

# Constitutional Paradigms and the Stability of States

Noel Cox

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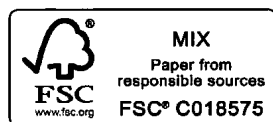
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# Preface

In broad terms this book examines the influence of constitutional legal paradigms upon the political stability and viability of states. The 'legal paradigms', in this sense, is to be understood relatively broadly, not as covering the specific constitutional rules which may apply to any given situation, or even the framework of institutions, powers and responsibilities within a constitution. Rather it should be understood to refer to the driving ethos, or *Grundnorm*, which underpins the whole constitutional system; the principles upon which the system operates. Nor is this *Grundnorm* to be seen as simply the economic imperative that drives a regime, though this may be a major element in a socialist or communist system (or indeed, in a pure capitalist system, if such a system exists in the real world). In these systems, the economic and the political imperative, cannot be easily separated – may be deliberately conflated – and the economic model may bear close resemblance to, or be indistinguishable from, the constitutional *Grundnorm*. But the *Grundnorm* also includes the historical, social and political principles which influence a constitution, including the degree to which the constitution may be classified as entrenched, flexible or normative. Thus constitutional legal paradigms refer to the underlying political theory, ethos and practice of a given state.

Success and stability are also terms that defy precise definition, and no attempt will be made here to construct a precise definition, even if this were possible or desirable. The success and stability of the state will be measured by comparison with other states with which the subject states have direct contact, or with which they may otherwise be compared. Thus only the broadest conclusions, if any, can be drawn from these empirical comparisons, and from the theoretical modelling which accompanies this. The more valuable contribution may indeed be to examine those states where there has been a fundamental change in *Grundnorm*. However, essentially this book is an exercise in analysing theoretical principles rather than practice, though from the theory practice may indeed follow.

The political viability of states is also to be understood, for the purposes of this study, in a limited, and special, sense. This is the on-going viability of a state, measured by internal and external factors, to successfully exist and compete with other states, as a state, rather than as a loose collection of individuals and communities. The state is more than simply a collection; it is greater than the sum of the components, or it would scarcely qualify, sociologically or politically, as a state. Here, too, the term 'state' is used in its broadest sense. No attempt has been made to exclude those states whose separate existence is not recognized by other states, for the existence of a state is determined by both reality and recognition. Nor is a distinction to be drawn between those states that have a fully developed

jurisprudence of the state, those where notions of public law are less systematically developed, and where the very notion of the 'state' may be looked upon with suspicion, or if not indeed regarded as an alien concept.

The viability of the state – and the viability of any human institution – may depend upon an apparently infinite number of variables. It may well be impossible to separate each of these from the others, or to distinguish what is truly the determining factor in any one given situation. These factors may include such divergent elements as the physical geography of the country, the composition – or the size, distribution and density – of the population. Nor is it possible to use a control group, a selection of countries whose variables are known, to identify the variables of other states.

In order to limit what might otherwise be an impossibly broad study, the book will examine one element only. It will consider the degree to which constitutional flexibility, rather than broader societal and environmental factors, appears to have contributed to stability, and thus led to the rise of 'successful' states and to the decline of 'unsuccessful' states. This will include some case studies, but this book is in no sense an empirical work. Rather, the emphasis is upon identifying the elements of state success and failure – if any – that may be ascribed to the underlying nature of the constitution.

Essentially this book is an exercise in discovering how the one element of the character or ethos of a legal system has influenced economic, social and political success. In part this is a consideration of the contribution of law, widely defined, to the success of states. Using primarily jurisprudential tools and lens, though not constrained by these, it applies a historical institutionalism to the identification of key dynamics in legal, political and economic history. It is necessarily a broad sweep, covering socialist and capitalist models, the rise and fall of empires, the growth and decline of the nation-state in Europe, and the emergence of the post-modern state.

