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SUBSIDIARITY AS A CONSTITUTIONAL PRINCIPLE IN NEW ZEALAND

*Benjamin F Gussen**

This paper argues that subsidiarity is a constitutional principle in New Zealand. The principle of subsidiarity is the essence of the Treaty of Waitangi, both in its English and Māori texts. It is also evident in the thinking behind the New Zealand Constitution Acts of 1846 and 1852. This constitutional tradition has been hidden since the abolition of the New Zealand provincial system in 1876. The resuscitation of subsidiarity as a foundational element of our constitution holds the key to our economic prosperity in a globalising world. Central government should, as a strategic policy, empower local government to function as municipal corporations with wide legislative powers.

I INTRODUCTION

New Zealand's political landscape up until the abolition of the provincial system in 1876 could be described as dominated by a tension between "centralist" and "provincialist" agendas.¹ "Centralists" were not for centralising government, but against "an unbalanced constitution ... in which the provinces had too much power at the expense of the legitimate functions of the General Government".² In essence, the issue was not "whether the state should be decentralised but ... how it should be decentralised."³

I analyse this tension under the rubric of subsidiarity, which indicates that in New Zealand there was a shift in emphasis from subsidiarity (vertical separation of powers) to *trias politica* (horizontal separation of powers).

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

2 At 353.

3 At 353.

The paper illustrates the affinity between the meta-rules of subsidiarity and the articles of the Treaty of Waitangi. It also looks at the constitutional experiment that brought about the provincial system in New Zealand, and the abolition of this system,⁴ only 24 years later.

The paper starts with a brief introduction to subsidiarity. Next, it analyses the links between subsidiarity and our early constitutional instruments. Finally, the paper looks at the relevance of subsidiarity today as a principle for constitutional design.

II SUBSIDIARITY: A RENDITION

The origins of the principle of subsidiarity can be traced back to ancient Greece.⁵ The principle places a constitutional responsibility on higher levels of government not only to enable the autonomy of lower levels, but to provide these lower levels with necessary support.⁶ One of the weaker versions of the subsidiarity principle can be found in the Tenth Amendment to the US Constitution where it states that "powers not delegated to the [federal government] by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people". A more recent formulation of the principle was established in the Charter of Fundamental Rights of the European Union in December 2000.⁷ The principle is also central to the European Charter of Local Self Government (arts 4(2) and 4(3)).⁸

A The Economic and Ethical Bases of Subsidiarity

Historically, there were two main formulations of subsidiarity. One is economic, the other ethical. One of the earliest economic articulations can be found in Christian Wolff's *Principles of Natural Law*, first published in 1754.⁹ In section 1022, the principle is formulated as integral to the creation of the welfare state, where the subsidiarity principle keeps "the burden of the welfare taxes

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

5 Chantal Millon-Delsol *L'État Subsidaire: Ingérence et Non-ingérence de l'État, Le Principe de Subsidiarité aux Fondements de l'Histoire Européenne* (Presses Universitaires de France, Paris, 1992) at 15.

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

7 Paolo G Carozza "Subsidiarity as a Structural Principle of International Human Rights Law" (2003) 97 AJIL 38 at 38.

8 For a critique of the principle of subsidiarity in the context of the European Union see Christian Kirchner "The Principle of Subsidiarity in the Treaty on European Union: A Critique from a Perspective of Constitutional Economics" (1998) 6 Tulane J Intl & Comp Law 291.

9 See Jürgen G Backhaus "Subsidiarity" in Jürgen G Backhaus (ed) *The Elgar Companion to Law and Economics* (Edward Elgar, Northampton (Mass), 1999) 136 at 137.

to be borne by citizens at a minimum".¹⁰ This is so given that state intervention is only where individuals have "no relatives or friends who could take care" of them.¹¹ In this sense, the state is only subsidiary to community relationships.

