

THE CONCEPT OF AUTONOMY AND THE TREATY OF WAITANGI

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Le Traité de Waitangi joue, depuis maintenant quelques années, un rôle central dans la hiérarchie des normes en Nouvelle Zélande. Certaines de ses provisions sont toutefois encore sujettes à interprétation et il reste que sa mise en œuvre est délicate dans quelques domaines spécifiques. C'est le concept d'autonomie, sous-jacent dans les dispositions du Traité, qui peut alors servir de grille de lecture pour une nouvelle définition de la notion de souveraineté de la population maori dans ses relations avec l'Etat néo-zélandais.

The Treaty of Waitangi has won wide acceptance in recent years as New Zealand's founding document. Controversy continues, however, over the meaning and interpretation of the Treaty and its application to particular policy areas. The concept of autonomy may more accurately describe the relationship between the Maori people and the New Zealand state, and can perhaps play a useful role in moving beyond more polarised discussions focusing solely on competing claims to sovereignty.

I- THE NEW ZEALAND SYSTEM OF GOVERNMENT

New Zealand's constitutional arrangements are widely held to be simple and straightforward. The country's political institutions are derived directly from British experience, and there has been little interest in experimenting with other forms or models of governance. Indeed, the overall tendency of New Zealand constitutionalism has been in the direction of simplicity: the country's system of provincial governments

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(with their local assemblies) was abolished in 1876⁵³³; the upper house of the national parliament was dissolved in 1951⁵³⁴; and developments since 1984 have seen a reduction in the scope and magnitude of state activity, with many departments of state being corporatised or privatised⁵³⁵. Most recently, in 2003, Parliament enacted legislation to terminate rights of appeal to the Privy Council in the U.K., establishing instead a new Supreme Court of New Zealand.

Such experimentation as has occurred in recent times has involved the country's electoral system, with the traditional single-member district plurality vote system – sometimes known as 'first past the post' (since an absolute majority of votes was not required for a parliamentary candidate to win a seat) – being complemented by a further vote cast by electors for the political party of their choice. The party vote, in turn, determines the composition of Parliament, with parties given seats in proportion to their share of the party vote nationwide. The Members of Parliament (MPs) who win seats in their constituencies are thus joined by other MPs from the respective party lists⁵³⁶.

⁵³³ William P. Morrell, *The Provincial System in New Zealand 1852-1876*, 2nd edition (Christchurch: Whitcombe and Tombs, 1964).

⁵³⁴ W. Keith Jackson, *The New Zealand Legislative Council: A Study of the Establishment, Failure and Abolition of an Upper House* (Dunedin: University of Otago Press, 1972).

⁵³⁵ See, for instance, Jonathan Boston, Paul Dalziel and Susan St. John, *Redesigning the Welfare State in New Zealand* (Oxford: Oxford University Press, 1999).

⁵³⁶ For a discussion of how the system works, see Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel S. Roberts, *New Zealand Under MMP: A New Politics?* (Auckland: Auckland University Press with Bridget Williams Books, 1996); for why the system was introduced, see Keith Jackson and Alan McRobie, *New Zealand Adopts Proportional Representation: Accident? Design? Evolution?* (Aldershot: Ashgate, 1998); and for the consequences of the system in three MMP elections, see Jonathan Boston, Stephen Levine, Elizabeth McLeay and Nigel S. Roberts (eds.), *From Campaign to Coalition: New Zealand's First General Election Under Proportional Representation* (Palmerston North: Dunmore Press, 1997); Jonathan Boston, Stephen Church, Stephen Levine, Elizabeth McLeay and Nigel S. Roberts (eds.), *Left Turn: The New Zealand General Election of 1999* (Wellington: Victoria University Press, 2000); and Jonathan Boston, Stephen Church, Stephen Levine, Elizabeth McLeay and Nigel S. Roberts (eds.), *New Zealand Votes: The General Election of 2002* (Wellington: Victoria University Press, 2003).