This book began as a research project undertaken while I was in residence as a visiting fellow at Wolfson College, Cambridge and as a Visitor to the Faculty of Law of the University of Cambridge during Michaelmas Term, 2006. I wish particularly to acknowledge the assistance and support of the President, Fellows, and staff of Wolfson College, as well as that of the graduates and undergraduates of the College, and of various visiting fellows and scholars.

I would also like to thank the Faculty of Law of the University of Cambridge, in particular Professor David Feldman, BCL MA *Oxford* FBA FRSA (Downing College), quondam Chairman of the Faculty Board of Law. Special thanks are also due to Sir Derek Oulton, MA PhD *Cambridge* GCB QC (Magdalene College). My thanks are further due to many others, who must remain unnamed, who have contributed in one way or another during the gestation of this work.

The remainder of the work for this book was undertaken at the School of Law of the Auckland University of Technology, New Zealand, which has a particular interest in the implications of the interaction of law and economy, and the Department of Law and Criminology, Aberystwyth University.

I would also like to thank the other scholars, commentators, reviewers and myriad other people who are inevitably involved to some degree in the production of any work of this sort. As always, any errors and omissions remain mine alone.

Noel Cox

## Note on the Author

Noel Cox was born in Auckland, New Zealand. After attending grammar school in Takapuna, he took up the study of law at the University of Auckland. After graduation with an LLB he was admitted and enrolled as a Barrister and Solicitor of the High Court of New Zealand. He later undertook an LLM at the same university, and received the Fowlds Memorial Prize as most distinguished student in the Faculty of Law. He subsequently undertook a PhD. His doctoral research was under the supervision of Associate Professor Raymond Miller, and was on the topic of the 'The Evolution of the New Zealand Monarchy: The Recognition of an Autochthonous Polity'. He also obtained a Certificate in Tertiary Teaching (CertTertTchg) and a Graduate Diploma in Tertiary Teaching (GradDipTertTchg), both from the Auckland University of Technology.

He also holds an MA of the Archbishop of Canterbury's Examination in Theology, for a thesis entitled 'An exploration of the basis of legal authority of the Anglican Church in New Zealand', and a Licence in Theology (LTh) from the University of Wales Lampeter. He completed an MTheol at the University of Auckland, in the field of systematic theology, on the topic, 'The meaning of catholicity with respect to ordained ministry in the Anglican Communion: An examination of the ecclesiology implicit in the validity of orders debate'.

Noel Cox holds the position of Head of the Department of Law and Criminology at Aberystwyth University. He was Professor of Constitutional Law at the Auckland University of Technology to 2010, and was Head of the Department of Law 2004–2008. He received the Vice-Chancellor's Excellence Award for Research, in 2002. He spent the summer of 2003–2004 as a Visiting Fellow, Faculty of Law, The Australian National University, Canberra, and the latter part of 2006 at Wolfson College, the University of Cambridge. He was elected a Visiting Fellow at St Edmund's College, the University of Cambridge, in 2009, though he was not able to take this up as he then accepted appointment to Aberystwyth University.

Apart from New Zealand, he is also admitted to practice law in England and Wales, the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and Victoria.

His previous books include *The catholicity of ordained ministry in the Anglican Communion* (Verlag Dr. Müller, Saarbrücken, 2009), *Church and State in the Post-Colonial Era* (Polygraphia Ltd, Auckland, 2008), *A Constitutional History of the New Zealand Monarchy* (Verlag Dr. Müller, Saarbrücken, 2008), and *Technology and Legal Systems* (Ashgate Publishing Ltd, Aldershot, 2006).

He was formerly Chairman of Monarchy New Zealand (previously The Monarchist League of New Zealand), and a member of the Council of the Auckland District Law Society. He is a Fellow of the Royal Historical Society.



