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The rise and fall of states: Some constitutional modelling

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The rise and fall of states: Some constitutional modelling

Abstract

From Gibbons' *Decline and Fall of the Roman Empire*, onwards – and indeed even earlier – there have been various attempts to explain the apparent mystery of why some civilisations rose and fell, apparently without reason, or at least without reasons that were readily apparent to the later observer (or indeed to the contemporary observer). Some of these studies have sought to identify key political or military influences – or the advent of a new technology – as affecting success or failure. Others have emphasised structural elements, such as the existence or absence of critical environmental factors. In a comparatively simple state such factors may indeed be crucial.

We will look at some of the theories that have been posited to help explain the rise and fall of civilisations. This article introduces the concept of the hard and soft constitution. Briefly, this is the principle that the flexibility of the constitution – it liberality – has a direct effect upon the success or failure of the state. The more flexible (or soft) the constitution the greater is the likelihood of success, as flexibility requires the development of shared power, dynamic tension, yet an overall cohesion that brings much needed political, social and economic stability.

1.1 Introduction

The question of what may be the key elements that determine the success or failure of a state is an extremely challenging one, fraught with danger to the wary and unwary alike. Any institution, whether it is large or small, is influenced by a range of variable factors. The greater the number of variables, the less likely the identification of a credible hypothesis to explain the development of that institution. This is especially so with states, which are not only complex, but also rarely homogeneous to any significant degree. It is often all but impossible to identify the casual influences that were dominant.

The definition of success is also problematic, given that success is determined as much by the cultural context, and is not wholly objective. It is partly for this reason that the focus of the article is on the possible influence of constitutional flexibility upon the stability of a state, and hence its success. It should be observed at this point that the term 'state' is used throughout the article in preference to country, or nation. The state is a legal, political and social entity, and countries and nations may lack one or other of these attributes – though they may have others unique to themselves. The success (or the stability) of nations, which may be classified according to racial, ethnic or other identifying feature, may be less readily ascribed to the institutional arrangements of that nation, as there is generally a degree of homogeneity present in the nation (or nation-state) that may not be present in the state.

A state is a much more complex entity than any other human institution, though it is not, perhaps, incapable of being understood as an institution. In practice one state might – perhaps as the result of conquest long ago – have a distinct political and religious history from its neighbouring state or states.[1] We might, for instance, have a region of the world in which there is one dominant ethnic group that is divided politically into two contiguous – and possibly even hostile – states. The separation may be simply political, perhaps due to some historical incident or agreement of the past. It might be religious or cultural, the direct result

[1] This example can of course be seen as loosely based on the example of the Balkans, though there are equivalent situations elsewhere.

of the imposition of an alien culture on the conquered people, or of its preservation in the non-conquered state. In our example, one state might be Muslim, the other Christian, or one Orthodox Christian, the other Roman Catholic.

If we were to measure the respective degrees of success or failure of these states (however that might be done), it may be possible to draw some conclusions from this, with respect to the influence of this one variable – religion. In other words, did this one significant variable contribute to the success or failure of the state?

But this seems to presuppose that there are no other variables, or at least to assume that they were less significant than the more overt difference between the two states. It could be that one state is oil or mineral-rich, and the other destitute of valuable natural resources. Still, one common element is better than none at all, and makes the task of the would-be comparer of the respective states slightly easier, with at least one element that may be discounted – or at least partially accounted for. A strict application of Ockham's razor[2] would doubtless reduce the variables still further, for the *lex parsimoniae* (law of succinctness) argues in favour of economy.[3]

It will be immediately apparent that comparing and contrasting states in this way is unlikely to ever be an exact science, due to the subjectivity in identifying and selecting variables, and the sheer number of variables, that is implicit in drawing such conclusions. However, it may nevertheless have some advantages as a tool, for instance, in identifying key elements for state sector reform.

Despite the inherent difficulties involved, or perhaps rather because of them, the study of the rise and fall of states, and civilisations, has proved a popular subject – especially among those inclined to speculate on the history (and the future) of humanity. For a relatively early work that sought to explain, as well as to describe, the course of history we have the magisterial example of Gibbons' *Decline and Fall of the Roman Empire*[4] – now sadly superseded as a work of scholarship but unsurpassed in its influence – as well as many other works, both before and since that magnum opus was published.

Some early histories, such as Raleigh's *History of the World*,[5] were inevitably limited in their coverage, temporally and geographically, and were scarcely 'world' histories as we would understand that term today. They also tended to be Euro-centric – for the simple reason that the majority of authors of such works were more familiar with Europe than they were with other continents and regions. There were, nevertheless, important anthropological surveys under taken in India, for instance, during the nineteenth century, in an attempt to understand the complexity of that country.[6]

With a greater knowledge of the rest of the world, and especially after the late nineteenth century explosion of European colonial activity around the world, came a greater interest and awareness in lost civilisations, decayed empires – and the forces that shaped them. There were, for instance, important anthropological surveys undertaken in India during the

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[2] *Numquam ponenda est pluralitas sine necessitate* ('Never posit pluralities without necessity); *Quaestiones et decisiones in quattuor libros Sententiarum Petri Lombardi* ('Sentences of Peter Lombard') Editione Lugdunensi (Lyon, 1495), i, dist. 27, qu. 2, K. In his *Summa Totius Logicae*, i. 12, William Kneale and Martha Kneale (eds.), *The Development of Logic* (London, 1962), p. 243, Ockham cites the principle of economy, *Frustra fit per plura quod potest fieri per pauciora* ('there is no value in using more when less will suffice').

[3] Inferring that 'simpler theories are, other things being equal, generally better than more complex ones' is just one way of many, and only seems more plausible to us because we are already assuming the razor to be true; see for instance Richard Swinburne, *Simplicity as Evidence for Truth* (Milwaukee, 1997). We are left with the choice of either accepting Ockham's Razor as an article of faith based on pragmatist considerations or opting to attempt justifying it deductively rather than inductively.

[4] Edward Gibbon, *The Decline and Fall of the Roman Empire* (London, 1994).

[5] Written while in prison in the Tower of London. It was published in 1614, in five volumes, but only reached as far as the Second Macedonian War in 130 BC.

[6] The Survey of India dates from 1767, the Geological Survey from 1851, and the Archaeological Survey from 1861.

nineteenth century, in an attempt to understand the complexity of that country.[7] But much of this work was still irremediably, and perhaps inevitably, Euro-centric.

In the twentieth century the focus tended to broaden to encompass the history and cultures of the world beyond the shore of Europe, European colonies and ex-colonies, and those lands contiguous to these. Even within empires greater attention was paid to the pre-European histories of the various cultures. The economic, social and political decline of India and China, relative to Western Europe, was a popular subject of study. Some of these works, while perhaps worthwhile for their own sake – for the furthering of genuine knowledge is rarely entirely profitless, whatever the direct benefit may be – came to be discredited for they were suspected of harbouring, or encouraging, notions of racial superiority. This, particularly after the Second World War, tended to have a stifling effect upon the more radical thinkers, possibility to the detriment of .human society as a whole.

There is much to be said for the argument that 'I disapprove of what you say, but I will defend to the death your right to say it'.[8] But an argument that one race is superior to another is as difficult to prove as many other of the variables in the success and failure of states – and probably less useful. A state is more than a collection of individuals, good bad and indifferent, or it is not a state. It is the community, the unity of the whole, which is critically important. Some races may have been less well adapted to life in a modern or post-modern commercial world, because of their cultural heritage, or levels of education, than others. But nevertheless, as human beings, all naturally adhere to a state (as we understand states in the post-1648 Westphalian sense), and all are capable of contributing to the success or failure of the state. It has yet to be shown whether the range of innate ability between races is statistically any more significant than the range within races. Probably it is not, and therefore adds little to our understanding of the dynamics of states, except in so far as the homogeneity of a state may be important.

One undoubted variable, when comparing and contrasting state with state, and region with region, is the ethnic composition of the population. Just as natural resources vary from state to state, both in quantity and quality, so the populations of states differed. But while the size, distribution, educational attainments might legitimately be compared, any suggestion that one race was superior – or another inferior – was rapidly dismissed as racist, and not worthy of serious consideration.

If racial characteristics are thorny problems for the investigator, so too are the political and economic, though for different reasons.

In this article we will commence with a review of some of the literature in the debate as to why some civilisations rise, while others decline or stagnate. These arguments may be seen as fallen broadly into the environmental or the institutional camps, though there is a degree of overlaps, and the emphasise varies among theorists. We will then narrow and refine the focus of the study onto the state, which may be a whole civilisation, or a sub-set of it. This will involve consideration of the theoretical modelling that has been proposed for civilisations, but with emphasis upon that which is most immediately applicable to the state, as distinct from the civilisation (the difference here being that the civilisation is political social and economic, while the state has a particularly strong political aspect).

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[7] The Survey of India dates from 1767, the Geological Survey from 1851, and the Archaeological Survey from 1861.

[8] Voltaire probably never said these exact words. They were written in 1906 by Evelyn Beatrice Hall (pseudonym S.G. Tallentyre) in the biography *The Friends of Voltaire* (London, 1906). The authoress did not attribute the words to Voltaire, but used them to sum up Voltaire's attitude.

1.2 The rise and fall of civilisations – some theoretical explanations

Let us first return briefly to the consideration of environmental factors upon the economic growth of civilisations. That group of scholars which emphasised the pivotal influence of geography may be typified by McNeill.[9] He argued that the West's growth was due to its resource base and to political competition that encouraged innovation. The latter variable may be seen as institutional – at least to some degree – but the former is explicitly environmental. In a similar vein Jones noted that the mountain chains and marshes of Europe formed barriers that prevented a single dominant state from evolving.[10] In the absence of this dominance a dynamic tension was created, between relatively evenly matched states, which encouraged the creation and dissemination of ideas, competition (both state and individual, with all levels between).

Diamond also emphasised geography, especially the abundant rainfall and the favourable effects of an indented coastline and high mountains on political evolution.[11] The rainfall allowed and encouraged stable and reliable settled agriculture, which in turn led to the establishment of settled communities. The coastline provided numerous opportunities for the establishment of cities and towns based upon commerce. The high mountains created natural barriers, carving up the continent into conveniently-sized pieces, each of which evolved into a stable political entity. It might be argued that the rainfall and coastline argument goes some way to explaining the development of civilisation in its earliest stages, but that it does not go far enough to explaining the modern success of the European states. It could however be argued that the agricultural stability, and coastal trade, allowed the states that had developed between the mountain chains to maintain and preserve their independence into modern times, and so allowed then to benefit from the dynamic tension of the intellectual revolutions from the twelfth century onwards.