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Even so, and notwithstanding the significant consequences for New Zealand's system of government brought about by the new electoral system (known as 'Mixed Member Proportional', or MMP), there has been little inclination to add clutter or complexity to New Zealand's essentially streamlined Cabinet (or Westminster) system of government. There is no written constitution⁵³⁷ and such debate as has been had about the concept has tended to regard such a document as superfluous, or worse, and in any case a project hardly worth the strife or inconvenience associated with drafting and adopting one, to say nothing of attempting to live by it.

But New Zealand's reputation for constitutional indifference, reflecting a pragmatic approach to politics, belies a degree of innovation. There are, for instance, a variety of special bodies – the Ombudsman, the Race Relations Conciliator, the Disability Commissioner, the Children's Commissioner and so on – established to allow individuals to seek redress for genuine grievances without embarking on a course of litigation⁵³⁸. New Zealanders are entitled to make submissions directly to parliamentary committees and the committees are expected to respond to them, even to the point of giving citizens the right to appear before them to present their views on pending legislation.

II - THE STATE AND THE MAORI PEOPLE

When it comes to the relations between the state and New Zealand's indigenous Maori population, there has for a long time been a recognition of the need for some special measures whether these relate to government administration or legislative representation. Separate Maori

⁵³⁷ There is, however, a Constitution Act, a piece of ordinary legislation passed by Parliament in 1986 and capable of amendment by the normal parliamentary procedures. For a discussion of the concept of 'constitutional conventions' in the contemporary New Zealand context, see Stephen Levine, 'The New Zealand Constitution: Context, Conventions and Contemporary Issues', in Stephen Levine and Yves-Louis Sage (eds.), *Contemporary Challenges in the Pacific: Towards a New Consensus, Volume 2, Revue Juridique Polynésienne*, 2002, pp. 225-240.

⁵³⁸ Excerpts from the statutes establishing these various bodies are given in Stephen Levine with Paul Harris (eds.), *New Zealand Politics Source Book: Third Edition* (Palmerston North: Dunmore Press, 1999), in Part I: The Constitution.

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representation in Parliament was begun in 1868 with the establishment of four Maori seats. In 2002 – 134 years later – there were seven Maori seats, with MPs elected by those Maori voters who choose to register on separate Maori voting rolls. The numbers of Maori in Parliament are substantially higher – the 2002 election led to 19 Maori being elected, including 10 from the party lists – and the post-election Executive of Labour Party Prime Minister Helen Clark saw four Maori appointed to ministerial posts (two within Cabinet, and two outside)⁵³⁹.

New Zealand's ministries of state include a Ministry of Maori Development, with overall responsibility for Maori development, but this Ministry is not alone in seeking to provide an appropriate state response to Maori needs and aspirations. The oldest of these, the Maori Land Court, for instance, has special responsibilities with respect to Maori lands – a subject of preeminent importance for Maori – and there are newer bodies dealing with specialist topics, among them a Maori Language Commission, the Maori television broadcasting system, and the Maori Fisheries Commission.

While these various entities can be regarded as a legitimate and pragmatic response by the state to particular policy areas, addressing problems or exploiting opportunities on behalf of Maori, support for such programmes and the institutions that deliver them can be eroded, at times sharply, when they are considered through an ideological framework. A Labour programme clearly devised to assist Maori to overcome economic and social deprivation, known as 'closing the gaps', had to be recast, and renamed, and opened to 'all New Zealanders', once it began to be viewed as a 'special' programme for Maori. What is known in the United States as 'affirmative action' appears to be no more popular among the majority population in New Zealand than it is in the United States, where it has often been a source of resentment among those excluded from its coverage. In early 2004 a speech given by the opposition National Party's leader, the uncharismatic Don Brash, propelled his party into a remarkably sudden and substantial lead over Labour, not through its style of presentation but rather through its message – one of opposition to programmes designed specifically and exclusively for the benefit of Maori.

Support for such programmes also declines, perhaps ironically, when it is Maori spokespersons who approach them, and comment on them,

⁵³⁹ A fifth Maori MP was appointed as a Parliamentary Under-Secretary and a sixth was appointed as a Parliamentary Private Secretary. Thus six of the Labour Party's ten Maori MPs were made members of the executive.