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# Introduction

The question of why some parts of the world have advanced politically, economically and technologically, while others have remained relatively less developed, is one which has interested historians, economists, social scientists (and to a lesser extent lawyers) for generations. What has been called the ‘Great Question’ is nothing less than an attempt to explain the rise of one civilization when others are in decline or stagnation, though the narrower phenomenon of state failure is relatively under-researched.<sup>1</sup> Needham, one of the leading early commentators on this question, asked ‘why, then, did modern science, as opposed to mediæval and ancient science (with all that modern science implied in terms of political dominance), develop only in the Western world?’<sup>2</sup> His answer, at least with respect to China – which has long been a staple subject for comparison – was the failure of the development of the merchant class,<sup>3</sup> which was pivotal in the West in its fostering of novel ideas. But he also ascribed to China a degree of innovation that has been questioned by others,<sup>4</sup> and thus, although his writings contain much of undoubted value, the application of his theoretical approach may not always have been sufficiently careful. We must be careful, lest our generalizations rob our hypotheses of any meaningfulness. It is also true that a great deal has already been written on this subject, and any writer should be wary of adding to this literature without some certainty that their contribution will be worthwhile. The particular contribution in this study is the focus upon constitutional modelling, and the influence of legal systems on political stability. While the latter in particular is not wholly original, nonetheless, it is rare for the influence to be considered holistically in this manner.

We will commence with a review of some of the main themes in the literature of the ‘Great Question’.

In a chapter in Marciano and Josselin’s *Law and the State: A Political Economy approach*,<sup>5</sup> Dudley considered the great increase in European wealth *vis-à-vis* that of Asia during the period 1700–1870. In a brief review of literature in the field,

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1 Robert I. Rotberg (ed.), *State Failure and State Weakness in a Time of Terror* (Washington, 2003), p. 2.

2 Joseph Needham, *The Great Titration: Science and Society in East and West* (London, 1969), p. 11.

3 Ibid, and *Science and civilisation in China* (Cambridge, 1954–95).

4 David Cosandey, *Le Secret de l’Occident* (Paris, 1997).

5 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), pp. 100–120.

two major camps emerged. One emphasized geography as the primary influence which led to this rapid growth in one region and comparative stagnation in others. The other group emphasized economic institutions as the primary influence. While there is something to be said in favour of each argument, it is possible to identify slightly more complex influences than geography, or economic institutions alone, at work.

Dudley, in assessing the physical and human environment, argued that Europe, more especially Western Europe, was the only one of the four major cultural regions that comprised Eurasia to have both a standardized medium and a non-standardized message.<sup>6</sup> By this he meant a common language – in each state rather than across the region (yet with a *lingua franca* to allow the free exchange of ideas) – and a diversity of scientific, cultural, religious and political ideas. Between 1700 and 1850, per-capita income effectively doubled in Europe. Over the same time period it was falling, at least in real terms, in the rest of the greater continent of Eurasia. Largely this is the result of political stability – or lack of it. Neither geography nor economic institutions alone can explain this relatively sudden divergence.

The result of both the advent of a free exchange of ideas, and a diversity of scientific, cultural, religious or political ideas, was a dramatic increase in the development of innovation, due to the reduction in the difficulties hitherto faced. Meanwhile, elsewhere in Eurasia, a reduced standardization of the medium – through political and ethnic rivalry and subdivision – inhibited, rather than fostered, innovation. The tendency at this time for common ideas to be enforced, rather than divergent views promoted, led to a concurrent tendency to conformity. Put simply, diversity of ideas in an environment where communications allowed the free (or relatively free) exchange of these ideas, was more beneficial than a uniformity of ideas and limited communications.

While this theory may be more finely nuanced than that offered by the geography versus institutions argument, it does not specifically consider the role played by the character or ethos of a legal system, and the ways in which this has influenced economic and political success. It is not necessarily true that the conditions that existed in Europe were markedly different from those in, for instance, the Roman Empire at its height. This was, for a considerable time, successful across much of Europe and parts of North Africa and Asia. It may be said, however, that the Roman empire was successful because it too allowed a diversity of ideas to be freely exchanged. It was, indeed, successful for a considerable period of time, but ultimately collapsed due to a variety of factors – factors that might have led to the eventual collapse of any civilization, however constituted.