Landes also laid much emphasis upon Europe's temperate climate, which allowed the population to accumulate a surplus above a subsistence level.[12] In contrast China's environmental conditions allowed generally stable peasant agriculture that was characterised by plenty in good times (that did not encourage the pursuit of surplus and so the development of a strong middle class), but destructive and destabilising famine in bad years. But he also promoted a cultural hypothesis, which might be characterised as a belief that the defining element in Western growth and development was a more dynamic European culture.[13]

This 'environmental' argument assumed that one culture might be more dynamic than another. This could be explained as being the result of a permanent state of imbalance (dynamic tension), or it might reflect the greater dynamism of an evolving culture – such as Europe's was from the end of the Dark Ages. This latter argument would help explain why the Crusades from the twelfth century onwards proved to be of such a lasting benefit to Europe. Not only was lost classical and all but lost Greek knowledge re-acquired, along with the newer Islamic learning, but the innovation and rapid growth that this engendered – and the evolution of modern states brought about by the political and military aspects of the Crusades – led to an intellectual blossoming in Western Europe, a challenging of received knowledge generally.

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9 William McNeill, *The Rise of the West* (Chicago, 1963), p. 114.

10 Eric L. Jones, *The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia* (2nd ed., Cambridge, 1987), p. 226; *The Record of Global Economic Development* (Cheltenham, 2002).

11 Jared Diamond, *Guns, Germs and Steel: The Fates of Human Societies* (London, 1997), pp. 409-12.

12 David S. Landes, *The wealth and poverty of Nations: why some are so rich and some so poor* (New York, 1998).

13 David S. Landes, *The Unbound Prometheus: Technological Change and Industrial Development in Western Europe from 1750 to the Present* (Cambridge, 1969); *Revolution in Time – Clocks and the making of the Modern World* (New York, 1983).

To Landes, and others who emphasised environmental factors, this dynamic evolution was due, at least in part, to the physical environment of Europe. The existence of plentiful and reliable rainfall could scarcely be enough, however, as the key element that led to the development of this region, for parts of the tropics enjoyed much higher rainfall, but never developed significant civilisations. To the environmentalist this too could be accounted for, being the result of excessively high temperatures (with an enervating effect on the human inhabitants, and the discouragement of complex clothing- and house-making), or an over-abundance of natural resources (with a similar effect).

Water is an importance element in the human condition, whether it is rainfall or not (and reliable), as well as the shape of the coastline (allowing safe harbours for ships), and the existence of rivers, allowing for inland navigation, irrigation, or providing a reliable water supply (and also sewerage system). Water was especially important in the thinking of Wittfogel. His hydraulic hypothesis contends that despotic governments often arose around rivers, as in ancient Egypt, China, and Mesopotamia. For him the presence – or indeed absence – of water was the single most important element in the development of the state. He developed the theory that the state arose when villages joined together to develop common irrigation projects (not necessarily due to free choice, but rather out of necessity, due to the physical environment). This co-operation, in Wittfogel's mode, greatly improved the productivity of agriculture.[14] But the next step, according to Wittfogel, was less beneficial. Once the state came into being as a means of developing irrigation (and it might be questioned how the co-operation of a group of villages can constitute a state), it soon inherently applied its bureaucracy to oppressive purposes.[15] In fact, according to Wittfogel, what he termed an hydraulic state will cease appropriating only when the marginal cost of further administrative control begins to exceed the marginal revenue to those benefiting from state action.[16] This is fundamentally a technology-driven model of the state.[17]

While this model might be of particular relevance to more primordial and less sophisticated states than are found today, it nevertheless illustrates the dependence of states on their physical environment.[18] He correctly identified centralised bureaucratic empire in China as inhibiting Chinese science, technology and economic development. But his central premise did not give sufficient weight to the fact that Chinese water management was mostly small-scale and local. Nor can this hypothesis explain the recent relative backwardness of Eastern Europe, or the success (albeit relatively short-term), of the Hittite empire, whose

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[14] He wrote that:

> In a landscape characterised by full aridity permanent agriculture becomes possible only if and when coordinated human action transfers a plentiful and accessible water supply from its original location to a potentially fertile soil. When this is done, government-led hydraulic enterprise is identical with the creation of agricultural life. This first and crucial moment may therefore be designated as the 'administrative creation point.'

– Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven, 1957), p. 109.

[15] Ibid., pp. 126–36.

[16] Wittfogel wrote that:

> The power of the hydraulic despotism is unchecked ('total'), but it does not operate everywhere. The life of most individuals is far from being completely controlled by the state; and there are many villages and other corporate units that are not totally controlled either.
>
> What keeps despotic power from asserting its authority in spheres of life? Modifying a key formula of classical economics, we may say that the representatives of the hydraulic regime act (or refrain from acting) in response to the law of diminishing administrative returns.

– Ibid., pp. 108–9. In Roman times whole districts were laid waste by the depredation of the tax collectors. See, generally, Jean Andreau, *Banking and business in the Roman world*, trans. Janet Lloyd (Cambridge, 1999).

[17] For more on this argument, see Noel Cox, *Technology and Legal Systems* (Aldershot, 2006).

[18] Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven, 1957).

capital Hattusa was largely devoid of natural water.[19] But he correctly saw Latin America and Russia as failing due to the existence of large landowners or the concentration of land ownership, and the tradition of authoritarian governments, and the failure of the merchant class to develop fully. He did not, however, explore the causes of these factors.

Finally, in a small selection of advocates for this approach, Pomeranz focused upon the stocks of coal, and access to the resources of the Americas.[20] For him, the economic explosion in Europe from the fifteenth century was due to the availability of these new resources. This however fails to explain the subsequent development of intellectual ideas and industrialisation in the United Kingdom, which did not obtain those resources, and the relative decline of Spain and Portugal, which did. The latter has, of course, been blamed on the sheer richness of the new continent – Spain collapse amid an embarrassment of riches. But is has also been ascribed to the political or religious conditions of the peninsula.

The second group among the rising/declining civilisations theorists gave pre-eminence to institutions, particularly what they saw as economic institutions. North argued that the structure of a society's political and economic institutions determines the performance of its economy and its rate of technological change. This is because institutions define the degree to which property rights are protected and contracts enforced – the cost of transactions, or the transactional cost.[21] This can be seen as primarily an economic model.

Josselin and Marciano suggested that by constraining the growth of the public sector, a country's legal system can and probably will have a considerable impact on its development.[22] This could be described as the 'arteriosclerosis' argument, though the constraint is not necessarily unconscious; it may be the result of deliberate and conscious choice. However, the greater the degree of freedom of choice, the greater the likelihood that this choice will lead to innovations. Conversely, if little choice is offered, by a stifling legal code, or archaic and inefficient administrative procedures or political apparatus, there is little incentive for innovation. Innovation might indeed be positively discouraged, for political, religious or cultural reasons. In the late eighteenth century the Chinese imperial reply to the tentative overtures of a British trade commission led by Earl Macartney was that 'Our empire possesses all things in prolific abundance.'[23]

But focusing primarily upon the growth of the public sector perhaps undervalues the positive consequences of a bureaucracy, in guarding against the unjust acquisition of property or ideas from others.

Lal took a different approach, arguing that the West's success was due to cultural factors. These included cosmological beliefs, political decentralisation and what he called 'the inquisitive Greek mind'.[24] For him the structure of governmental institutions was a consequence of underlying cultural factors, and not in themselves a cause.

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19 O.R. Gurney, *The Hittites* (2nd edn., Harmondsworth, 1990).

20 Kenneth Pomeranz, *The Great Divergence: Europe, China and the making of the modern World Economy* (Princeton, 2000).

21 Douglass C. North, *Structure and Change in Economic History* (London, 1981), p. 171; Douglass C. North, *Institutions, institutional change and economic performance* (Cambridge, 1990), p. 27.

22 Jean-Michel Josselin and Alain Marciano, 'The Paradox of Leviathan: how to develop and contain the future European state', *European Journal of Law and Economics*, 4 (1997): 5-21.

23 In 1793 Macartney was followed by 600 packages of presents, borne by 3,000 coolies. But his refusal to go down on both knees to the Chinese emperor ('kowtow', or *kòu tóu*) meant that his request for permission to open Chinese ports to British trade was turned down; Sir George Staunton, *An account of Macartney's embassy to China* (London, 1797); Sir John Barrow, *Some Account of the Public Life, and a Selection from the Unpublished Writings, of the Earl of Macartney* (London, 1807); Helen Macartney Robbins, *Our First Ambassador to China: An Account of the Life of George, Earl of Macartney* (London, 1908). See also, for later initiatives, G. Melancon, 'Peaceful Intentions: The First British Trade Commission in China, 1833-5', *Historical Research*, 73(180) (2000): 33-47.

24 Deepak Lal, *Unintended consequences: the impact of factor endowments, culture, and politics on long run economic performance* (Cambridge, 1998), p. 173.

Huff examines the cultural – religious, legal, philosophical, and institutional – contexts within which science was practised in the disparate cultures of Islam, China, and the West. He finds in the history of (European) law and the European cultural revolution of the twelfth and thirteenth centuries what he saw as major clues as to why the ethos of science arose in the West, permitting the breakthrough to modern science that did not occur elsewhere. It might be countered that any argument based on the preconception that 'modern science' is predominantly western, or that it is inherently different to pre-modern science is skewed. However, Huff's line of inquiry leads to novel ideas about the centrality of the legal concept of corporation, which is unique to the west (at least as the 'corporation' is understood in the modern west). This concept gave rise, according to Huff, to the concepts of neutral space and free inquiry.[25]

For Huff, free inquiry was limited in Islam due to the educational system which that religious engendered. Madrassas[26] were aimed at teaching two classes of science, and legal systems (or jurisprudence with associated logic, analysis and metaphysics). There were 'Prophetic sciences' and 'foreign sciences'. The former was actually based on logic systems whose boundaries were very clearly drawn: the prophetic sciences were in line with the concept of upholding 'divinity' as revealed by the *Quran*. The foreign sciences, on the other hand, were those analytical body of knowledge that were at odds with the Quranic traditions and the theological propositions:

> It was even essential to Islam, ..., because the 'method was part and parcel of the Islamic orthodox process for determining orthodoxy. Where it failed was in the creation of a set of objective standards of law, against which all other laws and principles could be judged. Since the legal principles of Islamic law had been given once and for all, in the *Quran* and the sunna, and in the principles of fiqh worked out by al-Shafi'i, the only task left was to use logic in the narrow sense, to uncover faulty reasoning and thus preserve the doctrinal status quo .... [27]

In this cultural tradition innovation could not prosper, yet in the tenth century Baghdad was the centre of a great Islamic civilisation – yet one that was based on ancient principles of science and knowledge.

Rosenberg[28] and Birdzell[29] argue that standard growth models can only provide the proximate causes of growth. Innovation and accumulation of capital, labour and natural resources is growth, but it does not explain growth. For them, the fundamental causes of growth lie in favourable institutions and freedom from political restrictions – more specifically, secure property rights and the freedom to engage in (almost) any line of business and to acquire and sell goods at an unregulated price. This meant that the process of innovation was delegated to private firms and that individuals themselves were forced to bear full responsibility for their failures and reap the full benefits of their successes; a laissez-faire model.