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from an ideological base. In recent years this has taken the form of insisting that the Maori people – or the Maori tribes – did not surrender sovereignty over New Zealand when their chiefs and leaders agreed to a treaty with a British naval captain at the north island town of Waitangi in February 1840. Assertions that Maori are not only the indigenous people of New Zealand, but that they remain sovereign – and thus entitled to rights of governance, either in ‘partnership’ with non-Maori or (for some Maori activists) as sovereign rulers – cannot but be viewed with alarm by many.

III - LABOUR, NATIONAL AND THE TREATY OF WAITANGI

The historical basis for these conflicting claims is clear enough: there was never one agreed-upon treaty text, and the discrepancies between the English and Maori versions of the Treaty of Waitangi are sufficiently significant as to lead quite reasonably to the conclusion that the parties were by no means agreeing to the same things. In any case we will never be able to be sure what the various participants thought they were accomplishing when they gave their consent to the paper before them.

In 1835, five years prior to the Treaty of Waitangi, a Declaration of Independence was issued by Maori, seeking by such means to establish for themselves a recognised political entity⁵⁴⁰. It is debatable whether or not the Treaty of Waitangi could be said to have legally extinguished such a claim, but in practical terms an independent Maori state did not survive the establishment of British colonial rule. There is, of course, a degree of nostalgia about the Maori political revival – for that is what has been taking place in recent times – but the romance of restoring Maori pride and pre-eminence is accompanied by practical objectives designed to improve contemporary Maori living conditions in all their aspects. This process is not assisted, however, by ideological conflict whose overall effect is to damage a consensus – a type of ‘social contract’ – that a fair, just and harmonious society can be developed among the many peoples now inhabiting New Zealand’s north and south islands.

⁵⁴⁰ The text of the Declaration of Independence is reprinted in Levine with Harris (eds.), *The New Zealand Politics Source Book*, pp. 19-20.

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In the absence of such a consensus and the national self-confidence associated with it, the New Zealand polity remains vulnerable to turmoil and turbulence arising out of any issue associated with Maori-state relations. The last thirty years have seen several sustained efforts, each significant, to develop and implement a strategy to resolve Maori claims and concerns. The third Labour government (1972-75) established the Waitangi Tribunal in 1975, to investigate and make recommendations about any Maori claims to have been 'prejudicially affected' by 'any policy or practice... adopted by or on behalf of the Crown'. The Treaty of Waitangi Act 1975 is described in its opening statement as 'An Act to provide for the observance, and confirmation, of the principles of the Treaty of Waitangi ...' and in due course the Department of Justice, in 1989, issued a document stating what, in fact, these 'principles' were. It was the fourth Labour government (1984-90), too, that amended the Treaty of Waitangi Act to allow for the Waitangi Tribunal to investigate claims dating back to 1840, as the original legislation had not been retrospective, thus excluding the very period during which most of the policies or practices that had adversely affected Maori, particularly in respect of their lands, had actually taken place.

The fourth National government also undertook strenuous efforts to resolve Maori claims and grievances. In 1994 it issued a document entitled *Crown Proposals for the Settlement of Treaty of Waitangi Claims*, describing the Treaty as 'the foundation document of New Zealand', one that 'acknowledged the Crown's right to govern in the interests of all our citizens'; that 'protected Maori interests'; and that 'made us all New Zealanders'⁵⁴¹. While some claims were settled, through negotiations undertaken by the Office of Treaty Settlements (a division of the Department of Justice) and approved by Parliament, the absence of any likely end to the process – the failure to glimpse any hope of 'closure' – helped to set the stage for the sharp loss of support for what had become in many ways a bipartisan (or multi-partisan) process of incremental reconciliation with respect to historic grievances.