The other formulation is ethical. A clear statement of this formulation can be found in the first papal encyclical on the "social question", Leo XIII's *Rerum Novarum* of 1891,¹² where we see a principle of intervention (positive dimension) but not interference (negative dimension) based on the ethical objective of "remedy of the evil or the removal of the mischief".¹³ A stronger and more precise version of the ethical formulation is contained in section 79 of Pius XI's 1931 papal encyclical paper, *Quadragesimo Anno*.¹⁴ This formulation emphasises the ethical constraint on larger (political) entities, preventing them from usurping duties that can be reasonably discharged by smaller entities. The justification for such a constraint is derived directly from "the principle of justice".¹⁵

B Subsidiarity and Sovereignty

The difference between decentralisation and subsidiarity is that the latter includes an ethical rationale that goes beyond the economic "efficiency" objectives inherent in decentralisation theories.¹⁶ Conventional public economics is predicated on a decentralisation theorem that models incomplete contracts under uniformity and homogeneity assumptions where the central government can replicate the public goods supplied by local governments. Subsidiarity on the other hand introduces a procedural mechanism that is partly predicated on ethical considerations that signal the appropriate scale at which political organisation should be induced. Subsidiarity is hence a decentralisation modality that takes into account the political forces of existing social structures.

¹⁰ At 137–138.

¹¹ At 137–138.

¹² The principle of sphere sovereignty is the reformed version of the Catholic principle of subsidiarity. See Jonathan Chaplin "Subsidiarity and Sphere Sovereignty: Catholic and Reformed Conceptions of the Role of the State" in FP McHugh and SM Natale (eds) *Things Old and New: Catholic Social Teaching Revisited* (University Press of America, Lanham (MD), 1993) 175 at 175.

¹³ Leo XIII "Rerum Novarum: Encyclical Letter on Capital and Labor (May 15, 1891)" in Claudia Carlen (ed) *The Papal Encyclicals 1878–1903* (The Pierian Press, Raleigh, 1990) vol 2 241 at 250–251.

¹⁴ Pius XI "Quadragesimo Anno: Encyclical Letter on Reconstruction of Social Order (May 15, 1931)" in Claudia Carlen (ed) *The Papal Encyclicals 1903–1939* (The Pierian Press, Raleigh, 1990) vol 3 421 at [79]–[80].

¹⁵ For a detailed account of the theological origins of subsidiarity, and for its counterpart in Calvinism, see Kent A Van Til "Subsidiarity and Sphere-Sovereignty: a match made in ...?" (2008) 69 *Theological Studies* 610.

¹⁶ See Albert Breton, Alberto Cassone, and Angela Frascini "Decentralization and Subsidiarity: Toward a Theoretical Reconciliation" (1998) 19 *U Pa J Intl Econ L* 21.

Unlike federalism, subsidiarity is about limiting sovereignty rather than dividing it. In this sense, subsidiarity is a wider concept than federalism. One way of limiting sovereignty is through dividing it between different levels of government and then attempting to centralise some of the functions at the federal level. However, sovereignty could also be limited by local autonomy in a "quasi-federal" arrangement where the central (federal) government continues to "succour" lower levels of government.

Due to the nature of subsidiarity's relationship to sovereignty, its role as a cornerstone in constitutional architecture straddles both unitary and federal states. For example, (the English translation of) the preamble of the 1997 Polish Constitution states that the Constitution is based "on the principle of subsidiarity in the strengthening [of] the powers of citizens and their communities". At the same time, art 3 of the Constitution states that "[t]he Republic of Poland shall be a unitary State". On the other hand, (the official English translation of) art 5a of the 1999 Swiss Federal Constitution states that "[t]he principle of subsidiarity must be observed in the allocation and performance of state tasks", while art 1 declares Switzerland a Confederation.

In summary, subsidiarity looks at limiting sovereignty. Federalism is only one mode of achieving the same, through dividing sovereignty between (usually) two tiers of government.¹⁷ Under subsidiarity there is a political exchange that sees a wide margin of local autonomy weaved into multi-level governance structures.

C Subsidiarity and Constitutional Economics

In this section, we look at insights from "constitutional economics".¹⁸ Defined broadly, constitutional economics would embrace the economics of property rights, law and economics (economic analysis of the law), political economy of regulation, new economic history and public choice (application of economics to political science).¹⁹ The starting point for constitutional economics, emerging from public choice, is the 1960s tome *The Calculus of Consent*.²⁰ While public choice was interested in choices within rules, constitutional economics was interested in choices *among* rules.