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25 Toby Huff, *The rise of early modern science: Islam, China, and the West* (2nd edn., Cambridge, 2003).

26 Madrasah (Arabic مدرسة) is the Arabic word for school. It is variously transliterated as *madrasah*, *madrash*, *medresa*, *madreseh*, *madrassa*, or *madressa*. It refers especially to a Islamic religious school. The word also exists in many Arabic-influenced languages such as Urdu, Hindi, Farsi, Turkish, Kurdish, Indonesian, Malaysian and Bosnian. The Hebrew word *midrasha* also means a place of learning.

27 Toby Huff, *The rise of early modern science: Islam, China, and the West* (2nd edn., Cambridge, 2003), p. 158.

28 Nathan Rosenberg, *Exploring the black box: technology, economics, and history* (Cambridge, 1994); Nathan Rosenberg and Walter G. Vincenti, *The Britannia Bridge: the generation and diffusion of technological knowledge* (Cambridge, 1978).

29 Nathan Rosenberg and E.E. Birdzell, *How the west grew rich: the economic transformation of the industrial world* (London, 1986).

According to Rosenberg and Birdzell these favourable institutions and political and economic freedoms arose in the West because of political fragmentation and competition between different territories in Europe. Investments and the merchant class were drawn to areas where property rights were respected and where they could carry out their business without too much political interference. There was no single empire in Europe, and therefore merchants could move from state to state as circumstances changed. The growth of markets – especially that of cities and long-distance trade – further spurred this development.

Dudley right observes that favourable geographic conditions are a necessary prerequisite for economic progress; but that this is not alone sufficient explanation.[30] China had the highest rate of innovation over two millennia before the modern era,[31] yet its economic progress – at least until very recently – was markedly inferior to that in the West. Both geography and institutions are important.[32] Dudley's approach was to look at communications, using Innis'[33] model, as modified by Kuznats.[34] The latter asked why over certain periods have income levels risen more rapidly in some societies than in others.[35]

Other approaches exist also, such as Cosandey's 'rich state system theory'.[36] In his view, internalist explanations of this sort all suffer from two serious inherent defects. First, Eastern Europe remains backward, despite ostensibly sharing the same environmental advantages supposedly enjoyed by the West. Second, because leadership fluctuations occurred among civilisations, such as in China, India, the Middle East, while at the height of their wealth. Inherent superiority cannot be a sufficient explanation.[37] Cosandey favours a mixed model, with environment being also an important factor.

Lang studied sociological and ecological aspects of Asian societies, religions and science. He identified stable political divisions to be a factor in scientific progress – China was more productive when it was divided politically. He also saw that the different coastline profiles of Europe and China was a major element in the development of different political models in the two regions.[38]

Sardar saw the present backwardness of non-European countries as due mainly to their past colonisation by Europeans.[39] Non-Western cultures are not, per se, obstacles to science, but science needs money to advance. The comparative retardation of science in the Third World is due – according to Sardar – to the lack of financial means, which he ascribed to the intervention of the West. While he would appear to be correct in some aspects of his views (such as the need for money to advance science), it must be questioned whether the West was responsible for the weakness of non-European science. The great age of Chinese innovation ended in around 1300, in the Arab world in about 1050, and in India as early as 700 AD. Some of this could be ascribed to the invasions of foes, but internal divisions seem to have played a larger role.

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30 Leonard Dudley, 'Explaining the great divergence: Medium and message on the Eurasian land mass 1700-1850', in Alain Marciano and Jean-Michel Josselin (ed.), *Law and the State: A Political Economy approach* (Cheltenham, 2005), p. 101.

31 Joel Mokyr, *The Lever of Riches: Technological creativity and economic progress* (Oxford, 1990), pp. 209-18.

32 Leonard Dudley, 'Explaining the great divergence: Medium and message on the Eurasian land mass 1700-1850', in Alain Marciano and Jean-Michel Josselin (ed.), *Law and the State: A Political Economy approach* (Cheltenham, 2005), p. 101.

33 Harold A. Innis, *Empire and Communication* (Oxford, 1950); *The Bias of Communication* (Toronto, 1951).

34 Simon Kuznats, *Modern Economic Growth: Rate, Structure and Spread* (New Haven, 1966).

35 See also Angus Maddison, *The World Economy: a millennial perspective* (Paris, xx).

36 David Cosandey, *Le Secret de l'Occident* (Paris, 1997).

37 David Cosandey, *Le Secret de l'Occident* (Paris, 1997).

38 Graeme Lang, 'Structural factors in the origins of modern science: a comparison of China and Europe' in Steven Tötösy de Zepetnek and Jennifer Jay, *East Asian Cultural and Historical Perspectives* (Edmonton, 1997), pp. 71-96.

39 Ziauddin Sardar, *Science, Technology and Development in the Muslim World* (London, 1977).

Nor is it certain that financial means was lacking in all of Africa in the post-colonial era; yet the majority of states on that continent have suffered repeated economic, political and social crises, and many are in a markedly worse situation relatively than they were at the granting of independence. The explanation may owe more to the constitutional arrangements of these states than to their innate resources.

In a similar manner to that just suggested – namely that progress and retardation was influenced more by a state of mind – or institutional arrangements – than by natural resources, Weber contended that religion was a prime catalyst for growth in Europe. In this theory a stern doctrine of Lutheranism and Calvinism promoted capital accumulation and economic development as a relentless commitment to one's earthly calling and in avoidance of trivial pleasures.[40] He derived the idea of religious inspiration for capitalism from the seventeenth century English economist Sir William Petty,[41] the founder of the modern science of demography, and considered by Marx to be the founder of classical political economy.

Weber argued that behavioural change alone could not bring about modern capitalism as it required an 'appropriate set of conditions' in the economic sphere. It was also driven by an underlying cultural (specifically religious) ethos. However, it may be questioned whether people are motivated by abstract ideas as much as Weber argued (Petty had relied on abstract ideas rather less, and cited many examples to prove that religious heterodoxy and trade go together). Perhaps more seriously, it was in the Reformed England (though also perhaps the Calvinist Scotland) rather than the Calvinist parts of Europe that the scientific revolution primarily originated, though there were instances of it appearing elsewhere. The role of religion cannot be ignored however, and there may be some truth in the comment by Kojève, that 'Europe owed its success to Christianity'.[42] The implications of the advent of a post-religious Europe on its economic standing – if any – remains to be seen.

It is important to observe that the advance of science and technology requires a thriving economy and a stable political division; not necessarily a concentration of power – indeed this would probably not promote innovation – but rather a dynamic tension between and among stable competitor states. If one is too dominant there could be a serious imbalance, which could result in instability in the weaker states, and eventually to the decline of the stronger state, as its markets, and sources of raw materials, become weaker. Balance – and the resultant tension of comparatively equal players – is crucial.

Baechler, developing a nascent state systems theory, concluded that Western Europe enjoyed a stable state system which was instrumental in the economic development of the region (what he called the 'growth of capitalism').[43] For him the existence of political stability was a necessary pre-condition for growth, and this pre-condition could only be brought about by the existence of stable states.

Taking a step back, to look at some of the possible reasons why stable states promoted growth, Blamont argued that government support for science and technology was motivated by prestige and power. Science was pursued as well, if not mostly, to satisfy the princely will for power and domination.[44] This domination might be internal, or it might be external – but it required a competitor to the prince, so the latter provided the most stable circumstances for innovation.

Braudel classified many decisive economic and political factors. He identified in particular the crucial role of sea-borne trade in the development of economic power. But he also emphasised the importance of multipolarity and the ultimately harmful effect of a unique

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40 Max Weber, *The Protestant Ethic and the Spirit of Capitalism* trans. Talcott Parsons (London, 1992).

41 Sir William Petty, *The Collected Works of William Petty* ed. T.W. Hutchison (London, 1997).

42 Alexandre Kojève, Александр Владимирович Кожевников, Aleksandr Vladimirovič Koževnikov. See Shadia B Drury, *Alexandre Kojève: The Roots of Postmodern Politics* {Basingstoke, 1994).

43 Jean Baechler, *Les Origines du Capitalisme* (Paris, 1971).

44 Jacques Blamont, *Le Chiffre et Le Songe: Histoire politique de la découverte* (Paris, 1993).

(without significant internal dynamic tensions) empire for China and the Muslim world. Braudel also recognised the importance of the causal relation between economic prosperity and the progress of science and technology.[45]

Jones, though advancing an environmental argument, considered many possible views, but was essentially an externalist. He also emphasised the gradual taming of governments as pivotal in the development of economies.[46] He sought for mechanistic – social, political, economic – reasons for the rise of the West, and ultimately emphasised the state system as the decisive factor in the ascendance of Western Europe and Japan.[47]

Many of these theorists were concerned with the particular problem of China. That country was for long centuries very innovative, and it enjoyed considerable natural resources. Why then did it fail to grow at a rate comparable with that of Europe in the eighteenth to the twentieth centuries? There must, logically, be some explanation, however difficult it might be to identify. While China differed in many respects from Europe, this did not mean that it should not be equally successful economically. One aspect in which it differed, and which may have had an effect, was in its constitutional ethos or paradigm. Intellectual and economic freedom was not merely tolerated in Europe, but encouraged (at least after the Reformation, and in many fields well before this). This process began to have an obvious effect in the United Kingdom, the first of the liberal democracies, though it can be traced back many centuries. While it would be precipitant to suggest that democracy is the explanation, it may be worthwhile to set this aside for consideration.

Diamond suggested that the mountain chains and marshes of Europe formed barriers which prevented a single dominant state from evolving. But would these physical barriers actually foster – or hinder – economic growth? The Roman empire extended across large tracts of Europe and North Africa despite these boundaries, and it was, for some centuries, economically and politically successful by any fair measure. Success may indeed have been due to factors independent of the physical environment, features that allowed success despite the hurdles the empire faced.

Mokyr concentrated his attention very largely on Western Europe and China, neglecting almost entirely the Middle East, India and other East Asian countries.[48] Further, he tended to over-simplify the degree of unity displayed in China, and as a consequence did not fully recognise that the degree of progressiveness of the Chinese governments is directly linked to the macro-political situation.

It has been observed that progressiveness is evident when China is stably divided, and non-existent or even negative when it is united.[49] It might however be observed that the current cycle of Chinese industrialisation and economic growth may contradict this hypothesis, but it can be countered that the primary catalysts for this expansion has been the existence of the Hong Kong Special Administrative Region, and to the fact that in mainland China, though provinces are theoretically subservient to the central government of the People's Republic of China, in practice provincial officials have a large amount of discretion with regard to economic policy.