IV - THE COURTS AND THE TREATY

Although New Zealand's courts have not traditionally been energetic with respect to constitutional issues, the judiciary has played an

⁵⁴¹ Extracts from the Crown Proposals documents are reprinted in Levine with Harris (eds.), *The New Zealand Politics Source Book*, pp. 35-39.

important role in recent years in giving greater legal effect to Treaty of Waitangi undertakings and commitments. The Court of Appeal's decisions in 1987 and 1989 emphasised the need for New Zealand's sovereign Parliament, in its legislation, to refrain from measures that would transgress against the Treaty of Waitangi – both the letter of the Treaty and its principles (or spirit)⁵⁴². While those decisions set in motion a number of important policy developments, particularly (but not exclusively) with respect to fisheries and land claims, they also ushered in a new language of 'partnership', in which on at least some topics there was to be an expectation that 'Treaty partners' would consult over policy. Whether this could be regarded as a 'shared governance' model – perhaps limited in scope, and perhaps not, depending on the meaning to be given to particular Treaty clauses – there was at least a recognition by the courts of the Treaty's historical and legal importance and its contemporary relevance.

The Court of Appeal also noted (in 1987), however, that 'questions surrounding the Treaty and its contemporary application' are 'difficult and complex'. This was further underscored in 2003 when the Court of Appeal held that Maori would be able to litigate over the ownership of New Zealand's seabed and foreshore⁵⁴³. The political consequences of this decision have been significant. The government's reaction was initially swift – the Prime Minister stated that Parliament would legislate to ensure that the country's seabed and foreshore would remain in public ownership – but so too was its retreat. All the fundamental differences over the meaning, purpose and contemporary reach of the Treaty of Waitangi emerged once more. Successive efforts were made to find a way to ensure non-Maori that their rights of access to, and use of, the country's coastal beaches and waters would not be altered, infringed or impeded. At the same time the government sought to demonstrate respect for Maori traditional or customary usage. These efforts were not sufficient to prevent discord between the government and Maori; dismay among many non-Maori, providing the context in which the National Party leader's broader speech attacking alleged Maori privilege was soon to be received; and disunity within the Labour Party, leading in due course to the resignation of one Labour Maori MP from Parliament and

⁵⁴² The pivotal cases were *New Zealand Maori Council v Attorney General* (1987) and (1989): excerpts from the decisions are reprinted in Levine with Harris (eds.), *The New Zealand Politics Source Book*, pp. 27-32.

⁵⁴³ The case was *Ngati Apa and others v Attorney General* (2003) 3 NZLR 643.

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her return via a special parliamentary by-election at the head of a new political party intended to challenge Labour's position as spokesperson for Maori interests.

Ultimately, the widening rift over the meaning of the Treaty has to do with whether Maori can be said to still possess 'sovereignty' as a nation or a people. For Maori the key word or concept in the Treaty is 'rangatiratanga', a contested word that appears to have a range of possible interpretations and applications⁵⁴⁴. The New Zealand state's view of the Treaty relationship, however, was most succinctly articulated in the Labour government's statement of principles.

V - THE TREATY OF WAITANGI – PROMISES AND PRINCIPLES

The first of the five principles identified by the Labour government in 1989, 'the Principle of Government', claimed that 'the first Article of the Treaty [of Waitangi] gives expression to the right of the Crown to make laws...': more briefly, 'The Government has the right to govern and to make laws'. The document stated, however, that 'this sovereignty is qualified by the promise to accord the Maori interests specified in the second Article an appropriate priority'⁵⁴⁵.

The second principle, appropriately, refers to the second Article of the Treaty of Waitangi, noting that it 'guarantees to iwi Maori [tribal Maori] the control and enjoyment of those resources and taonga [treasures] which it is their wish to retain.' This principle – 'Self-Management' – refers to 'the Crown's policy of recognising rangatiratanga', although the language used – 'self-management' rather than 'self-government', for instance – employs a meaning for that word, 'rangatiratanga', that falls short of the wider idea of 'sovereignty' sometimes associated with it⁵⁴⁶.

⁵⁴⁴ For a number of perspectives on the meaning of the word 'rangatiratanga', so frequently cited in sovereignty claims, see Simon Hope, 'The Roots and Reach of Rangatiratanga', *Political Science*, vol. 56, n° 1, June 2004.

⁵⁴⁵ The 'five principles' of the Treaty of Waitangi were identified and defined in the following document: Department of Justice, *Principles for Crown Action on the Treaty of Waitangi* (Wellington: Department of Justice, 1989).

