. Economic aggregates and averages are paradoxical: the propositions that are true when applied to a single individual become untrue when applied to the economic system as a whole.⁵⁶⁵

An emphasis on structure leads in turn to an emphasis on scale (the relationships between constituent parts and their change over time), and to a lesser extent on its manifestation as form. Scale “is extremely crucial today, in political, social, and economic affairs just as in almost everything else”.⁵⁶⁶ Just like language, scale (*qua* space and time)

⁵⁶¹ Adapted with modifications from Jantsch *Design for Evolution* Table 1 at 13.

⁵⁶² Kenneth Boulding *Towards a New Economics: Critical Essays on Ecology, Distribution, and Other Themes* (Edward Elgar, Aldershot and Brookfield, 1992) at 75.

⁵⁶³ Kenneth Boulding *Collected Papers* at 258-259.

⁵⁶⁴ An example of this fallacy is the theory of international trade, which fails to recognise that political states will always be heterogeneous.

⁵⁶⁵ Kenneth Boulding *A Reconstruction of Economics* (Wiley, New York, 1950) at 173, 175 and 187-189; Kenneth Boulding *Collected Papers* at 259.

⁵⁶⁶ Schumacher *Small is Beautiful* at 49.

conditions action. In the medieval period, it signified importance. Between the 14th and 17th centuries, with the development of capitalism and the discovery of the laws of perspective, the scalar hierarchy of values was replaced by a system of magnitude. Through a long sequence of abstractions, scale was transformed from a signifier of importance to a proxy for relationships. Unfortunately, this abstraction, progressed to a stage where it threatened the life of real organisms. These scale changes brought about the ‘human machine’, which required a ‘priesthood’ for the reliable organisation of knowledge (natural and supra-natural), and a ‘bureaucracy’ for an elaborate structure for giving and carrying out orders. There was now an almost universally institutionalised concern with punctuality and regularity.⁵⁶⁷

There is an optimal scale (and structure) for every organisation. The return-to-scales phenomenon in the evolution of lungs and internal skeletons allowed living organisms to break through the scale barrier. The mathematical principle behind this return to scale relates to the fact that doubling the length of a structure would quadruple its area and octuple its volume; such increasing returns to scale must at some point turn into diminishing returns. But the case for the ‘human scale’ is not only logistical, democratic or aesthetic; rather, it is ethical.⁵⁶⁸

The problem with delegating power beyond local communities, and the ensuing ideological commitment to a special type of technology, is diagnosed as a problem of scale. The dichotomy between affluence and sustenance parallels the dichotomy between modern and classical concepts of technics. Hobbesian structural changes in society allowed usurping local autonomy. There is a catastrophic result to the problems ensuing from a shift away from the human scale. The problem of scale arises from Hobbesian technologies that recognize no limits to size, speed, and violence. This needs to be countered by putting emphasis on scale and its problematisation. The human scale is the optimal scale for economic activity, which, when surpassed, would have adverse effects on humans. A return to the human scale, via decentralisation, is inextricably tied to specific technology choices, such as small machines utilising renewable resources. It should be emphasised that the

⁵⁶⁷ Lewis Mumford *The Transformations of Man* (Harper & Row, New York, 1972 [1956]) at 18, 20, 23, 50, and 98. Also refer to what Kenneth Boulding refers to as the Brontosaurus Principle: Boulding *The Organizational Revolution* at 35.

⁵⁶⁸ Boulding *A Reconstruction of Economics*.

human scale is never an absolute. Human scale is determined by the dimensions of the human body as well as the purposes that are served.⁵⁶⁹

The triumph of order over freedom is exhibited in the idea of ‘mechanomorphism’, or the scientific approach, where a mechanistic explanation of organic behaviour is seen as sufficient. The problem with economics is that it imitates science in being ‘mechanomorphic’. However, the dominance of this idea of ‘mechanomorphism’ is ephemeral. Organisms are open systems, while mechanisms are closed systems. Hobbes’ ‘zoömorphism’, where animal attributes are passed to human beings, led to distortion greater than the ‘anthropomorphism’ it reacted against. The character of systems changes not only because of scale production but also because they reach morphostasis.⁵⁷⁰ In essence, the production of scale leads to a distortion of the structural proportionality that defines the system. While technological change extends the size limits for social organisations, for example improved communication or transportation systems, such mechanical aids are not enough. There is also a need to change the internal structure to push the envelope of change. Increasing size (form) would be an evolutionary stable strategy *only* if accompanied by a more polycentric structure.⁵⁷¹

The problematisation of scale also relates to the concept of hierarchy which, as a communication system, emerged even before economic classes and state structures. There is a nexus between neuroticism and hierarchy. Hierarchy is a universal characteristic of organisations that is not found in organisms. The necessity for hierarchy (as a communication system) has also created a moral dilemma, namely the loss of equality in a highly stratified society. Both the market economy and democracy are partial solutions to this problem.⁵⁷²

⁵⁶⁹ Bookchin *The Ecology of Freedom* at 2, 36, 129, 133, and 221; Schumacher *Small is Beautiful* at 47, 120, 131; Mumford *The Myth of the Machine* vol 1 at 109 and 255; Murray Bookchin *The Rise of Urbanization and the Decline of Citizenship* (Sierra Club Books, San Francisco, 1987) at 28; Lewis Mumford *The City in History* at plate 59; Boulding *Collected Papers* at 125.

⁵⁷⁰ There are two reasons why behaviour systems (such as organisms and organisations) stop growing: either the environment becomes less favourable (the principle of the increasingly unfavourable environment), or the internal structure becomes less favourable (the principle of the increasingly unfavourable internal structure).

⁵⁷¹ Boulding *The Organizational Revolution* at 22-23 and 26-27. Also Refer to Boulding’s five principles of morphology (structural organisation) that illustrate how growth creates form and how form limits growth: Kenneth Boulding *Beyond Economics* at 81.

⁵⁷² Boulding *Collected Papers* at 260; Mumford *The Myth of the Machine* vol 2 at 95 to 99.

Boulding gives nine levels of hierarchy in systems: the most complex of these are transcendental systems, which incorporate the lower eight orders. Boulding opines that economics is centred at the second level: simple mechanical systems. However, the systems from which economics is abstracted are of the seventh and eighth orders, centred on human behaviour, both in the individual and in societal organisation. The economics resulting from such abstraction would hence suffer from sociological collapse in the Schumpeterian sense, since capitalism does not develop the human character necessary to sustain it. The shift from hierarchy to class societies occurred on the material and the subjective levels. These levels are overlapping. The material level is embodied in the emergence of the city, while the subjective level is seen in the emergence of a repressive sensibility internalising command and obedience.⁵⁷³

Although there is no single interpretation of history that could be satisfactory, history could be seen largely as a progression to new scales leading to more and more encroachment of politics on economics, or to be more precise the encroachment of statecraft on economics:⁵⁷⁴

“Statecraft consists of operations that engage the state: the exercise of its monopoly of violence, its control of the entire regulative apparatus of society in the form of legal and ordinance-making bodies, its governance of society by means of professional legislators, armies, police forces, bureaucracies, and the ancillary professionals who service its operations such as lawyers, educators, technicians, and the like.”

Both politics and statecraft are about the distribution of power.⁵⁷⁵ However, statecraft is paleotechnic, drawing on organisational models from the time of the industrial revolution, especially the idea of the nation state. Statecraft is highly technical, to ensure authority and subordination, and typically results in socio-psychological problems. On the other hand, politics is a small scale, organic, pre-technic phenomenon. Politics “rest[s] on ideological

⁵⁷³ Murray Bookchin *The Ecology of Freedom* at 6, 89, and 90; Boulding *The Organizational Revolution* at xxxii, xxxiii, and 53; Boulding *Collected Papers* at 39 and 76.

⁵⁷⁴ Bookchin *The Rise of Urbanization* at 243.

⁵⁷⁵ Power could be distributed either through the distribution of property or through legal and constitutional limitations.

traditions and premises very different from those we associate with the formation of the nation-state”.⁵⁷⁶

These new scales of organisation are characterised by rise in number, size and power. Today, human energy is devoted to a small number of large organisations, rather than the historical trend of devoting energy to a large number of small organisations. The paleotechnic period (1700 to 1900 CE) is characterised by an increase in energy utilisation, which resulted in dissociating power from its human and geographic limitations. The growth in size of organisations emphasised the role of power. It increased the danger of oligopoly and its emphasis on strategic competition. While this historical ‘progress’ rationalised the dominant economic conditions, the increase in organisations’ size and power has been due to a change on the supply rather than the demand side. The catalyst for this history of new scales was the nation state. It furnished infrastructures, especially transportation and communication systems, that allowed for a shift in the balance of power, as well as the role of power in society. Our culture became power centred. The mobility afforded by the nation state meant that all structures, especially at the local scale, became vulnerable. This mobility later engendered unemployment and mass migration into cities.⁵⁷⁷

There is a historical tension in social organisations between homogeneity and diversification. The emphasis on growth is heightened in dynamic organisations, where cessation of growth causes a moral crisis. Such organisations include the National Socialism of 1920s Germany, where the state (the social organisation) has to be (seen to be) ‘going somewhere’.⁵⁷⁸ In the context of cities, the quantitative changes brought by the change in scale led to qualitative changes (as Hegel would remind us),⁵⁷⁹ where the human roots of the city were drying up. *Urbs*, with its emphasis on order, was now replacing *polis*,

⁵⁷⁶ Mumford *The City in History* at 199; Boulding *The Organizational Revolution* at xxvi, 49, 51, and 53; Mumford *Technics and Civilization* (Routledge & Kegan Paul, London, 1934) at 417; Bookchin *The Ecology of Freedom* at 243; Bookchin *The Rise of Urbanization* at 137.

⁵⁷⁷ Boulding *The Organizational Revolution* at 17, 31; Mumford *Technics and Civilization* at 196. Mumford *Technics and Civilization* at 185; Mumford *The Myth of the Machine* vol 1 at 224, 252, and 255-256. Schumacher *Small is Beautiful* at 35, 50 and 135.

⁵⁷⁸ Boulding *The Organizational Revolution* at 29 and 30. Although sometimes the emphasis on growth could be to correct disproportionalities.

⁵⁷⁹ Hegel pointed out to this type of change where a threshold point moves the system from quantitative to qualitative change. See Georg Wilhelm Friedrich Hegel *Logic* W Wallace (trans) (Clarendon Press, Oxford, 1975). See also Carlos Domingo and Giorgio Tonella “Towards a Theory of Structural Change” (2000) 11 *Structural Change and Economic Dynamics* 209. See also John Grier Hibben *Hegel’s Logic: An Essay in Interpretation* (Charles Scribner’s Sons, New York, 1902).

with its emphasis on freedom. This transformation was transmitted from culture to culture through armies.⁵⁸⁰ For example, Rome relinquished its adherence to the *polis* model by opting for enormous territorial expansion, through which other cities came under strict Roman control. The Romans stripped the Greek *polis* model of its political economy.⁵⁸¹ This was also the genesis of the collapse of the Roman model as the empire succumbed under its own weight. Rome became the ‘imperial city’, the sovereign of all cities—a notion that lingers today in the form of capital cities, the seat of democratic governments and monarchical courts. Roman cities were modelled as ‘miniature Romes’, lacking the diversity inherent in the Greek *polis*.⁵⁸² The same approach can also be seen from the fourth century in Constantinople (the second Rome), and from the fifteenth century in Moscow (the third Rome).

These transformations were “irrational”.⁵⁸³ The resulting institutional structure does not “tend to produce psychologically healthy people”,⁵⁸⁴ since “[p]ower and order, pushed to their final limit, lead to their self-destructive inversion: disorganization, violence, mental aberration, subjective chaos”.⁵⁸⁵ This is so given that “the obstinate disregard for organic limits and human potentialities undermined those valid contributions both to the ordering of human affairs and the understanding of man’s place in the cosmos ...”⁵⁸⁶ Mumford continues to indicate that the dismal adaptation of the post-historic man to the pseudo-life of its mechanical collectives is “a theoretic possibility, not a historical probability ... [for] the conflict between the overrational [sic] and the irrational [is] too great to promise more than an increasingly erratic oscillation, ending in a final breakdown. Whatever his powers and numbers post-historic man has a short expectation of life”.⁵⁸⁷

⁵⁸⁰ Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1967 [1970]) vol 1 at 192.

⁵⁸¹ CG Thomas “The Greek Polis” in R Griffith and CG Thomas (eds) *The City-State in Five Cultures* (ABC Clio Santa Barbra, California, 1981) 31-69 at 42.

⁵⁸² G Parker *Sovereign City: The City-State through History* (Reaktion Books, London, 2004) at 73.

⁵⁸³ Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1967 [1970]) vol 1 at 218.

⁵⁸⁴ At 226.

⁵⁸⁵ Lewis Mumford *The Transformations of Man* (Harper & Row, New York, 1972 [1956]) at 133.

⁵⁸⁶ Mumford *The Myth of the Machine* vol 1 at 226.

⁵⁸⁷ Lewis Mumford *The Transformations of Man* (Harper & Row, New York, 1972 [1956]) at 137.

The story of economic change is the story of history itself, the story of structural modulations, of qualitative rather than quantitative change. History matured under civilization, the group of institutions that first took form under kingship and are characterised by “the centralization of power, the separation of classes, [and] the lifetime division of labor”,⁵⁸⁸ and reveals struggles and conflicts that replace old structures with new ones. Civilisation is ‘a change in scale’,⁵⁸⁹ not just in form. Civilisation is a complex system, since “pure play is one of the main bases of civilization”.⁵⁹⁰ Play is “chaotic and unpredictable, but out of it order keeps emerging”.⁵⁹¹ But Civilisation is not an ordinary complex system. It is a form of emergent complexity, constantly transforming itself—the genesis of innovation. In a system with emergent complexity, like civilization, change emerges from contradictions both in conceptual representations and in ethical judgments. Tragedy is born from contradictions in ethics, while philosophy (and mathematics) is born from contradictions in conceptual representations.⁵⁹² The greatest achievements of mankind are conceived through the same womb of tension between competing regimes.

Civilization’s emergent qualities became however Janus-faced. Inequalities of fortune rapidly developed. Civilisation became an institutionalised system of oppression. A prime example is that of Britain, which, after the Napoleonic Wars, started producing on a large scale, but at a terrible social cost, as revealed by parliamentary commissions in 1840–42. The advent of the industrial revolution saw the degradation of workers. Society’s malaise today could be traced to the expanding scope of civilisation beyond the human scale. Civilisation extends the realm of law and order beyond its local boundaries. Civilizations are not ‘self-contained organisms’. Organic societies internalise law and order,⁵⁹³ while civilization, due to the scalar deficit, externalises them. Under self-organisation internal

⁵⁸⁸ Mumford *The Myth of the Machine* vol 1 at 186. Note that the ‘division of labour’ was not a qualitative development as it does not change the nature of economies but increases their size (form). See Geoffrey Vickers *Value Systems and Social Process* (Basic Books, New York, 1968); Cited in Jantsch *Design for Evolution* at 52.

⁵⁸⁹ Mumford *The Myth of the Machine* vol 1 at 167.

⁵⁹⁰ J Huizinga *Homo Ludens: A study of the Play Element in Culture* (Paladin, London, 1970).

⁵⁹¹ Goodwin *How the Leopard Changed its Spots* at 187.

⁵⁹² Funtowicz and Ravetz (1994) 26(6) *Futures* 568 at 579.

⁵⁹³ Here ‘organic’ refers to the common element between the political state and the natural state.

and external factors merge. Historical differentiation between cultures becomes a process of syncretism, where each culture draws *freely* on other cultures.⁵⁹⁴

In organic societies emergent properties are not so fully developed as under civilization. On the other hand, continuous novelty is a characteristic property of emergent complexity. Species become extinct when they saturate their qualitative development and instead pursue a strategy of quantitative development based on specialisation.⁵⁹⁵ Physiologically, an organic society functions, despite its physical limitations, with an unconscious commitment to freedom. Organic societies lack economic classes and a 'political state'. An organic society does not have hierarchies, but 'unity of diversity'. While not homogenous social groups, these societies have intense solidarity (i.e. union of interests and purposes).⁵⁹⁶ Such societies were distinctly ecological. In these organic societies, the conception of individual autonomy had not yet acquired the fictive 'sovereignty'. Sovereignty was still limited by subsidiarity. Later, civilisation infected these organic societies with hierarchy, causing people to become mechanomorphic. Over time, everything was ranked over scales of varying degrees of superiority. Organic society's solidarity stemmed from strong social ties (kinship), which were, through civilization, replaced by ties based on classes, proprietorship and exploitation. With the breakdown of these societies, privilege became the *modus operandi* of social relationships. Civilisation induces change in society through division and specialisation, which brings unity only partially, and always through repression. Civilisation works through partial reconciliation rather than consensus. The root cause for this malaise could be traced back to the process of urbanisation. Pre-modern cities instead show a human propinquity, not only in size, but also in their ethical attributes. The

⁵⁹⁴ Peter Kropotkin *Fields, Factories and Workshops or Industry Combined with Agriculture and Brain Work with Manual Work* (GP Putman's Sons, New York, 1901) at 8; Kropotkin *Mutual Aid* at 115 and 139; Mumford *Technics and Civilization* at 172; Bookchin *The Ecology of Freedom* at 157 and 329; Mumford *Technics and Civilization* at 107; Jantsch *Design for Evolution* at 40; Mumford *The Condition of Man* at 351; Mumford *Technics and Civilization* at 107; Mumford *The Transformations of Man* at 155. For the framework of mechanical versus organic societies see Emile Durkheim *The Division of Labour in Society* (Free Press, New York, 1997).

⁵⁹⁵ Funtowicz and Ravetz 26(6) *Futures* 568 at 570; Jantsch *Design for Evolution* at 44. See also Pierre Teilhard de Chardin *The Phenomenon of Man* (Harper and Row, New York, 1959), and Pierre Teilhard de Chardin *The Future of Man* (Collins, London, 1964).

⁵⁹⁶ In its economic and ethical rationale, this solidarity formed the basis for what later came to be known as the principle of subsidiarity.

effect of post-civilisation on civilized societies could be as disastrous as that of civilisation on pre-civilized societies.⁵⁹⁷

6.3. 'Axial' change (*Achsenzeit*)

The etiquette of history is scalar change. A vivid example of this etiquette can be seen in the transformation from medieval to baroque institutions, a shift from localism to centralism, from the absolutism of God to the absolutism of the nation state. The nation state is anti-evolutionary. It prevents any evolutionary praxis. Through its uniform jurisdictional footprint (contiguous territory), it limits options. The worship of national history (à la Fichte) is a perversion driven by a mechanistic model of human relationships which is intended to exclude and dominate. The same mechanism can be traced throughout the 19th century in a Malthusian gradient that saw an imperialist struggle between nation states occult class struggle, and by doing so preserving the *status quo* of power distribution. The nation state was the harbinger of a very specific pathology: the 'ancien régime' syndrome. Internal contradictions, the birthmark of civilisation, were suppressed rather than resolved. Novelty and diversity now suffocated under the nation state. The homogenisation of society suppressed social problems to ensure the creation of a state that favoured the expansion of a market economy. In the process, the modality of capitalism adopted by the nation state ensured destroying governance structures at the local level. The rise of the nation state led to the death of the city, though a transformation that is recorded through history as a change in scale.⁵⁹⁸

Before the nation state, governance was based on sovereign cities rather provinces and nations. The nation state replaced the *polis* and its politics (a grass-root organisation embedded in localism) with statecraft to the end of highly centralised structures. The centralisation brought about by the nation state can be traced back to the French Revolution

⁵⁹⁷ Bookchin *The Ecology of Freedom* at 5, 44, 61, 65, 74, 96, 116, 143; Mumford 1967 *The Myth of the Machine* vol 1 at 167; Mumford *The Transformations of Man* at 38 and 275; Bookchin *The Rise of Urbanization* at x and 6; Boulding *Collected Papers* at 274.

⁵⁹⁸ Mumford *The City in History* at 65 and 347; Mumford *The Condition of Man* at 187, 291, 351, 356; Mumford *Technics and Civilization* at 190 and 291; Funtowicz and Ravetz 26(6) *Futures* 568 at 571; Peter Kropotkin *The Essential Kropotkin* (Liveright, New York, 1975) at 83. Bookchin *The Rise of Urbanization* at 145-146; Boulding *Collected Papers* at 78.

of 1794.⁵⁹⁹ City-based governance before the revolution can be seen in Italian city-states, or *communa*. However, these communes did not last long, as they created economic and political differentiation, setting *popologrosso* versus *popolomagro*. The rich merchants hence favoured the rise of the nation state to lessen local resistance to free trade. As a result, city sovereignty was lost and their role was reduced to one of slavery to the nation state.⁶⁰⁰

Notwithstanding the nation state's antievolutionary praxis, complexity theory suggests that history's scalar changes are cyclical. Civilisation, with its hegemonic inclinations, announced a phase of ossification where the political state fails to adapt in response to new challenges (the 'ancien régime' syndrome). But this stasis could only be followed by a period of rapid change. Hegemony alternates (structurally and temporally) with fragmentation. Civilisation has an 'autolytic' property—the final act in the 'ancien régime' syndrome, where the nation state cannibalises itself. In contrast 'autopoiesis', or evolutionary self-creation, is the fruit of complexity at a characteristic scale. The autolysis of the nation state ushers an 'anagenic moment': a culmination of the 'ancien régime' either in paralysis or unstable oscillations leading to ever intensifying crises: "the system shakes itself to bits. This phenomenon is most easily seen in the political and financial spheres. It manifests as a series of frantic and mutually contradictory attempts to restore a vanished stability".⁶⁰¹

History evolves through an *Achsenzeit* (axial or pivotal) cycle,⁶⁰² a 500-year cycle in culture where the human mind revolts against large-scale organisation.⁶⁰³ The 'axial' shift

⁵⁹⁹ Also see chapter 8 on the Swiss constitution and Jean-Jacques Rousseau, and chapter 9 on Baruch Spinoza and the Dutch republic.

⁶⁰⁰ Mumford *The City in History* at 347; Mumford *The Condition of Man* at 187, 291, 351, 356; Mumford *Technics and Civilization* at 190 and 291; Funtowicz and Ravetz 26(6) *Futures* 568 at 571; Kropotkin *The Essential Kropotkin* at 83. Boulding *Collected Papers* at 78; Bookchin *The Ecology of Freedom* at 190; Bookchin *The Rise of Urbanization* at 50, 51, 83, 98-99, 112, 145-146, 202, 222; Boulding *Collected Papers* at 267.

⁶⁰¹ Inayatullah 26(6) *Futures* 683 at 684; Funtowicz and Ravetz 26(6) *Futures* 568 at 571 and 572. See also Francisco Varela, Humberto Maturana and R Uribe "Autopoiesis: the organization of living systems, its characterization and a model" (1974) 5 *Biosystems* 5 187, and Ibn Khaldūn *The Muqaddimah : An introduction to history* (Princeton University Press, New York, 1958).

⁶⁰² For an explanation of the mechanisms that account for this cycle refer to the complexity ansatz and the analysis in chapter 3.

⁶⁰³ Mumford *The Myth of the Machine* vol 1 at 258 and 261; Mumford *The Transformations of Man* at 57-59, 63, 93, and 156. See also Karl Jaspers *The Origin and Goal of History* (Yale University Press, New Haven, 1956 [1953]) at 4; Shmuel N Eisenstadt (ed) *The Origins and Diversity of Axial Age Civilizations* (State University of New York, Albany (NY), 1986); For a critique of Jaspers' approach see Anthony Black "The 'Axial Period': What Was It and What Does It Signify?" (2008) 70 *The Review of Politics* 23. See

takes place during periods of social disintegration.⁶⁰⁴ Karl Jaspers places the beginning of this axial cycle at around 500 BCE:⁶⁰⁵

“There were a multitude of small States and cities, a struggle of all against all, which to begin with nevertheless permitted an astonishing prosperity, an unfolding of vigour and wealth. In China the small States and cities had achieved sovereign life under the powerless imperial rulers of the Chou dynasty; the political process consisted of the enlargement of small units through the subjection of other small units. In Hellas and the Near East small territorial units—even, to some extent, those subjected by Persia—enjoyed an independent existence. In India there were many States and free cities.”

The axial shift continued with oscillations between small and large jurisdictional footprints.⁶⁰⁶

“The universal empires which came into being at the end of the Axial Period considered themselves founded for eternity. But their stability was only apparent. Even though these empires lasted for a long time by comparison with the State-formations of the Axial Period, in the end they all decayed and fell to pieces. Subsequent millennia produced an extraordinary amount of change. From one point of view the disintegration and re-establishment of great empires has constituted history ever since the end of the Axial Period [the axial cycle], as it had constituted it through the millennia during which the ancient civilisations were flourishing.”

A prime example of the axial cycle is the changes that took place in the 16th century where mechanical organisation was replaced by forms of subsidiarity.⁶⁰⁷ The last five centuries (1600 to 2000 CE) saw a shift from the Old World structure analogous to the shift from Neolithic villages to the cities of ancient civilisations. The shift from villages to cities produced a level of technical complexity analogous to the complexity of modern and post-

especially Eugene Halton *From the Axial Age to the Moral Revolution: John Stuart-Glennie, Karl Jaspers, and a New Understanding of the Idea* (Palgrave Macmillan, New York, 2014) Chapter 3.

⁶⁰⁴ The word ‘axial’ is used to suggest a value of centrality leading to convergence.

⁶⁰⁵ Karl Jaspers *The Origin and Goal of History* (Yale University Press, New Haven, 1956 [1953]) at 4.

⁶⁰⁶ At 6.

⁶⁰⁷ Kropotkin *Mutual Aid* at 208.

modern societies. The complexity of modern and post-modern society is only technical; on a cultural level, we are no more complex than earlier societies.⁶⁰⁸

Historically there have been two prominent (and competing) conceptions of the political state: the state as a *societas* and as a *universitas*.⁶⁰⁹ These conceptions are dialectical, i.e. they overlap “over countless penumbra of varying depth”.⁶¹⁰ Nevertheless, as I discuss below, there are epochs where one or the other dominates. The tension between *societas* and *universitas* leads to a cyclical process as stylised in Table 6.2 below.

Period	Description
0 – 500 CE	<i>Universitas</i> enforced by a declining Western Roman Empire
500 – 1000 CE	<i>Societas</i> resulting from the spread of Christianity and Islam
1000 – 1500 CE	<i>Universitas</i> through the rise of leagues of European city-states
1500 – 2000 CE	<i>Societas</i> enforcing the Peace of Westphalia in 1648

Table 6.2: The oscillation between *societas* and *universitas* over the last 2000 years

The first conception, *societas*, is a civil condition,⁶¹¹ an individualistic and contractarian form of association where the state is analogous to a partnership.⁶¹² In the Roman private

⁶⁰⁸ Mumford *The Transformations of Man* at 3 and 94; Bookchin *The Ecology of Freedom* at 216.

⁶⁰⁹ See Michael Oakeshott *On human conduct* (Clarendon Press, Oxford, England 1975) at 200. There are other topologies which could be used to enrich the analysis of different forms of the state. For example, Hayek’s distinction between *teleocratic* and *nomocratic* ordering, and Habermas’ account of system integration and social integration. See Martin Loughlin *Foundations of public law* (Oxford University Press Oxford 2010) at 204. Oakeshott’s topology, however, furnishes a historical account that better explains the issues surrounding sovereignty.

⁶¹⁰ Nicholas Georgescu-Roegen *The Entropy Law and the Economic Process* (Harvard University Press Cambridge (MA), 1971) at 14 and 46.

⁶¹¹ JR Archer (1979) “Oakeshott on Politics” 41(1) *The Journal of Politics* 150 at 162.

⁶¹² L O’Sullivan (2000) “Michael Oakeshott on European political history” 21(1) *History of political thought* 132 at 141.

law of obligations, a *societas* is a contract that requires the agreement of the *socii* (the contractors). A state understood as a *societas* is the product of “a formal relationship in terms of rules, not a substantive relationship in terms of common action”.⁶¹³ Moreover, “what is intrinsic to this mode of association is not the choice to be related but the recognition of understood terms of relationships”.⁶¹⁴ *Societas* is seen to represent political relationships under democratic conditions.⁶¹⁵ The unity of a *societas* was the product of cultural homogeneity, rather than unity of purpose as seen under *universitas*.

A *Universitas*, or a corporation,⁶¹⁶ is a corporate body created by the state, such as municipalities, where individuals are associated in “a partnership of persons which is itself a Person”.⁶¹⁷ A *universitas* is distinguished from a *societas* in its identification of a common purpose and a substantive end.⁶¹⁸ Extreme cultural diversity negates the possibility of a *universitas*.⁶¹⁹ *Universitas* was advanced by the creation and extension of a central apparatus of ruling which was “totally indifferent to the constitution of a government ... Nor is related to [sovereignty]”.⁶²⁰ A *universitas* is a type of relationship where the common purpose leads to policies of integration as for example in medieval Europe.⁶²¹ In contrast to a *societas*, choice is intrinsic to membership of a *universitas*, although not when the state itself is understood as a *universitas*,⁶²² except where we impose limits on the size of jurisdictional footprints, such as under the sorting model by Charles Tiebout, which negates the compulsory nature of membership in a given state (see below).

⁶¹³ Oakeshott *On human conduct* (Clarendon Press, Oxford, England 1975) at 201.

⁶¹⁴ At 202.

⁶¹⁵ Chantal Mouffe “Democratic citizenship and the political community” in The Miami Theory Collective (ed) *Community at loose ends* (University of Minnesota Press, Minneapolis, MN, 1991) 70 at 76 and 78.

⁶¹⁶ Oakeshott *On human conduct* (Clarendon Press, Oxford, England 1975) at 200.

⁶¹⁷ At 203. Although in under Roman law the *universitas* itself was not a person. See O’Sullivan at 141.

⁶¹⁸ At 205.

⁶¹⁹ At 207.

⁶²⁰ At 267.

⁶²¹ At 281.

⁶²² O’Sullivan at 144; Archer at 162. See Oakeshott at 157-158.

In Table 6.2, I use a five-hundred-year axial cycle as a stylised indicator from which we can glean the oscillation between *societas* and *universitas*. This is best seen by tracing the local autonomy of European cities for the last 2000 years, signifying the emergence of *universitas* and the accompanying necessity of limiting jurisdictional footprints.⁶²³ Up to the fifth century, in Western Europe, the collapse of the Roman Empire was accompanied by population and economic decay that resulted in the demise of many towns.⁶²⁴ The breakdown of central authority provide impetus for a form of *universitas* that continued until the fifth century. From the fifth to the tenth centuries, there was a form of religious *societas* resulting from the spread of Christianity and Islam and their imitation of the Roman conception of social life.⁶²⁵ We can trace a form of *universitas* developing at the end of the tenth century when local autonomy was granted by charters such as those in Italy, where “Genoa claimed its first charter in 958, Mantua in 1014, Brescia in 1038, and Ferrara in 1055”.⁶²⁶ This trend of local autonomy spread to other parts of Europe and continued until the sixteenth century, thanks to “the growing success of town governments in managing their finances”.⁶²⁷ By the end of the fifteenth century, there were around five hundred independent political units.⁶²⁸ The demise of these polities, however, could be traced to the fourteenth century when “leading cities extended their hinterlands and control over smaller cities. One of the most aggressive, Florence, acquired Arezzo, Pisa, Livorno, and other towns ...”⁶²⁹ By the time of the Renaissance and the French Revolution we see the loose city networks, that formed the *universitas* between 1000 and 1500 CE, become consolidated across the continent in forms of ‘nation-building’ that “saw a general diminution in the local independence of local communities”⁶³⁰ through the “widespread

⁶²³ See generally Peter Clark *European cities and towns 400-2000* (Oxford University Press Oxford 2009).

⁶²⁴ At 103.

⁶²⁵ L O’Sullivan (2000) “Michael Oakeshott on European Political History” 21(1) *History of Political Thought* 132 at 142.

⁶²⁶ At 91.

⁶²⁷ At 101.

⁶²⁸ Joseph A Camillieri “Rethinking sovereignty in a shrinking fragmented world” in RBJ Walker and Saul H Mendlovitz (eds) *Contending sovereignties: redefining political community* (Lynne Rienner Publishers, London, 1990) 13 at 14.

⁶²⁹ Peter Clark *European cities and towns 400-2000* at 97.

⁶³⁰ At 202.

interference of the state ...”⁶³¹ This migration of sovereignty to the national level reached its zenith with the signing of the Peace of Westphalia in 1648, which later ushered a new form of *universitas* based on international instruments such as the Universal Declaration of Human Rights of 1948.⁶³² The last five centuries (1600 to 2000 CE) saw a shift from the Old World structure analogous to the shift from Neolithic villages to the cities of ancient civilisations. The key point is that the shift from villages to cities produced a level of technical complexity analogous to the complexity of modern and post-modern societies. The complexity of modern and post-modern society is only technical; on a cultural level, we are no more complex than earlier societies. Capitalism has not produced a more ‘sophisticated’ substitute to the societies of medieval Europe.⁶³³

As discussed below, there are now signs of a new era of *universitas*.