17 This explains why the US and Australia federal constitutions do not mention local government.

18 See also Charles M Tiebout "A Pure Theory of Local Expenditure" (1956) 64 *Journal of Political Economy* 416; and Vincent Ostrom, Charles M Tiebout and Robert Warren "The Organization of Government in Metropolitan Areas: A Theoretical Inquiry" (1961) 55 *American Political Science Review* 831.

19 James Buchanan "Constitutional Economics" in John Edwell, Murray Milgate and Peter Newman (eds) *The New Palgrave Dictionary of Economics* (Macmillan, London, 1987) 585. See also Helmut Leipold "Neoliberal Ordnungstheorie und Constitutional Economics: A Comparison between Eucken and Buchanan" (1990) 1 *Constitutional Political Economy* 47.

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

Constitutions are heavily influenced by economic considerations.²¹ The abolition of the provincial system is an example of how economics shapes constitutions. It is generally accepted that the main cause for the abolition was the budget deficits the provinces faced. It is conceded that one reason that precipitated the budget deficits was the provinces' large-scale borrowing.²² The abolition meant that the central government absorbed provincial functions. This tendency culminated in Vogel's policy of national development through public works. In addition, there was a tendency to squeeze out provincial powers by increasing decentralisation to a complex system of local government that included Municipal Councils, Road Boards, River Boards and Harbour Boards. In essence, the provincial system was supplanted by other local institutions through the Municipal Corporations Act 1867. These municipalities were placed in a position virtually independent of provincial legislation, and removed the need for the "meso" tier of provincial government, as the General Government could govern these institutions directly.

However, it does not take a huge leap of faith to see how what came to be known as "economic development" is an extension of colonisation.²³ Both look to grow the economic activity in a given locale in order to improve its standard of living. Both require an empowerment of "meso" levels of political organisation that modulate the power between the individual and the nation state. To see this we proceed to provide an analysis based on constitutional economics.

James Buchanan, the father of constitutional economics, argued that the analysis of the market as an evolutionary selection process can be extended to politics.²⁴ Hence, instead of a maximization

21 See the pioneering work by Charles A Beard *The Economic Basis of Politics* (George Allen & Unwin, London, 1935) at 67.

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

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

24 James Buchanan "Public Choice After Socialism" (1993) 77 *Public Choice* 67 at 69. This particular extension is difficult to accommodate with some of Buchanan's other constructs, especially his rejection of the state as an organism. See below for further discussion.

paradigm, constitutional economics uses a game theory exchange paradigm to describe cooperative interactions.²⁵ Under this formulation, the emerging solutions will always have their anchor in the micro scale of choices by single participants.

The analogy between markets and politics imports a third dimension in addition to the *homo economicus* and the exchange process, namely competition. In order for markets to function properly one needs to ensure a level of competition in the provision of goods and services. An analogy with politics would see this competition reflected in the provision of goods of public nature, through competing jurisdictions.²⁶

According to James Buchanan and Gordon Tullock, there are two separate and distinct elements in the expected costs of any human activity.²⁷ The first are "external costs" that an individual is expected to endure as a result of the actions of others (within his political group) over which he has no direct control. As the size of the political group increases, these external costs decrease:²⁸

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

The second element in the expected costs of any human activity are "decision-making costs", which the individual expects to incur as a result of his participation in organised activity. These costs are upward sloping, since "[i]f two or more persons are required to agree on a *single* decision, time and effort ... costs will increase as the size of the [political] group required to agree increases."²⁹

The objective of political organisation is to minimise these costs. In the authors' final analysis, they reach the following conclusion: "if the organization of collective activity can be effectively decentralized, this decentralization provides one means of introducing marketlike [sic] alternatives into the political process".³⁰ Therefore, "[b]oth the decentralization and size factors suggest that, where possible, collective activity should be organized in small rather than large political units".³¹ Under subsidiarity, with its ethical dimension, this decentralisation would take the shape of

25 James Buchanan *The Economics and the Ethics of Constitutional Order* (The University of Michigan Press, Ann Arbor, 1991) at 31.