⁵⁴⁶ Labour's other three principles were: 'Principle 3 – The Principle of Equality – All New Zealanders are equal before the law. Principle 4 – The Principle of Reasonable Cooperation – Both the Government and the iwi are

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Principle 2 recognises that 'iwi have the right to organise as iwi, and, under the law, to control their resources as their own'. It is perhaps better to relabel this principle – described in Maori as 'the Rangatiratanga Principle' – as 'the Principle of Autonomy' (rather than 'the Principle of Self-Management').

The English text of the Treaty of Waitangi states, in the first Article, that the Maori signatories 'cede' to the British 'absolutely and without reservation all the rights and powers of Sovereignty' that those signatories 'respectively exercise or possess... over their respective Territories as the sole Sovereigns thereof': thus, in constitutional terms, was any pre-existing state of independence terminated. An English translation made of the Maori text of the Treaty of Waitangi is somewhat different, however, with Maori ceding 'absolutely to the Queen of England for ever the government all of their land'⁵⁴⁷.

There is reasonable agreement as to the third Article to the Treaty, as in either case what is involved is a promise, or guarantee, of equality before the law. Maori were entitled to the same rights and privileges as other British subjects. Maori were to be given equal rights as citizens, a statement that in itself exhibits a spirit of tolerance in its refusal to discriminate or distinguish between Maori and non-Maori as members of a wider, newly invented political community.

The second Article of the Treaty provides further, distinctive guarantees to Maori, implying recognition as a people with its own inalienable rights and resources. The English version promises 'full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties... so long as they wish to retain [them]'. The English translation of the Maori version is considerably different, however, agreeing 'to protect the chiefs, the subtribes and all the people

obliged to accord each other reasonable cooperation on major issues of common concern. Principle 5 – The Principle of Redress – The Government is responsible for providing effective processes for the resolution of grievances in the expectation that reconciliation can occur.' The principles are reprinted (with accompanying commentary omitted) in Levine with Harris (eds.), *The New Zealand Politics Source Book*, pp. 33-35.

⁵⁴⁷ For texts of the Treaty of Waitangi, including both the English text and an English translation to the Maori text, see I. H. Kawharu (ed.), *Waitangi: Maori and Pakeha Perspectives on the Treaty of Waitangi* (Auckland: Oxford University Press, 1989).

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of New Zealand in the unqualified exercise of their chieftainship over their lands, villages and all their treasures’.

VI - AUTONOMY, SOVEREIGNTY AND THE TREATY RELATIONSHIP

The Waitangi Tribunal has discussed questions of ‘sovereignty’ from time to time, noting on one occasion that, looking at the Treaty in its entirety, ‘it is obvious that it does not purport to describe a continuing relationship between sovereign states. Its purpose and effect was the reverse, to provide for the relinquishment by Maori of their sovereign status and to guarantee their protection upon becoming subjects of the Crown. In any event on reading the Maori text in the light of contemporary statements we are satisfied that sovereignty was ceded. Tino rangatiratanga therefore refers not to a separate sovereignty but to tribal self-management on lines similar to what we understand by local government⁵⁴⁸.’

This ‘authoritative’ statement, along with other ‘pronouncements [by] courts and tribunals entrusted with the task of declaring the content of New Zealand law’, led one legal commentator to conclude that ‘New Zealand jurisprudence ... does not countenance the idea that a separate and residual sovereignty rests with Maori as the indigenous people of New Zealand⁵⁴⁹.’

In contemporary terms it could be said that what the British were offering, in return for the peaceful recognition of their acquisition of what was to come to be named New Zealand, was autonomy. This was, and is, a status less than that of an independent state, but more than that of a subservient colonial territory. New Zealand itself, as a colony, was to become part of the British Empire until its own emergence as a self-governing and ultimately independent entity. Nevertheless the terms of the Treaty of Waitangi that form the backdrop to such developments

⁵⁴⁸ See Waitangi Tribunal, *Muriwhenua Fishing Report*, Waitangi Tribunal Report No. 22 (Wellington: Government Printer, 1988), p. 187.