Sovereignty and *Societas*

It is possible to interpret sovereignty theories from the sixteenth century to this day as variations on the theme of power exchange between the dualism of ruler and ruled. From the sixteenth to the eighteenth centuries, the “individualistic, contractualistic” approach dominated.⁶³⁴ This approach was largely influenced by the *societas* view of the state.⁶³⁵ However, in the seventeenth and eighteenth centuries, as a reaction to the revolutionary tendencies that emanated from earlier theories of sovereignty, the state was now seen as imposed on the people rather than created by their own power. This eliminated the contractarian approach by perceiving the state in its historical context, either as a product

⁶³¹ At 208.

⁶³² Some theorists suggest that the effect of the Peace of Westphalia is largely mythical. See Raia Prokhovnik *Sovereignities: contemporary theory and practice* (Palgrave Macmillan New York 2007) at 60. The use the treaty is still useful for a demarcation of a new era of *universitas*.

⁶³³ Lewis Mumford *The Transformations of Man* (Harper & Row, New York, 1972 [1956]) at 3 and 94; Murray Bookchin *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (California Cheshire Books, Palo Alto, 1982) at 216.

⁶³⁴ Oakeshott at 251.

⁶³⁵ CE Merriam “History of the Theory of Sovereignty since Rousseau” in The Faculty of Political Science of Columbia University (ed) *Studies in History Economics and Public Law* (Columbia University Press New York 1900) 355 at 391.

of tradition and custom,⁶³⁶ or as a natural evolutionary necessity,⁶³⁷ or as a patrimonial source of authority.⁶³⁸ Now the state was seen as an organism capable of action beyond that taken by its constituent members. This organic-state tradition is orthogonal to the contractarian approach. In the latter, the state is simply a mechanism that cannot be larger than the sum of its (individual-based) parts. This understanding chimes, for example, with the Roman idea of the state.⁶³⁹ The mechanistic view negates the possibility of treating the state as a legal person and hence closes the door on the jurisprudential dimension of the state as a *universitas*.⁶⁴⁰ Notwithstanding, one point provides a common thread throughout sovereignty's classifications: it is perceived as a *societas* rather than a *universitas*.⁶⁴¹ Sovereignty is largely built on the idea of consensual authority (at least outside times of crisis). *Universitas* on the other hand, as exemplified in empire or 'global governance', "rests on the quite different premise that legislative consent to law is not so important to the authority of the law ... [under *universitas*] there is no great choices left to make".⁶⁴² For sovereignty to arise, a society must have already been established as separate from the state.⁶⁴³ The existence of *socii* (partners), while a necessary condition, is not enough for sovereignty to emerge. There also needs to be an exchange of power through what came to be known as the social contract.⁶⁴⁴

Given that sovereignty has its origins in *societas*, some argue that in the middle ages, there was no concept of sovereignty as we know it today—the seat of sovereignty was external to the (local) polity.⁶⁴⁵ Note however that medieval Europe also adopted a form of

⁶³⁶ At 393.

⁶³⁷ At 395.

⁶³⁸ At 393.

⁶³⁹ Merriam at 109.

⁶⁴⁰ Lars Udehn *Methodological Individualism: Background, History and Meaning* (Routledge New York, 2001) at 100. See Max Weber (1981) "Essay on Some Categories of Interpretive Sociology" 22 *The Sociological Quarterly* 145 at 159.

⁶⁴¹ Oakeshott at 251-252.

⁶⁴² Jeremy A Rabkin, *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, 2005) at 41.

⁶⁴³ FH Hinsely *Sovereignty* (CA Watts & Co Ltd London 1966) at 32.

⁶⁴⁴ At 131.

⁶⁴⁵ Rabkin at 47.

the principle of class representation which establishes a constitutional link to sovereignty.⁶⁴⁶ Nevertheless, the medieval *universitas* remained the norm until the sixteenth century when the Italian Renaissance (through the rise of city-states) and the German Reformation (through the drive for political authority over religious matters) started to undermine its dominance. Interestingly, the sixteenth century is also the historical origin for the modern capitalist world-economy and the origin of the (accelerating) international economic integration.⁶⁴⁷ And in this sense, is the genesis of a new form of *societas* (*qua* economic integration). By the sixteenth century, the *societas* that existed in Europe, under imperial sovereignty, was transferred to outside the continent where European states governed their imperial possessions as *societas*. As a response, another form of *universitas* came to prominence: federalism especially as illustrated by the United States of America. Moreover, a tendency towards other forms of a European *universitas* was registered in the nineteenth and twentieth centuries under failed French (Napoleon) and German (Hitler) campaigns. European *societas* seemed to triumph and was the basis on which the whole United Nations system was created. The end result was to spread this western model creating a global *societas* of (nation) states. However, even in the twenty-first century, we see further attempts towards *universitas*, albeit through a consensual route rather than a direct conflict one, in the form of the European Union.

From this perspective, sovereignty has a scalar anchor. Together with the idea of constitutionality (and its inherent consensual nature), sovereignty is not possible on a global scale. Sovereignty “evolved from a judicial concept focusing on the fight to make laws *domestically* to a political-science definition focusing on power and a state’s independence from outside actors”⁶⁴⁸ (Emphasis added). Sovereignty “imply[s] a community that can regulate itself without the approval or direction of *higher powers outside* the community”⁶⁴⁹ (Emphasis added). It pertains to a scale above the individual but one which has other scales

⁶⁴⁶ CA Beard *The Economic Basis of Politics* (George Allen & Unwin London 1935) at 47.

⁶⁴⁷ Immanuel Wallerstein “States? Sovereignty? The Dilemma of Capitalists in an Age of Transition” in David Smith, Dorothy Solinger, and Steven Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 20.

⁶⁴⁸ Scot Macdonald and Gunnar Nielsson “Linkages Between the Concepts of ‘Subsidiarity’ and Sovereignty: The New Debate Over Allocation of Authority in the European Union” (paper presented at the Fourth European Union Studies Association (EUSA) Biennial Conference, 1995).

⁶⁴⁹ Jeremy A Rabkin *Law without Nations? Why Constitutional Government Requires Sovereign States* (Princeton University Press, Princeton, 2005) at 43.

above it which justifies the need for ‘independence from outside actors’. Sovereignty can be at sub-national or national scales but cannot be global. This suggests that the genesis of sovereignty lies in local autonomy from where claims of sovereignty later migrated to the national scale. Sovereignty is therefore the essence of the ‘meso’ scale—an intermediate scale between the micro scale of the individual and the macro scale of the nation-state. At scales beyond the national, sovereignty fractures into a multitude, either through federalism, or the wider principle of subsidiarity.⁶⁵⁰

Subsidiarity and *Universitas*

The state *qua universitas* replaces sovereignty with subsidiarity (or its limited version of federalism).⁶⁵¹ Sovereignty was developed to furnish justification for ‘who’ holds (absolute) supreme power. On the other hand, subsidiarity (federalism) focuses on ‘how’ that supreme power is shared (divided). The origin of subsidiarity is traced to ancient Greece.⁶⁵² However, some suggest it has evolved within federal governmental regimes.⁶⁵³ Others argue subsidiarity derives from *methodological individualism*,⁶⁵⁴ suggesting a bottom-up legitimisation of authority.⁶⁵⁵ Regardless of its origin or rational basis, subsidiarity poses a threat to sovereignty.⁶⁵⁶ Subsidiarity “does not reconstitute the

⁶⁵⁰ At 43.

⁶⁵¹ For the similarities and difference between subsidiarity and federalism, see BF Gussen (2014) “Subsidiarity as a constitutional principle in new Zealand” 12(1) New Zealand Journal of Public and International Law 123.

⁶⁵² Chantal Millon-Delsol *L'État subsidiaire : ingérence et non-ingérence de l'État, le principe de subsidiarité aux fondements de l'histoire européenne* (Presses Universitaires de France, 1992) at 15-27.

⁶⁵³ Scot Macdonald and Gunnar Nielsson “Linkages Between the Concepts of ‘Subsidiarity’ and Sovereignty: The New Debate Over Allocation of Authority in the European Union” (paper presented at the Fourth European Union Studies Association (EUSA) Biennial Conference, 1995).

⁶⁵⁴ Paolo G. Carozza (2003) “Subsidiarity as a Structural Principle of International Human Rights Law” 97(38) The American Journal of International Law 42.

⁶⁵⁵ Scot Macdonald and Gunnar Nielsson “Linkages Between the Concepts of ‘Subsidiarity’ and Sovereignty: The New Debate Over Allocation of Authority in the European Union” (paper presented at the Fourth European Union Studies Association (EUSA) Biennial Conference, 1995).

⁶⁵⁶ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing London, 2002) at 26.

sovereign state as the object of its concern. It explicitly contemplates intervention and assistance for the purpose of protecting human dignity”.⁶⁵⁷ A nexus with human rights means that the principle is neither contractarian nor utilitarian. Furthermore, today the principle does not make any normative claims on the structure of political or economic organization.⁶⁵⁸ The principle remains paradoxical in that it limits the state, but also empowers and justifies it. It reduces the relationship between the national and the local scales to a one-dimensional functional exchange.⁶⁵⁹ While sovereignty, even if only implicitly, gives permanence to the national scale, (the strong version of) subsidiarity (unlike federalism) takes away that permanence: “Subsidiarity has updated the concept of decentralization ... No longer must arguments be made for the devolution of power from the nation-state. Instead the nation-state itself must defend its legitimacy against claims from communities demanding greater control over decision making”.⁶⁶⁰ The key point is that without proper constitutional constraints (see the discussion on Spinoza below) there will always be a cyclical dynamic that underlines the tension between *societas* and *universitas*.

There is now a considerable body of literature suggesting the nation-state is obsolete and is no more the optimal unit for organising economic activity.⁶⁶¹ Thanks to the information revolution, the *glocal*—the intertwining of the global and the local, is taking precedence over the national.⁶⁶² This withering of the nation-state is ushering a new form of ‘*universitas*’ that attacks sovereignty not only from within the (nation) state, but by attacking the state itself. An example at hand is that of Italy with its industrialised north

⁶⁵⁷ Carozza at 58.

⁶⁵⁸ At 44.

⁶⁵⁹ Chantal Millon-Delsol *L'État subsidiaire : ingérence et non-ingérence de l'État, le principe de subsidiarité aux fondements de l'histoire européenne* (Presses Universitaires de France, Paris, 1992) at 8.

⁶⁶⁰ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing London, 2002) at 29.

⁶⁶¹ Kenichi Ohmae *The End of the Nation State: The Rise of the Regional Economics* (HarperCollins London 1995). See also Jean-Marie Guéhenno *The End of The Nation-State* (University of Minnesota Press, Minneapolis 1995); Daniel Chernilo *A Social Theory of The Nation-State* (Routledge London, 2007); and David A. Smith, Dorothy J. Solinger and Steven C. Topik (eds) *States and Sovereignty in the Global Economy* (Routledge London 1999).

⁶⁶² On glocalisation see for example PS Gopalakrishnan *Glocalization: thinking global, acting local* (Icfai University Press, Hyderabad, 2008).

and rural south.⁶⁶³ Moreover, there is now a decoupling of the democratic process from the bulk of the working population. Governments have become hostage to political parties that represent special interests rather than the majority. The result being the adoption of policies (both at the national and sub-national levels) that make no economic sense.⁶⁶⁴ These gyrations are summed up by Gianni De Michelis, a former foreign minister of Italy, as follows: “We are witnessing the explosion of a long-obsolete model of liberal democracy that can no longer accommodate our dynamic, complex societies with their sophisticated electorate of vast diversity and highly differentiated interest”.⁶⁶⁵ Today sovereignty is largely seen as declining in the aftermath of increasing global economic integration, which continues to be dominated by one particular modality: globalisation.⁶⁶⁶ A new conception of the nation-state has emerged: the state as a network.⁶⁶⁷ Some however argue that “[t]he claim that globalization is undermining sovereignty is exaggerated and historically myopic,”⁶⁶⁸ adding that “indicators such as regulatory power and macroeconomic autonomy are ahistorical. They refer to state functions that were either never fully performed by sovereign states or only assumed very recently by such states”.⁶⁶⁹ Notwithstanding, states are no longer able to protect themselves from the negative actions of other states or outside groups.⁶⁷⁰ Sovereignty is not the absolute it used to be. It is now relative.⁶⁷¹ There is now imperial sovereignty that “signals the *end of the idea of the modern*

⁶⁶³ Ohmae at 16.

⁶⁶⁴ At 56.

⁶⁶⁵ At 60.

⁶⁶⁶ Joseph A Camillieri “Rethinking sovereignty in a shrinking fragmented world” in RBJ Walker and Saul H Mendlovitz (eds) *Contending sovereignties: redefining political community* (Lynne Rienner Publishers, London, 1990) at 38.

⁶⁶⁷ J Agnew and S Corbridge *Mastering Space: Hegemony, Territory, and International Political Economy* (Routledge New York, 1995) at 89. Cited in Andrew Herod *Scale* (Routledge, London, 2011) at 200.

⁶⁶⁸ Stephen D. Krasner “Globalization and Sovereignty” in David A. Smith, Dorothy J. Solinger, and Steven C. Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London 1999) 34.

⁶⁶⁹ Eric Helleiner “Sovereignty, Territoriality and the Globalization of Finance ” in David A. Smith, Dorothy J. Solinger, and Steven C. Topik (eds) *States and Sovereignty in the Global Economy* (Routledge London 1999) 138 at 149.

⁶⁷⁰ Steven Lee “A Puzzle of Sovereignty” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth Aldershot 2006) at 29.

⁶⁷¹ Martin Loughlin “Ten Tenets of Sovereignty ” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth Aldershot 2006) at 107-108. Citing Michel Foucault *Power* (New Press New York 2000) at 324. For Foucault’s views on sovereignty see Brian CJ Singer and Lorna Weir (2006) “Politics and sovereign power: considerations on Foucault” 9 *European Journal of Social Theory* 443.

state ... and of a relational sovereignty based on a territorial unit ...” (Emphasis added).⁶⁷² The link between sovereignty and territoriality is being replaced by arrangements where state jurisdiction is punctured by multi-level governance.⁶⁷³ The empirical and theoretical developments of the late twentieth century have “led to a more fundamental questioning of how national borders themselves have been conceptualized”.⁶⁷⁴ Similarly, in the European context, one can identify two (proto-glocal) constitutional revolutions since the end of World War II (WWII). The first is resulting in the more visible creation of pan-European institutions. The second is the counter-unitary-state revolution that started in the 1920s, but reached its height in the decades after WWII. This revolution saw the creation of sub-national, meso-scale, democratic institutions—especially ‘regional states’, that filled the space between the national and the local scales. By the 1990s, even the United Kingdom finally joined this constitutional revolution with the passing of the devolution Acts (The Scotland Act 1998, The Government of Wales Act 1998, and the Northern Ireland Act 1998).⁶⁷⁵ There is now evidence in the United Kingdom, of the emergence of ‘polycentric states’.⁶⁷⁶

Sovereignty is hence targeted by ‘the unravelling of territoriality’, which is a constitutive element of the state. A prime example of this is the disappearance of “territorially homogenous and exclusive” currencies that “accompanied the emergence of the ‘nation-state’”.⁶⁷⁷ Notwithstanding, it has to be said that capital mobility is not necessarily behind the fraying of state territoriality. Hence, the introduction of the Euro was also motivated by political calculations outside of already high levels of capital mobility. Moreover, financial globalisation *per se* does not necessarily pose a challenge to territorial currencies as can be seen in the growth of ‘local currencies’.⁶⁷⁸

⁶⁷² At 108-109.

⁶⁷³ J Allen and A Cochrane (2007) “Beyond the Territorial Fix: Regional Assemblages, Politics and Power” 41(9) *Regional Studies* 1161. Cited in Andrew Herod *Scale* (Routledge, London, 2011) at 201.

⁶⁷⁴ Andrew Herod *Scale* (Routledge, London, 2011) at 201-202.

⁶⁷⁵ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing London, 2002).

⁶⁷⁶ K Morgan (2007) “The Polycentric State: New Spaces of Empowerment and Engagement?” 41(9) *Regional Studies* 1237 at 1238.

⁶⁷⁷ Eric Helleiner “Sovereignty, Territoriality and the Globalization of Finance” in David A. Smith, Dorothy J. Solinger, and Steven C. Topik (eds) *States and Sovereignty in the Global Economy* (Routledge London 1999) 138.

⁶⁷⁸ At 152.

Others argue that the effect of *universitas* (*qua* economic integration through the modality of globalisation) on sovereignty is part of a cyclical process indigenous to capital accumulation, where the pendulum swings between the polar positions of *universitas* and *societas*. This effect of globalisation on sovereignty demonstrates the cyclical processes of ‘production of scale’ and ‘collapse’ where there is no constitutional constraint on the growth of the jurisdictional footprint of the state (refer to section 3). The last five centuries have seen more emphasis on *societas*, first in the European context, and later on globally, through the instruments of international law.⁶⁷⁹ However, we now see a shift in emphasis,⁶⁸⁰ even though the present wave of economic integration is not novel except for its scale:⁶⁸¹

“In each of the four systemic cycles of accumulation [marked by the migration of economic hegemony on the world stage from Genoa, to the Dutch, to the British, and last to the United States] that we can identify in the history of world capitalism from its earliest beginnings in late-medieval Europe to the present, periods characterized by a rapid and stable expansion of world trade and production inevitably ended in a crisis of over-accumulation that ushered in a period of heightened competition, financial expansion, and eventual breakdown of the organizational structures on which the preceding expansion of trade and production had been based ... these periods of intensifying competition [are] the time when the leader of the preceding expansion ... is gradually displaced ... by an emerging new leadership.”

After the Hobbes’ *Leviathan* (first published in 1651),⁶⁸² a sovereign state was conceived of as a territorial jurisdiction: “the territorial limits within which state authority may be exercised on an *exclusive* basis”⁶⁸³ (emphasis added). Today, however, “[e]merging forms of ‘complex sovereignty’ break down the internal structural coherence of the

⁶⁷⁹ Giovanni Arrighi “Globalization, State Sovereignty, and the “Endless” Accumulation of Capital” in David A. Smith, Dorothy J. Solinger, and Steven C. Topik (eds) *States and Sovereignty in the Global Economy* (Routledge London, 1999) 53.

⁶⁸⁰ See for example Yishai Blank (2010) “Federalism, Subsidiarity, and the Role of Local Governments in an Age of Global Multilevel Governance” 37(2) *Fordham Urban Law Journal* 509.

⁶⁸¹ At 55.

⁶⁸² Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996).

⁶⁸³ Robert Jackson “Sovereignty in World Politics: a Glance at the Conceptual and Historical Landscape” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot 2006) 3. Published earlier in *Political Studies* 1999 47(3) 431.

state”.⁶⁸⁴ Today’s jurisprudence “became the jurisprudence of a fracturing state, characterized by polycentric centers of power ...”⁶⁸⁵ These polycentric centres of power are an extension of the idea of shared sovereignty which could be traced back to ancient Greece.⁶⁸⁶ However, this idea did not re-emerge (in the form of federalism) until 1756 when John Locke revived the idea of the *Social Contract*, paving the way for the rise of federal states as exemplified by the United States (US 1789 constitution),⁶⁸⁷ and the Swiss federation (in the 1848, 1874, and 1999 constitutions).⁶⁸⁸ However, sovereignty was expected to still operate from within the state. Since the signing of the Peace of Westphalia in 1648, and especially in the post-Napoleonic era (after 1815), “a prominent operating principle regulating the size and shape of states has indeed been that *states should be contiguous and non-perforated*”⁶⁸⁹ (emphasis added). This should be understood in relation to the observation that “the Westphalian State is ... bound symbiotically to the ideology of nationalism”.⁶⁹⁰ The relationship between sovereignty and territory is captured by the principle of *uti possidetis juris* “according to which existing [state] boundaries are the preemptive basis for determining territorial jurisdictions in the absence of mutual agreement to do otherwise”.⁶⁹¹ In particular, this principle subordinated the principle of self-determination to boundaries decided by colonial powers: juridical-territories trumped sociological-territories.⁶⁹²

⁶⁸⁴ Kanishka Jayasuriya “Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth Aldershot 2006) 361 at 367.

⁶⁸⁵ At 372.

⁶⁸⁶ Aristotle *The Politics* (Harvard University Press Cambridge (MA), 1967) VII, 1326b, 1-26. For a discussion of the divided nature of Aristotle’s sovereignty, see RG Mulgan “Aristotle’s Sovereign” (1970) 18(4) *Political Studies* 518.

⁶⁸⁷ CE Merriam *History of the Theory of Sovereignty since Rousseau* (Batoche Books, Kitchener, 2001).

⁶⁸⁸ For example art3 of the 1999 Constitution.

⁶⁸⁹ Peter Kurrild-Klitgaard (2002) “Opting-Out: The Constitutional Economics of Exit” 61(1) *Journal of Economics and Sociology* 123 at 146, citing B Smith “The Cognitive Geometry of War” in P Koller and K Puhl (eds) *Current Issues in Political Philosophy* (Hölder-Pichler-Tempsky, Vienna, 1997) 394.

⁶⁹⁰ Stephen Tierney “Reframing Sovereignty? Sub-State National Societies and Contemporary Challenges to the Nation-State” in Neil Walker (ed) *Relocating Sovereignty* (Ashgate Dartmouth Aldershot 2006) at 245.

⁶⁹¹ Robert Jackson *Sovereignty: The Evolution of an Idea* (Polity Press, Cambridge, 2007) at 110.

⁶⁹² At 15.

The ‘modern state ideal’ is described as that where “a political economy would very much seem to be that of a geographically circumscribed area within which exists a more or less fixed political hierarchy, which includes all individuals and all political institutions, and whose physical extension is contiguous and non-perforated”.⁶⁹³ It could be argued that the collapse of the gold standard, the emergence of Keynesian economics, and European decolonization had the combined effect that in the mid-twentieth century the world increasingly came to be “pictured in the form of nation-states, with each state marking the boundary of a distinct economy”.⁶⁹⁴ The nation-state (since the eighteenth century) remains the principal territorial unit. Nations result from a process of production of scale that is enforced on a given territory. France is a prime example of this process.⁶⁹⁵ Critique of this national scale and the contiguous non-porous nation-state is relatively rare in the (constitutional) political economy literature, notwithstanding the now widely accepted claim that a decentralised political community would better meet heterogeneous individual preferences.⁶⁹⁶ Keeping in mind of course that decentralisation would obtain only under the auspices of the nation-state.

6.4. A ‘histopathology’ of economic change

While morphology looks at the form and structure of organisms in general, histogenesis looks at the formation of tissues from undifferentiated cells. For an organism, tissues constitute a meso scale between individual cells and organs (performing a specific function).⁶⁹⁷ To understand the problems facing economic change, we need to look at a histopathology that seeks to understand organisations at a meso level (the city), and a cytopathology, which studies diseases on the cellular (individual) level.

⁶⁹³ Peter Kurrild-Klitgaard (2002) “Opting-Out: The Constitutional Economics of Exit” 61(1) *Journal of Economics and Sociology* 123 at 124.

⁶⁹⁴ Timothy Mitchell (1998) “Fixing the Economy” 12(1) *Cultural Studies* 82 at 90.

⁶⁹⁵ John Hopkins *Devolution in Context: Regional, Federal and Devolved Government in the European Union* (Cavendish Publishing, London, 2002) at 8.

⁶⁹⁶ See for example James Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press Ann Arbor 1962).

⁶⁹⁷ In contrast physiogenesis looks at the function of such organs.

The thesis is that tinkering with ancient morphogenetic principles such as structural proportions led to the histopathology we see today. The demise of the sovereign city was not only due to limiting cooperation to a small association that distinguished between immigrants and earlier settlers, but more importantly to neglecting agriculture in favour of industry and trade. It was Roman law that eventually brought down the medieval city with the idea that salvation must be sought in a strongly centralised state. The state proceeded to weed out internal structures (of subsidiarity), in favour of narrow-minded individualism (as a cytopathology). The state brought about standardisation, mass production and the factory system. The same role of the state can be seen in legislation passed in England in 1809 marking the end of small-scale manufacturing.⁶⁹⁸ There is now tension between current economic theories and localism. The former are never submitted to the test of experiment. Now, monotronics created for economic expansion and military superiority has taken the place of polytechnics, based on the needs of living organisms.⁶⁹⁹

Schumacher links the size of the jurisdictional footprint (territory) with the theory of ‘economies of scale’ and modern technologies. He looks back at his native Germany and compares its economic fortunes under the Bismarck Reich with those of German-speaking Swiss and Austrian citizens, finding that the latter were no worse economically. He goes on to give a hypothetical where Denmark was annexed by Bismarck, and then queries whether Copenhagen would be under that scenario anything more than a provincial city.⁷⁰⁰

Over time, the power over other men that flowed from mechanomorphism resulted in a reversal where the organic [began] to dominate the machine. There was now a qualitative change towards social interests, due to a tendency to attain ‘smallness within bigness’ once the size of organisations (including polities) reaches a ‘great size’. During the 19th century, there was a significant increase in self-governance. Today, regional entities suppressed by mechanomorphic technics are being resurrected, both culturally and politically. The Scottish and Catalan separatist movements evidence this gradient.

⁶⁹⁸ Such laws not only emphasised qualitative growth but ushered the occultation of a just distribution system.

⁶⁹⁹ Brian Goodwin *How the Leopard Changed its Spots: The Evolution of Complexity* (Weidenfeld & Nicolson, London, 1994) at 109; Peter Kropotkin *Mutual Aid: A Factor of Evolution* (William Heinemann, London, 1904) at 140, 177-179, 181, 190, 217-218, 220, 226-228, and 255; Lewis Mumford *The Myth of the Machine* (Harcourt Brace Jovanovich, New York, 1967 [1970]) vol 1 at 149-150, 152, and 155.

⁷⁰⁰ Ernst F Schumacher *Small is Beautiful: Economics as if People Mattered* (Hartley & Marks, Vancouver, 1999) at 46-47, 53.

The most effective form of organisation is where society is ‘polylithic’ rather than ‘monolithic’, with many centres of power and an overall organisation with limited power to underwrite the system. The ideal of capitalism is based on a ‘polylithic’ society, as opposed to a ‘monolithic’ society which epitomises communism.⁷⁰¹ In ‘small-scale’ organisations, private ownership is natural. Conversely, in ‘medium-scale’ organisations, ‘private ownership is unnecessary’, as ‘voluntary surrender of privilege’ is not likely to occur where there is a large number of anonymous members. In ‘large-scale’ organisations, private ownership is irrational. Nationalism is a response to the irrationality of private

⁷⁰¹ The ideal of communism is structured around common ownership, hence leading to a monolith, rather than private ownership which would entail a polylithic structure (different power or decision-making centres). For further clarification of the terms ‘polylithic’ and ‘monolithic’ see Peter H Rossi “Power and Community Structure” (1960) 4(4) *Midwest Journal of Political Science* 390. At the critical scale (see chapter 3) there are no choices to make. Communism (socialism) takes hold, not because of individual choices, but because of the effect of (sub- or supra-optimal) critical scale where the collective takes over individual choices [Leopold Kohr *The overdeveloped Nations: The Diseconomies of Scale* (Schoken Books New York 1978) at 59]. Why this is so can be explained using the following ‘Crusoe’ hypothetical (ibid at 51-52):

“... let us visualize what would happen if a shipload of capitalist refugees from a communist country were wrecked on an uninhabited island. The smallness of their number would at once compel them to establish not a capitalist but a socialist community. No one could at first be permitted to follow his individualistic inclination and say: ‘I shall be the lawyer of this place,’ or ‘I shall be a landscape painter,’ ‘I, a professor of Latin.’ In socialist fashion, *competition would have to be replaced by cooperation*. A collective plan would have to be drawn up; property to be held in common; work be allocated on the basis of social need rather than personal desire ... Only after the population has grown to a size enabling it to specialize, would freedom of taste, disposition, and choice become possible. Only then would the assertion of *individualism* in the face of the collective pressure cease to be equivalent to treason ... [but as population continues to increase] the capitalistic self-balancing mechanisms ... cease to function as reliable guiding devices and no longer lead to social welfare simply because they lead to personal welfare. At a certain stage of growth, these two forms of welfare, previously complementary, must by necessity become mutually exclusive.” (Emphasis added)

Compare the above hypothetical with this one from constitutional political economy (CPE) literature [James Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962) at 18]:

“The familiar Crusoe-Friday model may be introduced for illustrative purposes, although its limitations must be fully acknowledged. Crusoe is the better fisherman; Friday the better climber of coconut palms. They will find it mutually advantageous, therefore, to specialize and to enter into exchange. Similarly, both men will recognize the advantages to be secured from constructing a fortress. Yet one fortress is sufficient for the protection of both. Hence, they will find it mutually advantageous to enter into a political ‘exchange’ and devote resources to the construction of the common good.”

The above scenario from Buchanan and Tullock suggests that there would be specialisation and exchange even if there were only two individuals. However, when the hypothetical from Kohr is superimposed, we start to question the meaning of ‘exchange’ as employed by Buchanan and Tullock. What Buchanan and Tullock mean by ‘exchange’ is in fact ‘cooperation’. While mutually advantageous, unlike a perfectly competitive market, this is an ‘exchange’ with no other (commonsensical) outcomes. Moreover, the specialization and the fortress referred to in the hypothetical are not optional. There is no choice: work is allocated on social needs rather than (subjective) personal desires. It is this scalar tension that I want to highlight and explain throughout this part.

ownership in large-scale organisations, which accentuates the danger of over-centralisation. Capitalism is about small scale. When wedded to large-scale organisation, capitalism faces the same fate of communism (à la Soviet Union). Large scale organisations suffer a breakdown of communication before reaching the size of the Soviet Union. Due to the size of their jurisdictional footprint, Russia, China, India, Brazil, and the USA, *inter alia*, are destined to face a similar collapse, albeit under different time scales.⁷⁰²

Cities are a viable alternative to the nation state. The city is an emergent complex system, the hub for economic activity. Historically, the city was the state itself. It was sovereign. But it was not a centralised state. It was organised as a federation of villages with common interests and aimed to achieve peace. The origin of the city arises from villages attaining a critical mass. The rise of cities is a product of ‘cultic practices’ rather than technological discoveries. The self-jurisdiction of the city developed out of the jurisdiction in the marketplace. The earliest cities were ideological creations of highly mutualistic communities.

There are two main arguments against municipal autonomy. The first is best articulated by James Madison where large-scale organisation is seen as more conducive to democracy.⁷⁰³ This argument is addressed in Section 6.5. The second argument is that today social life is too complex and needs the logical and administrative services of the nation state. However, there is neither historical nor contemporary evidence to support this argument. In particular, the rise of large organisations does not destroy small ones, due to the Principle of Interstices: holes can be occupied by organisations of smaller sizes. Small-scale organisations are resilient. Even under a system of keen competition, the middle-size farm can compete with the large.⁷⁰⁴

Our economic wellbeing depends on cities rather than nation states. Free cities act as ‘peripheral niches’ which become ‘supernovas’ of evolutionary change. Today ‘regionalism’ (the development of regions within a country) is the most pressing issue for

⁷⁰² See Mumford *Technics and Civilization* at 367 and 427; Schumacher *Small is Beautiful* at 47, 225-226, and 229; Mumford *The Myth of the Machine* vol 2 at 237; Kropotkin *Mutual Aid* at 283; Boulding *The Organizational Revolution* at 81; Boulding *Collected Papers* at 80 and 126.

⁷⁰³ See for example William Hutchinson et al. (eds) *The Papers of James Madison* (University of Chicago Press, Chicago, 1962).