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

27 Buchanan and Tullock, above n 20, at 43–44.

28 At 61.

29 At 65 (emphasis in the original).

30 At 109.

31 At 110.

legislative powers at the municipal or provincial levels. In other words, subsidiarity places decentralisation within existing geo-social structures.³²

D The Core Principles of Subsidiarity

While a polysemous principle in its classical formulation, the principle of subsidiarity's core could be decomposed into three interrelated meta-rules or sub-principles.³³ The first is a positive version, where a "rule of assistance" requires the central government to support local communities where they cannot perform the functions of governance. This rule would be violated where, for example, the central government refuses to assist upon the appeal of a local government, or when the local government requests aid for something it already can perform for itself.³⁴ This sub-principle resonates with an ancient concept in western political theory where the state has a duty to protect its subjects and a reciprocal duty of obedience on the subjects towards the state.³⁵

The second sub-principle is the "ban on interference", a negative version of the subsidiarity principle, where the central government is prohibited from interfering in the affairs of local government. This rule would be violated, for example, when the central government interferes with the work of a local government. This non-intervention rule parallels the concept emanating from the humanitarian movement of the 1820s and 1830s which recognises the sovereignty and independence of indigenous peoples. The third sub-principle derives from the first two and limits the legitimate support of higher levels of government to "helping local governments help themselves". This rule is violated where the positive rule is broken, for example, when the federal government fails to correct a state government that fails to respond to an appeal for assistance from a local government. This third sub-principle is also violated when the negative rule is broken, for example, when the federal government fails to stop a state government from interfering with the work of a local government.

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

33 See for example Gosepath, above n 6, at 162; and Peter J Floriani *Subsidiarity* (Penn Street Productions, Reading (PA), 2012) at 82–83.

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

35 This is what came to be known as the doctrine of allegiance.

III SUBSIDIARITY AS THE ESSENCE OF TE TIRITI O WAITANGI

The essence of the Treaty of Waitangi is subsidiarity.³⁶ Using a teleological reading, as I show below, the Treaty is an instance of all three sub-principles constituting the core of the principle of subsidiarity.³⁷

The preamble to the English text of the Treaty deems it necessary to recognise the British monarch as the New Zealand sovereign. This is "to protect [the] just Rights and Property [of Māori] and to secure them the enjoyment of Peace and Good Order" and "to establish a settled form of Civil Government with a view to avert the evil consequences which must result from the absence of the necessary Laws and Institutions". Article 1 of the English text of the Treaty cedes sovereignty as envisaged in the preamble, while art 3 confirms that the sovereign "extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects".

This is an instance of a political exchange analogous to exchanges in markets, as discussed earlier when we introduced constitutional economics. The exchange is evident in the wording of art 3 where it starts with the words "[i]n consideration thereof". There is in effect an exchange of sovereignty for a bundle of rights and privileges.

In art 2, the Sovereign:

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

The Māori text of the Treaty suggests that the purpose was to provide a government while securing tribal autonomy. In the Māori text, under art 1, Māori leaders gave the Queen "te kawanatanga katoa", or complete government over their land. In the Māori text, art 2 states that Māori were guaranteed "te tino rangatiratanga", or the unqualified exercise of their chieftainship over their lands, villages and all their property and treasures.

Article 3, similar to the English text, assures Māori of the Queen's protection and all the rights (tikanga) accorded to British subjects. This article is usually interpreted as expressing the ultimate goal of British Māori policy as the assimilation and eventual amalgamation of the Māori with

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

37 This analysis takes a wide interpretation of Māori as representing all local communities in New Zealand. See Benjamin F Gussen "The Marginalisation of Localism in Current Responses to the Ecological Crisis" (2012) 16 NZ J Env't L 167.

settlers as one people,³⁸ or in the words of Captain William Hobson upon the signing of the Treaty, "he iwi tahi tatou" (we are now one people).³⁹ However, this article would also show that the intention of the Māori was to cede governance only in relation to British settlers. Otherwise it would be redundant. Article 1 would have sufficed.⁴⁰ Notwithstanding, an idea of amalgamation opens the door to a wide interpretation of "self-governance" to encompass not only Māori but also the British settlers. Article 3 was an expression of an ideal of early Victorian humanitarianism: racial equality between Māori and the British settlers. This humanitarianism in the New Zealand context was an extension of efforts leading to the emancipation of slaves, the abolition of apprenticeship, and the 1837 House of Commons Committee of Aborigines in British Settlements Report.⁴¹ The *aggiornamento*⁴² of this humanitarian drive points to "the emerging doctrine of global humanitarian government and the transformation of sovereignty on the basis of a humanitarian rationale", which leads directly to the principle of subsidiarity as a "fallback responsibility" where "the failure of a state to provide basic security to its population opens the possibility of an external intervention".⁴³