It is the constitutional tension offered by the division of the country into relatively stable, but competing, units, that led to progress. It might almost be said that Orson Welles's memorable line from the film *The Third Man*, was prescient in anticipating later theorists: 'In Italy for thirty years under the Borgias they had warfare, terror, murder, bloodshed — they produced Michelangelo, Leonardo da Vinci, and the Renaissance. In Switzerland they had

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45 Fernand Braudel, *Civilisation and Capitalism, 15th-18th century* (London, 1985).

46 Eric L. Jones, The European Miracle: Environments, Economies, and Geopolitics in the History of Europe and Asia (2nd ed., Cambridge, 1987).

47 Eric L. Jones, *The Record of Global Economic Development* (Cheltenham, 2002)

48 Joel Mokyr, *The Lever of Riches: Technological creativity and economic progress* (Oxford, 1990).

49 David Cosandey, *Le Secret de l'Occident* (Paris, 1997), pp. 209-64.

brotherly love, five hundred years of democracy and peace, and what did they produce? The cuckoo clock.'[50] Dynamic tension has its advantages, as the role played by biodiversity in evolutionary biology illustrates.[51]

Pomeranz argued that stocks of coal, and access to the resources of the Americas, aided European economic growth. But China has much coal, and the gold from South and Central America helped to ruin the economy of Spain, and condemn it to centuries of relative economic and political oblivion. Europe itself was to undergo a long Dark Age, from c.300 AD to 1100 AD, that was caused by a variety of forces, not least of which was the mass migration of peoples from the east.[52]

Baechler, Blamont, Cesandey, Diamond, Needham and others offer us a variety of political and economic theories. Whilst they have some similarities there are also aspects in which they are divergent. The institutional theories from Huff, and Rosenberg and Birdzell, also reflect these difficulties. But from our perspective the greatest problem is that they are attempting to describe the success and failure of whole states and multi-state regions. Such as exercise inevitably present complexities of interpretation that threaten to reduce them to idle speculation. We will therefore attempt to narrow the focus, firstly by looking at the structural influences upon the success of individual states that may be ascribed to statehood itself.

1.3 The success of individual states

Failure in states is a notion that presents an immediate difficulty. Legal formalism may be in decline in respect of domestic law, but has apparently strengthened its hold on international law.[53] A failed state is still a state in international law, though sociologically or economically it may not be one. It is distinct from a state because it is a political entity, which a civilisation need not necessarily be (though it very often is, and the state and the civilisation may be one and the same). The existence of the legal structure or entity called the state, distinct from the community that comprises it, is an important element, for the state itself, as an entity, has its own inherent dynamism or tenacity.

This dichotomy – the tension between the state entity and the country or civilisation of which it is a part – allows the survival of many states whose viability is marginal, at best, and may actually contribute to the decline of such states[54] – especially if they comprise ill-matches geographical and ethic components – though whether this is a good or a bad thing is another question. In other cases the mere legal and conceptual existence of the state may also contribute to its survival as a community, though ultimately even here the normative effect of statehood has its limits. In recent years the collapse of Somalia may be seen as one example of the failure of a state, and the efforts of foreign powers, and domestic political, religious, tribal and military leaders to hold it together have not proven successful, though it is perhaps premature to entirely dismiss that state as failed. But there is a limit to the extent to which the notion of the state can contribute to the actual existence of that putative state.

The extent to which the notional existence of the state is crucial is subject to an important qualification. The notion of the state have subtly different meanings depending upon whether

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50 See the novel of the film, by its scriptwriter Graham Greene, published 1950.

51 Kevin J. Gaston and John I. Spicer, *Biodiversity: an introduction* (2nd edn. London, 2004).

52 Ferdinand Lot, *The End of the Ancient World and the beginnings of the Middle Ages* (London, 1953).

53 Gerard Kreijen, *State failure, sovereignty and effectiveness: Legal lessons from the decolonisation of Sub-Saharan Africa* (Leiden, 2004), p. 98.

54 Gerard Kreijen, *State failure, sovereignty and effectiveness: Legal lessons from the decolonisation of Sub-Saharan Africa* (Leiden, 2004), p. 98; Georg Sørensen, *Changes in Statehood: The Transformation of International Relations* (Basingstoke, 2001).

we are considering the state as an entity in international law, or from the perspective of the inhabitants. Although these two notions tend to be conflated – and perhaps the distinction is increasingly ignored in practice, it is nevertheless important. Let us begin with the notion of the state in international law.

The Montevideo Convention of 1933 is generally regarded as formally articulating for the first time the modern requirements for statehood. According to this Convention (strictly binding only on the party states, but generally accepted since then as representative of customary international law), a state must meet certain conditions to be a state in international law. It must have a permanent population (a settled population, rather than a merely transitory population, though numbers are not specified). It must have a defined territory (again, size is not specified, though presumably a *de minimis* condition applies. It must have an established government – though this need not be a democratic one, nor comply with any other conditions as to nature or form. Lastly, it must have the legal capacity to enter into diplomatic relations.[55] Although there has since the early 1930s been some consideration given to the minimum standards for governments – arguments that played a particularly important role during the prelude to the Balkans wars in the 1990s,[56] and the invasion of Iraq in 2003,[57] the conditions listed remain the only ones generally accepted at this time.

No other entity could be regarded as a state, whatever de facto power it may have – or purport to have, although a case has been made (unpersuasively) on behalf the Sovereign Military Order of Malta.[58] Leaderless and displaced populations, or distinct ethnic groups within states, generally lacked sovereign status and, accordingly, the recognition and protection of public international law, though there is some movement towards the recognition of indigenous populations. These groups may be fluid with respect to physical geographic boundaries, but do normally comprise a distinct political entity, at least in domestic law. The formal recognition of them in international law, on the other hand, would have potentially significant implications for the concept of state sovereignty, consequences as far-reaching as those that followed the Treaty of Westphalia.

Once we have identified a given political entity as constituting a state (and that may be a far from easy task, despite the apparent simplicity of the Montevideo requirements[59]), much yet remains unsettled. This is primarily because there are few, if any, internationally valid norms of domestic law with respect to statehood. In other words, though a sovereign state may appear much the same externally, from within there are marked internal structural differences between one state and another.

The precise nature of the authority of a state within its own territory is not within the scope of international law, and is heavily influenced by the particular constitutional, political, historical, social and economic heritage of individual states. It is therefore difficult to generalize about the nature and form of government. However, there are certain common elements, at least among the modern legalistic entities which we call states. In earlier times, that is, before the advent of modern juridical states, there was a greater element of flexibility

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55 *Montevideo Convention on the Rights and Duties of States*, 26 December 1933, 49 Stat 3097; USA Treaty Series 881, entered into force 26 December 1934, in *International Legislation*, ed. M.O. Hudson (6 vols,, Washington, 1931–50), vol. 6, p. 620; Ian Brownlie, *Principles of Public International Law* (5th edn., New York, 1998), ch. 5. Although the application of the Convention is confined to Latin America, it is regarded as declaratory of customary international law. See also *Island of Palmas Arbitration Case* (1928) No xix (2) Reports of International Arbitral Awards 829; (1928) 22 American Journal of International Law 986; 4 Arbitration Decisions 3.

56 Noel Cox, 'Developments in the Laws of War: NATO attacks on Yugoslavia and the use of force to achieve humanitarian objectives', *New Zealand Armed Forces Law Review* (2002): 13–24.

57 Noel Cox, 'The Consequences for the World Legal Order of the War on Iraq', *New Zealand Armed Forces Law Review* (2003): 11–7.

58 Noel Cox, 'The acquisition of sovereignty by quasi-states: The case of the Order of Malta', *Mountbatten Journal of Legal Studies*, 6(1&2) (2002): 26-47.

59 C. Hillgruber, 'The Admission of New States to the International Community', *European Journal of International Law*, 9 (1998): 491–509.

and consequently a lesser degree of similarity, in statehood. Because of the universality of international law, however fluid it may be, this has had an influence upon the development of the notion of the state domestically.

The spread of European colonial empires across much of the world, and especially in the nineteenth century – at the height of the notion of the sovereign state in international law – also had important implications domestically. Whereas in a state like Somalia (as we shall discuss shortly) institutional government was weak, and the 'state' depended upon internal checks and balances, post-colonial states sought to emulate the strong government models of the West – whether these were suited to their own particular circumstances. The world community also sought to impose certain domestic standards, such as democracy and the rule of law, again irrespective of the applicability of such concepts – which were assumed to be ubiquitous.

With the growing dominance of democratic concepts of government[60] – though not necessary the spread of democracy – it might be thought that if the people believe that a governmental institution is appropriate then it is also legitimate.[61] But this scheme omits important substantive questions about the justice (or even the role) of the state and the protection it offers the individuals and communities who belong to it.[62] It is generally more usual for commentators to maintain that a state's legitimacy depends upon its upholding certain human rights.[63] This may be seen in the use of such terms as freedom, democracy, rule of law, and tolerance, to be found even in the constitutions of totalitarian dictatorships.[64] Truly democratic states scarcely need to assert such principles (since they comprise the foundations of the constitution, formally or practically), yet they are rarely absent from modern constitutions.[65] But the state is as much an economic as it is a social or legal construct,[66] and it is important for its legitimacy and viability that the constitution remains broadly consistent with economic, and technological, realities.

Economic and technological changes eventually alter constitutions, because they change society, which constitutions reflect to a greater or lesser degree.[67] These changes need not necessarily be in the formal written Constitution, where these exist. It may be – and is indeed more likely to be – in the understanding, operation, or perception of the constitution. It is likely to be in the nature of the fundamental relationship between individuals and the state, between communities or society as a whole and the state, and between state and state. Yet because of their nature they may be only dimly perceived, and then possibly only with the incontestable advantage of hindsight.

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[60] Initially in western liberal democracies, and by extension, particularly through such institutions as the Commonwealth, throughout most of the world; See 'The Harare Commonwealth Declaration, 1991' (Issued by Heads of Government in Harare, Zimbabwe, 20 October 1991) available at <http://www.thecommonwealth.org/gender/htm/commonwealth/about/declares/harare.htm> (as at 6 December 2003).

[61] Penelope Brook Cowen, 'Neo Liberalism', in Raymond Miller (ed.), *New Zealand Politics in Transition* (Auckland, 1997), p. 341.

[62] This is illustrated by the study of the application of the model to Mummar Qadhafi's Libya; See Saleh Al Namlah, 'Political legitimacy in Libya since 1969' (1992) Syracuse University PhD thesis.

[63] See John Rawls, *Political Liberalism* (New York, 1993); Ted Honderich (ed.), *The Oxford Companion to Philosophy* (Oxford, 1995), p. 477; Matthew Swanson, 'The social extract tradition and the question of political legitimacy' (1995) University of Missouri-Columbia PhD thesis.