⁷⁰⁴ Mumford *The Myth of the Machine* vol 1 at 251; Lewis Mumford *The Culture of Cities* (Harcourt, Brace and Company, New York, 1938) at 4; Bookchin *The Rise of Urbanization* at 15, 21, 24, 152, and 227-229; Boulding *Collected Papers* at 129; Kropotkin *Fields, Factories and Workshops* at 79. See also Kropotkin *Mutual Aid* at 262.

countries with large jurisdictional footprints. For such regionalism to be successful, emphasis should shift to ‘intermediate technology’ geared towards local production and local use. Economic development is the process of transition from one type of organisation of society to another at a higher level of complexity. Economic regionalism leads to a balanced economy, where technic is spread not by transport (as it was in the 19th century), but by local development. The greatest benefit of economic regionalism is that different development practices could be experimented with and compared. Emphasis would be on quantitative riches, rather than qualitative abundance, which would bring an economy of ‘plentitude’. The best examples of plentitude exist in quite primitive communities.⁷⁰⁵

This scale correction must be tied to emancipatory social structures. These structures are linked to confederacies of cities. The solution is along the lines of city subsidiarity, where cities have the opportunity to self-organise politically and economically. Essential structural principles for existing large-scale political states include: *the principle of subsidiarity*, where decision-making is embedded within the lowest organisational level to fulfil such an obligation; *the principle of vindication*, where an underwriting system ensures (charter) cities are protected and their freedom upheld; and *the principle of identification*, where each sovereign city must have fiscal independence. Holland (the 16th century Dutch Republic) and Switzerland are good examples of how federation and unification problems could be resolved.⁷⁰⁶ Similarly, the short-lived sectional assemblies in the ‘Great French Revolution’ are an example of direct democracy in large cities in modern times. Municipal confederations are a distinct alternative to the nation state. This self-transformation at the local scale would lead to the unification of mankind. Such unification would reject universalism, adopting instead mankind’s rich diversity. This unification does not lie in mechanical universals but in an evolution that enriches the ‘fibrous’ structure of society.⁷⁰⁷

⁷⁰⁵ Bookchin *The Rise of Urbanization* at 228; Gould *The Theory of Options* at 52; Schumacher *Small is Beautiful* at 55 and 146 ; Boulding *Collected Papers* at 178-179; Mumford *Technics and Civilization* at 388-289; Mumford *The Myth of the Machine* vol 2 at 159, 396, and 401.

⁷⁰⁶ These are examples of the governance structure that should spread throughout the world. In support of this view see the discussions in Chapters 1, 4 and 5.

⁷⁰⁷ Bookchin *The Ecology of Freedom* at 260, 283, 311, 314, and 336; Bookchin *The Rise of Urbanization* at 147-150, 230, 259 and 262; Kropotkin *The Essential Kropotkin* at 72; Mumford *The Transformations of Man* at 139, 142, and 148; Mumford *The Condition of Man* at 174; Mumford *The City in History* at 340; Bookchin *The Rise of Urbanization* at 115; Kropotkin *Mutual Aid* at 239; Bookchin *The Limits of the City* at 21.

6.5. Democracy as evolutionary fitness

The most important output that democracy produces is evolutionary fitness where democratic societies are more effective in dealing with their problems and more able to adapt to the environment. The Greek city-states' survival for centuries is a testament to this proposition.⁷⁰⁸ When we interpret democracy as an evolutionary fitness trait, it becomes synonymous with voluntary cooperation. It is a short distance from this position to where we can see that democracy favours small scale organisation. Voluntary cooperation is linked to the idea of political trust (see Chapter 2). Political trust is a complex concept which is “a form of fiduciary trust between society and government ... which is inherently different from mutual trust between people”.⁷⁰⁹ In the context of municipal government there is empirical evidence that “trust in local officeholders is typically and often considerably higher than trust in national politicians” and that the “size of a municipality has a modest negative effect on political trust”.⁷¹⁰

We can see this link between democracy and evolutionary fitness in Dahl and Tufte (albeit indirectly) where they suggest that in the two traditions of locating democracy in sovereign cities and in the nation state the ideal polity would satisfy at least the following two dimensions (of democracy):⁷¹¹ the dimension of ‘citizen effectiveness’ and the dimension of ‘system capacity’. On citizen effectiveness, Dahl and Tufte conclude that there is a trade-off between two different aspects of effectiveness: the cost of participation and the cost of dissent. Their conclusion is reproduced with minor modifications as Figure 6.1 below.⁷¹²

⁷⁰⁸ Most of these city-states were democratic, with Sparta being the main exception. For details see PJ Rhodes *The Greek City States: A Source Book* (Cambridge University Press, Cambridge, 2007).

⁷⁰⁹ D Wansbrough Waiter *There's a Government in my Soup! Public Trust and Confidence in Food Regulators* (Australian National University, Canberra, Australia, 2002).

⁷¹⁰ Bas Denters “Size and political trust: evidence from Denmark, the Netherlands, Norway, and the United Kingdom” (2002) 20 *Environment and Planning C: Government and Policy* 793.

⁷¹¹ Robert A Dahl and ER Tufte *Size and democracy* (Stanford University Press Stanford, California 1974) at 20.

⁷¹² Dahl and Tufte, above n 711, at 108.

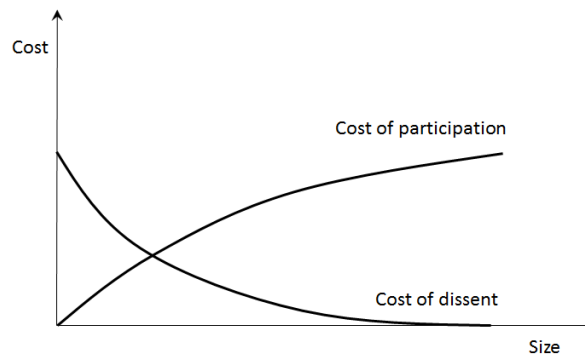


Figure 6.1: Trade-off on citizen effectiveness as presented by Dahl and Tufte

However, Dahl and Tufte do not suggest the existence of an optimal size. This is due to the demands of the other dimension of democracy (in the ideal polity), namely ‘system capacity’. They argue that “the criterion of system capacity makes small systems too costly for many purposes and thus leads to the need for many systems ... the criterion of system capacity implies that in the present world there is no single optimum size for democratic policies”.⁷¹³

The reason why Dahl and Tufte were not able to see an optimal scale is the use of ‘system capacity’ as a second dimension independent of citizens’ effectiveness. In order for us to see why this approach muddies the scale calculus involved, we turn to what is known in biology as the ‘Allee effect’: a positive correlation between population size and the mean individual fitness of a population or species.⁷¹⁴ More generally, “group size effects, sometimes called group augmentation, can promote the evolution of helping and other forms of complex cooperation [e.g. solidarity], in some circumstances in the absence of relatedness”.⁷¹⁵ The Allee effect can be depicted as shown in Figure 6.2.⁷¹⁶

⁷¹³ Dahl and Tufte *Size and democracy* at 109.

⁷¹⁴ James Costa *The Other Insect Societies* (Harvard University Press, Cambridge (MA), 2006) at 19.

⁷¹⁵ Costa *The Other Insect Societies* at 37.

⁷¹⁶ See WC Allee *Animal Aggressions* (University of Chicago Press Chicago, 1931); WC Allee *The Social Life of Animals* (William Heinemann, London, 1938). For an introduction to the Allee Effect see PA Stephens, WJ Sutherland and RP Freckleton “What is the Allee effect?” (1999) 87(1) *Oikos* 185.

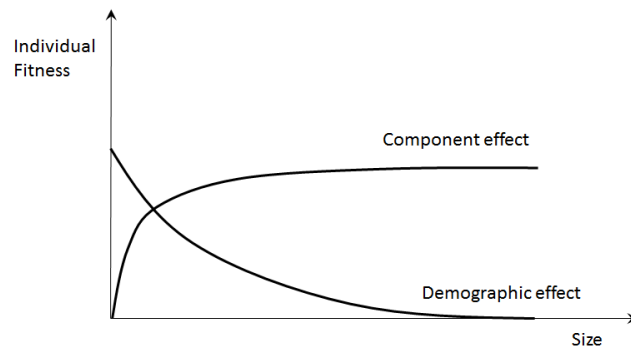


Figure 6.2: Trade-off between component and demographic effects in the Allee effect

For example, vigilance as an individual evolutionary trait would give rise to the component effect (in Figure 6.2). Other examples of component effects are cooperative hunting (analogous to warfare) and the ability to find mates more easily. At low population density, these component effects produce an overall demographic effect. The demographic effect however depends on negative density-dependent effects such as interference and depletion. As population density becomes high, negative density dependence depletes the demographic effect by offsetting the component effects e.g. through resource competition.⁷¹⁷ In other words, as the size (population) increases there will often be a reduction in the fitness of individuals. However, “[a]t low numbers or densities, the benefits from the addition of each successive individual outweigh the costs, such that there is a net gain in individual fitness, and fitness is highest at intermediate numbers of densities”.⁷¹⁸

The similarity between Figures 6.1 and 6.2 should be clear. The component effect corresponds to the cost of dissent while the demographic effect corresponds to the cost of participation (thinking of evolutionary fitness as a benefit equal to one minus the cost). We can reasonably conclude that democracy’s citizens’ effectiveness dimension corresponds to the evolutionary fitness trade-off as illustrated in the Allee effect. This does not however give any indication as to the role of the second dimension of democracy as identified by Dahl and Tufte, namely ‘system capacity’. Although from this evolutionary perspective, we can interpret Dahl and Tufte’s ‘system capacity’ dimension, which represents a polity’s

⁷¹⁷ AM Kramer and others “The evidence for Allee effects” (2009) 51(3) Population Ecology 351.

⁷¹⁸ PA Stephens et al. (1999) 87(1) Oikos 185.

ability to ‘manipulate and to adapt to its environment’,⁷¹⁹ as corresponding to the resultant evolutionary fitness from the trade-off inherent in the Allee effect. To further illuminate this proposition, the next step is to look at how this democracy has been implemented in societies other than human ones.

A primary candidate for such analogy would be social insects. Social insects happen to “exhibit the ultimate superorganism states, where interindividual conflict within the colony is minimal or non-existent”.⁷²⁰ Linking this to Dahl and Tufte’s observation that conflict is much less frequent in smaller systems,⁷²¹ we can start to see why the evolutionary aspect of democracy would favour smaller polities. However, this observation also finds support from the implication of the idea of superorganism, in particular the ramifications of the concept of self-organisation which produces the organisation seen in social insects (and other complex [adaptive] systems).⁷²² This self-organisation is based on the principle of unconscious cooperation which “is one of the basic principles of biology”.⁷²³ Note the resemblance of the self-organisation concept to Dahl and Tufte’s second dimension of democracy, ‘system capacity’, where the polity is able solve its problems and to adopt and adapt to its environment. In particular, it is the observation that self-organisation favours decentralization that we want to better understand (see also Chapter 7). Self-organisation does not require a ‘leader’ that has to assimilate all available information before making a decision. Self-organisation makes the decision-making process reliant on actions taken by agents locally.⁷²⁴

It is the idea of ‘division of labour’ that explains why self-organisation does not need centralisation.⁷²⁵ Division of labour is based on cooperation where members of a given group become dependent on one another for their survival. In particular, division of labour allows for the creation of more complex, and hence larger group sizes (see also Chapter 3).

⁷¹⁹ Dahl and Tufte *Size and democracy* at 110.

⁷²⁰ Bert Hölldobler and EO Wilson *The Superorganism* (WW Norton & Company, New York, 2009) at XVII.

⁷²¹ Dahl and Tufte *Size and democracy* at 92.

⁷²² Hölldobler and Wilson *The Superorganism* at 7.

⁷²³ WC Allee and others *Principles of Animal Ecology* (Saunders Philadelphia 1949) at 418.

⁷²⁴ See Francis Heylighen “Complexity and Self-Organization” in *Encyclopedia of Library and Information Sciences*, Third Edition (Taylor & Francis, 2009) 1215.

⁷²⁵ For a non-technical introduction to complexity and self-organization see Heylighen above.

For example, in social insects, the most socially sophisticated groups are correlated with the largest colony sizes.⁷²⁶ In fact, Dahl and Tufte find evidence that the larger the country, the more decentralized its government.⁷²⁷ They measure centralization as the relative size of central government to all governments. Decentralization is linked to the very nature of complexity, where the non-linearity of interactions leads to non-predictability that necessitates self-organisation, where local interactions produce global behaviour.⁷²⁸

In the complex polity, the ability to respond to citizens' preferences is a function of the interrelatedness or connectivity of the units constituting the complex polity (i.e. scale). It follows that these units would not be fully autonomous. Sovereignty is shared by these units in the complex polity.

On the other hand, the understanding of democracy as evolutionary fitness brings sustainability into the picture (see also Chapter 7). The question of democracy and size becomes a query about the sustainability of complex societies. Joseph Tainter finds that historically increasing complexity has limited the 'system capacity' of societies to resolve their problems and to adapt to their environment.⁷²⁹ This is an argument of diminishing returns to complexity. For Tainter "[w]hat is perhaps most intriguing in the evolution of human societies is the regularity with which the pattern of increasing complexity is interrupted by collapse—by episodes when societies change rapidly to a lower level of complexity".⁷³⁰ In other words, "the society 'decomposes' as people pursue their own immediate goals rather than the long-term goals of the society's leaders".⁷³¹ This is the essence of self-organizing as discussed above. Although Tainter does not use the term self-organizing, he correctly identifies the transition from higher complexity to self-organisation, and the ensuing decentralization of decision-making.

Tainter's depiction of complex societies is one where there is either resistance to self-organisation, which leads to collapse (Tainter provides the example of the Roman Empire

⁷²⁶ AFG Bourke "Colony size, Social Complexity and Reproductive Conflict in Social Insects" (1999) 12 J Evol Biol 245.

⁷²⁷ Dahl and Tufte *Size and democracy* at 37.

⁷²⁸ Heylighen in *Encyclopedia of Library and Information Sciences* 1215.

⁷²⁹ Joseph Tainter "Sustainability of Complex Societies" (1995) 27(4) Futures 397 at 400. See also Tainter "Social Complexity and Sustainability" (2006) 3 Ecological Complexity 91.

⁷³⁰ Joseph Tainter 27(4) Futures 397 at 399.

⁷³¹ At 400.

for this outcome), or where self-organisation is enabled (which Tainter sees as leading to simplification of the social relationships within the system), hence evading potential collapse (Tainter gives the example of the Byzantine Empire for this outcome). A better way to understand the difference is to think of two types of complexity: one based on hierarchical organisation (simple complexity), the other based on rhizomatal organisation (emergent complexity).⁷³² Rhizomatal causality is not chronological and does not look at the origin of things (inputs) but rather at their conclusions (outputs). In relation to democracy, rhizomatal causality would look at outputs such as happiness, rule of law, and economic growth, rather than the inputs of electoral processes and civil rights. A rhizomatal interpretation favours a non-hierarchical polity based on non-linear self-organisation and decentralization.

Growing degrees of economic integration (globalization) and the ensuing modulation of local-global power relations is putting more emphasis than ever before on clarifying our understanding of the democratic ideal and its operation from within the nation state. In fact, some argue that “globalization is the self-organizing process of constructing a world socio-economic community”.⁷³³ This level of economic integration is resulting from a paradigm shift away from the ‘international model’ and to a ‘transnational model’.⁷³⁴

Today, to cope with increasing environmental complexity, there needs to be a move away from hierarchical organisation, and towards growing degrees of self-organisation. The above excerpt provides one way of looking at the transition. Another way of explaining the same transition is the concept of a rhizome (above).

⁷³² Gilles Deleuze and Félix Guattari *A Thousand Plateaus* (Continuum, London, 1980).

⁷³³ Henk JL Voets and Lucio Biggiero “Globalization and Self-Organization: The Consequences of Decentralization for Industrial Organization” (2000) 10(1) *International Review of Sociology* 73. See also Philippe C Schmitter “The Future of Democracy: Could it Be a Matter of Scale? ” (1999) 66(3) *Social Research* 933.

⁷³⁴ Voets and Biggiero 10(1) *International Review of Sociology* 73. See also R Mateos and others “From Linearity to Complexity: Towards a New Economics” (2002) 10 *Complexity International*.

6.6. Conclusion: The sovereign city and subsidiarity for economic wellbeing

This analysis suggests a problematisation of scale, where the nation state portends a structural collapse. Evading such collapse would require restructuring inter-communal relations away from the epistemological privilege attached to the nation state.

The proposition is reminiscent of a Sanhedrin (סַנְהֶדְרִין) view of the world. In biblical Israel, each tribe was based on geographical demarcations, and had six elders representing it in the governance of the nation. Ancient Israel was a tribal confederation.⁷³⁵ Today, the equivalent proposition is for a resurrection of city sovereignty, lost when polities embarked on centralising political power and fulfilling Hobbes' vision of a strong centralised government. The result would be analogous to Spinozistic sovereignty.⁷³⁶

Unlike the general trend in the literature on democracy, sustainability and country size, I take an approach embedded in complexity theory which emphasises the multi-dimensional nature of democracy, sustainability and size. The potential relationship between democracy and size as an extension of the effect of organisational approaches (under complexity) on evolutionary fitness. Self-organisation, and superorganisms, suggest the classical view (i.e. an inverse relationship) is more in tune with complexity theory.

Moving from large to small polities requires charter cities.⁷³⁷ While I do not delineate the legal architecture that would lead to propelling such localities into taking over much of the role currently played by nation states, I anticipate future research would be dedicated to carrying out these tasks. It is hoped that the ideas presented here would provide an impetus for future development of legal doctrines that embody the drive towards smaller polities. This jurisprudence would then need to find a political voice through a new breed of political parties that emphasize constitutional limits on geo-political footprints.

⁷³⁵ See Nicholas Aroney "Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire" (2007) 26 *Law and Philosophy* 161 at 218 and the references therein (footnote 229).

⁷³⁶ Baruch Spinoza *A Theologico-Political Treatise and a Political Treatise* (Dover, New York, 1951).

⁷³⁷ See also Teresa Amabile and others "Breakthrough Ideas for 2010" (2010) 88 (1/2) *Harvard Business Review* 41 at 55 for a discussion of Paul Romer's idea of charter cities. See also <<http://urbanizationproject.org>> . See also Benjamin Barber *If Mayors Ruled the World* (Yale University Press, New Haven, 2013).

7. The Nexus between Subsidiarity and Sustainability

7.1. Introduction

In 1949 Morton Thompson published *The Cry and the Covenant*, a novel based on the life of Ignaz Semmelweis, a Hungarian physician of Austrian descent.⁷³⁸ In 1847 while working in Vienna's General Hospital, Semmelweis found that the rate of death among pregnant women in doctors' wards was three times the mortality rate of midwives' wards. Despite the publication of convincing evidence that hand-washing reduced the mortality rate (from childbed fever), his ideas were rejected by the medical community. Some doctors were even offended at the suggestion that they should wash their hands. Eventually, the rejection of his ideas led Semmelweis to a mental breakdown. In 1865, he was admitted to a Viennese lunatic asylum. He died after two weeks, aged 47, from internal wounds caused by beating.

In its simplicity, the main argument in this chapter is similar to Semmelweis' 'hand-washing' argument. Because sustainability is an 'emergent' property (as opposed to a 'resultant' one, i.e. traceable to its homogenous and commensurable components),⁷³⁹ it requires 'self-organisation' for it to emerge. In the context of constitutional law (and constitutional / complexity economics), such self-organisation would translate into the principle of subsidiarity. More importantly, Semmelweis is a reminder that what really needs to be overcome is political resistance to change. The road to sustainability must go through embedding subsidiarity as a constitutional principle.

Using complexity theory to understand sustainability is not a new endeavour.⁷⁴⁰ Nor is the call for human societies to self-organise at the local level.⁷⁴¹ What this chapter adds to

⁷³⁸ Morton Thompson *The Cry and the Covenant* (Doubleday Garden City, New York, 1949).

⁷³⁹ Emergence on the other hand relates to the cooperation of unlike components (think of cities interacting with each other) which results in behaviour that cannot be reduced to the sum of their individual *modus operandi*.

⁷⁴⁰ See for example Angela Ma Espinosa Salazar *A Complexity Approach to Sustainability: Theory and Application* (Imperial College Press, London, 2011). See also Tainter (1995) 27(4) *Futures* 397, Tainter *The Collapse of Complex Societies*, and Tainter (2000) 22(1) *Population and Environment* 3.

⁷⁴¹ See for example Klaus Mainzer *Symmetry and Complexity: the Spirit and Beauty of Nonlinear Science* (World Scientific, London, 2005) chapter 6.

existing literature is the use of complexity theory to explain the link between subsidiarity and sustainability. In particular, the chapter argues that in order to have a sustainable future, global governance should be based on a constitutional paradigm where nation states are re-designed as confederations of free (independent) cities. These cities would then be the locus of subsidiarity on a global scale. This paradigm is hardly an innovation. It has in fact been the dominant paradigm until the invention of the nation state in the 18th century.⁷⁴²

This reasoning resonates with the work of Elinor Ostrom. She identified what came to be known as the ‘nesting principle’ where “governance activities are organized in multiple layers of nested enterprises”.⁷⁴³ Ostrom argues that policy signals at the global scale are ineffective in reducing global warming. This is so given that such policies would not generate an adequate level of trust for collective action to be effective.⁷⁴⁴ Instead, Ostrom advocates for a focus on the local scale. This chapter builds on this proposition by appealing to the principle of subsidiarity. Governance at the local scale is not only conducive to but more importantly is *inductive* of sustainability.⁷⁴⁵

It is useful at this point to elucidate the relationship of polycentricity to subsidiarity. Polycentricity has three main attributes.⁷⁴⁶ First, it consists of multiple decision-making centres (distributed system). Second, it has an overarching system of rules defining the jurisdictional relationship of these centres to one another (rule of law). Third, it involves evolutionary competition and cooperation between the different decision-making centres (leading to spontaneity or self-organisation). Subsidiarity enters the picture where the multiple decision-making centres function autonomously; where ‘sovereignty’ is shared between these centres (but not necessarily divided as under federalism). Subsidiarity maleates the hierarchies that would otherwise dominate in polycentric political systems,

⁷⁴² See EJ Hobsbawm *Nations and Nationalism Since 1780: Programme, Myth, Reality* (Cambridge University Press, Cambridge, 1992).

⁷⁴³ Elinor Ostrom *Governing the Commons* (Cambridge University Press, Cambridge, 1990) at 90.

⁷⁴⁴ See Elinor Ostrom “A Polycentric Approach for Coping with Climate Change” Policy Research Working Paper 5095 (World Bank, Washington DC, 2009), Elinor Ostrom “A Long Polycentric Journey” (2010) 13 Annual Review of Political Science 1, and Elinor Ostrom “Beyond Markets and States: Polycentric Governance of Complex Economic Systems” (2010) 100(3) American Economic Review 641.

⁷⁴⁵ The author would like here to acknowledge the valuable remarks posted on el Hombre del Sur by DCK on a previous version of this paper. See <<http://elhombredelsur.com/2014/02/25/new-thinking-on-sustainability-conference-summary-part-2>>.

⁷⁴⁶ Paul Aligica and Vlad Tarko “Polycentricity: From Polanyi to Ostrom, and Beyond” (2012) 25(2) Governance 237.

making such hierarchies adaptable to change. This chapter expands on how subsidiarity guides the nesting principle at higher scales of governance.⁷⁴⁷

The invention of the nation state was only a step in a shift from the local to the global. This shift is rationalised through the need to manage high levels of complexity resulting from the industrial revolution and the ensuing (integration) process of globalisation. This complexity means that local challenges have global ramifications,⁷⁴⁸ which gives rise to the need for a globally coordinated response to the ecological crisis. The higher level of complexity is seen as requiring a global response to the ecological crisis.

This rationale is flawed (see Chapter 1).⁷⁴⁹ It conflates two different types of complexity, namely organised and dis-organised complexity. The type of complexity seen in the global scale is in fact of the second type, the ‘organised complexity’ type. This complexity emerges from the very existence of the correlation between the myriad of parts making the system. To address its challenges, we need to reduce the correlation between the parts, rather than globalise it through an international response.

The analytical structure for this chapter is shown in Figure 7.1. The chapter starts with Link 1 to explain the nature of emergence and self-organisation and their interdependence. Next, Link 2 provides a historical reconstruction of sustainability to the end of explaining its ‘emergent’ nature. The third section covers Link 3 which interprets subsidiarity as a self-organising principle of complex systems. The fourth section elaborates on Link 4, especially the role of cities as (complex) attractors.⁷⁵⁰ The paper ends with a sketch for a praxis in favour of small ‘jurisdictional footprints’.

⁷⁴⁷ See also Graham Marshall “Nesting, Subsidiarity, and Community-Based Environmental Governance beyond the Local Level” (2008) 2 (1) *International Journal of the Commons* 75. Marshall and Ostrom sterilise the political economy aspects of subsidiarity, for example when it comes to organising governance around Spinoza’s rendition of sovereignty. See BF Gussen “On the problem of scale: spinozistic sovereignty as the logical foundation of the constitutional economics” (2013) 7(1) *JPE*.

⁷⁴⁸ Bosselmann et al *Governance for Sustainability* at 3.

⁷⁴⁹ See the analysis in Gussen (2012) 16 *NZJEL* 167. See also Chapter 1 of this thesis.

⁷⁵⁰ Note that this chapter emphasises the role of vertical subsidiarity rather than horizontal subsidiarity (more autonomy to the private sector rather than the public one).

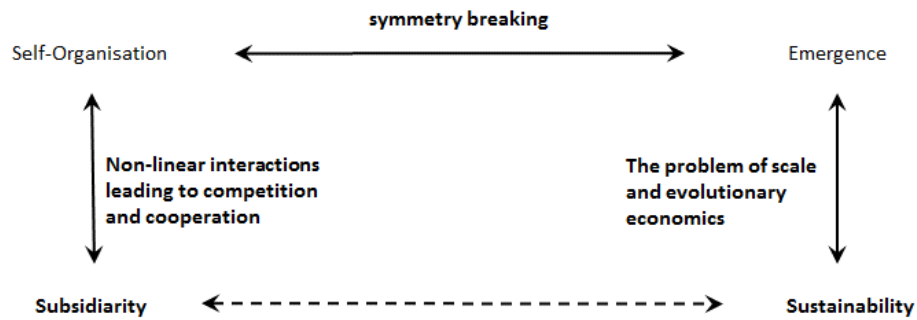


Figure 7.1: The four analytical links

7.2. Link 1: Self-organisation and emergence⁷⁵¹

Our starting point is to explain the concepts of self-organisation and emergence and their interdependence. Both concepts are key concepts in complexity theory.

Self-Organisation

Self-organisation, also known as spontaneous order,⁷⁵² refers to the ability of acquiring and maintaining a structure without external control. Self-organisation is associated with (non-equilibrium) pattern formation.⁷⁵³ The evolutionary process itself could be viewed as

⁷⁵¹ See generally Tom de Wolf and Tom Holvoet “Emergence versus Self-Organisation: Different Concepts but Promising When Combined” in Sven Brueckner et al (eds) *Engineering self-organising systems: methodologies and applications* (Springer-Verlag, New York, 2005) 1. See also Giovanna di Marzo Serugendo et al (ed) *Engineering self-organising systems : nature-inspired approaches to software engineering* (Springer, New York, 2004). Some of the classic works on complexity would also be useful for readers new to the topic. See for example Waldrop *Complexity*.

⁷⁵² Hayek *Law, Legislation and Liberty*.

⁷⁵³ Gregoire Nicolis and Ilya Prigogine *Self-organization in Nonequilibrium Systems: From dissipative structures to order through fluctuations* (Wiley, New York, 1977).

self-organising, and hence leading to emergent properties.⁷⁵⁴ This is part of an ongoing convergence of evolutionary and complexity thinking.⁷⁵⁵

Self-organisation has four characteristics. First, it restricts the behaviour of the system to a small region called an attractor (see section 7.5), which gives the system a structure. Second, self-organisation is possible only where there is freedom from external control. Third, self-organisation provides adaptable behaviour that makes the system robust to change (in the external environment). Fourth, it is a process that evolves over time towards more order (as an evolutionary fitness trait). These characteristics could be distilled to three essential ingredients:⁷⁵⁶ there needs to be many interactions between micro-scale (or lower scale) entities (the genesis of solidarity), non-linearity of these interactions (in the form of positive and negative feedback loops), and a balance between interactions resulting in competition, and those resulting in cooperation (or exploration and exploitation).

The dynamics of highly complex systems exhibit a combination of positive and negative feedbacks.⁷⁵⁷ This feedback means that causation in such systems is nonlinear. In other words, self-organisations exhibit negative and positive feedback that enables emergence to occur but also influences the structure of the system at the macro-level.

The ideas of Friedrich Hayek on spontaneous order could help illustrate self-organisation (see also Chapter 3). Hayek even coined a new word, ‘catallaxy’, to describe a self-organising system where voluntary co-operation dominates competition.⁷⁵⁸ For Hayek there are two types of order. The first is described as ‘taxis’: an ‘organisation’ which is ‘made’ or ‘artificial’. The second is referred to as ‘cosmos’: a ‘spontaneous order’ which is ‘grown’ endogenously and is self-organising. The primary example of cosmos is any society of a size larger than that of a tribe or clan. For Hayek, when one canvases regions of high complexity, one would be able to find only spontaneous order. The high complexity of such order is the result of elements adapting to their environment. A primary example

⁷⁵⁴ For the classic work on emergent evolution see Lloyd C Morgan *Emergent Evolution* (Williams and Norgate, London, 1923).

⁷⁵⁵ Gunther Eble “The Complexity of Evolution ” (2001) 6(6) *Complexity* 24.

⁷⁵⁶ Eric Bonabeau, Marco Dorigo, Guy Theraulaz *Swarm intelligence: from natural to artificial systems* / (Oxford University Press, New York, 1999).

⁷⁵⁷ Francis Heylighen “Complexity and Self-Organization” in Marcia J Bates and Mary Niles Maack (eds) *Encyclopedia of Library and Information Sciences* (2nd ed, CRC Press, Boca Raton (FL), 2008).

⁷⁵⁸ Friedrich Hayek *Law, Legislation and Liberty* vol 2.

of this high complexity is “the structure of the modern society”. In any given society, micro-level entities such as families and firms, which are organisations, are integrated into “a more comprehensive” (micro-level) spontaneous order.⁷⁵⁹

In addition, Hayek explains that the elements of spontaneous order will often adapt to the environment through a process of abstraction. Through evolution, “a repertory of action type adapted to standard features of the environment. Organisms become capable of ever greater varieties of actions...”⁷⁶⁰ Hayek also asserts that “the formation of a new abstraction seems *never* to be the outcome of a conscious process, not something at which the mind can deliberately aim, but always a discovery of something which *already* guides its operation.”⁷⁶¹ Hayek explains the role of abstraction in the emergence of new behaviour in the following terms.⁷⁶²

“It is the determination of particular actions by various combinations of abstract properties which makes it possible for a causally determined structure of actions to produce ever new actions it has never before, and therefore to produce altogether new behaviour such as we do not expect from what we usually describe as a mechanism. Even a relatively limited repertory of abstract rules that can thus be combined into particular actions will be capable of ‘creating’ an almost infinite variety of particular actions.”

Hayek hence proposes that self-organisation (spontaneous order) results in emergence through the process of abstraction.⁷⁶³ A similar proposition is introduced in Link 2, first however, a brief introduction to the concept of ‘emergence’.

Emergence

In essence, emergence refers to a global behaviour that arises from, but cannot be traced back to, the interactions of local individual parts. Note however, that the global behaviour

⁷⁵⁹ At 46.

⁷⁶⁰ New Studies at 42.

⁷⁶¹ New Studies at 46; emphasis in the original.

⁷⁶² New Studies at 48-49.

⁷⁶³ Also refer to the dialectic between symmetry and symmetry breaking discussed in Chapter 3.

is implicitly contained in the local behaviour of the parts if they are studied in the context in which they are found. Notwithstanding, the global behaviour cannot be predicted by studying the individual parts (reductionism). Arguably one of the widely accepted definitions is by Jeffrey Goldstein,⁷⁶⁴ where emergence is about the appearance of new structures during self-organisation.⁷⁶⁵

In occidental philosophy, the concept of emergence can be traced back to Aristotle.⁷⁶⁶ His version put emphasis on ‘wholes’ analogous to the idea of ‘gestalt effect’ in psychology. By the 20th century, emergence was being discussed through the autonomy of scales.⁷⁶⁷ Nature is organised on scales each operating under its own irreducible principles and laws. Hence, at a quantum scale we find laws of nature different from those at the human scale. At higher scales of organisation we find laws also different from those at the human scale. Even when thinking of scales as dimensions, a three-dimensional being is governed by laws that are different from those governing two- or four-dimensional ‘beings’. We can hence think of Newton’s laws of motion as emergent: they emerged from the laws governing physics at the quantum scale.⁷⁶⁸ Later in the chapter I return to the idea of scale production and its relation to emergence and sustainability.

Emergent properties have eight characteristics.⁷⁶⁹ First, they arise at the macro-level of the system. In other words, they are at a scale higher than the one that gives rise to the emergent properties. Second, these emergent properties are not reducible to the micro-level parts of the system (radical novelty). Third, emergent properties are coherent. They maintain a persistent pattern over time. Fourth, the macro-level behaviour arises from interactions of the parts at the micro-level. Fifth, emergent properties evolve over time. They are related to bifurcations in the system, i.e. the appearance of new attractors. Sixth, emergent properties require decentralised control. The global behaviour is influenced only by micro-level interactions. Seventh, there is a bi-directional link between the macro- and

⁷⁶⁴ Jeffrey Goldstein “Emergence as a Construct: history and issues” (1999) 11 *Emergence* 49.

⁷⁶⁵ For the interdependence between self-organisation and emergence see below.

⁷⁶⁶ For a definitive work on the history of emergence see David Blitz *Emergent Evolution: Qualitative Novelty and the Levels of Reality* (Kluwer Academic Publishers, Dordrecht, 1992).