It is possible, indeed desirable, to consider the question of human and natural environmental influences on economic growth. But this book is intended to both

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6 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. 120.

narrow the study and to alter its focus. Dudley's focus was on ideas; the focus of the book will be narrower – the idea of the constitution.

We will consider the degree to which constitutional flexibility, rather than broader societal and environmental factors, may have led to the rise of 'successful' states, and to the decline of 'unsuccessful' states, by promoting stability. Economic growth is one, but not necessarily the sole, criteria of success. The 'Great Question' may be based upon a yet more profound 'grand question' (as Cosandey calls it):<sup>7</sup> why do civilizations rise and fall? Answering that question is beyond the scope of this or of any single work or author. But it is the underlying hypothesis of this book that the constitutional paradigm of a country has a prime influence upon that country's success or failure, and that this principle can be extended to regions and continents also. Thus, although environment, broadly defined, is often a crucial element – for a country totally devoid of natural resources is scarcely likely to prosper – the model of constitution, or shape of the body politic, is critical to its viability and stability.

The model of the constitution is not necessarily confined to any particular form of government, democratic, parliamentary, presidential, monarchical, or any other form that may be imagined, but rather the underlying nature of the constitution. Is it rigid or flexible, can it adapt, or is it too flexible that it lacks coherency? These questions are important in influencing the success or failure of a state – or rather, since in the modern age states rarely fail (though examples have occurred however, such as Newfoundland,<sup>8</sup> and more disastrously for its people, Somalia<sup>9</sup>), the degree of success.

Of necessity this study is both historical and theoretical. As Mokyr has observed (in the context of a discussion of European pre-eminence, though his reasoning has general application here), 'Western technological superiority has deep historical roots, and can only be understood – if at all – by an analysis that

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

8 Newfoundland, a dominion of the British Empire and Commonwealth, voluntarily surrendered its independence and joined the Dominion of Canada in 1949, after a transitional period as a British colony, as a consequence of financial collapse brought about by the depression of 1929–30; *Report of the Royal Commission on Newfoundland Finances* (London, 1933).

9 Somalia is commonly, and perhaps fairly, regarded as a failed state (a term introduced by G.B. Helman and S.R. Ratner, 'Saving Failed States', *Foreign Policy*, 89 (1992–93): 3–20), after a decade without an effective central government – or without any central government at all for some years. Whether this can be regarded as a failed state, or whether this is simply an interregnum, or period without effective leadership pending the establishment of a new (probably dictatorial or military-backed) regime is uncertain. But the effective secession of Somaliland (formerly British Somaliland), a part of the country only since independence, probably indicates that the old Somalia is not a viable state; see Noam Chomsky, *Failed States: The abuse of power and the assault on democracy* (Crows Nest, 2006).

is willing to look back centuries, even millennia'.<sup>10</sup> The constitutional heritage of states cannot be understood out of the context from which it grew. For this reason there is some validity in the argument some have made that Western notions of democracy are alien to other parts of the world. They may be unfamiliar, even alien, but they may still be worthwhile. However the body's immune system has an unfortunate habit of rejecting alien implants. An alien concept will only add to the viability of a state if it is consistent with the constitutional ethos of the recipient state, and transplantable onto it.

Constitutional flexibility, in the sense of the hard or the soft constitution, is distinct from the narrower question of democracy, and is therefore foreseeable in any constitutional model. States have been successful in the past when democracy was rare or non-existent. Equally, today some states that might not be regarded as democratic – such as China – are apparently successful despite this absence of democracy. But in a soft constitution, where there is a degree of flexibility, societal pressures encourage and indeed depend on accountability, and in time this leads to democratic processes being created, and then instinctively followed. Democracy may not, *per se*, be essential to economic success, but its absence may prevent the long-term preservation of that success, in an environment where other states are democratic. It may also be that democracy develops as a necessary accessory to a maturing liberal state, as that state develops and grows. Perhaps, too, democracy is a phase through which states pass; is there a post-democratic future awaiting us? As yet there is little, if any, evidence for this, though the tendency towards voter apathy in much of the West could point towards this direction. If this does arise, then perhaps it will be a sign that the era of the dominance of the West is at an end, for the West's pre-eminence draws some of its strength from its liberal democratic ethos.