[64] Such as the 1977 Constitution of the Soviet Union; Constitution of the Union of Soviet Socialist Republics, 7 October 1977.

[65] The Constitution of the European Union also states that the Union is founded on the values of 'respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights …' in a society in which 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' (Article 1-2).

[66] See, for instance, John Locke; Martyn P. Thompson, *Ideas of contract in English political thought in the age of John Locke* (New York, 1987).

[67] See, generally, J. Woodford Howard Jr., 'Constitution and society in comparative perspective', *Judicature*, 71 (1987): 211–5.

Constitutional reform itself may be revolutionary yet preserve apparent formal continuity.[68] Changes need not be revolutionary in a strict legal sense, yet its effect may be revolutionary – as indeed may be its *Grundnorm*. The formalist approach of Kelsen maintains that if the constitution is changed according to its own provisions then the state and its legal order remain the same.[69] In this view it does not matter how fundamental the changes in the substance of the legal norms may be. If they are performed in conformity with the provisions of the (formal) constitution, continuity of the legal system will not be interrupted.[70] Thus, even though the nature of the relationship between individual and state – or between state and state – may have been profoundly altered, there is no revolutionary change to the constitution.[71] As an illustration, when the former republics of the Soviet Union declared their independence in 1991–92,[72] the provisions of the former Constitution of the Soviet Union (under which the constituent republics apparently enjoyed considerable autonomy) meant that the revolutionary nature of the dismemberment of the union was more real than apparent. Thus the formal structures of the post-Soviet states often closely resembled – at least during the transitional phase – their Soviet forms, yet their actual operation was quite distinct. However this understanding appears to minimise the real effect of constitutional change. Constitutions both reflect and influence governmental and societal behaviour, and fundamental changes in constitutions, however achieved, are likely to have significant medium- and long-term implications.

Nor does apparent continuity mean that there is real continuity. Ross emphasises the necessary discontinuity of a new constitutional order which has replaced an earlier one.[73] According to Ross, the legitimacy of a constitutional order goes beyond the legal system. If the political ideology changes at a time of constitutional change, so the legal continuity is disrupted.[74] In other words, if there is a profound social, political, or economic change, any resulting constitutional change may well be revolutionary in nature.[75] In this model the post-Soviet states were truly revolutionary in nature, since they rejected the social, economic and political model of communism – although their formal constitutional structures survived for a time. But it must be recalled that a constitution is far more than a statement of a formal power structure – it includes the ways in which that power structure actually operates.

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

The importance of this distinction between the legitimacy of a continuous legal order (however great the changes in the underlying norms may be), and the discontinuity of a new order, is profound. For, although superficially the constitutional order remains unchanged, yet in one model legitimacy is preserved, in the other it is undermined. It might well be wondered how this could be so, unless the notion of legitimacy is unrelated to any practical social application. Surely, it could be argued, the people of a given country know whether their

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[68] See Peter Paczolay, 'Constitutional Transition and Legal Continuity', *Connecticut Journal of International Law*, 8 (1993): 559–74; Ralf Dahrendorf, 'Transitions: Politics, Economics, and Liberty', *Washington Quarterly*, 13 (1990): 133–42.

[69] Hans Kelsen, *General Theory of Law and State*, trans. Anders Wedberg (Cambridge, 1945), pp. 117–8.

[70] Ibid., p. 119.

[71] And therefore the knowledge revolution would be economic and social, but not political.

[72] Edward W. Walker, *Dissolution: sovereignty and the break-up of the Soviet Union* (Lanham, 2003).

[73] See Alf Ross, *On Law and Justice* (London, 1958).

[74] Ibid.

[75] See, for instance F.M. Brookfield, *Waitangi and indigenous rights: revolution, law, and legitimation* (Auckland, 1999).

governing regime is legitimate or not? It shouldn't be a matter for political theorists to advise them, but should rather be an instinctive reaction to the regime which controls the state, the (non-political) apparatus of the state, and the role of the state.

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

If we wish to understand the relationship between constitution and technology, it is also important to consider the role and purpose of the state – though this has been a fundamental problem of all theories of the state since Aristotle,[76] and doubtless will remain so. Legitimacy of government has its social, political and economic aspects. As Hobbes maintained, government was a product of consensual alliance, and whilst it was generally for the common good, its primary purpose was to further the interests of the individual.[77] These interests are economic, in that the state should be able to ensure that the majority of its people have sufficient resources to live reasonably comfortably. They are also political, in that the population has certain expectations of involvement in decision-making, or at least some degree of consultation over matters which concern them. Social aspects include the element of belonging, a feeling of community with others of the nation-state.

Grady and McGuire have considered the nature of constitutions from an economic perspective. They have concluded that constitutions are not the product of consensual choice, but rather the result of weaker humans banding together to resist forceful appropriations from more dominant humans.[78] This conception may fit one economic model, but it does not necessarily assist us greatly when we consider the constitutional implications of the knowledge revolution. Nor may it be particularly helpful when we consider that government in any modern state – or even any pre-modern state – is more than simply a tribal alliance such as they appear to conceive it to be. That is not to say that this model does not adequately describe the origins of tribal and pre-city government.

The revolutionary potential of the knowledge revolution involves the empowerment of smaller and smaller groups, until one reaches the nadir, the wholly empowered individual. It is possibly true that no true Lockean constitution (where state and society are in a true compact[79]) exists today.[80] However consent – through acquiescence and participation – is found in most governmental systems.[81] It may just be that the level at which consent occurs – and the means of obtaining consent – are in the process of change.

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[76] He maintained that 'all associations are instituted for the purpose of attaining some good'.

– *The Politics of Aristotle*, trans. Ernest Barker (London, 1958), p. 1, cited by Hermann Heller, 'The Decline of the Nation State and its Effect on Constitutional and International Economic Law', *Cardozo Law Review*, 18 (1996): 1139.

[77] See, generally, works on sixteenth and seventeenth century political economy; Gerald Aylmer, *The struggle for the constitution, 1603–1689: England in the seventeenth century* (4th edn., London, 1975); John Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge, 1987).

[78] Mark F. Grady and Michael T. McGuire, 'The Nature of Constitutions', *Journal of Bioeconomics*, 1 (1999): 227–40.

[79] See Martyn P. Thompson, *Ideas of contract in English political thought in the age of John Locke* (New York, 1987).

[80] If, that is, it ever did.

[81] See Noel Cox, 'The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity' (2001) University of Auckland PhD thesis, chapter 2.

Let us begin with a review of four theories of the origin of the state, courtesy of Grady and McGuire.[82] These are the Hobbes–Buchanan contractarian theory, Karl Wittfogel's hydraulic despotism theory, Robert Carneiro's circumscription theory, and Mancur Olson's stationary bandit theory.[83] We will examine each of these in turn.

Thomas Hobbes began his analysis of the state with a consideration of the state of nature, for he saw the one as dependent upon the other. He assumed that before formal governments existed people were reasonably equal in endowments[84] – an assumption that might perhaps be subject to challenge, but which is nonetheless an appropriate starting point. Each individually, approximately equal mentally, and physically and morally, had an equal hope of acquiring the same ends, which were scarce (food, shelter and similar necessaries of life, as well as the rarer 'luxuries'). Each individual depended on their own efforts for his or her livelihood, and those of their family.[85] As a consequence, individuals were in direct and indirect competition with each other. This resulted in the 'war of every man against every man.'[86] In such a state of being opportunities for production, investment, learning, and exchange were limited, because each individual possessed 'continual fear and danger of violent death.'[87] Life was, or could very easily be, 'nasty, brutish and short.'[88] This created an incentive to seek improvement; though not necessarily the opportunity.

To escape from this ongoing cycle of conflict, individuals have an incentive to organise themselves into a commonwealth. This, in Hobbes' model, is a hierarchy that 'tie[s] them by fear of punishment to the performance of their covenants and observation of th[e] laws of nature .... '[89] They institute this commonwealth by giving a monarch or an assembly the right to represent them.[90] Government, then, was a product of self-interested consensual alliance. Whilst it was, in practice, generally for the common good, its primary purpose was to further the interests of the individual.[91]

This model, which may be described as a contract theory of government, was especially popular during the seventeenth century, at a time when the tensions of a most-mediæval monarchy and early-modern society come to the fore in England. At a time of dynamic tension it is common to seek for answers in the writings of theorists – rarer perhaps to find the answers there. The importance of the contract theory lay not in its perspicuous author's foresight but rather in its universality and applicability at once to a traditional early modern

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82 Grady and McGuire, 'The Nature of Constitutions'.

83 Thomas Hobbes, *Leviathan*, ed. Edwin Curley (Indianapolis 1994, first published 1688); James Buchanan, *The Limits of Liberty: Between anarchy and Leviathan* (Chicago, 1975); Karl A. Wittfogel, *Oriental Despotism: A Comparative Study of Total Power* (New Haven, 1957); Robert L. Carneiro, 'A Theory of the Origin of the State', *Science*, 169 (1970): 733–8; Mancur Olson, 'Dictatorship, Democracy, and Development', *American Political Science Review*, 87 (1993): 567–76.

84 He wrote that:

> Nature hath made men so equal in the faculties of body and mind as that, though there be found one man sometimes manifestly stronger in body or of quicker mind than another, yet when all is reckoned together the difference between man and man is not so considerable as that one man can thereupon claim to himself any benefit to which another may not pretend as well as he.

–Hobbes, p. 74.

85 See J. Desmond Clark, *The common heritage: the significance of hunter-gatherer societies for human evolution* (Canberra, 1990).

86 Hobbes, p. 76. For Hobbes, war did not consist only of actual battles, but also threats of battle ('For War consisteth not in battle only, or the act of fighting, but in a tract of time wherein the will to contend by battle is sufficiently known').

87 Hobbes, p. 76.

88 'No arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short'; Hobbes, part 1, ch. xviii.

89 Ibid., p. 106.

90 Ibid., p. 110.

91 See, generally, works on sixteenth and seventeenth century political economy; See Gerald Aylmer, *The struggle for the constitution, 1603–1689: England in the seventeenth century* (4th edn., London, 1975); John Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge, 1987).

society and a modern post-industrial state. Whereas in earlier societies the relative immobility of individuals led to a greater sense of community, which would allow the development of commonwealths, modern technological substitutes for the community provide equivalent mechanisms.

The new social and political structures potentially facilitated by advances in information technology offer the possibility of something very much like a constitutional contract,[92] though not necessarily with existing states or forms of states.[93] All existing states may be much more complex constitutional structures than the Hobbesian constitution would appear to suggest, however.