⁷⁶⁷ See Michael Polanyi “Life’s Irreducible Structure” (1968) 160 *Science* 1308.

⁷⁶⁸ See RB Laughlin *A Different Universe* (Basic Books, New York, 2005).

⁷⁶⁹ De Wolf and Holvoet in Brueckner et al (eds) *Engineering Self-Organising Systems: Methodologies and Applications* 1.

micro-levels. Eight, emergent properties are robust and flexible. They are insensitive to the failure of local parts.

The prime example of emergence is the ‘organisation of life’.⁷⁷⁰ Atoms interact to form molecules which combine further to form cells. The cells interact to form tissues which in turn form organs. The organs interact in organ systems that finally interact leading to the emergence of organisms. Organisms eventually lead to the emergence of ecological systems. The existence and the sustainability of such systems emerges from all the interactions at the lower scales.

Interdependence between self-organisation and emergence

While there could be self-organisation without emergence (such as where micro-level parts execute a blue print dictated across the whole system),⁷⁷¹ and emergence without self-organisation (such as where micro-level parts change their roles over time but within the same structure), in very complex systems (characterised by nonlinearity or the existence of positive and negative feedback inter and intra macro- and micro- levels) such as ecosystems, self-organisation and emergence occur together. Emergence in such systems is sometimes referred to as ‘reflective emergence’ where the observer is part of the system and hence causation would be circular.⁷⁷² In this case, self-organisation ‘causes’ emergence (upward causation from micro- to macro-) while emergence reciprocates with downward causation (also known as supervenience) that ‘causes’ self-organisation at the macro-level. This reciprocity between self-organisation (that reduces complexity) and emergence (that increases complexity) enables adaptability and stability.

In ecological systems (including human societies), the level of complexity makes imposing a structure *a priori* infeasible: the system needs to self-organise. Moreover, the large number of attractors in such systems (in particular cities) imposes a need for

⁷⁷⁰ See for example Alain Pavé “Biological and Ecological Systems Hierarchical Organization” in Denise Pumain (ed) *Hierarchy in Natural and Social Sciences* (Springer, Dordrecht, The Netherlands, 2006). See also Jantsch *Design for evolution*.

⁷⁷¹ See Julianne Halley and David Winkler “Classification of Emergence and Its Relation to Self-Organization” (2008) 13(5) *Complexity* 10.

⁷⁷² J de Haan “How Emergence Arises” (2006) 3 *Ecological Complexity* 293.

emergence. A global structure cannot be assigned. It has to emerge from interactions between these attractors (cities).

Self-organisation is analogous to symmetry. In highly complex systems, instabilities result in emergence through symmetry breaking.⁷⁷³ Emergence is analogous to the production of scale. While the reduction of symmetry through symmetry breaking results in complexity (see below). In this sense, complexity (*qua* reduction of symmetry) is an emergent phenomenon,⁷⁷⁴ or what some refer to as an ‘epiphenomenon’: it can be understood independent of the underlying phenomena it arises from.⁷⁷⁵ In the following section we introduce a model that provides more insights into sustainability as an emergent property.

7.3. Link 2: Sustainability as an emergent property⁷⁷⁶

In this part we examine the relationship between sustainability and complexity. This leads to the following proposition: sustainability is an emergent property.⁷⁷⁷ An emergent property is born out of more fundamental properties and yet is irreducible with respect to these properties.⁷⁷⁸ In the case of sustainability, emergence supersedes the interactions at lower levels and by doing so induces qualitative changes from quantitative ones.

⁷⁷³ Goodwin *How the Leopard Changed its Spots*.

⁷⁷⁴ Peter Corning “The Re-Emergence of ‘Emergence’: a Venerable Concept in Search of a Theory” (2002) 7(6) *Complexity* 18.

⁷⁷⁵ Russ Abbott “Emergence Explained: Abstractions” (2006) 12(1) *Complexity* 13.

⁷⁷⁶ For an authoritative introduction see Klaus Bosselmann *The Principle of Sustainability*.

⁷⁷⁷ This proposition has already been put forward by others, although no connection was made with subsidiarity. See for example Richard Bawden “Sustainability as Emergence: The Need for Engaged Discourse” in Arjen Wals and Peter Blaze Corcoran (eds) *Higher Education and the Challenge of Sustainability: Problematics, Promise, and Practice* (Kluwer Academic Publishers, Boston, 2004) 21; M Weinstein et al “The global sustainability transition: it is more than changing light bulbs” (2012) 9(1) *Sustainability: Science, Practice, & Policy* 4; W Rees “Cities as dissipative structures: global change and the increasing vulnerability of urban civilization” in M Weinstein & R Turner (eds) *Sustainability Science: The Emerging Paradigm and the Urban Environment* (Springer, New York, 2008) 244; WE Rees “Human nature, eco-footprints and environmental injustice” (2010) 13 *Local Environ* 685; WE Rees “What’s blocking sustainability? Human nature, cognition and denial” (2010) 6 *Sustainability Science Practice and Policy* 13.

⁷⁷⁸ Stanford encyclopedia of philosophy (1997) “Emergent Properties”.

Sustainability can be understood as a response to the problem of scale.⁷⁷⁹ This understanding is in contrast to sustainability as a legal (enforceable) principle or even an environmental grundnorm (legally binding superior norm).⁷⁸⁰ Notwithstanding, the legal enforceability of sustainability would have to be through the constitutionalisation of another principle: subsidiarity. As recalled by Bosselmann “environmental law is built around environmental principles that originated partly in law and partly in other disciplines including ethics, science, economics as well as foundational cultural concepts”.⁷⁸¹ Bosselmann rightly points out that this hybrid genesis does not negate the need for distinguishing between legal and non-legal norms. This chapter however argues that the key normative aspect of sustainability is subsidiarity. Sustainability requires a commitment to subsidiarity, rather than a directly enforceable global legal principle.

The problem of scale states that there are three steps leading from symmetry to collapse: symmetry breaking, production of scale, and increasing complexity (see Chapter 3). What is essential for this section is the impact of how scale is produced on the tendency of systems to collapse. Strong links that emerge among elements (or subsystems) are one form of scale production. Such tight coupling in dynamical systems results in chaotic behaviour. Alternatively, if systems are coupled neither too tightly nor too loosely they will have ‘complex attractors’ that enhance their robustness.⁷⁸²

Dynamical systems in the physical world are said to be dissipative. Cities are a prime example of such dissipative structures.⁷⁸³ These systems require a driving force in order for them to have change. When dissipation and the driving forces balance, the system tends to a ‘steady state’ of typical behaviour. This subset of possible behaviour is known as an attractor. An attractor is then an ‘area’ into which the behaviour of a dynamical system settles. Cities can be conceived of as spatial attractors of human population analogous to

⁷⁷⁹ BF Gussen (2013) 24(1) Constitutional Political Economy 19.

⁷⁸⁰ For the current legal understanding of the sustainability principle see for example RE Kim and K Bosselmann “International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements” (2013) 2 Transnational Environmental Law 285. See also Richard Shearman “The Meaning and Ethics of Sustainability” (1990) 14(1) Environmental Management 1; Simon Dresner *The Principle of Sustainability* (2nd ed, Earthscan, London, 2008).

⁷⁸¹ Bosselmann *The Principle of Sustainability* at 46.

⁷⁸² Marion *The Edge of Organization* at 155-158.

⁷⁸³ WE Rees “Cities as Dissipative Structures: Global Change and the Vulnerability of Urban Civilization” in MP Weinstein and RE Turner (eds) *Sustainability Science: The Emerging Paradigm and the Urban Environment* (Springer, Berlin, 2012).

attractors in dynamical systems.⁷⁸⁴ In other words, cities act as ‘gravitational fields’ that attract capital (in all its forms).⁷⁸⁵ Global cities in particular are attractors of power, especially economic power.⁷⁸⁶

A system with a high level of complexity will usually have more than one attractor. The interaction (coupling) of these attractors leads to a restoration of the symmetry that was originally ‘lost’. Hence, after several stages of symmetry breaking, the symmetry is ‘resurrected’ by a series of symmetry-creating collisions of chaotic attractors. This symmetry creation destroys the (spatial and/or temporal) structure gained earlier through symmetry breaking.

Complex attractors are especially useful for understanding how collapse can be mitigated, as these attractors are largely immune to cascading damage. Collapse in complex systems is a function of the level of coupling among subsystems or elements. The higher the level of coupling among the elements, the wider the effect of any sudden changes on the system as a whole (hence, collapse is globalised). Of course, with no coupling among elements, there is no system; however, between these extremes, there is a region where a low level of coupling will localise the effects of collapse and provide a robust system.⁷⁸⁷

Based on the above problematisation of scale we can think of sustainability as a fitness trait preventing complexity from leading to collapse. This understanding resonates with a broad consensus on the core attributes of sustainable (economic) development: long-term, out-of-equilibrium dynamics leading to qualitative change intended to avoid irreversible damage to ecosystems and to the sustainable use of (renewable) natural resources.⁷⁸⁸ Sustainable (economic) development would then be best understood under the evolutionary paradigm of economic analysis.⁷⁸⁹ Under this paradigm, the economy is a bundle of the

⁷⁸⁴ Dimitrios Dendrinos “Cities as spacial chaotic attractors ” in E Elliott and LD Kiel (eds) *Chaos Theory in the Social Sciences: Foundations and Applications* (University of Michigan Press, Ann Arbor, 1996).

⁷⁸⁵ See Peter Allen *Cities and Regions as Self-organizing Systems: Models of Complexity* (Overseas Publishers Association, Amsterdam, 1997); Juval Portugali “Self-organizing cities” (1997) 29 (4–5) *Futures* 353.

⁷⁸⁶ Saskia Sassen *Cities in a World Economy* (Pine Forge Press, Thousand Oaks, CA, 2006).

⁷⁸⁷ The work by Granovetter is useful here to explain further the nature of coupling. See Granovetter (1973) 78(6) *American J of Sociology* 1360; Granovetter (1983) 1 *Sociological Theory* 201; and Granovetter (1985) 91(3) *American J of Sociology* 481.

⁷⁸⁸ Peter Mulder and Jeroen CJM Van den Bergh “Evolutionary Economic Theories of Sustainable Development” (2001) 32(1) *Growth and Change* 110.

⁷⁸⁹ *Ibid.*

non-equilibrium processes that emerge from actions of agents whose differences contribute to the change.⁷⁹⁰

If we are to accept that sustainable development is closely related to evolutionary processes in the economy, it would be possible for us to see why sustainability is an emergent property. Just like ‘un-sustainability’ (collapse), it emerges from the interaction of diverse agents. The difference between the two is that in the case of collapse there are no (institutional) constraints on the production of scale. In the case of sustainability, there are (legal) limits on the scale at which these diverse agents organize.

7.4. Link 3: Subsidiarity as an organising principle for complex systems

This section provides a reconstruction of subsidiarity which elucidates how this principle maps onto self-organisation.⁷⁹¹ The starting point is a brief historical account of the rationale behind subsidiarity (see also section 4.2).⁷⁹²

The principle of subsidiarity has three meta-rules that govern the interaction of different parts of a given system or organisation.⁷⁹³ The first is a positive version, where a ‘higher levels support lower levels in case of need’. This requires the central government to support local communities where they cannot perform the functions of governance. The second meta-rule is that ‘higher levels must not arrogate functions of lower levels’. This is a negative version of the subsidiarity principle, where the central government is prohibited from interfering in the affairs of local government. The third meta-rule derives from the first two and is implied by the hierarchical structure (micro versus macro level): the first and second meta-rules apply to all parts of the system. The third meta-rule could also be interpreted as ‘helping others help themselves’.⁷⁹⁴

⁷⁹⁰ See the seminal work by Richard Nelson and Sidney Winter *An Evolutionary Theory of Economic Change* (Harvard University Press, Cambridge, 1982).

⁷⁹¹ As with many other political concepts, subsidiarity is a complex construct. For a critical review of this concept see Andreas Føllesdal “Survey Article: Subsidiarity” (1998) 6(2) *Journal of Political Philosophy* 190.

⁷⁹² See statistics and training of the Lombardy Region Istituto Regionale Di Ricerca Della Lombardia (IReR) *Subsidiarity: Brief Anthology* (Regione Lombardia, 2009).

⁷⁹³ See Gosepath in Føllesdal and Pogge (eds) *Real World Justice: grounds, principles, human rights, and social institutions* 157-170.

⁷⁹⁴ See Floriani *Subsidiarity* (Penn Street Productions, Reading (PA) 2012) at 82-83.

We can now see a similarity between self-organisation and subsidiarity. Self-organisation can be distilled to three characteristics (see section 7.2): interaction of many parts; these interactions are nonlinear (with feedback loops); and that these interactions balance cooperation (assistance) and competition (bar on interference) between the parts. Cooperation and competition occur between elements forming micro-scale or lower scales of organisations. These elements feedback into higher forms of organisation (at the macro-level) resulting in non-linear interactions inter- and intra- scales. In this sense, in the context of governance, subsidiarity is self-organisation.

7.5. Link 4: Scale correction

The world political map is ‘lumpy’. It is dominated by the inertia of large political territories such as Russia, Canada, China, the USA, Brazil, Australia and India. Some have suggested that such polities should be broken down into more manageable units.⁷⁹⁵ A more practical approach is to have such countries re-designed (constitutionally) around the principle of subsidiarity.⁷⁹⁶ Subsidiarity would enable a specific type of sovereignty that results in a polycentric commonwealth between independent cities (see Chapter 9). When thinking about the micro-scale of self-organisation, cities seem to be a rational option. Cities are the engines of economic growth.⁷⁹⁷ Economic development as symmetry breaking occurs at the local (urban) scale: it is embedded in cities and their hinterland.⁷⁹⁸

Coupling attractors (cities) rigidly could cause instability through scale entanglement. One such example is the state monopoly on legal tender, Jacobs explains the mechanism through which national currencies feedback works in the following terms:⁷⁹⁹

⁷⁹⁵ See for example Kohr *The Breakdown of Nations*.

⁷⁹⁶ See also the arguments in Frederick J Lee “Global Institutional Choice” (2010) 85 NYU L Rev 328. See also Blank (2006) 47(1) Harv Int’l L J 264; Robert Vischer “Subsidiarity as a Principle of Governance: Beyond Devolution” (2001-2002) 35 Ind L Rev 103.

⁷⁹⁷ See in particular Jacobs *The Nature of Economies*, and Jacobs *Cities and wealth of nations*.

⁷⁹⁸ Jacobs *Nature of Economies* at 63.

⁷⁹⁹ Jacobs *Cities and the Wealth of Nations* at 158-162.

“[I]magine a group of people who are all properly equipped with diaphragms and lungs but who share only one single brainstem breathing centre ... [T]he breathing centre would receive consolidated feedback on the carbon-dioxide level of the whole group without discriminating among the individuals producing it. Everybody’s diaphragm would thus be triggered to contract at the same time. But suppose ... some were swimming and diving, and for some reason, such as the breaking of the surf, had no control over the timing of their submersions. Imagine what would happen to them ... feedback control [is] working perfectly ... but the results would be devastating because of a flaw designed right into the system.”

The problem is then one of scale. Currencies are intended as feedback mechanisms on the scale of city-regions, not national or supra-national scales.

The current ‘powerlessness’ of cities is a symptom of liberalism. Arthur Schlesinger argues that urbanization caused the ‘rise’ in city importance.⁸⁰⁰ The fear of the changing nature of the city population led to additional political support for controls by the state. Today, most scholarship on the city as an institution is limited to its internal governmental structure, accepting state control as a given. According to Schlesinger, our current image of cities has become an established part of liberal social thought.⁸⁰¹

Similarly, Gerald Frug finds that the law governing cities derives from the hostility of liberal political thought to the exercise of power by entities intermediate between, and thus threatening the interests of, the state and the individual.⁸⁰² Under liberalism, the idea of real local power conveys a picture of the strangulation of nationwide businesses by a maze of conflicting local regulations and the frustration of national political objectives by local selfishness and protectionism.⁸⁰³ Frug asks an important question: why have we chosen to rely on private corporations rather than cities as our principal means of decentralisation? He attributes this in part to the continuing power of liberal ideas, which suggest that the kind of organisations that wield economic power are radically different from cities—a difference summarized by their being ‘private’ and cities ‘public’, and that this difference legitimises the *status quo* against any genuine transfer of power to cities.⁸⁰⁴

⁸⁰⁰ Arthur Meier Schlesinger *The rise of the city, 1878-1898* (Macmillan, New York, 1933).

⁸⁰¹ Gerald Frug “The City as a Legal Concept” (1979-1980) 93 Harv L Rev 1057 at 1120.

⁸⁰² At 1059.

⁸⁰³ At 1067.

⁸⁰⁴ At 1128.

7.6. Conclusion: Subsidiarity as a necessary condition for sustainability

The 'hand washing' argument in this chapter is about shifting our focus from sustainability to subsidiarity. Embedding subsidiarity as a constitutional principle is the key to enabling sustainable development. Pursuing sustainability on a global scale is futile given its emergent nature.

PART V A BLUEPRINT FOR SUBSIDIARITY IN NEW ZEALAND

8. The Swiss Constitution as a Guide for New Zealand Subsidiarity

8.1. Introduction

One of the most distinctive features of Swiss (*Emmentaler*) cheese is the holes (or eyes) that result from lactic acid fermentation and give the cheese its taste and quality.⁸⁰⁵ In this chapter these ‘eyes’ are seen as analogous to city-regions—the ‘eyes’ of economic growth. The proposition is for *Emmentaler* subsidiarity: jurisdictional footprints ‘punctured’ by sovereign city-regions that constitute the nucleus of a bottom-up, network-like, political union.⁸⁰⁶

⁸⁰⁵ C Steffen, P Eberhard, JO Bosset, M Rüegg “Swiss-Type Varieties” in PF Fox (ed) *Cheese: Chemistry, Physics and Microbiology* (Springer, New York, 1993) 83-110.

⁸⁰⁶ In the Swiss context, we can trace the origins of this subsidiarity in the writings of Jean-Jacques Rousseau:

“[The] act of association produces a moral and collective body ... This public person, which is thus formed by the union of all the individual members, used to be called a *city*, and now is called *republic* or *body politic*. When it is passive, it is called by its members *State*, and *sovereign* when it is active, *power* when it is compared to similar bodies. With regard to the associates, they take collectively the name of *people*, and are called individually *citizens* ...”
[Jean-Jacques Rousseau *Social Contract and The First and Second Discourses* (Yale University Press, New Haven, 2002) Book I, Chapter VI at 164 (emphasis in the original).]

However, Rousseau was not only weary of the idea of a confederation of cities, but also saw a non-reconcilable dichotomy between urban and rural areas:

“[W]hat is to be done when the State comprises many cities? Will the sovereign authority be divided? Or must it be concentrated in a single city and render subject all the others? My answer is that neither alternative is good. In the first place, the sovereign authority is simple and undivided, and we cannot divide it without destroying it. In the second place, a city, no more than a nation, can be lawfully subject to another, because the essence of the body politic consists in the union of obedience and liberty, and these words, subject and sovereign, are correlatives, the notion underlying them being expressed in the one word citizen. My answer, furthermore, is that it is always bad to merge several towns into a single State, and, in desiring to create such a union, we must not flatter ourselves that we can avoid the usual problems. The defects of large States cannot be used as an objection against a man who only desires small ones. But how can small States be endowed with sufficient force to resist large ones? Just as Greek towns used to resist the great King, and as more recently Holland and Switzerland resisted the House of Austria. If, however, the State cannot be reduced to proper limits, one option still remains; it is not to allow any capital, but to make the government sit alternately in each town, and also to assemble in them one by one the people of the country. Populate the territory uniformly, extend the same rights everywhere, spread everywhere abundance and life; this is how the State will become simultaneously the strongest and the best governed that may be possible. Remember that the walls of the towns are constructed solely of the wreckage of farm houses. For every palace that I see built in the capital, I seem to see a whole rural district laid in ruins.” [Jean-Jacques Rousseau *Social Contract and The First and Second Discourses* (Yale University Press, New Haven, 2002) Book III, Chapter XIII at 219.]

This chapter looks at the Swiss federal constitution for guidance. The aim is to furnish normative signals on procedural and substantive criteria for power sharing. For our purposes, a constitution is defined broadly to include all the fundamental rules that govern a socio-economic entity.⁸⁰⁷ Emphasis however will be on how constitutions regulate the relationship between vertical (and horizontal) levels of government.

What is the rationale for conducting a comparative analysis with Switzerland rather than other countries with a long history in subsidiarity, most notably Italy and Germany? There is a scalar difference as to the jurisdictional footprint (territory) of each country. New Zealand has an area of around 268,000 square kilometres, compared to only 41,000 square kilometres for Switzerland. Italy has an area more comparable to New Zealand. Moreover, New Zealand's current electoral system (Mixed Member of Parliament or MMP) was inspired by the German version.⁸⁰⁸ Using Germany as a benchmark would be probably better aligned with this aspect of our constitution. So why Switzerland?

The answer comes from the multicultural nature of Switzerland—a multiculturalism around ancient communities rather than immigration. Switzerland is “a microcosm of Europe because of its cultural, linguistic, religious and regional diversity”.⁸⁰⁹ The Swiss model provides insights into how social complexity could be reduced through constitutional designs. Given the multicultural nature of New Zealand society, even though our multiculturalism is different in its extent, and given that issues emanating from this multiculturalism are central to future constitutional change in New Zealand, a study of the Swiss constitution is more useful than other alternatives.

There are valuable lessons in how Switzerland was able to achieve *political* multiculturalism. This was mainly through renouncing the ideal of ‘the nation state’. In other words, an artificial state with one culture, one language, one religion and one identity. Instead, Switzerland opted for a multi-cultural state anchored in social realities.⁸¹⁰ In

⁸⁰⁷ Aalt Willem Heringa and Philip Kilver *Constitutions Compared: an introduction to comparative constitutional law* (3rd ed, Intersentia, Cambridge, 2012) at 2.

⁸⁰⁸ See for example Jonathan Boston and others “Why Did New Zealand Adopt German-Style Proportional Representation?” (1996) 33(4) Representation 134.

⁸⁰⁹ Jürg Steiner “Forward to the First Edition” in Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (3rd ed, Palgrave Macmillan, New York, 2010) at xvi, citing Stein Rokkan.

⁸¹⁰ Linder *Swiss Democracy* at xx.

addition, Switzerland opted for *pragmatic* political integration.⁸¹¹ While originally it chose ‘consensus’ rather than ‘majority rule’ as its criterion for democracy, after 1848 (and the invention of modern Switzerland), it settled for a double majority criterion for constitutional decision-making (amendments),⁸¹² which resulted in power-sharing arrangements to accommodate various segments of Swiss society.

This does not mean that there are no other models of power-sharing,⁸¹³ nor that the Swiss model does not have its own drawbacks, accentuated by Europeanisation and Globalisation. The Swiss model would still stand out in its ability to imagine a ‘national’ identity without effacing the rich regional diversity that intermediates between the individual and the state. This nation-building was an evolutionary bottom-up endeavour, unlike the revolutionary top-down approach registered in New Zealand.

It is to another seminal point that I ask leave now to transport the reader. Switzerland was not able to renounce another ideal deeply ingrained in current constitutional designs: the ideal of ‘the contiguous state’. The Swiss cantons were always designed to cover the whole area of the Swiss federation. The Swiss were not able to imagine any other possibilities. This proved to create tensions. More on this later when I discuss the effects of integration (both at the global and European scales) on the viability of the current (cantonal) Swiss model.

There is however, a more direct reason for choosing Switzerland. This has to do with the geographical nature of its federalism relative to other countries. If we look at the jurisdictional footprint of the 26 Swiss cantons, we find the largest, Graubünden (or Grisons), has an area of around 7,000 square kilometres, around half the size of metropolitan Sydney, and only around 17% of the total area of Switzerland. The smallest canton, Basel-Stadt, has an area of only 37 square kilometres. In comparison, the largest German state, Bavaria, has an area of 70,000 square kilometres, around 19% of the total area of Germany. Similarly, the largest region by footprint in Italy is Sicily, with 25,000 square kilometres, or 8% of Italy’s total area. More asymmetries can be found in the USA

⁸¹¹ See Karl Deutsch *Die Schweiz als paradigmatischer Fall politischer Integration* (Haupt, Bern, 1976), cited in Linder *Swiss Democracy* at 5.

⁸¹² A ‘double majority’ means a majority of the voters and a majority of the cantons. Since 1848, there were only eight bills rejected as a result of the cantonal majority requirement, six since the 1970s. The more recent cases address constitutional issues. See Adrian Vatter “Federalism” in Klöti et al *Handbook of Swiss Politics* at 85.

⁸¹³ See for example, Arend Lijphart *Democracy in Plural Society* (Yale University Press, New Haven, CT, 1977); Kenneth D McRae (ed) *Constitutional Democracy* (McClelland and Stewart, Toronto, 1974).

and Australia. It should be clear that many of the constituent members of other federations are viable as separate independent countries. In contrast, the small size of the Swiss cantons has contributed positively to the 700 year longevity of the federation. Their relative power to each other, and to other polities outside the federation, provides the glue of their unity.

A third reason for choosing Switzerland is that it is a ‘laboratory’ for testing the effects of integration. Rather than focus on the effects of globalisation, the Swiss case gives indications of the effects of such integration under a more intense setting, namely EU integration. As argued in this chapter, this provides a clear policy signal toward redistributing (legislative) powers towards urban agglomerations rather than existing regional (or state) demarcations. It follows that we also need to reconsider the usefulness of the contiguous nation state model.

A fourth reason comes from the relatively similar timeline for the modern political states in both Switzerland and in New Zealand. The modern Swiss federal constitution and the Treaty of Waitangi trace back to 1848 and 1840 respectively. Of course the sedimentary processes leading to these events are very different, but the fact that the current constitutional setups could be traced to these milestones gives an insightful contrast of the constitutional development in each country. Both countries were influenced by the *zeitgeist* of the middle 19th century, in particular the American and French intellectual influences. The former emphasised divided sovereignty, and the latter equality and democratic structures.

Notwithstanding, the findings from our analysis are not universal. The Swiss model is the product of a specific historical and socioeconomic context. The model is not the result of some inherent virtue but of external forces.⁸¹⁴ Drawing on this model would make sense only where our own cultural and institutional heritage are taken into consideration. Primarily, the Swiss model is based on ‘consensus democracy’ rather than ‘majoritarian democracy’. The former is based on power-sharing: “the compromise between centralists and cantonalists”.⁸¹⁵ The latter, at least in its pure form, is a ‘winner takes all model’. The structure of governments implementing the consensus model is federal and decentralised,

⁸¹⁴ Peter Sager “Swiss Federalism: A Model for Russia?” (1995) *St Louis-Warsaw Transatlantic L J* 163 at 167.

⁸¹⁵ Wolf Linder *Swiss Democracy: Possible Solutions to Conflict in Multicultural Societies* (3rd ed, Palgrave Macmillan, New York, 2010) at 191. For a comparative analysis of Majoritarian versus Consensus Democracy see Arend Lijphart *Patterns of Democracy: Government Forms and Performances in Thirty-Six Countries* (Routledge, London, 1999); cited in Linder.

while the majoritarian model is more relevant to unitary and centralised governments. Moreover, the consensus model is applicable to rigid constitutions, while the majoritarian one is dominant where the constitution is unwritten or flexible. In addition, the consensus model applies where parliament is bicameral, while the majoritarian model concentrates legislative power in a unicameral legislature.⁸¹⁶ This means that the Swiss model is closer to the US model with its emphases on cooperation and control, rather than the Anglo-Saxon Westminster model based on the doctrine of the Separation of Powers. Moreover, the emphasis on consensus takes the analysis beyond formal institutions and towards political values embedded in the Swiss culture itself that make this model a viable option.

The methodology used in this chapter is both morphological (on structure) and physiological (on function) and aims at producing normative signals as to future constitutional change in New Zealand. This methodology is also, inevitably, historical, if only to explain the genealogical connections that led to the emergence of constitutional praxes.⁸¹⁷

It is instructive to look at Figure 8.1 below. This figure captures the nature of Swiss federalism over two dimensions: process (bargaining on issues and programs between vertical levels of government) and structure (constitutional acknowledgement of vertical levels of government). While this figure reflects the relative position of New Zealand and Switzerland in 1985, it is still instructive as to the differential between the two countries in 2014 on both process and structure. The latter should be straight forward as there has been no change in the constitutional arrangements for vertical levels of government since 1985. As to process, it could be argued that the Local Government Act 2002 (NZ) might have improved the bargaining position of local government. On this point please refer to Chapter 1, where it was argued that the 2002 Act has not delivered on these aspirations. The Anglo-Saxon orthodox approach of spoon-feeding with model-by-laws under the auspices of central government remains the norm.⁸¹⁸

⁸¹⁶ See Lijphart's topology in Linder *Swiss Democracy* at 192-195.

⁸¹⁷ For a survey of methodologies employed in the study of constitutions see Vicki Jackson "Comparative Constitutional Law: Methodologies" in Michel Rosenfeld and András Sajó *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, Oxford, 2012) at 54.

⁸¹⁸ AHM Dolle and DJ Elzinga *Handboek van het Nederlandse Gemeenterecht I* (Rijksuniversiteit Groningen, Groningen, 1993) at 180 et seq; cited in Frederik Kistenkas "European and Domestic Subsidiarity: An Althusian Conceptionalist View" (2000) 8 *Tilburg Foreign L Rev* 247 at 252.



Figure 8.1: Structure and process in federal and selected non-federal polities.⁸¹⁹

To further motivate the discussion in this part, Figure 8.2 gives a pictorial representation of federalism versus subsidiarity. It provides four types of political organisation.

⁸¹⁹ Adopted from D Elazar "Federalism and Consociational Regimes" (1985) 15(2) The Journal of Federalism 17.

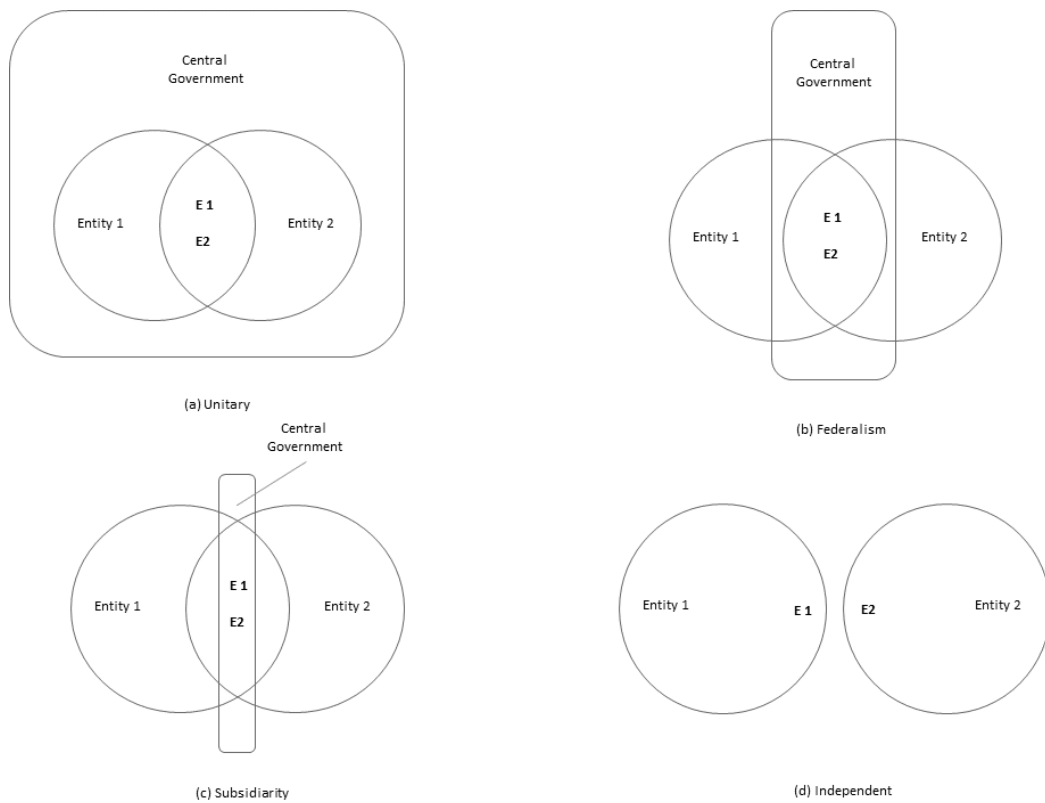


Figure 8.2: An illustration of the differences between federalism and subsidiarity

For simplicity, and without loss of generality, let us assume that we have only two entities, say two islands like the ones we have in New Zealand; assume that each one is considered a political entity, in that it needs to make policy decisions. Each entity is assumed to have only one decision to make, namely, in relation to education policy E . The first entity would adopt education policy E_1 and the other entity education policy E_2 .