⁵⁴⁹ Alex Frame, ‘“Sovereignty” and “self-determination” for indigenous peoples in multiethnic states, with particular regard to New Zealand and Fiji’, in Brij V. Lal and Tomasi Rayalu Vakatora (eds.), *Fiji and the World: Volume 2, Fiji Constitution Review Commission Research Papers*, Suva, Fiji: University of the South Pacific, School of Social and Economic Development, 1997, p. 253.

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were in no way inconsistent with them. The Maori people were neither fully absorbed into a settler colony or state, and nor were they altogether assimilated into the independent nation that followed.

In the absence of a supreme constitutional document or a full appreciation of the idea of democracy as involving ‘popular sovereignty’, New Zealand governments and Members of Parliament have long believed in and celebrated a doctrine of ‘parliamentary sovereignty’, allowing the New Zealand state to legislate and regulate at will. The concept of ‘limited government’, constitutionally restrained, has never penetrated very deeply into the country’s political culture.

Between the extremes of ‘parliamentary sovereignty’, then, and ‘Maori sovereignty’ can be found a place in which, at least potentially, democratic values and Maori aspirations can be brought into harmony. In regarding the status of the Maori people within New Zealand in a manner consistent with domestic law and the Treaty of Waitangi (in both its letter and spirit), it is possible to see an outcome in which choices other than ‘independence’ and ‘dependence’ come to prevail. All around the world, forms of autonomy for various groups – many of them indigenous – have been devised to satisfy communal aspirations, enhance living standards, and preserve a wider social peace. The seabed controversy, with its abrupt challenge to Labour’s rule, has revived interest in New Zealand’s constitutional development. For the Deputy Prime Minister, Michael Cullen, the seabed decision by the Court of Appeal suggested that the courts were moving away from their accustomed role, allegedly making law rather than interpreting it, and so usurping Parliament’s historic and sole prerogative⁵⁵⁰. At the same time there have been indications of a renewed effort by the government to consider whether constitution-writing might have a role to play in remedying New

⁵⁵⁰ See Michael Cullen’s speech to a Human Rights Commission Forum on ‘Human Rights and the Foreshore and Seabed’, held in Wellington on 1 June 2004, at which he observed that ‘the role of judicial officers is to interpret the law in individual cases; in other words to give effect to the will of Parliament. It is Parliament’s job to pass the law and to amend it when it fails to reflect the will of the people. Whenever judicial officers stray towards making the law we run into trouble, not because their views are wrong – indeed they are often in the best possible position to comment on the efficacy of particular laws – but because they are unelected officials and have no democratic mandate’. The speech is available from: <http://www.scoop.co.nz/mason/stories/PA0406/S00019.htm>.

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Zealand's confusions about the status of the Treaty of Waitangi and the role of Maori within the wider political community.

New Zealand's long tradition of constitutional inarticulateness may have led it to obscure a recognition of other choices available to it. Over the past twenty years New Zealand has moved away from its previous position as a highly centralised state providing a virtually all-encompassing range of services to one more interested in promoting free-market solutions wherever possible. During this period – which also saw New Zealand break with its traditional alliance partners to become a nuclear-free country – there was an effort by elites to encourage a reading of the Treaty of Waitangi as almost a sacred document, one that established a nation, guaranteed equality, and inscribed an indigenous people's basic rights and privileges. It may now be fruitful to look again, and more closely, at the actual provisions of the Treaty, at a time when there is a greater awareness of the wide range of political status alternatives in use within modern nation-states⁵⁵¹. A reading of the Treaty as a document providing for a measure of autonomy for the country's indigenous people would allow for discussion to move on towards consideration of the scope of autonomy and the circumstances under which it can be exercised, allowing for greater self-government and self-management by Maori while at the same time providing assurances that the stability and survival of the wider nation-state is not in any way at issue. Easing concerns among both Maori and non-Maori in this manner would provide a more promising atmosphere for the resolution of historic Maori grievances, the broader goal shared by all parties.

⁵⁵¹ See, for instance, Daniel J. Elazar, *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (Harlow, Essex: Longman, 1994), for a description of a wide variety of forms of governance currently in use (and a discussion of the ways in which these operate in countries all around the world).