In Grady and McGuire's view,[94] Hobbes and Buchanan[95] have not fully addressed the problem of what they termed sovereign appropriation. At least Hobbes assumed that the sovereign would behave benevolently, though this assumption may perhaps only be correct if the sovereign is deemed to be rational. Nevertheless, with a monopoly of force over a particular geographic area, a sovereign possesses a private incentive – or at the least the opportunity – to appropriate from his or her subjects,[96] without inhibition. This however is unlikely to happen because the sovereign, whether individual, oligarchy, or party, will wish to retain power. When over-reaching occurs, revolution (formally such, or constitutional shifts in the balance of power or authority) will occasionally restore the balance[97] – though not necessarily rapidly.

Because of the greater mobility of people and assets that it brings,[98] the networked economy reduces the ability of sovereigns to appropriate, because their subjects can more easily exit over-reaching regimes.[99] This assumes the networked economy is independent of state control to the extent that the state does not restrict, in part or in whole, this movement. The reduction in transaction costs created by the Internet, and by information technology, more generally creates the possibility of competing Hobbesian commonwealths, each constituted by customers and dependent upon their continuing loyalty. This view was widely held in the halcyon days of Internet growth in the 1990s,[100] but has since fallen out of

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[92] For an example, see Ronald M. Peters, Jr., *The Massachusetts constitution of 1780: a social compact* (Amherst, 1978).

[93] See, for instance, the arguments of the 'cyberspace'; John Perry Barlow, co-founder of the Electronic Frontier Foundation (EFF), made the seminal statement to this effect:

> Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of the Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.

– John Perry Barlow, 'A Declaration of the Independence of Cyberspace', at <http://www.eff.org/pub/Publications/John_Perry_Barlow/barlow_0296.declaration> (as at 6 December 2003).

[94] Grady and McGuire, 'The Nature of Constitutions'.

[95] Buchanan.

[96] Grady and McGuire, 'The Nature of Constitutions'.

[97] Formerly great theologians of the Church like St Thomas Aquinas [*Summa theologiæ*, ed. John A. Oesterle (Englewood Cliffs, 1964), vol. II–II, Q. xlii, a.2], Francisco Suarez ['Defensio fidei', book VI, ch. iv, p. 15, in *Selections from three works: De legibus, ac deo legislators, 1612, Defensio fidei catholicae, et apostolicae adversus anglicanae sectae errores, 1613, De triplici virtute theologica, fide, spe, et charitate, 1621*, trans. Gladys L. Williams, Ammi Brown and John Waldron (Oxford, 1944)], and Domingo Bañez, O.P. [*De justitia et jure*, Q. lxiv, a. 3], permitted rebellion against oppressive rulers when the tyranny had become extreme and when no other means of safety were available. This carried to its logical conclusion the doctrine of the Middle Ages that the supreme ruling authority comes from God through the people for the public good. As the people immediately give sovereignty to the ruler, so the people can deprive him of his sovereignty when he has used his power oppressively (mediæval rulers were seldom women).

[98] It has been said that a global economy is largely replacing and overwhelming national and regional economies; Louis Henkin, 'That 'S.' Words: Sovereignty, and Globalization, and Human Rights, Et Cetera', *Ford Law Review*, 68 (1999): 1–14, 5–6.

[99] See, for instance, Noel Cox, 'Tax and regulatory avoidance through non-traditional alternatives to tax havens', *New Zealand Journal of Taxation Law and Policy*, 9 (2003): 305–27.

[100] See David R. Johnson and David G. Post, 'Law and Borders: The Rise of Law in Cyberspace', *Stanford Law Review*, 48 (1996): 1367–402.

favour,[101] as the reality of the Internet was seen to be not as independent or as robust as many observers had hoped and expected. But, whilst the Hobbesian state was a social construct, it would appear that its nature – even its existence – was determined by the technological limitations of its makers.

If this is so, fundamental changes in technology may – and perhaps should – result in changes to the constitution itself. If the individual's need for protection, assistance, or supervision, is reduced (or disappears), so the role of the state changes.[102] A specific example of this is the tendency of the Internet, and modern electronic telecommunications in general, to reduce the degree of reliance upon formal contact with governmental agencies – such as educational institutions – for information and knowledge. This both tends top break down the dependence upon and also allow greater interaction with the state – at the user's choice. This may result in a centralisation of government agencies, and a gradual decline in the importance of regional, provincial, state and municipal agencies.

The second theory of the state to be considered is that of Karl Wittfogel. Wittfogel argued that despotic governments often arose around rivers, as in ancient Egypt, China, and Mesopotamia.[103] He theorised that the state arose when villages banded together to develop common irrigation projects, which vastly improved the productivity of agriculture.[104] Nevertheless, once the state came into being as a means of developing irrigation, it soon turned its bureaucracy to oppressive purposes.[105] As mentioned above, this is fundamentally a technology-driven model of the state.[106] While this model might be of particular relevance to more primitive and less sophisticated states than are found today (or even in mediæval times), it nevertheless illustrates the dependence of states on their physical environment.

Carneiro, an anthropologist, theorised that states began in areas of environmental or social circumscription.[107] These were areas where the physical environment imposed some limitation upon geographical growth, or where linguistic cultural or other social circumstances restricted the spread of populations. He looked at the places where states first arose (as far as our imperfect knowledge of human pre-history can tell us). These were areas such as the Nile, Tigris–Euphrates, and Indus valleys in the Old World and the Valley of Mexico and the mountain and coastal valleys of Peru in the New World. These were all areas where water, or of arable land, was present, but in a severely limited area.

He found that all were areas of 'circumscribed agricultural land.'[108] In his words, '[e]ach of them is set off by mountains, seas, or deserts, and these environmental features sharply delimit the area that simple farming peoples could occupy and cultivate.'[109] He contrasted

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[101] See Jonathan B. Wolf, 'War games meets the Internet: Chasing 21st century cybercriminals with old laws and little money', *American Journal of Criminal Law*, 28 (2000): 95–117.

[102] The converse is true also. In the course of the Industrial Revolution the scale and complexity of the state grew enormously, in part as a consequence of the technological change, and as a result of the social changes which these wrought. See, for instance, Steven Puro, 'Technology, politics and the new Industrial Revolution', *Public Law Forum*, 4 (1985): 387–98.

[103] *Oriental Despotism: A Comparative Study of Total Power* (New Haven, 1957).

[104] He wrote that:

> In a landscape characterised by full aridity permanent agriculture becomes possible only if and when coordinated human action transfers a plentiful and accessible water supply from its original location to a potentially fertile soil. When this is done, government-led hydraulic enterprise is identical with the creation of agricultural life. This first and crucial moment may therefore be designated as the 'administrative creation point.'

– Wittfogel, p. 109.

[105] Ibid., pp. 126–36.

[106] Remembering the definition of technology as processes and things people create for the purpose of using them to alter their lifestyle or their surroundings.

[107] Carneiro, 738.

[108] Ibid., 734. The degree of circumscription varied considerably.

[109] Ibid., 734–5.

these 'environmentally circumscribed' areas to areas in which states did not arise as early, for instance, the Amazon basin and the eastern woodlands of North America.[110] From this we might conclude that states arose when competition for scarce responses – with no room for expansion – reached a critical level. The necessity of economic survival led to the development of settled states.[111] This may be less obviously a technology-driven state. But even here it was the degree of technological development which determined when this critical level which led to state development would occur.[112] Settled agriculture – as distinct from the hunter-gatherer culture – was a more technologically advanced economic structure,[113] which led to a more advanced constitution.

In the fourth and last of the models of the state considered by Grady and McGuire,[114] Mancur Olson has argued that the state can be equated to a 'stationary bandit', who robs the people within his or her jurisdiction (through taxes and the like) and protects them from roving bandits[115] – competitors. These quasi-parasitical arrangements are similar to the 'manors' of the criminal underworld in many nineteenth and twentieth century western cities. Olson argues that ruled people prefer a stationary bandit to roving bandits because the stationary bandit has an incentive to invest in public goods that increase the people's wealth and therefore the tax revenues that can be extracted from them.[116] Thus, a 'bandit' will wish to provide services to his or her subject people, because of the direct and indirect benefits they receive.

This theory is very similar to a more general theory developed independently by Grady and McGuire to explain primate, including human, political structures.[117] In some respects it is an economic model of society, but it is, like Hobbes' model, based on self-interest rather more than physical environment. It also has strong parallels with the feudal system of allegiance and service, which was primarily based on the idea of reciprocal obligations.

The basic idea common to both Grady and McGuire's theory and that of Olson is that the sovereign[118] is effectively the residual claimant of the group he or she (or more usually, 'it', since the sovereign is likely to be corporate) rules.[119] When the group creates a surplus of resources, the sovereign is in a position to appropriate that surplus, though it will not inherently do so. Olson stressed that the sovereign's position of residual claimant – or what we might call, eminent domain – could induce the sovereign to create public goods, such as irrigation projects (to use Wittfogel's example). The sovereign could then appropriate the surplus from these investments.[120]

The sovereign would have an incentive to keep peace within the group and even to enforce efficient private law because these types of legal rules would increase the surplus from group activities and therefore create a greater possibility for sovereign appropriations.[121] The surplus, as in ancient Egypt, was then at the disposal of the state, which might use it to

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[110] Ibid., 735. It might be countered that the Amazonian jungle provided a commensurate degree of circumscription – and even the woodlands of North America may have done so.

[111] See Anthony Molho, Kurt Raaflaub and Julia Emlen, *City states in classical antiquity and Mediæval Italy* (Ann Arbor, c.1991).

[112] The processes used to alter their lifestyles being settled agriculture – including animal husbandry.

[113] See Max Weber, *The agrarian sociology of ancient civilizations*, trans. R.I. Frank (London, 1976).

[114] Mark F. Grady and Michael T. McGuire, 'A Theory of the Origin of Natural Law', *Journal of Contemporary Legal Issues*, 8 (1997): 87–129.

[115] See Olson, 'Dictatorship, Democracy, and Development', 568–70.

[116] Ibid., 569.

[117] See Grady and McGuire, 'A Theory of the Origin of Natural Law'.

[118] Meaning the holder of authority in a state, not necessarily limited to hereditary monarchs of traditional form.

[119] The Crown, in British law and practice remains the residual landlord, and entitled to the assets of those who die without any heirs, under the doctrine of *bona vacantia*; Chris Ryan, ''The Crown' and corporate bona vacantia', *Kingston Law Review*, 12 (1982): 75–87.

[120] See Olson, 'Dictatorship, Democracy, and Development', 569–71.

[121] See Grady and McGuire, 'A Theory of the Origin of Natural Law', 118–20.

undertake further public works or to feed the population in times of need.[122] The 'surplus' model may be correct – but it was very often the existence of a technological system which enabled this surplus to be achieved in the first place.[123] It is also a mechanistic model, that pre-supposes conscious or unconscious self-interest as the predominant motivation for state action.