Panel (a) in Figure 8.2 shows a situation where the two entities agree to coordinate their policies under a central government in a unitary constitutional arrangement. Here the central government dictates one policy on both entities. In other words the probability that both educational policies in each entity are the same is equal to 1 (certain). We can represent this as follows: $P(E_1 = E_2) = 1$.

In a federal setup, depicted in panel (b) of Figure 8.2, the entities do not have a complete overlap with the central government. Instead the central government is entrusted with coordinating education policies only. The entities have the liberty to develop their own policies in other policy areas, if and when they arise. Here we can write: $P(E_1 = E_2) \rightarrow 1$. In other words, even if today the policies are not identical, they tend to converge over time. The probability that the policies are going to be the same in the future is certain.

In panel (c) the entities decide to assign a subsidiary role to the central government. Here the central government still coordinates education policies, but only through guidelines. The area of overlap between the two entities on education policies is not covered completely by the central government. Instead the entities have a final say on these policies. Here we can write: $P(E_1 = E_2) \neq 1$. In other words, the policies are not identical and would tend to remain this way in the future give the inherent differences between the entities. Nevertheless, they would still have a level of similarity based on central guidelines: $P(E_1 = E_2) \neq 0$. This situation is similar to the education policy in Switzerland.⁸²⁰ The Swiss education system is one of the most decentralised in the world. The central government plays almost no role in decision-making. Most decision-making is split equally between the cantons and the communes. The central government has legislative and administrative authority only in areas such as vocational training and university education.⁸²¹

In panel (d) the two entities are independent. This is where we would conclude that $P(E_1 = E_2) \approx 0$, or the probability that the educational policies in both entities are equal is almost zero; the education policies in the two entities have little in common.

Now that I have elaborated the difference between subsidiarity and federalism for this chapter, I next look at the origin of the modern Swiss Confederation, and the forces that shaped its constitution.

⁸²⁰ See generally Gunther Hega “Federalism, Subsidiarity and Education Policy in Switzerland” (2000) 10(1) Regional and Federal Studies 1.

⁸²¹ Arnold Heidenheimer *Disparate Ladders: Why School and University Policies Differ in Germany, Japan, and Switzerland* (Transaction Publishers, London, 1997).

8.2. The genesis of the Swiss Constitution

Switzerland was born a poor nation. Over its seven centuries of existence it managed to become one of the World's most prosperous nations, notwithstanding its geographical constraints. It built a successful economy, based predominantly on high end services and manufacturing, where almost 90% of the firms have nine employees or less.⁸²²

Switzerland was born in 1291 when three rural alpine regions (Uri, Schwyz, and Unterwalden) signed a charter for a loose confederacy (*Eidgenossenschaft*)⁸²³ declaring themselves in the process independent from the Holy Roman Empire (the House of Habsburg). The 1291 Federal Charter states that:⁸²⁴

“the people of the valley of Uri, the democracy of the valley of Schwyz, and the community of the Lower Valley of Unterwalden, seeing the malice of the age, *in order that they may better defend themselves, and their own*, and better preserve them in proper condition, have promised in good faith to assist each other with aid, with every counsel and every favour, with person and goods, within the valley and without, with might and main, against one and all, who may inflict upon any one of them any violence, molestation or injury, or may plot any evil against their persons or goods. And in every case each community has promised to *succour the other when necessary*, at its own expense, as far as needed in order to withstand the attacks of evil-doers, and to avenge injuries; to this end they have sworn a solemn oath to keep this without guile, and to renew by these presents the ancient form of the league, also confirmed by an oath.” (Emphasis added)

The Charter goes on to indicate the existence of a ‘common council’ and suggests that the decisions to be taken by this council are by ‘unanimous consent’. It also provides a mechanism of dispute resolution:⁸²⁵

“We have also vowed, decreed and ordained in common council and by unanimous consent, that ... if dissension shall arise between any of the *Eidgenossen*, the most prudent

⁸²² Linder *Swiss Democracy* at 3.

⁸²³ The term literally means an oath of equal partners: *eid* means oath, *genosse* means fellow, comrade.

⁸²⁴ The Swiss Federal Charter of 1291. Available at <http://www.lexilogos.com/declaration/suisse_pacte_tableau.htm> (accessed on 14 September 2014). See also The Federal Administration website <<http://www.admin.ch/org/polit/00056/index.html?lang=en>>.

⁸²⁵ *Ibid.*

amongst the confederates shall come forth to settle the difficulty between the parties, as shall seem right to them; and whichever party rejects their verdict shall be held an adversary by the other confederates”.

By the 14th century these three regions were joined by the city states of Lucerne, Zürich and Bern, and by the time of the French revolution the total number of regions was thirteen. The Confederation ended when Bonaparte invaded Switzerland, bringing with him the promise of ‘one person, one vote’ and the rule of the majority—democracy. But French plans for a Helvetic Republic, reminiscent of their puppet regime in Holland, lasted only from 1798 to 1815. The Swiss were aided by serendipitous events beyond their borders, which allowed them to reinstate a loose confederation of 25 cantons. This loose confederation is not very different from the United Colonies of New England we looked at in Chapter 5, where there was no real parliament and where delegates were bound by the instructions of their cantonal governments. While there was a reversal of the French tide, the idea of democracy proved to take root even after 1815. The issue for Swiss society was how to modify this ideal to fit into their multicultural constitutional designs.

Just like New Zealand, modern Switzerland had its civil war at the beginning of its formation. While the war in New Zealand was based on ethnic lines, in Switzerland the war was more along religious lines. Similar to the tension we saw in New Zealand during the 1846 and 1852 Constitutions, this confederation was under two main political factions: regionalists (or conservatives) which were mainly Catholics, and centralists (or radicals) which were predominantly Protestant. By 1847 this tension led the regionalists to secede from the confederation, which was followed by a short war that resulted in their defeat. This signalled a strategic intent towards centralisation, based at least partly on economic considerations at the zenith of the industrial revolution,⁸²⁶ and evidenced by a transformation from a confederation to a federation. The outcome of this transformation was the Swiss Federal Constitution of 1848, which was revised in 1874 and 1999 mainly to rewrite in a modern understandable language.⁸²⁷ This laid the organisational framework for the federal state that exists today.

⁸²⁶ William Rappard *Le Facteur Économique dans L'avènement de la Démocratie Moderne en Suisse* (Georg, Genève, 1912); cited in Linder *Swiss Democracy* at 15.

⁸²⁷ Walter Haller “The New Swiss Constitution: Foreign and International Influences” (2002) 30 *International Journal of Legal Information* 256 at 256. See also Walter Haller *The Swiss Constitution in a Comparative Context* (Dike, Zürich, 2009).

To summarise, the aim is to analyse Swiss constitutional development, to the end of enlightening constitutional change in New Zealand. Switzerland was born out of the political activity of the Habsburgs, it was modernised out of resistance to Napoleonic intervention. But it was economic integration that proved to be the *leitmotif* behind Swiss federalism. It was the need to create a common economic market between the cantons that accelerated the pace of reform and provided the impetus for a federal infrastructure. This again is not very different from the public works that led eventually to the abolition of the regions in New Zealand.

8.3. Key features of the Swiss Constitution

The discussion in this part focuses on the Swiss Federal Constitution of 1999 unless otherwise stated. Under the Constitution, Swiss democracy has three main pillars: federalism, direct democracy, and power-sharing. Democracy is embedded in local political structures hence allowing for different answers to the same issues, depending on local preferences. The 1999 constitution continued the same position in 1874 and 1848 on cantonal sovereignty. Hence rather than the “We the People” opening of the US Constitution, we find “The Swiss People and the Cantons” in a clear acknowledgement of the role of the cantons as power mediators between the individual and the (federal) state. The Swiss opted for a different formula than the US ‘melting pot’ where the dominant (white protestant) culture expects to absorb all other cultures. Instead, the Swiss acknowledge and defend their differences as exhibited in the cantons. The cantons participate in federal decision-making. The bicameral Swiss parliament has a lower National Council representing the people, and the Council of the States which represents the cantons, with equal votes regardless of each canton’s population. Cantons also participate institutionally in referenda on constitutional change. Moreover, in art3 of the Constitution, the cantons are declared as sovereign, “except to the extent that their sovereignty is limited by the Federal Constitution”.⁸²⁸

Unlike the (unwritten) New Zealand Constitution, the Swiss Constitution creates legislative, executive and judicial organs at each (vertical) level: at the level of the

⁸²⁸ Confederation of 18 April 1999. Available at < <http://www.admin.ch/ch/e/rs/1/101.en.pdf>>.

federation, of the cantons (there are 26 cantons), and the communes (around 2700).⁸²⁹ This gives effect to the principle of ‘dual legitimacy’ where collective decision-making is carried out by both: the people and the cantons. Moreover, these cantonal and communal levels serve as training grounds for politicians, and as laboratories for institutional experiments.⁸³⁰

Swiss federalism gets its legitimacy from the self-rule maintained by the cantons (constitutional autonomy) and the shared-rule between these cantons at the federal level (constitutional power-sharing).⁸³¹ Constitutional progression from 1848 to 1999 put more emphasis on power-sharing (art45 and art55).⁸³² However, one of the key changes in the 1999 Constitution was to expand cantonal participation in foreign policy.⁸³³ Pragmatically, the model continues to account for the fragmented nature of Swiss federalism (driven by cultural and religion differences). Hence the preamble states that the Confederation is “determined to live our diversity in unity respecting one another”. The Confederation is required by the Constitution to “promote...cultural diversity” (art2, para2).

The federal executive branch has seven members, instead of the prime minister role we have in New Zealand. There is no political leader nor a leader of the opposition. These Councillors are elected for a four-year term and belong to the four strongest political parties.⁸³⁴

One key feature of Swiss constitutionalism as highlighted in the 1848 Constitution is captured by the following excerpt:⁸³⁵

“What, then, is the peculiar mark and symbol of the Swiss Constitution, taken as a whole? When all has been said and done, the most characteristic provisions are those which introduce forms of direct government or of pure democracy, as the technical expression

⁸²⁹ Linder *Swiss Democracy* at 9; Haller *The Swiss Constitution* at 41.

⁸³⁰ Walter Haller “The New Swiss Constitution: Foreign and International Influences” (2002) 30 *International Journal of Legal Information* 256 at 261.

⁸³¹ Thomas Fleiner “Recent Developments of Swiss Federalism” (2002) 32(2) *Publius* 97 at 99.

⁸³² At 101. See also Haller *The Swiss Constitution* at 45.

⁸³³ See Peter Hänni *Kantone und Aussenpolitik: Die Rolle der Kantone in einem sich wandelnden internationalen Kontext* (Schlussbericht, Bern, 2000).

⁸³⁴ See Haller *The Swiss Constitution* at 128.

⁸³⁵ William McCrackan *The Rise of the Swiss Republic: A History* (2nd ed, Henry Holt and Company, New York, 1901) at 352. Also see the 2010 print by Nabu Press.

is ... [R]epresentative democracy has never felt quite at home in Switzerland; there has always been an effort to revert to simpler, more straightforward methods; *to reduce the distance which separates the people from the exercise of their sovereignty*; and to constitute them into a court of final appeal".⁸³⁶ (Emphasis added)

Through direct democracy, the Swiss can influence parliamentary decisions in three ways: by (1) election, (2) popular initiative, and (3) referenda. Elections do not result in a government and an opposition, but in a grand coalition where decision-making is by negotiation and compromise, rather than Westminster winner-takes-it-all.

What is of specific interest are the second and third ways. Popular initiatives, first introduced in 1891, require 100,000 signatures to demand constitutional amendments. These signatures would need to be obtained within 18 months.⁸³⁷ The Federal Council (the executive) and the Federal Assembly (parliament) are able to give a non-binding advice on the proposal and can also formulate a counterproposal. Referendums on the other hand are a matter of right. Parliament has to submit every constitutional amendment and every major legislation or international treaty for popular approval.

In contrast, in New Zealand, popular initiatives, known as citizen initiated referenda (CIR), and referenda generally, are not binding, unless they are called after the government passed enabling legislation. More importantly, constitutional amendments do not require referenda. Under the Citizens Initiated Referenda Act 1993, such popular initiatives are non-binding. They require the signature of 10% of all registered electors (roughly 300,000) within 12 months. The Clerk of the House of Representatives has the right to alter the referendum question.⁸³⁸ Since the CIR had been introduced, only five questions received enough support for a citizens-initiated referendum to be held.⁸³⁹

⁸³⁶ Reducing this distance is a key feature of subsidiarity. See the next section.

⁸³⁷ See Chancellerie fédérale "Initiatives Populaires" <<http://www.bk.admin.ch/themen/pore/vi/index.html?lang=fr>>.

⁸³⁸ In 1986, a Royal Commission report was quite critical of CIR, describing it as "blunt and crude devices" the frequent use of which "would blur the lines of accountability and responsiveness of governments and political parties and blunt their effectiveness" [Royal Commission on the Electoral System *Towards a Better Democracy* (Appendix to the Journals of the House of Representatives of New Zealand, 1986-87, vol 9, Royal Commissions, 1986) at 175]. See also Bonnie Laxton-Blinkhorn "Half-hearted Democracy: A Critical Examination of the Operation of Citizens Initiated Referenda in New Zealand" (Master of Arts Thesis, University of Auckland, 1996).

⁸³⁹ See Electoral Commission "Referenda" <<http://www.elections.org.nz/voting-system/referenda>> .

Power sharing in Switzerland is based on a universal rule of proportionality.⁸⁴⁰ Proportionality is directly related to subsidiarity.⁸⁴¹ It allows local representation across vertical levels of government. This (political rather than legal) rule is found at almost every institution in the Swiss federation: from the Federal Council down to the nomination of high government officials. It is practiced in many cultural organisations and even in sports. There is no rigid legal quota. The main criteria are political party affiliation, mother tongue (language), and gender. Over- and under-representation is allowed but compensated for over time.

Under the Swiss model, the central government issues only general guidelines, leaving specific legal provision for cantons to decide. In other words: the “Swiss [federal] government is (only) as centralised as is necessary – and as decentralised as is possible”.⁸⁴²

Swiss federalism is often described as cooperative.⁸⁴³ This mode of cooperation was born of economic complexities and efficiencies. There are two types of cooperation: vertical, between the federation and the cantons, and horizontal, between the cantons themselves. Vertical federalism can be seen in the fact that most federal programmes are carried out by cantons and communes. The federal government has no administrative bureaucracy as for example in the USA, with its own regional services, agencies and courts. Horizontal cooperation can be seen in inter-cantonal treaties, the *concordats*, which allow for regional cooperation on administrative, legislative and juridical matters.

Federalism in the Swiss context is about protecting the rights of minorities rather than shared or collective decision-making (e.g. in the USA or Australia). The emphasis is on giving cantons their own constitutions and governmental structures. The cantons are also able to influence federal decision-making through institutional participation in policy-making at the national level.⁸⁴⁴

⁸⁴⁰ Linder *Swiss Democracy* at 35.

⁸⁴¹ See for example Paul Craig “Subsidiarity: A Political and Legal Analysis” (2012) 50(s1) *Journal of Common Market Studies* 72.

⁸⁴² Tamara Ehs and Bruno Kaufmann “Federalism and Direct Democracy: The Swiss Case in the Age of Transnational Politics” (2010) 4 *Vienna Online Journal of International Constitutional Law* 180 at 182.

⁸⁴³ See for example Wolf Linder and Adrian Vatter “Institutions and Outcomes of Swiss Federalism: The Role of the Cantons in Swiss Politics” (2001) 24(2) *West European Politics* 95 at 103.

⁸⁴⁴ Walter Haller “The New Swiss Constitution: Foreign and International Influences” (2002) 30 *International Journal of Legal Information* 256 at 261.

There are seven basic principles that drive cantonal autonomy under Swiss federalism:⁸⁴⁵ (1) the existence of the cantons is guaranteed; (2) they are free to choose their internal organisation, and (3) government; (4) they have far-reaching responsibilities, and (5) commensurate financial resources; (6) the cantons are not subject to political control; and (7) they participate with equal rights in federal decision-making. The implementation of these principles depends on institutional arrangements, vertically between the federal government and the cantons (e.g. the Council of States), and horizontally between the cantons themselves (e.g. inter-cantonal treaties). The following section analyses this autonomy through the lens of subsidiarity.

8.4. Subsidiarity and its future in Switzerland

Introduced for the first time in the 1848 Constitution,⁸⁴⁶ the principle of subsidiarity in Switzerland is not only a procedural criterion delineating the power of each level of government, but also a substantive one, ensuring that decision-making remains as close as possible to Swiss citizens.

Swiss federalism should be called Swiss subsidiarity (see below). While the Swiss Constitution divides powers between the vertical levels of government (art3), these powers are embedded in a complex network of socio-cultural relationships. They are shared in “a spirit of comity and federal-cantonal partnership”.⁸⁴⁷ Here we again see the effect of scale. In a small country like Switzerland, sovereignty is shared through a (formal and informal) network of cooperation.⁸⁴⁸ Swiss federalism is about sharing powers to preserve the multicultural diversity of Swiss society. This is the essence of subsidiarity where diverse entities enter into a ‘partnership’ to advance shared objectives, but no more. The emphasis would be on the liberty of these entities—on collective rights rather than individual rights. Hence the preamble to the Constitution sets the objectives of strengthening “liberty,

⁸⁴⁵ Jean-François Aubert *Exposé des Institutions Politiques de la Suisse à Partir de quelques Affaires Controversées* (Payot, Lausanne, 1978); Hanspeter Kriesi *Le Système Politique Suisse* (Economica, Paris, 1998).

⁸⁴⁶ Gunther Hega “Federalism, Subsidiarity and Education Policy in Switzerland” (2000) 10(1) *Regional and Federal Studies* 1 at 3.

⁸⁴⁷ Thomas Fleiner “Recent Developments of Swiss Federalism” (2002) 32(2) *Publius* 97 at 104.

⁸⁴⁸ At 120.

democracy, independence, and peace...in solidarity and in openness to the world”. This should be read in conjunction with art44, para1, requiring the confederation and the cantons to “support each other in the fulfilment of their duties” and to “cooperate with each other”. The ‘solidarity’ qualifier also emphasises the subsidiarity understanding of Swiss federalism. This is in unison with the arguments in Chapter 6 where there is a need for cooperation as well as competition to foster evolution.⁸⁴⁹

A “spirit of solidarity” is also mentioned in the Preamble to the 1999 Constitution. In the context of Swiss federalism it translates into emphasis on cooperation rather than competition between the communes and the cantons.⁸⁵⁰ The Swiss model of federalism is therefore different from the Tieboutian model of preference sorting, but similar to the Spinozistic vision adopted in Buchanan’s constitutional economics, and exemplified in the New England Confederation (see Chapter 5).⁸⁵¹

This section argues that Swiss federalism is more in the nature of subsidiarity as illustrated in Figure 8.2. This is supported by arguments from the education system in Switzerland. One thing that could easily be discerned about the system is that half of the cantons start the schooling year in spring, while the other half in autumn.⁸⁵² Other differences are detailed below.

Swiss Cantons and Communes

One of the key features of Swiss constitutionalism is cantons. Under the 1815 confederation these cantons were autonomous. As a result, decisions by the ‘general assembly’ (*Tagsatzung*) had to be unanimous—ratified by all cantons. In other words none

⁸⁴⁹ Two examples of this solidarity are the constitutional amendments that were carried out by the cantons of Basle and Jura. These amendments require the approval of the federal parliament. In the Basle case the amendment imposed on cantonal authorities the responsibility to fight with legal means the proposals for any nuclear power plants. In the Jura case the amendment was to politically encourage the Protestant and French-speaking minority in the neighbouring canton of Bern to secede and join their canton. The Basle amendment was approved and the Jura one rejected. The rationale in both cases was ‘solidarity’. In the Basle case solidarity was not violated, but in the Jura case, the call for secession would have violated the solidarity between the cantons. For more details see Fleiner (2002) 32(2) *Publius* 97 at 118-119.

⁸⁵⁰ Linder *Swiss Democracy* at 67-69.

⁸⁵¹ Ulrich Klöti et al *Handbook of Swiss Politics* (2nd ed, Neue Zürcher Zeitung Publishing, Zürich, 2007) at 25.

⁸⁵² Linder and Vatter (2001) 24(2) *West European Politics* 95 at 105.

of the cantons has a veto-right over such decisions. But this unanimity rule was abandoned since 1848 when the new constitution was adopted by a (double) majority rather than by consensus (i.e. a majority of peoples' votes and a majority of cantons' votes).⁸⁵³ The setup was analogous to a constellation of small states united by an international treaty, hence the name '*Eidgenossenschaft*'.⁸⁵⁴ This setup was not too remote from the setup envisaged under the Declaration of Independence of 1835 and its generalised form under the Treaty of Waitangi 1840. The northern tribes wanted a loose confederation for security and cooperation. Article 2 of the Declaration of 1835 stated that "[a]ll sovereign power and authority ... is hereby declared to reside entirely and exclusively in the hereditary chiefs and heads of tribes in their collective capacity", which suggests a consensus approach similar to that envisaged under the Old Swiss Confederacy.

Pragmatically, the setup was too unyielding, especially for the purposes of economic integration. One option, the one finally chosen in New Zealand in 1876 with the abolition of the provinces, was to abandon the cantons for a French-inspired administrative m. This solution would have been a return to the French model that existed in Switzerland between 1798 and 1803, and would have also been in line with the options chosen by Italy and Germany in the 19th century. It was primarily the high resistance that the conservatives showed to this alternative, and the ensuing civil war of 1847, that made it unviable.

The second option was a compromise between the centralists and the decentralists—a third way between the loose confederation, and a unitary state: a constitutional design inspired by subsidiarity where the cantons maintained most of their sovereignty, while delegating some of their responsibilities to a central government. The people under this design are citizens of their communes, of their cantons, and of the state (art37, para1 of the 1999 Constitution). The original design of the (1848) Swiss Constitution contemplated a subsidiary function for central authority, something we can still see in the autonomy still afforded to cantons. But also in the fact that this federal system has three rather than two tiers, it drills self-determination down to its lowest denominator: the commune.

This setup was influenced by the US Constitution. It resolves the tension between democracy (one person, one vote), and (symmetric) federalism (where each member of the federation has equal influence regardless of its population or geographic size). However, it was also an innovation in the 'onion-like' sharing of power over multiple layers of political

⁸⁵³ Ehs and Kaufmann (2010) 4 Vienna Online J of Int'l Const L 180 at 185.

⁸⁵⁴ Linder *Swiss Democracy* at 43.

organisation. Moreover, the Constitution of 1848 contemplated only a small role for central government. The powers of the federal government were very limited: foreign policy (war and peace treaties, relations with foreign states), currencies, fixing weights and measures, execution of public works. Civil and criminal law fell within the cantons, as well as the police (in many areas), public education, transportation, the bulk of military affairs and economic legislation (including commercial banks).⁸⁵⁵

Nevertheless, the responsibilities of the central government cannot be seen as static. The dynamic nature of sharing power and responsibilities between vertical levels of government requires a clear constrain on the potential size central government could attain. This was the insight from Buchanan's constitutional economics that we discussed in earlier chapters (See Chapters 4 and 5). The Swiss version of this constrain was to constitutionalise local autonomy at the federal, cantonal and communal levels (in the federal and sub-federal constitutions). Hence, art3 of the current 1999 Federal Constitution states that:

“The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They exercise all rights that are not vested in the Confederation”.

To understand the rationale in art3 we also need to look at art5a:

“The principle of subsidiarity must be observed in the allocation and performance of state tasks”.

Article 5a should also be read in conjunction with art2, para2: “[The Swiss Confederation] shall promote ... sustainable development”. The nexus between sustainability and subsidiarity was explored in Chapter 7 where it was argued that subsidiarity is a necessary and sufficient condition for sustainability.

The issue is inevitably one of interpretation. Under the Swiss Constitution all powers, including future powers, are invested in the cantons, unless the people and the cantons decide to invest such powers in the central government. Similar designs could be argued to exist in the US, under the 10th amendment, and in Australia under section 51 of the Commonwealth of Australia Constitution Act 1900 (Imp). However, in Australia and the

⁸⁵⁵ Andreas Kley “Constitution Fédérale” in Gilles Attinger (ed) *Dictionnaire Historique de la Suisse* (Hauterive, Bern, 2006). Available online at < <http://www.hls-dhs-dss.ch/index.php> > .

US the courts have consistently interpreted the provisions in a way that would give central government more new powers.⁸⁵⁶ In Switzerland, there is much more reluctance to bestow powers on the central government, unless by referenda (rather than by judicial review).

The distinctive feature of a canton vis-à-vis a region or a state is its small (territorial) size. This is important. It denies cantons complex governance structures that become bureaucracies. This also meant most public work projects are community-led.⁸⁵⁷

Swiss cantons are sovereign.⁸⁵⁸ Article 1 enumerates the “Sovereign Cantons of Switzerland” in the 1874 Constitution, and art3 of that constitution enforces that

⁸⁵⁶ See for example Vikram Amar and Mark Tushnet *Global Perspectives on Constitutional Law* (Oxford University Press, Oxford, 2009) Chapter 3; Patrick Parkinson *Tradition and Change in Australian Law* (5th ed, Thomson Reuters, Sydney, 2013) at [6.80].

⁸⁵⁷ Arnold Niederer *Gemeinwerk im Wallis: bäuerliche Gemeinschaftsarbeit in Vergangenheit und Gegenwart* (Kerbs, Basel, 1965); cited in Linder *Swiss Democracy* at 17.

⁸⁵⁸ The idea of a federal system created from the union of sovereign polities has been vexing political theory for centuries:

“The notion that a federal system is legally the effect of a contract between sovereigns has created permanent problems from which the modern federal state, for all its difference from the *foedus* of old, has not recovered. The idea that a polity can be founded in a contract between sovereign or quasi-sovereign member-states led naturally to the idea of secession, to the idea of simply breaking a disagreeable contract whenever any fact or pretext of bad faith on the part of any other party arose. And there was just enough of this idea, reinforced by historical knowledge of the Swiss and Netherlandish governments, and of the [American] Articles of Confederation, to lend credibility to the doctrines of a writer such as Calhoun, who developed the idea of federalism-as-contract to heights undreamed of in the 16th and 17th centuries.” [Patrick Riley “Three 17th Century German Theorists of Federalism: Althusius, Hugo and Leibniz” (1976) 6(3) 7 at 9. See also John C Calhoun *The Works of John C Calhoun* RK Cralle (ed) (D Appleton and Co, New York, 1883) vol 1 at 111].

Notwithstanding the perplex nature of this issue, some countries have given clear guidance through express rights of secession. For example Ethiopia have provided an express right to recession: Constitution of Ethiopia 1995, art39. On the other hand, “Switzerland has no express right of secession in its constitution”: Andrei Kreptul “The Constitutional Right of Secession in Political Theory and History” (2003) 17(4) *Journal of Libertarian Studies* 39 at 76. Switzerland however allows for internal secession. For example, on 1 January 1979 a new canton, the canton of Jura, was formed by the internal secession of three French-speaking districts from the canton of Bern. This was ratified by a national referendum accepting the accession of the new canton to the Swiss Confederation. In addition, on 28 January 2013, the Bernese Grand Council gave the green light to holding a referendum on merging the other four French districts still in the Bern canton with the Jura canton. The referendum was held on 24 November 2014 when the majority of these districts decided to stay in the canton of Bern. The exception was the town of Moutier which is likely to bid separately to join the Jura. Note that earlier Swiss federal Constitutions did not foresee the need for a procedure for territorial modifications. However, in 1999, the rules that were developed according to the experience of the secession of the Jura territory. Under art53(3) of the 1999 federal Constitution, any changes to the territories of cantons will now have to be approved by the Federal Assembly. Theoretically, there might even be efforts to re-establish the ‘Rauracian Republic’ which included parts of France and Switzerland around the Jura Mountains, although it would be challenging to obtain a federal endorsement of such a move. The key point is that such recognition will have to be by consensus rather than based on archaic notions of absolute sovereignty, if only to ensure international recognition. For more details see John RG Jenkins *Jura Separatism in Switzerland* (Oxford University Press, Oxford, 1986). See also Mikulas Fabry *Recognizing States: International Society & Establishment of New States Since 1776* (Oxford University Press, Oxford, 2010).

sovereignty. A similar guarantee to cantonal sovereignty can be found in the 1874 and 1999 Constitutions (art5 and art3 respectively). One of the key indicators of this sovereignty is cantonal diversity, linguistically, culturally, and socio-economically (including education policies). However, the sovereignty of Swiss cantons has to be understood under the rubric of ‘relative sovereignty’ rather than ‘absolute sovereignty’. Swiss sovereignty rests on the *division* of sovereignty powers between the cantons and the federal government, although their sovereignty is not limited by the federal Constitution (art3) insofar as residual powers remain with the cantons. On the other hand, under the federal Constitution, the cantons enjoy all state traditional powers, including constitution-making (art51) and treaty-making powers (art56).

In addition, the third tier of government in Switzerland, the municipalities (or the communes) have a bundle of rights guaranteed by the Federal Constitution.⁸⁵⁹ The existence of these municipalities is guaranteed by cantonal constitutions and by art50 of the Federal Constitution. The municipalities have private and public law personality and enjoy general public powers at the local level.⁸⁶⁰ These include the right to exist or to merge with other communes, the right to choose their political structure and administration, the right to fiscal autonomy through imposing taxes (not only on land but also on income),⁸⁶¹ and the residual powers not under cantons or the central government. An important part of the administration of these municipalities (and cantons) is a system known as *Milizverwaltung* or self-administration which helps reduce the bureaucratic burden of public administration by entrusting it to ordinary citizens, instead of public servants.

In addition to their executive and administrative bodies, communes have full legislative powers on areas that fall under their competency. Larger communes have parliaments, while smaller ones have citizens’ assemblies. These communes are proving to be the ‘cash cows’ through which cantons are able to balance their books. The municipalities’ share of cantonal expenses has also been increasing steadily in recent years.⁸⁶²

⁸⁵⁹ Linder *Swiss Democracy* at 57. See also Ulrich Klöti et al (eds) *Handbook of Swiss Politics* (Neue Zürcher Zeitung Publishing, Zürich, 2007).

⁸⁶⁰ See Katia Horber-Papazian “Municipalities” in Klöti et al *Handbook of Swiss Politics* 227 at 235.

⁸⁶¹ Municipalities in fact collect all income taxes, including those of the canton and the federal government. See Linder *Swiss Democracy* at 62. This right to collect taxes introduced competition between the cantons, e.g. where some introduced flat tax rates to attract wealthier citizens, although only at healthy levels generally inductive to economic development.

⁸⁶² Horber-Papazian in Klöti et al *Handbook of Swiss Politics* 227 at 238.

Subsidiarity in Switzerland meant that “[i]nstead of people flocking to where the money is, Swiss federalism has seen to it that the money is sent to where the people are”.⁸⁶³ In the context of welfare services, we see this strategy at work in the level of pension provided to retirees. For example, where a person’s pension from the federal scheme is too small, additional benefit is provided by the cantons. This is only one example of a larger strategy of financial compensation where differences in resources and spillovers are adjusted to help poorer communes and cantons towards economic development. This compensation is yet part of a larger strategy of solidarity.

Swiss federalism is open to the creation of new cantons. The effect of such new cantons on the stability of Swiss federalism is less than the effect seen in New Zealand under the New Provinces Act of 1858. Given Switzerland’s small area, the new cantons are similar in size to the rest of the cantons. They have no disadvantage due to their relative resources. For example, the canton of Jura was created in 1979 when it separated from the canton of Bern. The new canton has an area of 839 square kilometres, or 14% of the Bern canton after separation, which is commensurate with the area of most other cantons. There is a symmetry between the cantons in their jurisdictional (territorial) footprint that helps maintain their ‘federalism’.

Notwithstanding the above discussion, it has to be conceded that over the last 150 years there has been a gradual shift in power away from cantons.⁸⁶⁴ This can be seen today in the emphasis put on shared-rule over self-rule. Since 1874 there has been around 140 constitutional amendments that collectively diminished cantonal self-rule. This setting of ‘entropy’ (qua uniformity) can be understood as inevitable if we remember that the Swiss model is after all a model of a ‘contiguous state’. This allows for central government, over time, to consolidate its position in order to allow for more ‘interaction’ between the cantons.⁸⁶⁵ Similar effects can already be seen in the USA and Australia.⁸⁶⁶

⁸⁶³ Linder *Swiss Democracy* at 67.

⁸⁶⁴ In terms of our earlier discussion on localism, this needs to be understood in terms of a threshold signal, namely city subsidiarity and the rise of metropolitan areas as the globalisation nodes in the world system. Localism is no more possible on a small scale such as the canton (were the largest by area has around 7,000 square kilometres). The concept of (non-contiguous) city-regions would be the logical scale for localism in the current world system.

⁸⁶⁵ Fleiner (2002) 32(2) *Publius* 97 at 117.