The Treaty can be understood as emanating from the core of the principle of subsidiarity.⁴⁴ The transfer of sovereignty to the nation of New Zealand (under the British monarch) would negate the possibility of territorial divisions enjoying state-like autonomy. However, this does not eliminate the possibility of subsidiarity as understood through its three sub-principles.

As discussed above, the first sub-principle of subsidiarity is the "rule of assistance", which requires the central government to support local communities where they cannot perform the functions of governance. The Treaty refers to this positive aspect of subsidiarity in the preamble and in arts 1 and 3. The Treaty intended first to establish a central government that could "avert the evil

38 Peter Adams *Fatal Necessity: British Intervention in New Zealand 1830–1847* (Auckland University Press, Auckland, 1977) at 15.

39 Alan Ward *A Show of Justice: Racial "Amalgamation" in Nineteenth Century New Zealand* (Auckland University Press, Auckland, 1995) at 42.

40 See Paul Moon "Three Historical Interpretations of the Treaty of Waitangi (1840)" (1998–1999) *The Electronic Journal of Australian and New Zealand History* <www.jcu.edu.au>.

41 Adams, above n 38, at 57.

42 The term *aggiornamento* comes originally from Roman Catholic history and theology and suggests the modernisation of concepts to fit current modalities. It alludes to the Catholic statement of subsidiarity.

43 Nicolas Guilhot "The Anthropologist as Witness: Humanitarianism between Ethnography and Critique" (2012) 3 *Humanity* 81 at 82.

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

consequences which must result from the absence of the necessary Laws and Institutions"⁴⁵ and that could then provide protection and enjoyment of peace and order. In this sense, the Treaty is intended to assist local communities in carrying out their tasks.

The second sub-principle, the "ban on interference", is seen in art 2, where "full exclusive and undisturbed possession" and unqualified exercise of chieftainship is imparted to the Māori as representative of the local communities. The qualifier "undisturbed" is a clear indication of the ban on any interference in the affairs of local communities.

The third sub-principle, "helping local governments help themselves", can also be seen simultaneously in the operation of arts 1 and 2. The Treaty envisages putting in place laws and institutions to help the Māori to help themselves in their "exclusive and undisturbed possession" and their exercise of their chieftainship.

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

The above subsidiarity-centred hermeneutics chime with historical facts leading to the Treaty. Both missionaries and humanitarians (such as the members of the Aborigines Protection Society in London) proposed, on ethical grounds, British intervention to establish bureaucratic authority in New Zealand. This was calculated to replace internecine wars by using dialogue as the method for resolving social conflict among Māori and between Māori and the settlers.⁴⁶ These ethical themes resonated at the Colonial Office through an intellectual connection with the concepts of trusteeship and humanitarianism. These concepts gathered momentum since Burke's 1783 axiom that "every species of political dominance and commercial privilege was in the strictest sense a trust, and that it was an essential characteristic of every trust that it should be rendered accountable", and "became a powerful political ideology in the first half of the nineteenth [century]".⁴⁷

Similarly, James Busby, the British resident in the Bay of Islands, envisaged "a congress or a General Assembly of [Māori] Chiefs under the 'fostering power' of the [British] governor".⁴⁸ James Stephen, the permanent under-secretary at the Colonial Office, was interested in establishing legal

45 Treaty of Waitangi 1840, preamble.

46 Ward, above n 39, at 32–33.

47 Adams, above n 38, at 57.

48 Ward, above n 39, at 28.

authority in New Zealand rather than British sovereignty *per se*.⁴⁹ Stephen's intention was to "authorise the explicit recognition or codification of Māori customs which would have the force of law in Māori districts".⁵⁰ This is a clear signal of an intention to distribute legislative power within New Zealand. However, Lord John Russell, the Secretary of State for Colonies from September 1839 to September 1841, diluted Stephen's suggestion of a declaratory law "recognising" Māori customs to one "authorising the Executive to tolerate" them.⁵¹ Nevertheless, it was humanitarian concerns that were emphasised in the instructions to negotiate a cession of sovereignty, given to Captain William Hobson, RN, the then Lieutenant Governor of New Zealand, by Lord Russell's predecessor, Lord Normanby, in August 1839.⁵²