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

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

The concept of the state is very resilient, both internally and externally, as an institutional entity, and as a concept in international law. However late the twentieth century was marked by the development of new types and new hierarchies of state, as understood in international law. Partly this was the result of the ending of the Cold War, and partly independent long-term political and economic developments, such as globalisation, and colonial and post-colonial legacies. Transnational organised crime is said to threaten the viability of societies.[124] These developments brought challenges to the Westphalian model of the exclusivity and equality, especially since the co-operation of states, that had become more sophisticated during the nineteenth century, and into the twentieth, fractured under the pressure of an increasing number of states.

Several studies have shown that the so-called 'post-modern' state has matured (or is in the process of maturing) in the West. In these, the state confines itself – or is confined – to guarding and improving the free market conditions through which wealth is generated. It is in Second and Third World countries (perhaps more the former than the latter) that the strong state is still sought.[125]

In *The Breaking of Nations*,[126] Cooper denies what he calls the universality of international society. In effect it is a rejection of the twentieth century acceptance of the equality of states – an idea that was not accepted in earlier centuries, though rarely enunciated formally. He divides states into three types (or rather, the world into three parts, since not all the world is necessarily comprised of states), the pre-modern, the modern and the post-modern. The pre-modern world covers an expanding area of the world where the state has lost the monopoly of

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[122] For Egyptian administration generally, see Klaus Baer, *Rank and title in the Old Kingdom; the structure of the Egyptian administration in the fifth and sixth dynasties* (Chicago, 1960); Naguib Kanawati, *The Egyptian administration in the Old Kingdom: evidence on its economic decline* (Warminster, 1977). See also Joseph G. Manning, *Land and power in Ptolemaic Egypt: the structure of land tenure* (Cambridge, 2003).

[123] This may be governmental technology, or human resource management, rather than mechanical technology (though even this latter played a part).

[124] Neil Boister, 'The Trend to Universal Extradition over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime', *Acta Juridica* (1993): 287-313.

[125] Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003), pp. 3-4.

[126] Robert Cooper, *Breaking of Nations: Order and Chaos in the Twenty-First Century* (revd. edn., London, 2004).

the legitimate use of force (which is an essential attribute of de facto or de jure statehood), and where it is without fully functioning – or even any notional – states. The modern state is primarily concerned with the notion of territorial sovereignty (its creation, preservation, and, at times, its expansion), and national interest (which may be more inward-looking). In the post-modern state foreign and domestic policy is inextricably linked, and tools of governance are shared. Security is no longer based on control over territory or the balance of power (as in Europe for much of the nineteenth and twentieth centuries). Cooper writes that:

> we have, for the first time since the 19th Century, a terra nullius … And where the state is too weak to be dangerous, non-state actors may become too strong. If they become too dangerous for established states to tolerate, it is possible to imagine a defensive imperialism. If non-state actors, notably drug, crime or terrorist syndicates take to using non-state (that is pre-modern) bases for attacks on the more orderly parts of the world, then the organised states will eventually have to respond. This is what we have seen in Colombia, in Afghanistan and in part in Israel's forays into the Occupied Territories.[127]

The pre-modern parts of the world – or states – are the failed states.[128] These include Somalia, Afghanistan and Liberia,[129] and other states and former states where chaos rather than order has prevailed. Many of these are post-colonial states. The failure might not necessarily be irreversible – indeed in some cases apparently terminal decline was reversed, usually through the intervention of other states. In the cases where no revival has yet occurred the state no longer fulfils Max Weber's criterion of having a legitimate monopoly on the use of force. Cooper develops this notion with respect to Sierra Leone.[130] That country's collapse taught three lessons (as Carty paraphrased Cooper):

> Chaos spreads (in this case to Liberia, as the chaos in Rwanda spread to the Congo). Secondly, as the state collapses, crime takes over. As the law loses force, privatised violence comes in. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world.[131]

To Cooper, the United Nations is an expression of the modern, while failed states come largely within the ambit of the pre-modern. The Charter is simply conceptually inapplicable.[132] The modernity of the United Nations is that it rests upon state sovereignty and that, in turn, rests upon the separation of domestic and foreign affairs.[133]

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

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127 Robert Cooper, *Breaking of Nations: Order and Chaos in the Twenty-First Century* (revd. edn., London, 2004), pp. 17-18.

128 A term introduced by G.B. Helman and S.R. Ratner, 'Saving Failed States', *Foreign Policy*, 89 (1992-3): 3-20.

129 Anthony Carty, 'The Iraq Invasion as a Recent United Kingdom "Contribution to International Law"', *European Journal of International Law,* 16 (2005): 143.

130 Robert Cooper, *Breaking of Nations: Order and Chaos in the Twenty-First Century* (revd. edn., London, 2004), pp. 66-69.

131 Anthony Carty, 'The Iraq Invasion as a Recent United Kingdom "Contribution to International Law"', *European Journal of International Law* 16 (2005): 143.

132 Robert Cooper, *Breaking of Nations: Order and Chaos in the Twenty-First Century* (revd. edn., London, 2004), pp. 16-37.

133 Robert Cooper, *Breaking of Nations: Order and Chaos in the Twenty-First Century* (revd. edn., London, 2004), pp. 22-26.

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

Studies have shown that there a several strong indicators of high risk of state failure.[134] In one report these were described as being when a state favoured a closed economic system (such as when openness to international trade was low or non-existent); when infant mortality was high; and when they were undemocratic.[135] Lack of democracy fed on itself,[136] and led to other social and economic ills. A state in the early stages of modernity may suffer especially seriously from these symptoms, as they have a developed authority, and a degree of centralisation, but are otherwise in some respects undeveloped.

It has been observed by Rotberg that some states fail because they are 'convulsed by internal violence and can no longer deliver positive political goods to their inhabitants'.[137] In *State Failure and State Weakness in a Time of Terror*, a book he edited, contemporary cases of nation-state collapse and failure are examined. Perhaps more importantly, it establishes clear criteria for distinguishing collapse and failure from generic weakness or apparent distress, and collapse from failure.[138]

Clarke and Gosende examine how Somalia, a nation-state with an apparently strongly cohesive cultural tradition, a common language, a common religion, and a 'shared history of nationalism', could fail. They suggested that it could perhaps be due to Somalia having never been a single coherent territory.[139] In Cooper's model, Somalia would be a pre-modern state.

Crucially, Somalia had existed with a finely balanced anarchical tribal order, based on the Xeer, a self-regulating set of rules and norms, which balanced economic and political life, in which one was prevented from dominating others.[140] European-style centralised governmental institutions, based on hierarchical notions of sovereignty, was alien,[141] and the subsequent endeavours of the post-colonial regime to develop a merchant and middle class mere exasperated the problem.[142]

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

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134 Daniel C. Esty, J. Goldstone, T.R. Gurr, P.T. Surko and A.N. Unger, 'State Failure Task Force Report', in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003).

135 Daniel C. Esty, J. Goldstone, T.R. Gurr, P.T. Surko and A.N. Unger, 'State Failure Task Force Report', in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003).

136 Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003), p. 9.

137 Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003), p. 1.

138 Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003), p. 1.

139 Walter Clarke and Robert Gosende, 'Somalia: Can a Collapsed State Reconstitute Itself?', in Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003).

140 I.M. Lewis, *A Pastoral Democracy: a study of pastoralism and politics among the Northern Somali of the Horn of Africa* (Oxford, 1982); *A Modern History of Somalia: nation and state in the Horn of Africa* (4th edn., Oxford, 1988); J. Chopra, 'Achilles' Heel in Somalia: Learning from a Conceptual Failure', *Texas International Law Journal*, 31 (1996): 495-525.

141 Gerard Kreijen, *State failure, sovereignty and effectiveness: Legal lessons from the decolonisation of Sub-Saharan Africa* (Leiden, 2004), p. 66.

142 A.I. Sarnatar, 'Destruction of State and Society in Somalia: Beyond the Tribal Convention', *Journal of Modern African Studies*, 30 (1992): 625.

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

Davenport observed, in a paper on the evolution of segregation in South Africa, 'can liberal doctrines be applied instates whose citizens are backward'?[143] Even J.S. Mill, in the introduction to his essay 'On Liberty' (1859), argued that: 'Despotism is a legitimate mode of government in dealing with barbarians, provided the end be their improvement, and the means justified by actually effecting that end. Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion'.[144] Indeed, Hobhouse observed that 'A specious extension of the white mans' rights to the black may be the best way of ruining the black'.[145] Though these may be relatively extreme examples, yet their message is clear – we may have a consistent and ubiquitous notion of the state in international law, but the state domestically may not be so uniform, and we impose uniformity at the risk of de-stabilising the state.

1.4 Conclusion

The rise and fall of civilisations and of states has been variously ascribed to institutional and environmental factors. Attempts to develop rational and systematic explanations have not however necessarily avoided the perils of generalisation, and many theories contradict each other. However it would seem that changes in intellectual attitudes have been as significant as any environmental elements, though these may perhaps be ascribed, in part, to environmental factors. But change implies some catalyst. Technological discoveries may themselves prove catalysts for further developments, but the greatest catalyst would appear to be the intellectual quest, which is driven by religious, political, and philosophical ideas – perhaps Lal was not altogether wrong in his assessment of the pivotal role of the 'the inquisitive Greek mind'[146] in the development of the West.

Weber's *The Protestant Ethic and the Spirit of Capitalism*[147] has been described as 'a polemic that links the Protestant Revolution (the Reformation) and the Industrial Revolution, in particular, Calvinism and the rise of entrepreneurial capitalism.'[148] In this model a paradigm shift away from religious conceptions which had shaped the European world for over a thousand years brought with it a renewed interest in the physical world – and a new approach to observing and understanding it. This was more than a more revolution; it was a new approach to life, a change as profound as that which punctuated the end of the classical world and the beginning of the modern world.[149] The Reformation led at once to new governmental structures and to new innovations in technologies. A revolution changes political systems and governments; the Reformation changed almost every aspect of western European society, including religion, government, scholarship, education, and business.[150]

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143 T.R.H. Davenport, 'Civil Rights in South Africa, 1910-1960', *Acta Juridica*, (1960): 11-28, 27.

144 *Utilitarianism* (London, 1910), p. 73.

145 L.T. Hobhouse, *Liberalism* (London, 1911), pp. 43-4.

146 Deepak Lal, *Unintended consequences: the impact of factor endowments, culture, and politics on long run economic performance* (Cambridge, 1998), p. 173.

147 Max Weber, *The Protestant Ethic and the Spirit of C apitalism*, trans. Talcott Parsons (London, 1992).

148 Steven McGready, 'The Digital Reformation: Total Freedom, Risk, and Responsibility', *Harvard Journal of Law and Technology*, 10 (1996): 148. Even those theorists who dispute Harvey's Marxist accounts of the origins of social and economic acceleration generally accept his observation that 'the history of capitalism has been characterised by a speed-up in the pace of life'; David Harvey, *The Condition of Postmodernity* (London, 1989), p. 240.