⁸⁶⁶ See for example, Augusto Zimmermann “Judicial Betrayal” (2012) 28(2) *Policy* 18.

But today we also see external forces putting pressure on cantons to merge, even physically. Globalisation, with its emphasis on (economic and socio-political) integration and economies of scale, is rendering decision-making at the communal, cantonal, and federal levels impossible. Instead we are witnessing the rise of another polity: the metropolitan city. It is the metropolis that functions as a node in the global network leading to integration. Globalisation is effected by the metropolis. The typical architecture of such urban agglomerations is a city forming the nucleus for a peripheral region of communes. This trend is in action in Switzerland as well: between 1848 and 2005, the number of municipalities decreased from 3,203 to 2,758.⁸⁶⁷ Moreover, almost 70% of the Swiss population lives in such city-regions.⁸⁶⁸ What is still missing is a central authority to run these agglomerations—not just in Switzerland, but in the whole of Europe.

This rise of the metropolis is the Achilles heel of Swiss federalism. The small jurisdiction of each region means that metropolitan areas infringe on historical (cantonal) boundaries that are hard to renounce. In contrast, in federalisms where regions are of larger sizes, the metropolis becomes a revived kernel of the same historical boundaries.⁸⁶⁹

Nevertheless, Swiss federalism provides important insights for New Zealand. The small size of Swiss cantons means that their individual power is easily contained. But they are becoming less relevant in an age of globalisation. Large states such as those in the USA and Australia are also losing to globalisation. In both cases, the metropolis is proving itself to be a ‘political’ structure that is (re)gaining ascendancy. Such agglomerations also reflect historical and political affiliations. For example, the supercity of Auckland is also the kernel of the historical region abolished in 1876. A federalism for the 21st century would see this agglomeration harness a sovereignty that reflects its growing influence beyond the shores of New Zealand. But not so any larger footprints. Hence, a region such as Canterbury would not be a member of such a federation. A city such as Christchurch however would.

⁸⁶⁷ Horber-Papazian in Klöti et al *Handbook of Swiss Politics* 227 at 245.

⁸⁶⁸ Linder *Swiss Democracy* at 85.

⁸⁶⁹ For further analysis of the issues raised by agglomeration in Switzerland, see Daniel Kübler in Ulrich Klöti et al (eds) *Handbook of Swiss Politics* (Neue Zürcher Zeitung Publishing, Zürich, 2007) 253.

The effect of Europeanisation on Swiss Federalism

I have chosen Switzerland partially because it represents a microcosm of the effects of integration on federalism. It provides an environment where a more intensified interaction between the local and the global scales could be examined. The effect of Europeanisation on Switzerland is an analogue of the effect of globalisation on federalism around the world.

It is clear that “[t]he gradual intensification of European integration represented a challenge to the political experience of Switzerland since policy areas that had been exclusively in the cantonal domain became subject to European integration”.⁸⁷⁰ In 2007, the Swiss Federal Council identified a risk of centralisation due to Europeanisation, and its effects on Switzerland through bilateral agreements with Brussels and the possibility of accession to the EU. A response to this identified risk would come from art5a and its elaboration in art44 of the Constitution:

“Art. 5a Subsidiarity

The principle of subsidiarity must be observed in the allocation and performance of state tasks”.

“Art. 44 Principles

1. The Confederation and the Cantons shall support each other in the fulfilment of their duties and shall generally cooperate with each other.
2. They owe each other a duty of consideration and support. They shall provide each other with administrative assistance and mutual judicial assistance.
3. Disputes between Cantons or between Cantons and the Confederation shall wherever possible be resolved by negotiation or mediation”.

The effect of art5a and art44 is that the ‘support’ and ‘cooperate’ actions leading to a ‘duty of consideration and support’ are embedded in a framework of subsidiarity, where ‘disputes’ are resolved through direct ‘negotiation and mediation’.

This vision is also supported within the EU. Under art5 of the Treaty on European Union (Maastricht), which introduces the principles of conferral, subsidiarity, and proportionality,

⁸⁷⁰ Ehs and Kaufmann (2010) 4 Vienna Online J on Int’l Const L 180 at 186.

and under the principle of autonomy in art2 of the European Charter of Local Self-Government (see Chapter 1 for more details), and since the 2007 Treaty of Lisbon amendments (art11, para4 on citizen initiated proposals), participative processes are moving the Union towards a post-national polycentric system in which consociational (i.e. community-based),⁸⁷¹ direct democracy is integrated into the Westminster model of representative democracy.⁸⁷² This vision has its historical pedigree in Althusian subsidiarity, where the architecture of local governance is anchored in existing geographical and socio-political structures (see Chapters 4 and 5).⁸⁷³ With the ongoing integration at the European and global levels, an integration that goes beyond the economic sphere, we see this Althusian rendition taking hold at the nodes that enable all forms of integration: agglomerations.

Agglomerations (city-regions) are now the tension point between forces of globalisation and localisation. According to the United Nations these agglomerations account for 64% and 86% of the world total population in developing and developed countries respectively.⁸⁷⁴ The coming polycentric system will have its nucleus as the city-region and integrate through bottom-up processes and structures toward the supra-national (European and global) scales. It embodies a ‘circular sovereignty’ (*sovereiniteit in eigen kring*) reminiscent of its Spinozistic rendition (see Chapter 9).⁸⁷⁵

There is a historical anchor for such subsidiarity. Since the 15th century, power in Swiss cities was centralised in local small councils (*Kleine Räte*), controlled mainly by aristocracy.⁸⁷⁶ This is close to the city sovereignty also envisioned by Spinoza.⁸⁷⁷ By the

⁸⁷¹ Also referred to sometimes as ‘concordance’ (*Konkordanz*) or ‘power sharing’.

⁸⁷² See Ehs and Kaufmann (2010) 4 Vienna Online J on Int’l Const L 180 at 189 and the references therein.

⁸⁷³ Some argue however, that the EU version of subsidiarity is better understood in terms of economic efficiency. See for example Aurélian Portuese “The Principle of Subsidiarity as a Principle of Economic Efficiency” (2011) 17 Colum J Eur L 231. A better understanding would come from mapping the subsidiarity topology introduced in Chapter 5 over the efficiency strands in the models from Chapters 2 and 3.

⁸⁷⁴ “Urban life: Open-air computers” *The Economist* (online ed, London, 27 October 2012).

⁸⁷⁵ Kistenkas (2000) 8 Tilburg Foreign L Rev 247 at 253. While Kistenkas suggests that the principle of subsidiarity in the European context is not legally binding, consult Petr Novak “The Principle of Subsidiary (April 2014) Fact Sheets on the European Union at 3 <http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.2.2.pdf>.

⁸⁷⁶ Roger Sablonier “The Swiss Constitution” in Christopher Allmand (ed) *The New Cambridge Medieval History* (Cambridge University Press, Cambridge, 2006) 645 at 656-657.

⁸⁷⁷ BF Gussen “On the problem of scale: Spinozistic sovereignty as the logical

14th century rural *Orte* had also formalised their assemblies (*Landsgemeinde*). But there was widespread rural unrest driven by economic and social issues. Putting an end to these uprisings required a wider consolidation of these councils into a “whole confederate system of alliances”,⁸⁷⁸ more in the spirit of a league of independent and equal states (regardless whether urban or rural). While this alliance had no sovereign authority, it brewed a common and unique Swiss identity.

What we see today is a ‘remake’ of the Swiss identity around evolving agglomerates within a global process of integration. It is these city-regions that will shape a new Swiss identity even as unique as it historically was.

8.5. Conclusion: Swiss insights into subsidiarity

I am writing this conclusion on Election Day (in New Zealand), 20 September 2014, after learning the final results of the Scottish Independence Referendum. The British Prime Minister has just promised “a better [constitutional] settlement for all the UK”.⁸⁷⁹ There is now a promise of a ‘devolution revolution’ where more ‘home-rule’ is to be afforded to all parts of the UK, not only Scotland, but also Northern Ireland, Wales, Cornwall, and other localities. While this chapter does not touch on these developments, they give a clear indication of the currency of the discourse and the conclusions.

The chapter highlights two points for constitutional designs: first, autonomous entities cannot be the size of independent countries, as is the case in the US, Australia or even the UK (with Scotland at almost 80,000 square kilometres, more than ten times the size of the largest Swiss canton). If they were, centrifugal forces will see to it that they become completely independent (on the long run). This explains the counterbalancing gradual power shifts to the centre. The Swiss model gives another alternative where autonomous entities are designed with small jurisdictional footprints. Such entities would not be a threat neither internally nor externally.

foundation of constitutional economics” (2013) 7(1) *The Journal of Philosophical Economics*.

⁸⁷⁸ Sablonier, above n 876, at 660.

⁸⁷⁹ “David Cameron: ‘we need a better settlement for all of UK’ after Scottish independence referendum” *The Telegraph* (UK, 20 September 2014).

The second point is that globalisation is now changing the nature of these autonomous entities. Given the central role played by metropolitan cities in globalisation, it is inevitable that they will demand, and receive more autonomy. Not necessarily to facilitate their role in integration, but because they have become *de facto* foci in the confrontation between globalisation and localisation. An updated version of the Swiss model would see ‘cantons’ redefined to align with these new realities. This would not mean creating artificial entities, but would emphasise the historical role of the sovereign city.

The above points lead to this conclusion: the contiguous nation state model is of no value moving forward. Instead, for multicultural ‘nation’ states, we need a model of a non-contiguous state—a ‘network’ state. Probably, the best illustration of such a state would be a cross section of a disc of *Emmentaler* cheese. The yellow cheese represents the central government, while the holes or eyes represent sovereign city-regions that maintain their unique identities. What is essential in this setup is that such agglomerations are non-contiguous. What binds them together is the ‘federal’ state. Nevertheless, they are partners in decision-making at the ‘national’ (federal) level. There could even still be a meso tier representing merged cantons that mediate between the federal and this new municipal scale. But these sovereign entities would not be too close to each other, nor attempt any absorption of their respective jurisdictions.

For New Zealand, the proposition is for an emulation of Swiss cantons around the original colonies, namely, Auckland, New Plymouth, Nelson, Christchurch, and Dunedin. These ‘cantons’ would be non-contiguous charter cities organised around existing agglomerations. Wellington would continue to function as the capital of a federal state. Of course, there are many details that need to be ironed out before a complete constitutional design is available. But that would need to be left for future research.

9. Spinozistic Sovereignty as the Logical Foundation of Constitutional Economics

9.1. Introduction

In *The Calculus of Consent*, James Buchanan and Gordon Tullock state that the political ideas of Baruch Spinoza, “in many respects . . . may be taken as the most appropriate chosen classical precursor to [constitutional economics]”.⁸⁸⁰ Notwithstanding this endorsement, the authors do not investigate Spinoza’s rendition of sovereignty. Instead, they point out that:⁸⁸¹

“Spinoza’s influence on our own ideas has been limited to his general and indirect effects on the Western intellectual tradition. In a specific sense, we have carefully reviewed Spinoza only after the completion of an initial draft of the main body of this book [*The Calculus of Consent*].”

In *The Calculus*, one of the foundational works in constitutional economics, the word ‘sovereignty’ appears only four times; two of these appearances are in the appendices, and not as the subject of analysis but as a reference point for the models therein. A similar marginalization of sovereignty can be seen in recent works. For example, in a monograph entitled *The Calculus of Consent and Constitutional Design*,⁸⁸² the word ‘sovereignty’ appears only once—in the introduction. This is problematic not only because sovereignty is closely related to the evolution of the state, but because, through the temples of constitutional order, sovereignty became the shaman of all economic activity.⁸⁸³

Sovereignty is a fundamental pillar of the capitalist world economy. Mercantilism led to the first constitutional rationalization of the exercise of sovereign power as a practice of government.⁸⁸⁴ Later, the nation state, through its legislative monopoly, became

⁸⁸⁰ James Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962) at 313.

⁸⁸¹ At 313.

⁸⁸² Keith Dougherty *The Calculus of Consent and Constitutional Design* (Springer, New York, 2011).

⁸⁸³ See for example Beard *The Economic Basis of Politics*.

⁸⁸⁴ Michel Foucault ‘Governmentality’ in Graham Burchell, Colin Gordon, and Peter Miller (eds.) *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf, London, 1991) 87.

indispensable to the conduct of economic enterprise. Probably the strongest evidence of the link between sovereignty and economics comes from the idea of legal tender and the historical evolution of (national) territorial currencies. The same can be said about the rise of central banks and their influence, through sovereignty, on economic activity. Some would argue that the tendency to grant independence to central banks and the creation of non-national currencies such as the euro signify the increasing irrelevance of sovereignty.⁸⁸⁵ However, a quick glance at the euro crisis (which continues to unfold in 2014) shows why such logic is wanting. In fact, the current drive within the European Union for economic integration (through the euro) is matched with a similar political integration.⁸⁸⁶ If anything, this suggests a resilient link between economics and politics. Even the analysis of what some theorists perceive as the ‘decline’ of sovereignty is also framed in reference to economic systems, in which the ‘decline’ of sovereignty today is seen as a “sign of the acute crisis of capitalism as an historical system”.⁸⁸⁷

The link between economics and sovereignty suggests that the latter should be at the heart of economic analysis. This is more so in the case of constitutional economics, given its focus on the analogy between markets and politics. It is difficult to see how constitutional economics can treat the subject of choice among constraints without an examination of as fundamental a constitutional concept as sovereignty. Observing that sovereignty is becoming less and less relevant in a world with increasing economic integration not only misses the point of the choice *among* constraints, but also amounts to a misunderstanding of the concept of sovereignty itself. Historically, sovereignty has been, and continues to be, a response mechanism to forms of *universitas*, the current exemplar of which is globalization.⁸⁸⁸

⁸⁸⁵ Eric Helleiner *The Making of National Money: Territorial Currencies in Historical Perspective* (Cornell University Press, Ithaca, 2003).

⁸⁸⁶ See for example Mark Halleberg “Fiscal Federalism Reforms in the European Union and the Greek Crisis” (2011) 12(1) *European Union Politics* 127–142.

⁸⁸⁷ Wallerstein in David Smith et al (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 20 at 33.

⁸⁸⁸ For the key work on the concept of *universitas*, see Michael Oakeshott *On Human Conduct* (England Clarendon Press, Oxford, 1975).

Admittedly, just as with most political concepts, sovereignty is intrinsically controversial.⁸⁸⁹ Nevertheless, sovereignty has a common denominator that makes it a viable explanatory variable. This denominator is seen in a (political) power struggle between three scales: the local, the national, and the global. Within the European context, sovereignty grew from the impulse towards independence following protracted tensions between medieval kings and external powers in the form of popes and emperors.⁸⁹⁰ From the 16th century and up to the 1920s, power was transferred from local to national levels of governance, and then, through globalization, from national to global governance. The weakening of the role of the nation state since World War I led to a reversal of this transfer.

This chapter attempts to elucidate the role of sovereignty within constitutional economics. In particular, an investigation is made into the nature of Spinozistic sovereignty and how it moves beyond an analysis of power relations, and into providing a normative discourse on the form of the state. To this end, the second section of the chapter furnishes a brief introduction to sovereignty. The third section expands on sovereignty under the analogy between markets and politics. The fourth section elaborates on Spinoza's understanding of sovereignty, especially his preferred structure for the state. The chapter ends with some concluding remarks.

9.2. Sovereignty between absoluteness and divisibility

The literature on sovereignty provides a plethora of classes and categories.⁸⁹¹ Only a few of these are explored in some detail here. The aim is to clarify the links between constitutionalism and sovereignty, and trace the concept's transformation from absolute to

⁸⁸⁹ RBJ Walker "Sovereignty, Identity, Community: Reflections on the Horizons of Contemporary Political Practice" in RBJ Walker and Saul H Mendlovitz (eds) *Contending Sovereignties: Redefining Political Community* (Lynne Rienner Publishers, London, 1990) 159.

⁸⁹⁰ FH Hinsely *Sovereignty* (CA Watts & Co, London, 1966).

⁸⁹¹ A caveat:

"Sovereignty, like so many terms that straddle the boundary between law and politics, is a concept denoting a cluster of related ideas rather than one single clearly defined one. Moreover, in nearly all its clustered elements, it is a contested concept, in the sense that different theoretical approaches dispute over its correct explanation or definition, usually also disagreeing about its practical relevance".

S Veitch, EA Christodoulidis and L Farmer *Jurisprudence: Themes and Concepts* (Routledge-Cavendish, London, 2007) 10–11.

divided sovereignty. A key feature of sovereignty is power exchange. This exchange leads to a specific structure of the state. For example, Hobbesian sovereignty leads to a unitary state, whereas Spinoza's strand favours a federal polity.

Sovereignty on the most part is a legal concept.⁸⁹² It is the power to make binding law in a particular territory. Within the European context, sovereignty grew from the impulse towards independence following protracted tensions between medieval kings and external powers (popes and emperors). The genesis of sovereignty lies in claims to local supremacy. It is this point that will be developed further by examining the link between sovereignty and constitutionalism.

Constitutionalism, especially in the context of states, is integral to sovereignty. Sovereignty is 'constitutional independence', "a claim to the exclusive right to make rules",⁸⁹³ and hence "the first bulwark of constitutional government—as it implies the right to say no to outsiders".⁸⁹⁴ The starting point is to interpret 'constitution' widely as the fundamental law principles from which the state draws its authority. Constitutionalism can hence result either from a (revolutionary) contractarian approach, or through an evolutionary approach based on norms and conventions. Constitutionalism moderates the absoluteness of sovereignty, making its exercise subject to authorization, while supplying internal legitimacy. Sovereignty is inseparable from constitutionalism.

The link between sovereignty and constitutionalism can be traced back to ancient Greece.⁸⁹⁵ Aristotle states that the constitution is the government, and the government is the sovereign in the state.⁸⁹⁶ This constitutional link to sovereignty is also seen in medieval Europe.⁸⁹⁷ In the history of sovereignty leading up to the European revolutionary upheavals in the 16th and 17th centuries, there is almost universal agreement that the foundation of

⁸⁹² Scot Macdonald and Gunnar Nielsson "Linkages between the Concepts of 'Subsidiarity' and Sovereignty: The New Debate over Allocation of Authority in the European Union" (paper presented at the Fourth European Union Studies Association (EUSA) Biennial Conference, 1995).

⁸⁹³ J Thomson "State Sovereignty in International Relations" (1995) 39 *International Studies Quarterly* 213 at 219; cited in David Smith et al (eds.) *States and Sovereignty in the Global Economy* at 2.

⁸⁹⁴ Rabkin *Law without Nations?* at 69.

⁸⁹⁵ For the purposes of this chapter, no distinction needs to be made between contractarian-ism and the original-contract approach.

⁸⁹⁶ Aristotle *Aristotle's Politics* Carnes Lord (ed and trans) (The University of Chicago Press, Chicago, 2013).

⁸⁹⁷ Beard *The Economic Basis of Politics*.

sovereign power comes from an original contract,⁸⁹⁸ either between the government and the people,⁸⁹⁹ or between the people among themselves followed by a further agreement between people and government (Pufendorf), or a single contract in which the sovereign and the state are created simultaneously (Hobbes and Rousseau). Early formulations of sovereignty focused on deriving power from the people as a whole, whereas later formulations reverted to individual ‘natural rights’.

The sovereign state came to be conceived of as a territorial jurisdiction at the national scale.⁹⁰⁰ It was not until the rise of federal polities exemplified by the United States that a shift occurred in the analysis towards a possible divisibility of sovereignty. Hence, for Jean Bodin,⁹⁰¹ who in the 16th century developed a political theory to secure the stability of the state against anti-nationalism (and by doing so formulated the concept of sovereignty for the first time), sovereignty is always in the service of a nation.⁹⁰² Bodin signalled the advent

⁸⁹⁸ See generally Merriam *History of the Theory of Sovereignty since Rousseau*.

⁸⁹⁹ Johannes Althusius *The Politics of Johannes Althusius* Frederick Smith Carney (trans and ed) (Eyre & Spottiswoode, London, 1965). Althusius saw politics as a relational process, a process of communication, just like it was described by James Buchanan: James Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, Ann Arbor, 1962). In addition, for Althusius, politics is not about power, but about mutual trust. See Thomas Hueglin “Johannes Althusius: Medieval Constitutionalist or Modern Federalist?” (1979) 9(4) *Publius* 9 at 25. For Althusius, sovereignty is the connection between politics and jurisprudence. His political system was an ‘association of associations’ where sovereignty is shared rather than divided (as in federalism). This is different from Rousseau’s approach where he constructs sovereignty as resulting from the collective of individuals rather than an association of associations, leading to difficulties in conceptualising a confederation of cities. See Jean-Jacques Rousseau *The social contract and The First and Second Discourses: Rethinking the Western tradition* (Yale University Press, New Haven, 2002) Book III, Chapter XIII at 219. See Pieter S Gerbrandy *National and International Stability: Grotius, Althusius, Van Vollenhoven* (Oxford University Press, London, 1944) at 14 and 37; cited in Wordling (below). In fact Althusius maintained, just like Bodin, that sovereignty is indivisible. See for example Henk ES Wordling “The Constitutional State in the Political Philosophy of Johannes Althusius” (1998) 5(2) *European Journal of Law and Economics* 123. However, unlike Bodin, Althusius envisaged a political system where polities would share their sovereignties. This was possible given Althusius’ separation of the right of sovereignty from its exercise. See Thomas O Hueglin *Early Modern Concepts for a Late Modern World: Althusius on Community and Federalism* (Wilfrid Laurier University Press, Waterloo, Ontario, 1999) at 182. Althusius’ political system ensured that sovereignty would not result in complete absorption of the constituent polities—a tendency that can be discerned in federal states, especially today in the context of the Australian Commonwealth. Althusius imagined “a kind of co-sovereignty shared among partially autonomous collectivities consenting to its exercise on their behalf and within the general confines of this consent requirement”: Thomas O Hueglin *Early Modern Concepts for a Late Modern World* at 4. See also Patrick Riley “Three 17th Century German Theorists of Federalism: Althusius, Hugo and Leibniz” (1976) 6(3) *Publius* 7.

⁹⁰⁰ Robert Jackson “Sovereignty in World Politics: A Glance at the Conceptual and Historical Landscape” (1999) 47(3) *Political Studies* 431.

⁹⁰¹ J Bodin *Six Books of the Commonwealth* MJ Tooley (trans) (Blackwell, Oxford, 1955).

⁹⁰² To be exact, Bodin’s rendition of sovereignty had elements from both, the classical and the constitutional theories of sovereignty. The classical theory has three main elements: (1) unlimited power,

of sovereignty's absolutism, which reached its zenith in the 17th century with the *Leviathan* of Hobbes.⁹⁰³ This absolutism meant that sovereignty could not be shared or divided. Absolutist sovereignty had intellectual opposition in the form of the *Monarchomachs*, epitomized by Johannes Althusius,⁹⁰⁴ who revived the Middle Ages (democratic) trust-based theories of sovereignty. This approach was also dominated by a contractarian approach—again emphasizing the nexus between sovereignty and constitutionalism. More recently, Habermas elaborated on the idea that sovereignty is the people, underscoring the importance of involving 'the people' actively in rational decisions that guide sovereigns.⁹⁰⁵

(2) sovereign power being the source of all rights, and (3) the state, rather than the people or the constitution, is the bearer of this power. The constitutional theory had the following main elements: (1) sovereignty can be divided, (2) sovereignty is not vested in any will, and (3) the constitution is the bearer of this power. See Andrew Heywood *Political Ideas and Concepts: An Introduction* (Macmillan Press, London, 1994) at 49-53, cited in Dusan Pavlovic "Rousseau's Theory of Sovereignty" (Master of Arts Thesis, Central European University, 1997) at 5-6. For Bodin, just like for Hobbes and later on for Rousseau, the sovereign can decide whatever he or she wills. However, Bodin also recognised that the sovereign power was subject to limitations such as the law of God and nature. See J Bodin *Six Books of the Commonwealth* Book I, Chapter VIII.

⁹⁰³ Thomas Hobbes *Leviathan* Richard Tuck (ed) (Cambridge University Press, Cambridge, 1996).

⁹⁰⁴ Johannes Althusius *The Politics of Johannes Althusius* Frederick Smith Carney (ed and trans) (Eyre & Spottiswoode, London, 1965).

⁹⁰⁵ Just like Althusius, Habermas, is also interested in the problem of coordinating the actions of irrational agents. Irrationality (or bounded rationality) leads to pluralism, and this brings the problem to a formulation close to the discourse seen in Althusius. Habermas indicated that "[i]n complex societies, even the most earnest endeavors at political self-organization are defeated by resistant elements originating in the stubborn systemic logics of the market and administrative power": Jürgen Habermas "Popular Sovereignty as Procedure" in James Bohman and William Rehg *Deliberative Democracy* (Massachusetts Institute of Technology, Cambridge (MA), 1997) 35-66 at 41. However, Habermas not only favours contractarian forms of political theory (which is what Althusius followed), but also neo-Kantian political theory (especially its emphasis on normative arguments): Bernard Yack "The myth of the civic nation" (1996) 10(2) *Critical Review: A Journal of Politics and Society* 193 at 200. Habermas' solution to the problem is therefore 'communicative action' which enables mutual understanding (as opposed to 'instrumental action'). See Jürgen Habermas *The Theory of Communicative Action* (Beacon Press, Boston, 1985) vols 1 and 2. He adds that:

"A government which based its action on the premise that its citizens' loyalty must be rooted in the consciousness of a common nature and destiny, shared by a more or less homogenous nation, would find itself having to enforce a certain uniformity against the actual complexity and the growing diversity of modern life" [Jürgen Habermas "National Unification and Popular Sovereignty" (Tseo-nam lecture delivered at Seoul University, Seoul, May 1996) at 10 <<http://newleftreview.org/static/assets/archive/pdf/NLR21501.pdf> >.]

It follows that for Habermas, autonomy is not associated with individuals (as for Rousseau) or associations (as for Althusius), but with 'communicative action'—the use of reason among participants in public discourse. Using a network analogy, Habermas focuses on the 'links' between the constituent parts regardless of whether these parts are individualistic, or collectivist, or both. However, his popular sovereignty encourage people to think of themselves as a body politic prior to political institutions (ibid). In relation to legal autonomy, Habermas develops the co-originality thesis: both democracy (i.e. popular sovereignty) and constitutionalism (i.e. individual rights) are the same principle under conditioned 'communicative action' (i.e. public deliberation). See Jürgen Habermas *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press, Cambridge, 1996). Habermas

To the absolutist and trust-based theories of sovereignty is added a Germanic ‘natural rights’ strand, which led to the articulation of theories by Samuel Pufendorf, John Locke, and Christian Wolff, among others. Under these theories, sovereignty’s absoluteness was watered down to mere supremacy, either in the person of a monarch, in the case of Germany, or through a (fiduciary) legislature, in the case of England. In France, however, the ‘natural rights’ discourse, especially that of Jean-Jacques Rousseau,⁹⁰⁶ was committed to a sovereignty that was absolute, infallible, and inalienable. In the 1794 French Revolution, sovereignty resided in the nation. Similarly, after the July 1830 Revolution, sovereignty emanated from the reason (intelligence) of the collective (community) as a whole. Now, it was the nation that was recognized as sovereign, not the monarch, nor reason in the absolute. By the time of the 1848 Revolution, the idea of sovereignty of the nation had gained general acceptance.⁹⁰⁷

The German States exhibited a similar evolution, in which the seat of sovereignty was also shifted from the people to the state. However, the German tradition emphasized the

suggests therefore that pluralities can be integrated politically through consensus on procedure rather than on substance. See Jürgen Habermas *The Inclusion of the other: Studies in Political Theory* C Cronin (trans) (Polity, Cambridge (UK), 1998) at 225. See also Stephen Brooks (ed) *The Challenge of Cultural Pluralism* (Praeger Publishers, Westport (CT), 2002); Mark Bevir *Encyclopedia of Political Theory* (Sage Publications, Thousand Oaks (CA), 2010).

⁹⁰⁶ According to Rousseau, through the social contract, people surrender all their ‘natural rights’ to the sovereign. Under the social contract ‘individual rights’ are concessions given by the sovereign. See Jean-Jacques Rousseau *The social contract and The First and Second Discourses: Rethinking the Western tradition* (Yale University Press, New Haven, 2002) Book I, Chapter VI at 163. See also Jean-Jacques Rousseau *A Dissertation on Political Economy* (Barber & Southwick, Albany (NY), 1797). To make this point clear:

“The reason that Rousseau, by introducing the social contract, wants people to lay down their natural rights merely to get them again lies in his intention to give them back these rights from the sovereign power. The social contract is the act confirming that all the rights people have are these given to them by sovereign power. Thus, all the rights people have are still theirs. However, although their possessors remain the same, their source has been changed. People have them no longer from nature, but by the sovereign’s will, on the basis of sovereign’s concession. Upon contracting, all the rights people have are not natural, but derivative. Rousseau wants people’s freedom to be the holy right which would be the basis for all the other rights, provided that this right no longer comes from nature, but from the social contract. If Rousseau really had wanted our freedom to be the same in both natural and political states, he would have done the same as Locke. According to Locke, people did not lay down their freedom and a set of other rights. As a consequence, one can find in Locke’s theory not only natural rights as limiting the sovereign power, but also the right to rebel.” [Dusan Pavlovic “Rousseau’s Theory of Sovereignty” (Master of Arts Thesis, Central European University, 1997) at 26-27.]

Unlike Hobbes, Rousseau wanted the people to hand over their rights to themselves (constituted as the sovereign) rather than to a monarch or an oligarchy who thence became the sovereign.

⁹⁰⁷ Merriam *History of the Theory of Sovereignty since Rousseau* at 66.

need for an organic law—a constitution—binding the sovereign. The state, as a Platonic (ideal) organism, was promoted as the new bearer of sovereignty. Here, the state was a product of evolution rather than revolution. This organic conception of the state follows a tradition extending from the Greeks through the Middle Ages, and registering acceptance in the theories of Althusius, and even Hobbes.

However, Buchanan and Tullock reject the organic conception of the state. They point out that “[o]nly some organic conception of society can postulate the emergence of a mystical general will that is derived independent of the decision-making process in which the political choices made by the separate individuals are controlling”.⁹⁰⁸ This rejection negates the possibility of treating the state as a legal person and hence closes the door on the jurisprudential dimension of the state.⁹⁰⁹ The organic-state tradition is diagonal to the Roman approach, in which the state never appeared as a distinct personality, “but always the sum of the Roman citizens”.⁹¹⁰ This is also the Wicksellian approach at the crux of constitutional economics—that the state is the sum of its citizens: “If utility is zero for each individual member of the community, the total utility for the community cannot be other than zero”.⁹¹¹

Historically, a shift in theoretical emphasis was triggered by the growth of state federations, especially in the Swiss, German, and American contexts. The emphasis was now on division of sovereignty. A salient example is the 1789 United States Constitution, in which sovereignty was divided between the states and federal government. In the *Federalist Papers*, James Madison elaborated on the theoretical foundations of the possibility of a divided sovereignty in which the states were sovereign as long as their sovereignty was not affected by the constitution.⁹¹² The idea of divided sovereignty later found its way to Europe through Tocqueville,⁹¹³ although he was of the opinion that a

⁹⁰⁸ Buchanan and Tullock *The Calculus of Consent* at 12.

⁹⁰⁹ Max Weber “Essay on some categories of interpretive sociology” (1981) 22(2) *The Sociological Quarterly* 145.

⁹¹⁰ Merriam *History of the Theory of Sovereignty since Rousseau* at 109.

⁹¹¹ K Wicksell “A new principle of just taxation” in Richard Musgrave and Alan Peacock (eds) *Classics in the Theory of Public Finance* (Macmillan and Company, New York, 1994) 72 at 77.

⁹¹² Alexander Hamilton, James Madison and John Jay (eds) *The Federalist: On the New Constitution Written in 1788* (Masters & Smith, Hallowell, 1852).

⁹¹³ Alexis de Tocqueville *The Old Regime and the Revolution* John Bonner (ed and trans) (Harper & Brothers, New York, 1856).

divided sovereignty would be impractical in Europe given the presence of great military monarchies. Similarly, John Calhoun,⁹¹⁴ in what could be considered an overture to the American Civil War, attacked the doctrine of divided sovereignty because it was contrary to the logical basis of secession. After the American Civil War, the nationalist movement gained the upper hand. The writings of Francis Lieber,⁹¹⁵ who found the location of an organic sovereignty in the nation, capture the essence of their drive. The same logic was followed by others.⁹¹⁶

The above brief history of sovereignty illustrates the origin of the state as a response to crises, at least in the European context. The evolution of this concept goes hand in hand with the civil wars of the 16th and 17th centuries. The tension between absolute and divided sovereignty ended in dominance by the former since the 18th century.