IV SUBSIDIARITY AND THE NEW ZEALAND CONSTITUTION ACTS OF 1846 AND 1852

There have been attempts to provide a decentralised system of governance in New Zealand since *Te Tiriti* was signed in 1840.⁵³ One of the early examples was in Wellington where the settlers were "anxious to secure the advantages of a Municipal Corporation".⁵⁴ However, what came to be known as the "Wellington Republic" was ended when the newly declared Lieutenant-Governor William Hobson sent a detachment of troops to bring an end to it.⁵⁵ The demand for self-government could also be seen in the Constitutional Associations of the 1850s.⁵⁶ In a letter to Lord Grey dated 19 February 1852, the Otago Settlers' Association accentuated the fact that each settlement in New Zealand possessed "an individual life and attributes of its own" which "gives each an equally strong title, to conduct its own affairs".⁵⁷

49 At 31.

50 At 38.

51 At 38.

52 Adams, above n 38, at 59. See also "Normanby to Hobson, 14, 15 August 1839" in Robert McNab (ed) *Historical Records of New Zealand* (Government Printer, Wellington, 1908) vol 1 at 729–39.

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

54 Edward Jerningham Wakefield *Adventure in New Zealand, from 1839 to 1844: with Some Account of the Beginning of the British Colonization of the Islands* (J Murray, London, 1845) at 342.

55 At 378. See also JC Beaglehole *Captain Hobson and the New Zealand Company* (Dept of History of Smith College, Northampton, (Mass), 1928) at chs 6 and 7.

56 Department of Justice "Appendix A. The electoral law of New Zealand: A brief history" in *Report of the Royal Commission on the Electoral System: Towards a Better Democracy* (The Royal Commission on the Electoral System, Wellington, 1986).

57 Morrell, above n 22, at 15.

Notwithstanding, in the early 1850s some important local politicians were dismissive of provincial councils. Some, like Sir David Monro of Nelson, preferred to see them as glorified parish councils – a minimalist view.⁵⁸ Others, like James Macandrew of Otago, had an exalted view.⁵⁹ But even those in favour of a unitary government, such as JR Godley, recognised the independence instincts that prevailed in the 1840s and 1850s.⁶⁰

The agitation by the settlers culminated in 1846, when the United Kingdom Parliament passed the New Zealand Constitution Act 1846,⁶¹ which established our first provincial system with two provinces, "New Ulster" and "New Munster". By cl 5 of the 1846 Bill, these provinces were empowered to "enact laws, statutes and ordinances for the peace, order and good government".⁶² For all pragmatic purposes, this constitution was suspended by Governor George Grey until the passing of the New Zealand Constitution Act 1852 was passed.

This Act was superseded by the New Zealand Constitution Act 1852.⁶³ The 1852 Act gave New Zealand a settled, semi-federal system of government.⁶⁴ This provincial system has since been described as "quasi-federal".⁶⁵ The "quasi" qualifier is necessary as there was no formal division of

58 The author would here like to acknowledge the contribution of the referee to a previous draft of this paper. See also RE Wright-St Clair *Thoroughly a Man of the World: a Biography of Sir David Monro* (Whitcombe & Tombs, Christchurch, 1971); and RM Allan, NM Taylor and P Cocks *Nelson: A History of Early Settlement* (AH & AW Reed, Wellington, 1965).

59 See AH McLintock *The History of Otago: the Origins and Growth of a Wakefield Class Settlement* (Centennial Historical Publications, Dunedin, 1949); EA Olssen *A History of Otago* (J McIndoe, Dunedin, 1984); TM Hocken *Contributions to the Early History of New Zealand* (S Low, Marston and Co, London, 1898); and J Dunmore *Wild Cards: Eccentric Characters from New Zealand's Past* (New Holland, Auckland, 2006).

60 Morrell, above n 22, at 15. See also CE Carrington *John Robert Godley of Canterbury* (Whitcombe & Tombs, Christchurch, 1950).