149 See Ferdinand Lot, *The end of the ancient world and the beginnings of the Middle Ages* (London, 1953).

150 See Norman Jones, *The English Reformation: religion and cultural adaptation* (Oxford, 2002); Ethan H. Shagan, *Popular politics and the English Reformation* (Cambridge, 2003); Elmore Herbison, *The Christian scholar in the age of the Reformation* (New York, 1956); Lewis W. Spitz, *The Reformation: education and history* (Aldershot, 1997); and Joseph Loewenstein, *The author's due: printing and the prehistory of copyright* (Chicago, 2002) respectively.

But whether the Reformation should be seen as a technological revolution which led to further technological revolutions as well as to constitutional revolutions remains to be seen. It may equally validly – perhaps more so – be seen as the constitutional revolution which led to technological revolution. Either way, the process was multi-directional throughout, with law, government, society and technology influencing each other.

McGready has argued that the advent of the personal computer (PC), the Internet (and the World Wide Web – often included in the term Internet) is causing a reformation rather than a revolution.[151] He argues that the changes being wrought by the knowledge revolution will be as far-reaching as those of the Reformation.[152] Like the Reformation, it will be a series of revolutions, and not simply a single discrete change. Whilst this view is not necessarily shared by all – indeed it may be seen as radical by the Internet realists – nevertheless it is worth careful consideration.

One reason for this profound change, according to McGready, is that the new rights which aim to respond to opportunities and risks arising from new information and communication technologies, biotechnological or other technology-based industrial development, are not grounded in the nation-state. Generally, established civil, economic, social and political rights,[153] were predicated upon the existence of the nation-state, and indeed were constructed within the framework of the nation-state.[154] Globalization, and a concurrent individualisation (or the enfranchisement of the individual) has led to additional rights, desires and pressures.[155] These threaten the state, not to its very existence,[156] but in its relationship with its people and with other states.

The concept of the state is not necessarily unassailable, as has been seen in the few modern examples we have of supra-national political entities. Indeed the concept of the autonomous sovereign state is a relatively modern one. The state's potential loss of power and autonomy to regulate economic and social activity, as well as to protect individual rights, has been accepted by the member states of the European Union. They have voluntarily relinquished some of their sovereignty – and will gradually loose more of it, some powers passing to the Union, and some being delegated to regional authorities.

The creation of this supra-national entity is as the result of a process that to a certain degree anticipated contemporary global tendencies,[157] but which is so far the best (if not the only) example of a modern multi-national quasi-state. The members of the European Union enjoyed certain shared heritage, including significant cultural, historical and legal links – though Christianity was rejected as a core principle.[158] Such common elements are not found throughout the world, thus making truly global government rather more complex a proposition. Economic and cultural globalization can continue regardless, but it will have an uncertain effect on states.

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151 McGready, 'The Digital Reformation', 139.

152 Ibid.

153 See, for instance, the Universal Declaration of Human Rights, as passed and proclaimed by the General Assembly of the United Nations on the tenth day of December 1948 (Wellington, 1951).

154 See Maria Eduarda Goncalves, 'Technological change, Globalization and the Europeanization of rights', *International Review of Law, Computers and Technology*, 16 (2002): 301–16.

155 Such as raised economic and political expectations in poorer and less democratic countries.

156 See Martin Wolf, 'Will the nation-state survive Globalization?', *Foreign Affairs*¸80 (2001): 178–90.

157 See Goncalves, 'Technological change, Globalization and the Europeanization of rights'.

158 The Constitution states that the Union is founded on the values of 'respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights …' in a society in which 'pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.' (Article 1-2). It fails to mention Christianity, which is the conceptual basis for these principles, though the preamble does say that the signatories to the Constitution draw inspiration from the 'cultural, religious and humanist inheritance of Europe, from which has developed the universal values of the inviolable and unalienable rights of the human person, freedom, democracy, equality and the rule of law'.

In 1996 Khan argued that the evolution of a world without borders seemed unavoidable.[159] He postulated a theory of a Free State, relying on Hugo Grotius, most particularly *The Law of War and Peace*.[160] Khan argued that the globalizing tendencies of the late twentieth century, when he was writing, rendered the state effectively obsolete, as it was no longer the efficient player which justified its creation.

Yet it is possibly very premature to consign the nation-state to the scrap heap of history.[161] This is not least because, despite continued falls in the costs of transport and communications in the first half of the twentieth century, integration actually reversed course – for predominantly political and related sociological reasons.[162] But it may well be necessary to re-examine the place of the state in the new world technological order.[163] It is information, not transportation (though that is one aspect of communications, a sub-set of information), that is crucial to globalization, and the biggest potential threat to the state.

Cortada examined the historical, cultural, and (to some degree) legal aspects of interaction between society and information.[164] He maintained that the information age is not really a new phenomenon, but rather is the most recent manifestation of a long-standing process of historical evolution.[165] This would seem both logical and correct – so far as it goes. As McGready might argue, this is a reformation, a series of revolutions, and so the apparent continuity is masking a deeper, more profound, underlying change.

Lessig suggests that the historical evolution of the information society is a foundational preamble for what he characterises as one of the most critical battles of our time – the battle for the future of the Internet.[166] Both views may be correct, for while the knowledge technology may be grounded in an earlier Industrial Revolution, so evolution has its periods of stagnation, and its periods of fundamental change.[167] We may be entering just such a latter phase now.

The challenge for governments is to respond to this ongoing – and possibly long-term[168] – revolution,[169] and not become victims of it.[170] The more inflexible the state – or the more dogmatic – the greater the risk of failure.[171] Failure by governments to respond fully and effectively to changing paradigms[172] can result in loss of competitive advantage[173] – or even

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159 L. Ali Khan, *The Extinction of Nation-States: A World without Borders* (The Hague, 1996), p. 1.

160 *De jure belli ac pacis*, ed. F.W. Kelsey (New York, 1964, reprint of 1925 edition).

161 Wolf, for instance, argues that the nation-state is not endangered by globalization. His reasons are that the ability of a society to take advantage of the opportunities offered by international economic integration depends on the quality of public goods; the state normally defines identity; and International governance rests on the ability of individual states to provide and guarantee stability; Wolf, 'Will the nation-state survive Globalization?'.

162 Ibid.

163 The term 'new world order' has been much used in the context of the global security system, but it arguably has greater relevance in the economic sphere, where it is more clearly developing. See Laura Yavitz, 'The WTO and the environment: the Shrimp case that created a new world', *Journal of Natural Resources and Environmental Law*, 16 (2001): 203–55, cf Ernest Easterly, III, 'The rule of law and the new world order', *Southern University Law Review*, 22 (1995): 161–83.

164 James W. Cortada, *Making the Information Society: Experience, Consequences and Possibilities* (Paramus, 2001).

165 Ibid.

166 Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* (New York, 2001).

167 See later sections.

168 It is, of course, impossible to predict what further developments are likely to occur, which makes it necessary that the legal system – and the constitution – is sufficiently flexible so as to allow this development, and yet restrict or prohibit developments which are deemed unsuitable.

169 See Ilene K. Grossman, 'The new Industrial Revolution: meeting the challenge', *Public Law Forum*, 4 (1985): 419–26; Rudin, 'State involvement in the 'new Industrial Revolution''.

170 See Maurice Pearton, *The knowledge state: diplomacy, war, and technology since 1830* (London, 1982).

171 See Bruce Parrott, 'Technology and the Soviet polity: the problem of industrial innovation, 1928 to 1973' (1976) Columbia University PhD thesis; Rensselaer W. Lee, 'The politics of technology in Communist China' (1973) Stanford University PhD thesis.

172 A paradigmatic is a technical concept derived from linguistics and semiotics, used in anthropological theories of meaning, to denote the stable, rule-governed aspect of communication (opposite of syntagmatic, that which flows and moves in time). The concept is often used more loosely about basic premises underlying communication (as grammar underlies

the existence of that state (through the loss of economic viability).[174] This ability to respond is not merely political, social or economic. It is also constitutional. The challenge – or threat – of techno-globalism to sovereign states[175] has profound implications for jurisprudence.[176]

The difficulty with understanding the nature of the information revolution is that we are all part of it – though that is perhaps not a dissimilar difficulty to that presented by evaluating any contemporary political, social or technological change. We do not have the luxury of being an interested (or disinterested) bystander,[177] nor do we enjoy the benefits of hindsight. We are also constrained by our own cultural traditions, which tend to inhibit our appreciation of cross-disciplinary changes. All writing on the constitution – however this was be defined – is underpinned by some theoretical perspective, however dimly perceived or narrowly conceived.[178] Legal and constitutional history cannot be left to the lawyers alone, nor to historians.[179] Neither can the analysis of the contemporary constitution by political scientists exclude consideration of its legal and historical, as well as its political, aspects. Constitutional lawyers are concerned particularly with legal validity. They may not be especially interested in the normative standing of the power arrangements that the law validates. None of these approaches are especially sensitive to technology. A multi-disciplinary approach is needed.

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language). 'Paradigmatic shifts' should thus be understood as fundamental changes in the premises of communication; Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago, 1962).

[173] For example, see House of Representatives Standing Committee for Long Term Strategies, *Government response: Australia as an information society: grasping new paradigms* (Canberra, c.1992); Nick Moore and Jane Steele, *Information-intensive Britain: an analysis of the policy issues* (London, 1991), where the emphasis of both is upon information technology. See also James Botkin, Dan Dimancescu, Ray Stata and John McClellan, *Global stakes: the future of high technology in America* (Cambridge, c.1982); Thomas L. Friedman, *The Lexus and the Olive Tree* (London, 2000), p. 9.

[174] Response does not mean single-issue responses, but refers rather to the matching of constitution and society.

[175] See Sylvia Ostry and Richard R. Nelson, *Techno-nationalism and techno-globalism: conflict and cooperation* (Washington, 1995).

[176] See Catherine Dauvergne (ed.), *Jurisprudence for an interconnected globe* (Aldershot, 2003); Richard Warren Perry and Bill Maurer (ed.), *Globalization under construction: governmentality, law, and identity* (Minneapolis, 2003); Jean Stefancic and Richard Delgado, 'Outsider jurisprudence and the electronic revolution: Will technology help or hinder the cause of law reform?', *Ohio State Law Journal*, 52 (1991): 847–58.

[177] Though classical communism would claim that it possesses the tools to achieve this.

[178] Martin Partington, 'The Reform of Public Law in Britain,' in Patrick McAuslan and John McEldowney (ed.), *Law, Legitimacy and the Constitution*: *Essays marking the Centenary of Dicey's Law of the Constitution* (London, 1985), pp. 191–211, 192.

[179] F.M. Brookfield, *The Constitution in 1985*: *The Search for Legitimacy* (Auckland, 1985), p. 1.