9.3. Sovereignty and the analogy between markets and politics

This section examines how sovereignty is positioned relative to a core premise in constitutional economics, namely, the analogy between markets and politics (see also section 4.2). This analysis suggests that sovereignty under constitutional economics would have the characteristics of being relational (contractarian) and divided. As delineated in the next section, both characteristics dominate Spinoza's conception of sovereignty. Without any constitutional safeguards in place, this relational basis continues to fray as sovereignty, predominantly through its economic rationale, amplifies the jurisdiction of the state.

To bring sovereignty into the exchange process inherent in markets, we need a relational definition. In constitutional economics, the market, as an evolutionary selection process, was extended to politics, by using an exchange paradigm to describe cooperative

⁹¹⁴ John Calhoun *A Disquisition on Government and a Discourse on the Constitution and Government of the United States* (D Appleton and Co, New York, 1853).

⁹¹⁵ Francis Lieber *What is Our Constitution: League, Pact, or Government?* (Board of Trustees, New York, 1861).

⁹¹⁶ Merriam *History of the Theory of Sovereignty since Rousseau* at 91.

interactions.⁹¹⁷ This exchange analogy carries ‘relational’ tones in which “[b]oth the economic relation and the political relation represent co-operation”.⁹¹⁸

Baruch Spinoza provides a relational definition of sovereignty: as an abstract notion (albeit not ahistorical one) of “the relationship between rulers and ruled for the exercise of political power [and] the independent status of the body politic on the international stage”.⁹¹⁹ Under this understanding, sovereignty is “a condition of political interactions, embedded in [relations] that ground association”.⁹²⁰ Through this relational definition, sovereignty becomes the exchange taking place at the input to the process in which the state transforms power into authority. It is the source from which the state makes binding law in a particular territory.

A relational definition of sovereignty imports a small-scale organisation of the state.⁹²¹ A stark difference exists between economic exchanges in large ‘modern’ societies and those registered in so-called ‘primitive’ societies (societies of relatively small size and lacking in technological and economic development). In these societies, economic transactions cannot be understood apart from ‘relational’ social obligations. For the analogy to work, a ‘relational’ level commensurate with that of politics is required, one in which participants take the interests of other participants (especially their long-term interests) into account. In contrast, the “theory of markets postulates only that the relationship be economic, that the interest of [the other party] in the exchange be excluded from consideration”.⁹²² Politics is seen to exhibit efficiency similar to that of voluntary markets in which unanimity around the political process can judge the efficiency of collective action. This analogy suggests that “the average individual acts on the basis of the same

⁹¹⁷ James Buchanan *The Economics and the Ethics of Constitutional Order* (The University of Michigan Press, Ann Arbor, 1991); James Buchanan “Public choice after socialism” (1993) 77 *Public Choice* 67.

⁹¹⁸ Buchanan and Tullock *The Calculus of Consent* at 19. This formulation of a political power exchange has a Foucauldian overtone, in which power is a “certain type of relation between individuals”. See Michel Foucault *Power* at 324.

⁹¹⁹ Raia Prokhovnik “From democracy to aristocracy: Spinoza, reason and politics” (1997) 23 (2-4) *History of European Ideas* 105. See also the analysis in section 2.5.

⁹²⁰ Adam T Smith “Archaeologies of sovereignty” (2011) 40 *Annual Review of Anthropology* 415 at 426.

⁹²¹ For a clearer understanding of the size of population that would constitute a small organization, refer to Kohr *The Overdeveloped Nations*.

⁹²² Buchanan and Tullock *The Calculus of Consent* at 16.

over-all [*sic*] scale when he participates in market activity and political activity”.⁹²³ In this sense, there is a continuum between economic and political ‘exchanges’.

Constitutional economics emphasizes cooperative forms of interaction through a contractarian approach in which legitimacy is assured through the agreement of all parties concerned. In contrast, politics—‘orthodox’ politics, to be precise—has a non-cooperative, ‘conflictual’ perspective, focusing on the distribution of value among winners and losers. However, in constitutional economics there would be no net losers. This last point has been critiqued on the grounds that “the analogy between politics and markets made by constitutional economists is theoretically weak and clouds rather than enhances our understanding of political economy. Politics has very little in common with non-coercive, voluntary exchange in the marketplace”.⁹²⁴ Note, however, that the theoretical approach to the state as a voluntary institution can be traced to Aristotle’s conviviality theory of the origin of the state, especially as delineated by Léopold Kohr.⁹²⁵ The conflict-based origin of the state (notwithstanding its long tradition through the scholarship of Bodin, Hume, Turgot, and Nietzsche, among others) conflates the origin of the state with its operation beyond the constitutional phase. A sustained ‘production of scale’ phase (which increases the size of the political community) will result in such conflict. This is when the state continues to grow in size (larger territory, larger population, and larger government). However, that does not mean that the origin of the state is conflictual. The Hobbesian state of nature, in which he opined that conflict was the *raison d’être* for the state, was the product of Hobbes’s own *zeitgeist*. At the constitutional level, politics would also lend itself to a cooperative analytical framework: “The market and the State are both devices through which co-operation is organized and made possible”.⁹²⁶

Reconciling markets and politics as cooperative at the constitutional phase formulates the core issue as one of scale:⁹²⁷

⁹²³ Buchanan and Tullock *The Calculus of Consent* at 18.

⁹²⁴ Walter Block and Thomas J di Lorenzo “Is voluntary government possible? A critique of constitutional economics” (2000) 156(4) *Journal of Institutional and Theoretical Economics* 567 at 567.

⁹²⁵ Kohr *The Overdeveloped Nations*.

⁹²⁶ Buchanan and Tullock *The Calculus of Consent* at 19.

⁹²⁷ Block and di Lorenzo (2000) 156(4) *Journal of Institutional and Theoretical Economics* 567 at 580.

“[D]isagreement with constitutional economics is more than a definitional one. Buchanan and Tullock label a wide range of seemingly voluntary collective choice institutions as ‘government’ and, admittedly, a reasonable case can be made that, say, a village fire department might make a good example of voluntary government, at least *on a relatively small scale*. But the distinguishing characteristic is that in a truly voluntary setting the parties to an agreement have a right to secede from the agreement.” (Emphasis added)

The key words are ‘on a relatively small scale’. Of course, the above quote refers to only an element of the state, namely that of ‘government’ (the other main elements being population and territory), but it still gives a good illustration of the scalar anchor between markets and politics. The right to secede itself can be seen as indicative of a large polity still viable in the event of secession.

The analogy between markets and politics imports another dimension, in addition to the *homo economicus* and the exchange process. For markets to function properly (i.e. to be Pareto efficient), one needs to ensure a level of competition in the provision of goods and services. An analogy with politics would see this competition reflected in the provision of goods of a public nature, through competing jurisdictions.⁹²⁸ Such competition, which is discussed in the next section, is salient in Spinoza’s sovereignty.

9.4. Spinozistic sovereignty

Constitutional economics does not accept absolute sovereignty.⁹²⁹ It sides instead with Spinoza.⁹³⁰ Spinoza separates the constitutional and operational levels of collective decision-making, hence paving the way for the possibility of a divided sovereignty. His preferred structure follows from this divided sovereignty and results in a polycentric commonwealth between independent cities.

⁹²⁸ This jurisdictional competition could be linked to what came to be known as systems competition. See Hans-Werner Sinn *The New Systems Competition* (Blackwell, Oxford, 2002).

⁹²⁹ Geoffrey Brennan and James A Buchanan *The Power to Tax* (Liberty Press, Indianapolis, 2000).

⁹³⁰ Buchanan and Tullock *The Calculus of Consent*.

Note that some commentators question whether Spinoza in fact had a conception of sovereignty.⁹³¹ This chapter starts from the proposition that “Spinoza must by definition have a conception of sovereignty. According to this perspective, sovereignty is a general feature of all political societies across time and place, underlying the diversity of laws and institutions”.⁹³² His approach is similar to that of Hobbes, when he was able to use sovereignty to rank different forms of the state. However, while Hobbes reaches a conclusion in favour of the unitary state, Spinoza finds federalism superior.

Taking Holland as the point of reference for his analysis, Spinoza intended to show that “the failure of the experiment in Holland was not due to lack of zeal but to lack of theoretical understanding [which] requires more than mere theoretical understanding to remedy it”.⁹³³ Hence, on the cover of his *Treatise on Politics* (TP), Spinoza declares his objective as “[to show] how a Monarchy and an Aristocracy must be organized if they are not to degenerate into Tyranny, and if the Peace and Freedom of the citizens is to remain intact”.⁹³⁴ Spinoza declares that his “objective in applying [his] mind to politics is not to make any new or unheard of suggestions, but to establish by sound and conclusive reasoning, and to deduce from the real nature of man, nothing save the principles and institutions which accord best with practice” (TP I 4).

For Spinoza, sovereignty is not repugnant to principles of provincial autonomy. In fact, it could be argued that “Spinoza’s notion of sovereignty is crucially designed ... to check the development of centralized government, not to promote it”.⁹³⁵ Spinoza follows a contractarian approach to sovereignty in which “breach of the contract [by the sovereign] is not punished by civil right but by the right of war” (TP IV 6).

Spinoza puts emphasis on understanding human nature and its effect on the obedience demanded of them as subjects (TP III 10). Spinoza sees the “right of the sovereign ... in the fact that it was ... the mind of the state by which all its subjects had to be guided ... [the sovereign] alone had the right to make laws ...” (TP IV 1). He stresses that “the causes

⁹³¹ Raia Prokhovnik (1997) 23(2-4) *History of European Ideas* 105; Prokhovnik (2001) 27(3) *History of European Ideas* 289; Prokhovnik *Spinoza and republicanism* (Palgrave Macmillan, Basingstoke, 2004).

⁹³² Prokhovnik (2001) 27(3) *History of European Ideas* 289 at 290.

⁹³³ George Gross “Spinoza and the federal polity” (1996) 26(1) *Publius* 117 at 123.

⁹³⁴ Baruch Spinoza *The Political Works* AG Wernham (ed and trans) (Clarendon Press, Oxford, 1958). References to the *Tractatus Politicus* are given within parenthesis starting with the letters TP.

⁹³⁵ Prokhovnik (2001) 27(3) *History of European Ideas* 289 at 297.

and natural foundations of the state are not to be sought in the precepts of reason, but must be deduced from the common nature or constitution of men” (TP I 7).

According to Spinoza, “the virtue of a state is stability” (TP I 6). Spinoza was writing in Latin and the word he used for stability is ‘*securitas*’, which could also be translated as security. Spinoza’s stability is akin to the idea of being protected from danger, which suggests an evolutionary connotation. Spinoza sees sovereignty in an evolutionary light: “[M]an, like everything else in nature, does his utmost to preserve his own being” (TP II 7). In this sense, sovereignty guides the analysis for the structural form that best *stabilizes* the state. Hence, for Spinoza, sovereignty is a logical necessity,⁹³⁶ a function of evolutionary fitness that prevents the state from collapse; and degeneration into tyranny is the first step into extinction. Accordingly, he states that:

“[I]f a state is to be capable of lasting, its administration must be so organized that it does not matter whether its rulers are led by reason or passion ... In fact it makes no difference to the stability of a state what motive leads men to conduct its affairs properly, provided that they *are* conducted properly.” (TP I 6)

Spinoza then goes on to state that “[t]he best condition of a commonwealth is easily discovered from the purpose of political order: which is simply peace and security of life” (TP V 2).

Spinoza advocates a sovereignty vested in several cities, in which:

“all the cities are joined and bound together, not as allied states, but as constituent parts of one state ... the power of the city constitutes a great part of the power of the state itself, and the larger the city, the greater its contribution to the power of the state; hence the cities cannot all be regarded as equal, but the right of each, like its power, must be determined by its size.” (TP IX 4)

Under this arrangement, “each city must remain in possession of its own right as far as possible, and must have more right in the government in proportion as it exceeds the others in power” (TP IX 6). For Spinoza, this polycentric arrangement in which sovereignty is vested in several cities is superior to one in which a capital city dominates the state. He gives several arguments supporting his position. First, the fact that each city is represented

⁹³⁶ At 297.

in proportion to its power would increase competition between cities. This competition would lead to cities increasing their populations “by ruling more by kindness than by fear” (TP IX 14). Moreover, sovereignty vested in several cities “needs no safeguards to prevent [it] from being overthrown by a sudden attack”, since the freedom “enjoyed by several cities” makes it “not sufficient for [usurping] sovereignty to seize one city in order to gain control over the rest” (TP IX 15).

Note that this arrangement is different from the arrangements we see today in the United States and Australia. Spinozistic sovereignty provides a model:⁹³⁷

“in which powers are shared between sovereign bodies ... which reaffirm their separateness ... In federal systems such as the United States or in Australia, legislative, judicial and executive powers are distributed between federal and different state governments ... under [Spinozistic sovereignty], however, ‘confederal’ powers ... were extremely closely restricted ... Rather than attempting to harmonize differences ... [it upholds] the constructiveness of difference ...”

Polycentric states are at the centre of Spinoza’s discourse.

Buchanan echoes Spinoza when he explains his idea of federalism as “diversity among separate co-operative communities, of shared sovereignty, of effective devolution of political authority and, perhaps most importantly, of the limits on such authority”.⁹³⁸ Buchanan envisaged a “federal union within which members of separate units cooperate” and share sovereignty, in which constitutional requirements guarantee free trade, and with a monetary constitution based on competing currencies.⁹³⁹

9.5. Conclusion: City subsidiarity beyond contiguous Westphalian sovereignty

Historically, sovereignty succumbed to the concept of ‘nation’. This resulted in sovereignty being conceived of as a one-dimensional possibility: a nation state either has it

⁹³⁷ Raia Prokhovnik *Sovereignities: Contemporary Theory and Practice* (Palgrave Macmillan, New York, 2007) at 228.

⁹³⁸ Buchanan *Europe’s Constitutional Future* at 3-4.

⁹³⁹ At 18.

or it does not. It became an absolute quality. Sovereignty as understood today is “a right of membership, historically determined, in what amounts to a very exclusive political club”.⁹⁴⁰ This club of nation states is “the most exclusive political club in the world and has been so for several centuries”.⁹⁴¹ A sovereign state is conceived of as an exclusive territorial jurisdiction. Since the signing of the Peace of Westphalia in 1648, and especially in the post-Napoleonic era (after 1815), “a prominent operating principle regulating the size and shape of states has indeed been that states should be contiguous and non-perforated”.⁹⁴² This should be understood in relation to the observation that “the Westphalian State is ... bound symbiotically to the ideology of nationalism”.⁹⁴³ The relationship between sovereignty and territory is captured by the principle of *uti possidetis juris*.⁹⁴⁴ In particular, this principle subordinated the principle of self-determination to boundaries decided by colonial power: juridical territories trumped sociological territories.

It was not until the rise of federal states exemplified by the United States that a shift in the analysis towards the possible divisibility of sovereignty occurred. Today, the political state is “characterized by polycentric centers of power”.⁹⁴⁵ These centres of power are an extension of the idea of divisibility of sovereignty. However, using the analogy with the idea of a ‘polycentric’ legal order (implying a multiplicity of independent centres of decision-making),⁹⁴⁶ there is no extensive (economic) evaluation of the need for, or merit of, an analogous ‘polycentric’ constitutional order.⁹⁴⁷ The assumption is usually made that “there is a state or a commonwealth, without exploring the question of which domain [which is a scalar construct] this commonwealth or state should actually occupy, and in relation to what other public bodies”.⁹⁴⁸ While conceding that some literature touches on

⁹⁴⁰ Jackson (1999) 47(3) *Political Studies* 431 at 449.

⁹⁴¹ At 449.

⁹⁴² Kurrild-Klitgaard (2002) 61(1) *Journal of Economics and Sociology* 123 at 146.

⁹⁴³ Stephen Tierney “Reframing Sovereignty?” in Neil Walker (ed.) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 239 at 245.

⁹⁴⁴ Jackson (1999) 47(3) *Political Studies* 431.

⁹⁴⁵ Kanishka Jayasuriya “Globalization, sovereignty, and the rule of law” in Neil Walker (ed.) *Relocating Sovereignty* (Ashgate Dartmouth, Aldershot, 2006) 361 at 372.

⁹⁴⁶ Tom Bell (1991) 7(1) *Institute of Humane Studies Review*; Hayek *Law Legislation and Liberty* vol 1.

⁹⁴⁷ RE Barnett *The Structure of Liberty* (Clarendon Press, Oxford, 1998).

⁹⁴⁸ Backhaus “Subsidiarity” in Backhaus (ed.) *The Elgar Companion to Law and Economics* 136 at 137.

the structure of the state and its relation to economic structures, emphasis should be on maximizing constitutional options rather than deciding among constraints *per se*. The ‘choice among constraints’ does not explain where the total set of available constraints arises in the first place. Constitutional economics seems to treat these constraints as exogenous—a consequence of not engaging sovereignty. The ability to distinguish between different scales (from the global to the local) goes a long way towards explaining how options are limited (and hence constraints created). This in turn results in a dynamic set of constraints from which to choose. However, this is available only when the structure of the state is made the subject of analysis. In particular, when questioning the national scale as the default level of analysis, a very different set of constraints emerges.

Unfortunately, in constitutional economics, a taste of ‘Westphalia sovereignty’ and its emphasis on the nation state still lingers. Although ideas on sovereignty and jurisdiction are not usually treated explicitly, they can be gleaned from the assumptions typically made by constitutional economics. The central feature here is still the same as it has been since early discourse on political economy, which in fact is the same impetus underlying most theories of sovereignty: legitimization of the nation state. Even when scalar differentiation is engaged, it is never in relation to the state, but rather to government—leaving other elements of the state, especially territory and population, beyond systematic inquiry. Hence, we find discourse on the optimal size of government, but not on the optimal size of states, in which government is understood as only one element of the state, distinct from the latter’s territory. There has even been a tendency to treat ‘government’ and ‘state’ interchangeably, further disguising the essential issue of territoriality and the ensuing possibilities of divided sovereignty.⁹⁴⁹

A nuanced reading of Spinozistic sovereignty militates against the existence of colossal jurisdictions. One can trace the logic of limiting the jurisdiction of states within a polycentric constitutional set-up back to Aristotle. Although some pronouncements from constitutional economics echo these ideas, constitutional economics would not pass muster unless it is understood that the golden principle for constitutional design is the inquiry into how states can be engineered along the lines of Spinoza’s federal polity. This aspect of the analysis has not yet received much emphasis when it comes to normative constitutional designs. It is submitted that such emphasis would lead to countries as large as Russia and

⁹⁴⁹ Hayek *Law Legislation and Liberty* vol. 1 (The University of Chicago Press, Chicago, 1983) at 48.

China, and even the United States, being questioned as to their stability in the post-constitutional phase.

PART VI EPILOGUE

10. Constitutional Change: Issues and Challenges

10.1. Introduction

Previous chapters furnish descriptive and normative arguments for the (re)introduction of subsidiarity as a constitutional principle in New Zealand, especially through charter cities. This chapter looks at issues and challenges facing such constitutional changes.

The starting point is an account of the latest conversation on constitutional change as documented by the ‘Advisory Constitutional Panel’ in the booklet of 2012 and the report of 2013. These documents are analysed in section 2 through the lens of subsidiarity and its mapping onto issues relating to the Treaty of Waitangi, local government, and the distribution of power. Section 3 outlines a four-phase strategy detailing how subsidiarity can be introduced as a constitutional principle, and how charter cities could be created in New Zealand. The chapter ends with some remarks in Section 4.

This chapter does not deal with potential issues arising from the enforceability of subsidiarity once introduced as a constitutional principle in New Zealand. The reader is referred to a recent paper by Werner Vandenbruwaene for issues around legal enforcement.⁹⁵⁰

10.2. The Constitutional Advisory Panel: The conversation and the report

In August 2011 the New Zealand government established a Constitutional Advisory Panel to engage the public in a conversation about constitutional issues, and report the findings to the New Zealand deputy Prime Minister and to the Minister of Māori Affairs. In September 2012 the government published a booklet in which the Panel provided summary information about the existing constitutional arrangements and perspectives based on “existing resources, including academic texts, previous ministerial inquiries, case law, Waitangi Tribunal reports and news media”.⁹⁵¹ Given this wide input into the

⁹⁵⁰ Werner Vandenbruwaene “What Scope for Subnational Autonomy: the Issue of the Legal Enforcement of the Principle of Subsidiarity” (2014) 6(2) Perspectives on Federalism.

⁹⁵¹ Constitutional Advisory Panel *New Zealand’s Constitution: The conversation so far* (Ministry of Justice, September 2012) at 4.

conversation, the chapter uses the Panel's work as an authoritative account of the constitutional arrangements in New Zealand and the issues identified as most relevant to any future constitutional change. In addition, the chapter analyses the report on the conversation issued by the New Zealand government in November 2013.⁹⁵² The constitutional conversation ran from February to July 2013.⁹⁵³

The common themes emerging from the constitutional conversation included 'having a voice' where the people would have effective representation and meaningful participation in decision-making. For this to happen, alternative constitutional processes need to be explored. Examples include "more frequent use of referenda for significant decisions, and more consensus building and engagement at the community level".⁹⁵⁴

Of particular interest are the Panel's comments in relation to distributing legislative powers especially through the principle of subsidiarity and sovereign cities. It is worth noting here that the word 'subsidiarity' does not appear in the booklet of September 2012, and appears only once in the November 2013 report.⁹⁵⁵ In addition, the questions developed by the Panel to help the public develop their submissions do not refer to subsidiarity or even to the relationship between local and central government.⁹⁵⁶

The Treaty of Waitangi

The Panel does not recognise any nexus between the Treaty and the principle of subsidiarity. The Panel however states that '[t]he New Zealand constitution increasingly reflects the fact that the Treaty of Waitangi is regarded as a founding document of government in New Zealand'.⁹⁵⁷ Through its wide consultation process with the New Zealand public, the Panel identified three perspectives on the Treaty: (1) the Treaty is

⁹⁵² Constitutional Advisory Panel *New Zealand's Constitution: A Report on a Conversation* (Ministry of Justice, November 2013).

⁹⁵³ At 102.

⁹⁵⁴ At 13.

⁹⁵⁵ At 69. This reference to subsidiarity was partly because of a presentation given by this author at the NZCPL conference *Unearthing New Zealand's Constitutional Traditions* hosted by Hon Chris Finlayson QC, Attorney-General of New Zealand at Parliament Buildings, Wellington, from 29–30 August 2013.

⁹⁵⁶ Constitutional Advisory Panel *Report* at 92-93.

⁹⁵⁷ Constitutional Advisory Panel *The conversation so far* (Ministry of Justice, September 2012) at 7.

fundamental to how the country is governed, (2) it informs the multicultural future of New Zealand, and (3) it has no role in how the country is governed.⁹⁵⁸ The Panel goes on to state that:⁹⁵⁹

“It is clear from the conversations that the Treaty is an important document to [Māori], along with a significant number of New Zealand individuals and organisations. Although ideas about fitting the Treaty within the existing arrangements are relatively well traversed ... options starting with the Treaty of Waitangi are only beginning to develop.”

The Panel goes on to offer three *viable* high level options for the future role of the Treaty: (1) placing the Treaty at the centre of constitutional arrangements; (2) preserving current institutions of government, and settling Treaty issues through direct negotiation with the Crown; and (3) taking active steps to accommodate Treaty rights and obligations through entrenchment and/or using it as a tool of interpretation or as benchmark of consistency on government legislation.⁹⁶⁰

The Panel identifies the principle of partnership, based on “mutual respect and good faith”, as the most commonly referred to principle emanating from the Treaty.⁹⁶¹ The Panel further identifies two questions arising from the constitutional conversation on the Treaty:⁹⁶² (1) what will happen when all the historical Treaty grievances are settled? And (2) should the Treaty be entrenched? On the first question the Panel suggests that the principles of the Treaty, as interpreted by the courts, would still have an impact on the Crown’s decision-making even after all historical grievances are settled. The principles will continue to help apply the text of the Treaty to modern circumstances.⁹⁶³

As to whether the Treaty should be entrenched, the Panel seems to suggest a revival of the Māori clause from the draft Bill of Rights where the rights of the Māori people under

⁹⁵⁸ Constitutional Advisory Panel *Report* at 31.

⁹⁵⁹ At 33.

⁹⁶⁰ At 34. A fourth option where the Treaty is not part of the constitution was deemed ‘not viable’.

⁹⁶¹ Constitutional Advisory Panel *Conversation* at 36.

⁹⁶² At 39-40.

⁹⁶³ Constitutional Advisory Panel *Report* at 29-30.

the Treaty are recognised and confirmed, and where the New Zealand Bill of Rights Act 1990 would be entrenched.⁹⁶⁴

In summary, the Panel recommends developing a range of options for the future role of the Treaty, either through existing constitutional arrangements or through ones where the Treaty is the foundation.⁹⁶⁵

Local Government

As to local government, given that its role and function are established by Parliament, amendments to its relationship to central government, including the possibility of constitutional recognition, can be passed by simple majority.⁹⁶⁶ The Panel acknowledges that such constitutional recognition would give stability to the relationship between local and central government. Moreover, constitutional recognition would accentuate the important role that local government plays in the exercise of public power, especially through facilitating community's democratic participation. Most importantly, constitutional recognition would facilitate the "desirability of decentralising power".⁹⁶⁷

The Panel considers a number of options for this constitutional recognition: (1) entrenchment of the Local Government Act 2002, (2) a parliamentary convention to secure consensus for changing this Act, (3) referring to local government in a written constitution, or (4) amendment of the Constitution Act 1986 to give such constitutional recognition to local government. Notwithstanding, the Panel also acknowledges the concerns some of the public have in relation to a more litigious relationship between local and central government given a constitutional recognition of the former.

The Panel indicates that local government legislation (in particular the Local Electoral Act 2001, the Local Government Act 2002, and the Resource Management Act 1991)

⁹⁶⁴ Constitutional Advisory Panel *Report* at 53-56.

⁹⁶⁵ Constitutional Advisory Panel *Report* at 16.

⁹⁶⁶ At 69.

⁹⁶⁷ At 69.

accentuates the relationship of Māori to natural resources.⁹⁶⁸ Historically Māori were responsible for managing natural resources, but today that function is entrusted to local government.⁹⁶⁹ The Panel echoes Māori aspirations in having their own “politically autonomous structures”,⁹⁷⁰ and entertains possibilities of “multiple sovereignties”.⁹⁷¹

In summary, the Panel recommended exploring constitutional arrangements around the status and functions of local government and its relationship to central government.⁹⁷²

Distribution of Powers

The Panel also raised the issue of whether New Zealand should have a written constitution. According to the Panel a constitution “[g]enerally ... sets out the structure and rules for a country’s government”,⁹⁷³ and sets out “the key institutions that will make up the state [and] what power those institutions have ...”⁹⁷⁴ The Panel adds that “[c]onstitutions in federal countries (like Australia) describe the distribution of powers between the national government and the provincial or state governments”,⁹⁷⁵ but does not go to explain whether such distribution is possible in a unitary state such as New Zealand.

In its discussion of the possibility of a written constitution, the Panel looks at the constitutional evolution in New Zealand including the passing of the Constitution Act 1852 (UK). While the Panel accounts for the existence of provincial governments under the 1852 Constitution as well as their abolition in 1876,⁹⁷⁶ it does not go any further in discussing

⁹⁶⁸ For example s 77 of the Local Government Act 2002 where local councils must take account of Māori perspective when making important decisions involving land or water.

⁹⁶⁹ Constitutional Advisory Panel *Report* at 42.

⁹⁷⁰ At 29.

⁹⁷¹ At 41.

⁹⁷² Constitutional Advisory Panel *Report* at 18.

⁹⁷³ Constitutional Advisory Panel *The conversation so far* at 46.

⁹⁷⁴ At 46.

⁹⁷⁵ At 47.

⁹⁷⁶ Constitutional Advisory Panel *Report* at 23 and 111.

the desirability of such quasi-federal arrangements. Nor does the Panel highlight how the Constitution Act 1986 shifted the emphasis from vertical to horizontal separation of power.

However, the Panel does seem to criticise the Abolition of the Provinces Act 1875:⁹⁷⁷

“The Act was a major constitutional stepping stone for New Zealand where the power of central government greatly increased. Under the Constitutional Act 1852, the six provincial governments had full legislative powers, forming a quasi-federal system of government ...”

“Premier Julius Vogel was the driving force behind the change ... largely to help further his infrastructural projects. The Act, ‘notwithstanding a very strong and persistent opposition’, passed the House of Representatives 52 votes to 17 and the Legislative Council by 23 votes to four.”

On the balance, the Panel is not alive to (quasi) federalism as part of our constitutional heritage, and more importantly, to its relevance to our constitutional future, especially with a growing trend of globalisation and the increasing importance of local governance.

10.3. How to introduce subsidiarity into the New Zealand Constitution

This section presents a four-phase strategy for the introduction of subsidiarity into the existing constitutional arrangement in New Zealand. First however, the section canvases some of the overseas developments as discussed by the Constitutional Advisory Panel. The section then critiques this benchmarking as it does not identify decentralisation as a driver of constitutional change overseas.

Benchmarking procedural alternatives for constitutional change

In most jurisdictions where the constitution is either entrenched or supreme law, or both, constitutional change requires specific procedural steps to bring about constitutional

⁹⁷⁷ At 114.

amendments or new constitutions altogether.⁹⁷⁸ For example, in Australia, the Australia Constitution Act 1900 is the supreme law of the Commonwealth of Australia. The Constitution was approved in a series of referendums held over 1898–1900 by the people of the Australian colonies. The constitution can only be amended through a public referendum.⁹⁷⁹ Such amendments will first need an absolute majority in both houses. However, if the amendment is passed by the lower house (by absolute majority) and rejected by the upper house twice, the amendment may still proceed to the next phase where the General-Governor puts the referendum bill to the electors, two to six months after passing parliament. To be successful, the bill requires the approval of the majority of electors nationwide, and a majority in a majority of the Commonwealth states. If successful the bill receives Royal Assent and will be in effect when proclaimed.

Historically, constitutional change in Australia was proposed either through constitutional conventions such as the 1998 convention on whether Australia should become a republic, or through an expert panel such as the 2010 issue of constitutional recognition of Aboriginal and Torres Strait Islanders. In the former case the referendum was held in 1999 and was rejected by the public. In the latter case, the government delayed the referendum due to a low level of public awareness and “proposed an Act of Recognition to Parliament, with a sunset clause of two years so that there would be a call to action within that time”.⁹⁸⁰

The Panel also discussed constitutional change in other countries.⁹⁸¹ In Bolivia a new constitution was drafted by a constituent assembly elected by the public, and affirmed in a referendum. Amendments to the constitution must take place through an original Constituent Assembly and be approved by referendum.⁹⁸² Ecuador followed a similar approach.⁹⁸³ Iceland opted for a constitutional council rather than an elected constitutional assembly after technical difficulties with electing the assembly. In Kenya, constitutional change was guided by a committee of experts who submitted a draft of the constitution to

⁹⁷⁸ Constitutional Advisory Panel *Report* at 140.

⁹⁷⁹ Section 128 of the Australia Constitution Act 1900.

⁹⁸⁰ Constitutional Advisory Panel *Report* at 142.

⁹⁸¹ At 140-150.

⁹⁸² Constitution of the Republic of Bolivia 2009, Article 411.

⁹⁸³ Constitution of the Republic of Ecuador 2008, Articles 441 to 444.

the national assembly, and was later endorsed by a referendum. Amendments to the constitution need to be passed by either house of parliament and assented to by the president. In Canada the constitution could be amended by the federal parliament. Provinces would however need consent to the amendments if affecting them. In Israel, one of the three countries that do not have a written constitution (the other two being the United Kingdom and New Zealand), constitutional change progresses incrementally: where there is consensus on specific constitutional areas, basic laws are enacted. In South Africa amendments to the constitution require a super-majority in the national assembly and may also require the consent of six of the nine provincial legislatures.

The Panel's discussion of other countries' constitutional experiences is not alive to the sweeping trend towards decentralisation, especially in Latin American countries. The recognition of more Aboriginal rights in these countries goes hand in hand with subsidiarity. Take the example of Ecuador. Title V of the 2008 Constitution is dedicated to territorial organisation of the state. Chapter 1 of Title V delineates the general principles. In particular:⁹⁸⁴

“**Article 238.** Decentralized autonomous governments shall have political, administrative and financial autonomy and shall be governed by the principles of solidarity [and] subsidiarity ... Under no circumstances shall the exercise of autonomy allow for secession from the national territory.⁹⁸⁵ Decentralized autonomous governments encompass rural parish boards, municipal councils, metropolitan councils, provincial councils and regional councils”.

“**Article 240.** The decentralized autonomous governments of the regions, metropolitan districts, provinces and cantons shall have law-making powers within the scope of their competences and territorial jurisdictions ...”

⁹⁸⁴ Articles 238-241, Republic of Ecuador Constitution of 2008.