61 New Zealand Constitution Act 1846 (Imp) 9 & 10 Vict c 103.

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

63 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72.

64 "New Zealand's Nine Provinces (1853–76)" (Hocken Collection Bulletin 31 March 2000).

65 At 2; David Gordon Herron "The Structure and Course of New Zealand Politics, 1853–1858" (Thesis (PhD), University of Otago, 1959) at 1; and Ron Watts "Federalism Today" (paper presented at the International Conference on Federalism 2002, Saint Gallen, 2002). According to Watts (at XX), quasi-federalism is where:

... the overall structure is predominantly that of a federation but the federal or central government is constitutionally allocated some overriding unilateral powers akin to those in unitary systems that may be exercise in certain specified circumstances.

sovereignty, and "the provinces were financially very much dependent on the General Assembly".⁶⁶ It could even be argued that the Constitution was "quasi-federal" in a way not very different from the system established by the British North America Act 1867 (Imp) (BNA),⁶⁷ which evolved into the Canadian federal system we know today.⁶⁸ Under this Act, however, the provincial governments were not represented in the General Assembly, nor was there any such element of federalism in the Legislative Council (as there was, for example, in Canada under the BNA).

Under s 2 of the 1852 Act, the country was divided into six provinces: Auckland, New Plymouth, Wellington, Nelson, Canterbury and Otago. Section 3 of the Act (which determined the structure of the provincial legislatures) was entrenched.⁶⁹ However, under s 19, these provinces were given only restricted legislative powers. Nevertheless, there was a vertical division of power, both regarding the executive and legislative branches of government, the latter being a trademark of federal states. The Act ensured that the provinces were kept under the legislative and financial control of the General Government.⁷⁰ Section 32 established a General Assembly constituted of the Governor, an upper house (the Legislative Council) and the House of Representatives. The Council's absence of provincial politicians – members being appointed by the Governor and later on by the central government – made it more centralist than the House of Representatives.⁷¹ The General Assembly was now entrusted with making "laws for the peace, order, and good government of New Zealand".⁷² The provinces had the authority to pass legislation,⁷³ although the Governor had a reserve power to veto such legislation,⁷⁴ and the Crown's right to disallow provincial Acts within two years of their passage was preserved.⁷⁵ Provincial councils would manage such things as providing public works (including railways) and immigration. Courts, crime, customs, coinage, ports, weights and measures, banking, shipping, Crown lands, marriage and wills were the responsibility of the General Assembly (the national government).⁷⁶ Social welfare (in the fields of

66 Morrell, above n 22, at 55–57.

67 British North America Act 1867 (Imp) 30 & 31 Vict c 3.

68 See for example JR Mallory "The BNA Act: Constitutional Adaptation and Social Change" (1967) 2 RJT 127.

69 At 13.

70 At 286.

71 At 62 and 66.

72 New Zealand Constitution Act 1852 (Imp) 15 & 16 Vict c 72, s 53.

73 Section 18.

74 Section 29.

75 Section 58.

76 Section 19.

health and education) was carried out by the provinces.⁷⁷ The key point is that the "role of national organisations whether private or public was less important than it is today."⁷⁸

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

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

The last straw came when Sir Julius Vogel's attempt to create a major forest conservation plan for New Zealand encountered hostility from provinces unwilling to transfer lands to the General Government.⁷⁹ As a result, Vogel supported the abolition of the provinces and public opinion sided with him. Calls to abolish were debated in the General Assembly as early as 1871. This was finally enacted by the Abolition of Provinces Act 1876.

A Competing Constitutional Designs

In this section I canvas the competing approaches to the constitutional designs of 1846 and 1852: the first is in the spirit of subsidiarity and places legislative powers closer to the constituency in the form of municipalities or provinces with wide legislative powers. The other suggested that legislative power should remain the domain of a central government.

In 1845, the then British Prime Minister, Sir Robert Peel, was of the opinion that "the best plan would be the formation of municipal government, with extensive powers of local taxation, and of meeting all local demands."⁸⁰ In particular, he added that "a system of proprietary government,

⁷⁷ Morrell, above n 22, at 75.

⁷⁸ Wood, above n 1, at 359.