Part I of the book, 'Legal Paradigms', considers the theories that have been advanced in an attempt to explain the rise and fall of civilizations. Some of these are valuable in general, while others contribute to an understanding of the process by which these variables can be isolated and studied. The focus is then changed, in the second and third chapters of the first part, to look at individual states, and the factors that appear to have led to their success and failure. Finally, the concept of the hard and soft constitutions will be introduced and explained. This concept is based on the notion that the formal constitutional flexibility of states is a major factor in determining their success and failure.

In Part II, 'The Viability of States', we will apply this concept to different types of state models. These types include authoritarian, doctrinaire liberal, empires and supra-national entities, and mixed models. None are exclusively of the soft or the hard constitution type. Still, some have been markedly less successful than others, and we will examine the performance of these state models, with the purpose of ascertaining whether it may be the flexibility of the underlying constitutional

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

paradigm, rather than the form or type of the model itself, that helps influence state stability and viability.

This part comprises a series of case studies, looking at particular states at specific points in time. In doing so, the scale of the study is made more manageable, yet its validity remains essentially unimpaired. As noted in the Preface, using jurisprudential tools and lens, but not constrained by these, it applies an historical institutionalism to the identification of key dynamics in legal, political and economic history. Through these case studies we may identify at least some of the elements common to the hard and the soft constitution, and the correlation between these and the stability of the regimes. The case studies include, among others, Ireland and New Zealand in the twentieth century, and eastern Europe in the late twentieth century. In these and other examples the focus is upon the responsiveness of the constitution to changing circumstances.





# PART I

## Legal Paradigms

From Gibbons's *Decline and Fall of the Roman Empire*, onwards – and even earlier – there have been various attempts to explain the apparent mystery of why some civilizations rose and fell without reason, or at least without reasons that were clearly evident to the later observer (or to the contemporary spectator). 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 emphasized structural elements, such as the existence or absence of critical environmental factors. In a comparatively simple and small state such factors may be crucial. For ancient Sparta, to use an example, the form of the body politic, with its inherent and systematic militarism, was a key element to the success of that state during its heyday from the seventh to the fourth centuries BC. Similarly, the presence of the Nile, the comparatively fertile lands of the Indus valley, and the golden crescent in Mesopotamia, led to the early development of civilizations in these regions.

In some instances the success and failure of a city state – perhaps the most simple, or least complex, form of state that we have known (or at least of which surviving records, literary and archaeological, tell) – has been largely due to the existence of trade routes, and to a plentiful and reliable supply of water. The disruption of one or other of these has been catastrophic for the states concerned. Parts of Asia are liberally sprinkled with the desiccated remains of cities, whose days of glory passed as rapidly as their wells grew dry. For many of these cities, important enough in their own day, we do not even know their names.

We are left to speculate on the thoughts and sensations that passed through the minds of the last generations of City Fathers, as they saw their glory depart from them, unable to stay the seemingly inescapable advance of death. For us, now, there is often little more than the ‘two great trunks’ of stone, in Shelley’s sonnet ‘Ozymandias’ (published in 1818). Although written of Egypt, whose glory did not altogether pass from the knowledge of mankind, this can describe many lost and now almost entirely forgotten civilizations of the past.

There is something tragic in viewing the surviving tangible evidence of the death throes of a civilization, whether it be great or small. For those most intimately concerned – the dwellers in that civilization – the end may, however, have been neither recognized nor understood. Perhaps it was blamed upon the enmity of the Gods – as indeed it must have seemed to the people of a great city,