⁹⁸⁵ Note that solidarity is a conjugate of subsidiarity in that both together allow for a dialectic of competition and cooperation that induces evolution of social and economic systems. Solidarity is the unity of a social group at the local level, especially when equipped with financial and political independence. Sustainability, introduced in art3 of the 2008 Ecuador Constitution, is unity on a global scale. Subsidiarity bridges the local and global scales.

The above formulation is analogous to what this thesis aspires to have in New Zealand. Similar constitutional provisions can be found in the Constitution of Bolivia and others.⁹⁸⁶

As the Panel indicates, “New Zealand’s constitution is not entrenched, so as a matter of law no special procedures are required to change it”.⁹⁸⁷ Given that New Zealand does not have a supreme law constitution, introducing subsidiarity as a constitutional principle involves a pragmatic approach. However, the main issue is not the technicalities of introducing subsidiarity but rather the ‘buy-in’ by the general public.

The rest of this section delineates a strategy for making the principle of subsidiarity part of New Zealand’s constitutional fabric. The strategy is based on four phases. Note that this strategy does not require radical changes in existing constitutional arrangements. It does not envisage a written constitution, or any supreme law status for the constitution. It reduces resistance to change by working from within existing constitutional instruments such as the Treaty of Waitangi and the Constitution Act 1986.

Phase 1: The need for an educational engagement strategy

To ensure a successful introduction of subsidiarity into the existing New Zealand constitutional arrangement, and more importantly, to ensure a continuing operation of this principle in our constitutional instruments, we need to first ensure a deep understanding by the public of this principle, its role in our constitutional past, and its importance to our constitutional future. If we fail to achieve this, even a nominal acknowledgment of the principle in our instruments would be no more than ‘window dressing’, without any meaningful results, especially on the economic development of New Zealand.

More should be done to improve civics and citizenship education in schools, similar to the drive that was recommended by the Constitutional Arrangements Select Committee in 2005.⁹⁸⁸ This time, the drive is to highlight the nexus between the Treaty of Waitangi and the principle of subsidiarity, and to stress the importance of subsidiarity in a globalising

⁹⁸⁶ See for example art270, the Republic of Bolivia Constitution of 2009.

⁹⁸⁷ Constitutional Advisory Panel *The conversation so far* at 49.

⁹⁸⁸ Constitutional Advisory Panel *Report* at 98.

world. The (normative) constitutional role of local government would also see more coverage in New Zealand curricula.

The logical starting point would be the LLB curriculum, were currently there is little or no discussion of subsidiarity. The principle needs to be discussed in compulsory ‘public law’ and ‘constitutional law’ courses. There should also be more research in the honours component (e.g. seminars) and at the masters and PhD levels on this principle (NZQA levels 8 and 9), and how it could help New Zealand achieve its socio-political and economic potential. Interdisciplinary work would be inevitable, and should be encouraged.

Secondly, Māori need to debate the proposition that the essence of the Treaty is subsidiarity, otherwise there would be resistance on their part of any attempts to constitutionalise the Treaty in that form, namely as *sui generis* of a larger constitutional principle that applies across all layers of our social fabric. Subsidiarity is a suitable vehicle through which the Treaty becomes a living document that inspires ‘local governance’ as a cornerstone of our constitution. Once local government is given a constitutional recognition, Māori would have a stronger role in affecting policies that impinge on their affairs and on the wider community.

Thirdly, political parties need to appreciate the ‘water’ qualities of subsidiarity. Introducing subsidiarity does not give any substantive policy signals; just like water, subsidiarity has no flavour. Subsidiarity is a form of procedural natural justice. It is up to communities to colour their political autonomy with whatever policies they choose. All political parties would benefit from subsidiarity. Subsidiarity provides these parties with a better representation at the local level, closer to their constituents, and more aligned with their aspirations. Subsidiarity would not give any ideological advantage to any political parties. It only improves the machinery of democracy available in New Zealand.

Fourth, the role of the media is paramount in informing the debate on subsidiarity. There needs to be concurrent coverage of the link between subsidiarity and our constitutional heritage, as well as debates on the merit of subsidiarity in this day and age. Public funding for documentaries about the link between subsidiarity and the Treaty, as well as the experience that other countries have had would help inform our own debate.

I cannot over-emphasize the importance of this educational phase. As a result it may require a long gestation period—possibly decades. This could be shortened through a serious commitment by the stakeholders identified above. But it cannot be hurried. Subsidiarity would result in a net benefit to New Zealand only if the public are mentally prepared to perceive and receive these benefits. This is an evolutionary process that

demands a considerable investment in scarce resources to prepare the socio-political platform for a successful implementation of subsidiarity in New Zealand.

Having emphasized the importance of the first phase, it would not follow that the other three phases would have to remain dormant until the fruits from the first phase are ripe. Especially the second phase (see below) would benefit from an overlap with the first phase. There is a healthy symbiosis between the first and second phases.

Phase 2: Waitangi Tribunal and a subsidiarity interpretation of the Treaty

As argued earlier, subsidiarity is the *hypostasis* of the Treaty. It could be seen as a platform on which most if not all Treaty principles could be positioned.⁹⁸⁹

In this regard, there is a role for the Waitangi Tribunal to play in examining the nexus between subsidiarity and the Treaty, and in informing the potential of subsidiarity as a vehicle for the *réactualisation* of the Treaty and its constitutional incorporation. Similarly, the courts have a role in elucidating this link on the one hand, and between subsidiarity and other Treaty principles on the other.

While this phase could progress in tandem with Phase 1, there is a need first for Māori, and the New Zealand public in general, to become more informed about subsidiarity and to be better equipped to follow the reasoning by the Tribunal and the courts.

Phase 3: Subsidiarity and the Constitution Act 1986

Apart from recognition of subsidiarity as the essence of the Treaty, there is a more general argument for its inclusion as part of the New Zealand constitution. Current trends towards greater economic integration through globalisation are putting more emphasis on the role of local governments as players on the ‘international’ stage. Subsidiarity induces evolutionary fitness that would ensure sustainability (ecological, social, economic, and political) in such an environment.

It is hence necessary to introduce subsidiarity into existing constitutional instruments. Given the special position of the Constitution Act 1986 in these arrangements, it would be reasonable to suggest that subsidiarity would need to be introduced into this Act. An

⁹⁸⁹ For a delineation of the principles see Janine Hayward *The Principles of the Treaty of Waitangi* (Waitangi Tribunal, 1999) available at <<http://www.justice.govt.nz/tribunals/waitangi-tribunal/documents/public/treaty-principles-appendix-99/view>>.

amendment to the 1986 Act could be passed by a simple majority, as none of its sections are entrenched.⁹⁹⁰ The difficult part is not the technical process of enacting the amendment, but certain political calculations that would still hinge on the popularity of such a move. Moreover, the objective is the ability to produce an amendment that would have ‘teeth’: able to provide the benefits envisaged from the introduction of subsidiarity across New Zealand, rather than ‘window dressing’. For this to happen, Phase 1 should be given time to bring about a national consensus on such amendments.

It is apposite here to comment on the relation between the Constitution Act 1986 and the Constitution Act 1852. While the Panel suggests that the Constitution Act 1986 repealed the Constitution Act 1852, the 1986 Act was intended to reform New Zealand’s constitutional law as largely found under the 1852 Act.⁹⁹¹ The 1986 Act serves a function similar to that served by the 1999 and 1874 Acts in Switzerland, namely, updating the language of the earlier Acts. The long title of the 1986 Act is “An Act to reform the constitutional law of New Zealand, to bring together into one enactment certain provisions of constitutional significance, and to provide that the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom shall cease to have effect as part of the law of New Zealand”. Section 26(1)(a) of the 1986 Act also suggests that the 1852 Act ceases to have effect as part of the law of New Zealand. However, the 1986 Act adopts much of what is already in the 1852 Act. For example s 10(2) states that “[t]he House of Representatives is the same body as the House of Representatives referred to in section 32 of the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom”. Section 14(2) states that “[t]he Parliament of New Zealand is the same body as that which before the commencement of this Act was called the General Assembly (as established by section 32 of the New Zealand Constitution Act 1852 of the Parliament of the United Kingdom) and which consisted of the Governor-General and the House of Representatives”. According to Sir Geoffrey Palmer, who introduced the 1986 Act, it was simply intended to update the 1852 Act.⁹⁹² The quasi-federal logic initiated in the 1852 Act remains part and parcel of our current constitutional heritage, even after the 1876 Vogel abolition.

⁹⁹⁰ The only exception is section 17(1) which is entrenched by section 268 of the Electoral Act 1993. However, this section relates to the term of parliament and is not relevant for the proposals in this thesis.

⁹⁹¹ A comment made by Professor Philip Joseph during the NZCPL conference *Unearthing New Zealand’s Constitutional Traditions*, Wellington, 29–30 August 2013.

⁹⁹² Comments made by Sir Geoffrey Palmer during the NZCPL conference *Unearthing New Zealand’s Constitutional Traditions* Wellington, from 29–30 August 2013.

A gestalt look at the Constitution Act 1986, however, suggests that a section about subsidiarity has no natural anchor in its existing parts. The 1986 Act is made of five parts. The first introduces the sovereign, while parts two to four delineate the horizontal separation of government into the executive, legislative, and judiciary. Part five lists miscellaneous provisions such as naming the parliamentary library, and the ceasing of UK enactments to have effect in New Zealand. Schedules 1 and 2 to the Act list amendments and repeals respectively. Based on the existing structure of the 1986 Act, none of the five parts is a natural place where an amendment could be introduced.

Subsidiarity is envisaged as a cornerstone of our constitutional past and future. For it to be introduced to the 1986 Act, a new ‘general provisions’ part that delineates the vertical distribution of power within New Zealand is required. This part would come right after section 1 and replaces the sovereign as the first part. The text could be (informed by art5a of the 1999 Swiss Constitution) as follows:

Part 1
General Provisions

2. The principle of subsidiarity, including its rendition in the Treaty of Waitangi, must be observed in the allocation and performance of state tasks.

Further delineation of the principle should be left for the courts to develop. One exception is city sovereignty that should attach, in a progressive manner, to existing and future cities in New Zealand. This brings me to the fourth, and most ambitious, phase of the introduction of subsidiarity into New Zealand.

Phase 4: City Subsidiarity and the Auckland Supercity

In 2010, the New Zealand government introduced the Auckland Region local government council, the Auckland Council, which covers an area of around 5,000 square kilometres (still smaller than the largest Swiss canton, Graubünden). The Council, driven

primarily by efficiency gains, amalgamated the function of the Auckland Regional Council and the region's seven city and district councils: Auckland City Council, Manukau City Council, Waitakere City Council, North Shore City Council, Papakura District Council, Rodney District Council and most of Franklin District Council. This amalgamation was dubbed the 'Auckland supercity'.

As discussed in Chapter 3, cities are attractors in a complex, adaptive system that we refer to as the 'economy'. It hence follows that these attractors need to enjoy a high level of 'self-organisation' or autonomy. This would suggest that a supercity like Auckland needs to be reorganised as a 'charter city'. This does not mean that a federal configuration would result. A 'charter city' would still be created by an act of parliament, and would be fitted into a subsidiarity (power-sharing) set up rather than a divided-power one. The same vision should roll out to other cities such as Christchurch, Tauranga, and Dunedin.

The Council was set up by three pieces of legislation: the Local Government (Tamaki Makaurau Reorganisation) Act 2009, the Local Government (Auckland Council) Act 2009 and the Local Government (Auckland Transitional Provisions) Act 2010. It is envisaged that a similar piece of legislation would enable a distribution of legislative powers to the existing Auckland Council, where it also obtains political and fiscal concessions. However, in this Phase it would be necessary to first have a referendum in Auckland on such measures. The proposition is no less than creating a self-governing polity within the Kingdom of New Zealand, and the same needs to be fully endorsed by the people who would benefit from it. Once Aucklanders opt for a charter city, the next step would require passing legislation in parliament to that effect. All New Zealanders would still have a say on the formation of the charter city through the democratic process.

This would be a set-up similar to that enjoyed by cities such as Hong Kong. The Basic Law given to the Special Administrative Region (SAR) of Hong Kong would be a guide for a charter for Auckland. In particular, the following two sections would be essential to the Auckland constitution:

Part I :

General Principles

Article 1

The Auckland City is an inalienable part of the Kingdom of New Zealand.

Article 2

The New Zealand parliament authorizes the Auckland Council to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, in accordance with the provisions of this Law.

The above two articles clarify the envisaged level of autonomy. But it would be premature to develop the whole charter at this point. As indicated earlier, it would take decades to introduce the principle of subsidiarity into the Constitution Act 1986. Only then will a charter be ready for further elaboration. If we reach that point, other cities in New Zealand would be able to enjoy a similar status.

Two points would give me consolation at this juncture. There are precedents from other jurisdictions on setting up such autonomous regions. Their experience would be invaluable for the introduction of the Auckland charter. Second, the charter would have to gain support from across a large section of Aucklanders. More of the charter could be developed after wider consultation. Again this is a proposal that would not be on the table unless and until subsidiarity is adopted. In fact, this fourth Phase might not even materialise at all. It is all in the hands of the electorate and their perceived merit of the arguments made in this thesis.

It is also useful to point out the alternative of a quasi-federal set up similar to the one we had under the Constitution Act 1852. This could be seen as an alternative to charter cities. However, given our experience with that set-up, and the experience of neighbouring and relatively similar countries with this type of federalism, especially the issues seen in Australia and the United States, including the re-concentration of power with the federal

government over time, it would be only a second best alternative to the more stable set up of charter cities. This is so given that under the latter the balance of power remains in the hands of the central government hence improving stability, but also giving cities a wide margin for innovation on social and economic policies (see also Chapters 3 and 6).

10.4. Conclusion: Subsidiarity and the New Zealand psyche today

This chapter argues for the introduction of the principle of subsidiarity from within existing constitutional arrangements. This approach capitalises on the relative ease with which we can amend the Constitution Act 1986 and the ability to interpret the Treaty of Waitangi as an instance of this principle. The fact that the New Zealand constitution is neither written nor supreme makes incorporating subsidiarity a matter of securing a simple majority on an amendment to the Constitution Act 1986. There would still be a need to introduce a new ‘general provisions’ part where subsidiarity could be incorporated.

But this relative ease of amendment should not be confused with embedding subsidiarity in our constitutional thinking, nor the pre-requisite social and political ‘buy-in’. The difficult task is to ensure that the general public is familiar with subsidiarity and able to see its benefits. This requires education and dialogue both through formal channels, such as tertiary institutions, and other education providers; but also, and more importantly, through informal (educational) channels such as the media. Subsidiarity needs to be showcased through our constitutional history, namely through the Treaty of Waitangi and the quasi-federal provincial system we had from 1852 to 1876, as well as through showcasing constitutional change in other countries where subsidiarity is a central theme. Latin American countries such as Bolivia and Ecuador are such examples.

I have provided a sketch of a four-phase strategy to bring about subsidiarity as a constitutional principle in New Zealand. The first phase is a civic educational-engagement phase as discussed above. The second is about the role of the court system and the Waitangi Tribunal in interpreting the Treaty as an instance of subsidiarity. The third phase is the actual amendment of the Constitution Act 1986.

The fourth phase is the aspirational part of the strategy. It is revolutionary and hence is likely to engender resistance. This phase envisages the creation of charter cities within New Zealand where a high level of political, fiscal, and legislative autonomy would be enjoyed first by Auckland, and later potentially by Christchurch and other cities. The vision is to

have such cities compete directly on the international stage, similar to cities such as Hong Kong and Singapore. Of course the creation of these latter cities is entangled in events deep in the history of colonialism, but points made in previous chapters apply equally to this proposal. Cities are the engines of economic growth. In a complex system such as the economy, these cities play the role of attractors of all forms of capital. If such attractors are coupled strongly, that is to say if they are forced to follow the same political and economic policies, there is a real danger of causing political and economic crises that could shake the system to bits. Instead, a weak coupling would allow these attractors to attain a level of resonance that helps induce sustainability (including in the ecological sense). This weak coupling translates into the proposition of local autonomy in the form of charter cities.

The alternative of a (quasi) federal system is not likely to evade the problems of strong coupling. The resulting regions would be of such power that their interaction would also produce tension at a paralyzing magnitude. The federal government would find it inevitable to recentralise most powers simply to enable a reasonable level of functionality. But this takes you back to strong coupling which on the long run would lead also to collapse. The difference is that a strong federalism (in the European sense) would result in a 'stroke'-like death while recentralisation takes you down the path of a cancer-like death.

In the final analysis it might be that the ideal of charter cities will have to wait for its implementation for a different time and a different context. I would be content if New Zealand only nudges its existing constitutional arrangement in the direction of subsidiarity. It would then be the noble burden on the shoulders of Māori and other local communities to see it through a praxis that brings prosperity to their communities and further afield.

11. To Conclude: The Case for Subsidiarity in New Zealand

11.1. Introduction

This doctrinal thesis is about subsidiarity in the New Zealand context. But its relevance goes much further than these shores. In the European context, the issue is gaining a new momentum in the wake of the Scottish Independence Referendum of 18 September 2014. The United Kingdom government came out with a promise for a ‘devolution revolution’,⁹⁹³ not only as a result of the independence movement in Scotland, but also due to similar calls from Wales, Northern Ireland, and Cornwall, to name only a few. Similar independence movements are mushrooming around Europe.⁹⁹⁴ In Catalonia, the Catalan self-determination referendum was planned for 9 November 2014, even though the Spanish government has signalled that it would block such a referendum.⁹⁹⁵ Ignoring such desires for local autonomy in a world dominated by an increasing pace of political, social and economic integration would be disastrous. Countries, including New Zealand, need instead to look for more viable solutions other than complete independence. Charter-city subsidiarity is the most promising among options for local autonomy.

This thesis furnishes positive and normative arguments to support the proposition for subsidiarity as a constitutional principle in New Zealand. This chapter repeats the conclusions provided throughout the thesis. First the arguments why subsidiarity is a constitutional principle in New Zealand are summarised. Next the normative arguments why it should be a constitutional principle in New Zealand are summarised. The last section leaves the reader with a road map on how this principle can make a comeback in our future constitutional change.

⁹⁹³ Patrick Wintour, Severin Carrell and Rowena Mason “Scottish Referendum: Cameron Pledges Devolution Revolution after No Vote” *The Guardian* (United Kingdom, 19 September 2014) <<http://www.theguardian.com/politics/2014/sep/19/scottish-referendum-david-cameron-devolution-revolution>> .

⁹⁹⁴ See for example “Separatist, Independence, and Decentralization Movements” Constitution Society (21 May 2014) <http://www.constitution.org/cs_separ.htm> .

⁹⁹⁵ “Spain to Block Catalonia Independence Referendum” (12 December 2013) British Broadcasting Corporation (BBC) <<http://www.bbc.com/news/world-europe-25353086>> .

11.2. Subsidiarity as a constitutional principle in New Zealand

Alas, today, many polities, including New Zealand, fail to appreciate the nexus between subsidiarity and stable, prosperous, political structures. Although historically, responses to ecological crises seemed to be alive to the imperative of embedding decision-making at the local level. In contrast, our response to the ecological crisis of our times seems to be ideologically wedded to the global scale—the very cause of this crisis. Even the Earth Charter, the flagship in the discourse on the modern response to the ecological crisis, is largely tilted in favour of nation states rather than the local autonomy without which any response to the crisis would at best be a ‘placebo effect’. Through the fiction of ‘indigenous people’ which marginalises local communities in search of self-organisation; through ‘universal human rights’, with their emphasis on individual rather than collective (communal) rights; and through the illusion of the ‘complexity imperative’ where the complexity of our world dictates coordination at the global rather than the local level, we were led to believe in the virtues of social, economic, and political integration. We now accept globalisation (one particular modality of integration) as the only effective form of combating the modern ecological crisis.

Our constitutional heritage in New Zealand provides a stark contrast to the approach we have today. Today the New Zealand government is opposed to local autonomy, as illustrated by the case study on the proposed biosphere reserve for Waiheke Island, and even in the Local Government Act 2002. Historically however, we find that this country was built on the idea of local autonomy. Both the Declaration of Independence of 1835, and the Treaty of Waitangi of 1840 acknowledge subsidiarity as a guiding principle. While the word ‘subsidiarity’ itself never features in these documents, it is possible to see how both are intended to give effect to the rules inherent in the idea of subsidiarity, namely, a rule of assistance, a ban on interference, and helping local governments help themselves (i.e. gaining competencies). The 1835 Declaration was emulating the Articles of Confederation of the United Colonies of New England of 1643. The United Tribes of New Zealand was a loose confederation between the northern tribes to ensure that legislative authority was held by them (art2 of the Declaration). The Treaty of Waitangi played the role of the US Constitution of 1787 in imagining a new national identity beyond the North Island, and inviting the southern tribes to join the Confederation. Just like the US Constitution used the Articles of Confederation of New England as its prototype, so too did the Treaty of Waitangi use the 1835 Declaration of Independence as its reference point.

The Articles of the Treaty illustrate a clear connection with the principle of subsidiarity. The Treaty refers to the rule of assistance in the preamble and in arts 1 and 3. The ban on interference can be seen in art 2, while the competence rule is operative in both arts 1 and 2. On this teleological reading of the Treaty, subsidiarity is its essence.

The logic of local autonomy is also evident in our earliest constitutional designs. Both, the Constitution Act of 1846, and the Constitution Act of 1852 envisaged a ‘quasi’ federal system. The ‘quasi’ qualifier signified a fiscal dependence of the provinces on central government. While the first (1846) Act was largely suspended, the second established a functioning provincial system around the original six colonies, a setup not very different from that in 17th century New England. This provincial system was ‘umbilically’ connected to the Declaration and the Treaty through section 71. This section gave a clear indication of New Zealand’s commitment, at least in theory, to the decentralisation of legislative powers. In fact, the original designs for both Acts envisaged much wider local autonomy, with municipalities having their own legislative powers. But what was legislated was more in line with the powers given to other provinces in the British Empire, in particular in Canada under the British North American Act 1867 where a ‘quasi’ federal system evolved to the federal system we see today. Unfortunately, the whole federal setup was abolished in 1876 mainly to eliminate provincial resistance to central government expanding its jurisdiction. Unlike New England, New Zealand was not helped by external events such as the Glorious Revolution of 1688, and was not able to reverse this abolition. In New Zealand, dominion proved to be more resilient than in New England.

In the next section, normative arguments elaborate the negative effects of this dominion on the economic development of New Zealand.

11.3. Why subsidiarity should be a constitutional principle in New Zealand

The triumph of dominion in New Zealand had lasting, detrimental, implications on its economic development. Constitutional economics suggests that there is an optimal size for any given jurisdictional footprint (i.e. the geographical area within which a political entity has legislative powers). There is a size that minimises the sum of ‘external costs’ (the costs an individual is expected to endure as a result of the actions of others) and ‘decision-making

costs' (the costs an individual incurs from his participation in decision-making) in a given jurisdiction. This optimal size is roughly that of an agglomeration, a city-region, like the Auckland supercity, or the six original colonies. In order for a polity like New Zealand to function optimally, it would hence need to adopt a constitutional architecture that brings such agglomerations into a political union, where the central government would only function subsidiarily. The alternative of enforcing an artificial homogeneity across the country, which we have followed since 1876, has brought serious negative effects on our economic performance. Unlike New England, which today, even as part of a larger political entity, is ranked twelfth in economic complexity, and has a (PPP) per capita of around USD 60,000, New Zealand is ranked 42nd in economic complexity and has a (PPP) per capita of USD 30,000. New Zealand has been largely confined to producing low value products such as meat and dairy, while machinery accounts for less than 1% of all exports. The key point is not that a 'quasi' federal provincial system would have made us better off economically; a glance at Australia shows it slumbering at 52nd in economic complexity. Instead, the key point is that enabling a local autonomy such as in New England would provide a better venue for innovation, and hence, on the long run, economic prosperity. There are of course other factors that explain the difference in economic development between New Zealand and New England, and it would be unreasonable to suggest that the differential is solely due to subsidiarity. However, subsidiarity would have played a major role.

On the long run, the effects of centralisation are more pronounced. The nation state portends structural collapse. A morphological analysis of political structures suggests a tendency of dynamic, change-seeking, structures to ossify over time. The setting-in of this mechanomorphism (i.e. the triumph of order over freedom) is explained by constitutional designs that allow central governments to continue growing perpetually. This departure from the human scale for political, social and economic activities leads to a Hobbesian structural change that usurps local autonomy. The tinkering with ancient morphogenetic principles such as structural proportions, in the distribution of (legislative) powers, led to a histopathology (a malfunctioning at the meso, city-region, level) evidenced today by the demise of the sovereign city, and the crescendo of political, social and economic crises we witness around the globe. But there is an axial shift that occurs every 500 years, where society revolts against large polities and resolves to attain 'smallness within bigness'. Today we see this shift taking place where society is demanding 'polyolithic' rather than 'monolithic' political organisation (Scotland and Catalonia are a case in point). The nation state is entering a 500 year cycle of morbidity. The demands of democracy as an

evolutionary fitness require imagining a world governed by confederations of cities reminiscent of a Sanhedrin (סַנְהֶדְרִין) view of the world (as seen in the tribal confederation of ancient Israel).

Analytically, there are clear indications that subsidiarity cannot be overlooked. In any social relationship where there is a power component (other than coercive power), there is also a social trust complement. According to the auxilium model (Chapter 2), upholstering this social trust holds the key to stabilising power structures, including those underlying governance. The ability to do so requires resolving inherent informational asymmetries within such relationships. The more complex the relationship, the more there are informational asymmetries, and as a consequence, the longer is the power distance between the parties to the relationship. There are two technologies for resolving informational asymmetries. A static, *ex post*, approach where there are high standards of conduct imposed on the party holding the power balance. This is the essence of the fiduciary principle. The second approach is a dynamic one where, *ex ante*, the party holding the balance of power provides the weaker party with the competence to make their own decisions. This is the essence of the subsidiarity principle. The dynamic intervention is inevitable given the limit to the burden fiduciary obligations could have on the more powerful party.

On the long run, only the subsidiarity approach would ensure a stable power structure. This can be seen through the complexity ansatz (Chapter 3). The inevitable production of scale, and hence production of complexity (through demands for integration resulting from increased informational asymmetries due to the production of scale) would ensue from the repeated interaction between parties to the relationship. To evade collapse the very nature of the relationship has to be altered subsidiarily to stabilise the power structures underlying the relationship. Complexity theory informs us that when systems are properly coupled, i.e. not too loosely or too tightly, complex attractors (such as city-regions) become immune to collapse. In other words, when in a given jurisdiction there is strong homogeneity (through centralisation of the legislative function) we have tight coupling; and when the entities in the jurisdictions are given too much legislative power (independence) we have loose coupling. Both these scenarios would result in weak architectures prone to crises and collapse. The optimal solution, as proposed by Baruch Spinoza and Jane Jacobs, is for sovereign localities to take the centre stage in constitutional designs.

Globalisation (and its microcosm of Europeanisation) also necessitates a return to subsidiarity. While efforts for integration on a global scale could be traced to the dawn of civilisation, the integration of our time is leading to transformations different in their scale,

scope and complexity. Globalisation contains economic, technological, cultural, and political dimensions, through which it changes the role of the state from an active policy-maker to a passive unit of administration. Power is being centralised away from the nation state and into supranational instruments. This is resulting in ‘scale entanglement’ where the local and national scales are subdued by the global scale. In this modality of integration, cities play a major role. Metropolises are the nodes in a network that propagates the universals of globalisation. And it is in these cities that forces for and against globalisation clash. Local issues now have global ramifications. The current independence movements in Scotland and Catalonia are examples of this tension. The issue for these cities is not as much to participate in this integration or not. But to do so on their own terms. Globalisation is heightening demands for sovereignty to be returned to the local scale. Globalisation is overseeing a shift in power from the central government and towards municipal governments.

11.4. The way forward

The proposition is not very different from that made by Baruch Spinoza in the 17th century. Spinoza argued for constitutional designs where sovereignty (understood as a relationship between rulers and ruled) is shared between different cities in a loose confederation. Buchanan, the founder of constitutional economics, echoes Spinoza in his vision for federalism, especially for Europe, where there would be diversity among separate small jurisdictions with shared sovereignty and devolution of legislative powers. This is also not very different from the ‘devolution revolution’ envisaged in the United Kingdom today. These constitutional designs are in full contrast with the Hobbesian vision of a strong central government, a vision that continues to influence our constitutional arrangements in New Zealand. According to Spinoza, sovereignty is not incompatible with local autonomy. Moreover, he suggests that a polycentric arrangement where sovereignty is shared among several cities would provide stability. This is analogous to results under the auxilium model and the complexity ansatz. The proposition is for charter cities in a bottom-up architecture of the modern political state.

A useful model to look at is the Swiss model. After all, our electoral system in New Zealand was inspired by the German electoral system, and it would not be unreasonable to look for similar inspiration from Switzerland. Switzerland is closer to New Zealand due to

the nature of its multicultural society and the relatively similar reference point for their modern existence. The modern Swiss Confederation was created in 1848 (with the adoption of the Swiss Federal Constitution), while the idea of New Zealand as a nation came about in 1840 (with the signing of the Treaty of Waitangi). In Switzerland, the principle of subsidiarity is given constitutional recognition through arts 3 and 5 of the Federal Constitution of 1999. However, the practice of subsidiarity can also be seen in the Confederation Charter of 1291. One example of how this subsidiarity is put to practice is the education system, which to this day is one of the most decentralised in the world. Except for some vocational training and university education, most of the expenditure is in the hands of cantons and communes. The cantons are in control of their own education policies, with the central government only providing guidelines at the federal level.

Switzerland is an excellent case study for subsidiarity because of its small jurisdictional footprint (around 40,000 square kilometres) and the small size of its constituent members (the largest canton being around 7,000 square kilometres). This limit on the size of its cantons helped stabilise the Confederation. None of the cantons is viable as an independent entity (in contrast to a region the size of Scotland with roughly 70,000 square kilometres). Of course there are even smaller independent polities just to the east, namely the Principality of Lichtenstein (at 160 square kilometres only), but unlike the democratic cantons, the House of Lichtenstein still maintains substantial political power which ensures the viability of this polity. Switzerland is also a good case study for the effect of globalisation, using Europeanisation as a proxy, on the local and national scales. Today the Swiss cantons are under pressure to relinquish their local autonomy in the face of integration at the European and global scales. This pressure is resulting in the emergence of new political structures where agglomerations (city-regions) are gaining ascendancy. The Swiss model seems to be moving towards a Confederation of agglomerations rather than of the cantons that exist today. This is not surprising given that integration takes place through, and would be negotiated in, these city-regions.

The proposition is not for a ‘blanket’ adoption of the Swiss model in New Zealand. While there are similarities between the two jurisdictions, there are also important differences. The nature of our multicultural history and the history of our constitutional arrangements (especially the abolished provincial system) require indigenous solutions to our constitutional challenges. Nevertheless, a look at the Swiss model, its subsidiarity, and the praxis of this subsidiarity (given integration pressures), is useful when it comes to imagining our own version of subsidiarity. A feature that could be imported from the Swiss

model is the need to limit the jurisdictional footprint of our local governments, and to centre these on agglomerations such as the Auckland supercity, and other large cities in New Zealand. These design concepts are not contingent on the cultural make up of Switzerland but relate to more universal observations around the stability of political structures.

Pragmatically, however, I do not envisage a ‘devolution revolution’ in New Zealand. It is hoped that this thesis will go some way into convincing policy-makers of the need for subsidiarity. The ease with which we can bring about a constitutional change to recognise subsidiarity as a constitutional principle in New Zealand, relative to other countries, for example through an amendment of the Constitution Act 1986, is deceiving. The real issue is rather to induce a ‘buy-in’ by the New Zealand voter of the importance of this principle for our economic wellbeing and for the stability of our country on the long run. Only then would a constitutional recognition of subsidiarity be meaningful and effective. But bringing about this change in the New Zealand psyche would take years if not decades. The role of policy-makers is to bring subsidiarity to centre stage in our education system and in our political discourse. Over time this will hopefully translate into an understanding of the role of subsidiarity and the way it could benefit New Zealand. Only then would we be ready for a constitutional change that gives effect to subsidiarity.

This subsidiarity should bring about municipalities with wide legislative powers, just like they were envisioned under the 1852 constitution original design. This time however, given the lessons from the Swiss model, the municipalities would be limited to the size of city-regions. This means that the constitutional design would see non-contiguous cities become sovereign, under a charter from the British monarch. The New Zealand central government would play a vital role in ‘underwriting’ these cities to ensure their success.

This thesis does not provide a complete blueprint for this constitutional design. Fiscal arrangements on sharing revenue and expenses, the level of participation in central government decision-making, mechanisms for conflict resolution, and these cities’ share of natural resources are all issues that need to be ironed out. It would be premature to do so at this juncture. After all this is a bottom-up process rather than a top-down one. Once the idea of charter cities is accepted as the optimal architecture, the next step would be for a royal commission to look at fleshing out the details around this constitutional arrangement.

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