⁷⁹ See Graeme Wynn "Conservation and Society in Late Nineteenth-Century New Zealand" (1977) 11 *New Zealand Journal of History* 124.

⁸⁰ (19 June 1845) 81 *GBPD HC* 950.

which implies control over the local Government, to be divided with the Crown, would be one from which no good could arise."⁸¹ He was of the opinion that:⁸²

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

Similarly, Lord John Russell (1st Earl Russell) was of the opinion that "one of the primary measures should be the establishment of municipal government."⁸³ Lord John Russell referred to the instructions given in December, 1840, to the Governor of New Zealand to promote, as far as possible, the establishment of municipal and district governments for the conduct of local affairs.⁸⁴ The other view was articulated by John Arthur Roebuck:⁸⁵

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

Eventually, the 1846 Act provided for municipal corporations but only with the powers of English boroughs. By 1848, Westminster passed a Suspending Act under which those parts of the 1846 Constitution dealing with establishment of provincial assemblies and the General Assembly were not to come into force for another five years. This was due to the instigation of the then Governor of New Zealand, Sir George Grey, who argued that the Act would undermine Māori interests. The Earl of Lincoln provides further explanations of the constitutional design:⁸⁶

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

81 (19 June 1845) 81 GBPD HC 952.

82 (23 July 1845) 82 GBPD HC 998.

83 (19 June 1845) 81 GBPD HC 934.

84 (23 July 1845) 82 GBPD HC 1015.

85 (30 July 1845) 82 GBPD HC 1236.

86 (14 February 1848) 96 GBPD HC 582–583 (emphasis added).

The suspension provoked resistance from the settlers, who self-organised into Constitutional Associations. The first was launched in Wellington in December of 1848. Soon after, advocates of these Associations left for Britain. These included Charles Clifford of Wellington, FA Weld, also of Wellington, Henry Sewell of Canterbury, and William Fox, the official representative of the Associations in Britain. These advocates united in England with Edward Gibbon Wakefield (the Director of the New Zealand Company) to attempt to lobby the British Government. The 1852 Act is likely to have been drafted at the home of Sir Charles Adderley by him, Wakefield, and these advocates.⁸⁷ Sir John Pakington (2nd Baronet) explains the 1852 constitutional design options that were on the table in these terms:⁸⁸

[There were] three alternatives ... [First:] giving Provincial Legislatures, [Second:] follow the precedent of the Australian Government Act of 1842 [sic], and give ... municipal bodies with enabling Clauses to legislate on certain subjects, and that they should be restricted from legislating on all subjects beyond those specified ... [Third:] ... [to leave] to the Central Legislature, when formed, to provide for the municipal government of these separate districts in such manner as they might think best ... the House would see that between the [first and second alternatives] the distinction was ... one of name than of fact. *[The Bill's] intention was that ... Provincial Legislatures should, in fact, be municipal ...*

The issue could be formulated as one of tension between federal and unitary government. WP Morrell correctly identifies the evolutionary aspects of this tension:⁸⁹

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

In an evolution similar to that of Canada under the BNA Act 1867, Sir George Grey pursued a policy of revenue localisation that transferred power from the central government to the provinces.⁹⁰ The provinces "passed most of the legislation of New Zealand",⁹¹ through the "compact of 1856", all the revenue from the sale of Crown land was allocated to the provinces, as well as three-eighths of the customs revenue. This revenue allowed the provinces to carry out colonisation, which involved organising immigration and public works, notably roads (and later railways) and land settlement.

87 Department of Justice, above n 56.

88 (4 June 1852) 122 GBPD HC 18 (emphasis added).

89 Morrell, above n 22, at 261.

90 At 64.

91 At 80.

But in the 1850s New Zealand was suffering from a "governance problem" due to the lack of sufficient settlers able and willing to make politics a profession,⁹² as well as from the changing nature of New Zealand's social fabric:⁹³

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

Given this demographic change, the concept of provincialism became insufficiently rooted in, and supported by, the settlers, and soon afterwards, the public developed a strong sentiment that the provinces should be abolished.⁹⁴

These demographic changes also fermented a third dimension of the "governance problem" in the form of a (perceived) risk of political fission.⁹⁵

B Structural Analysis of the Acts

As a starting point, the structure of the 1846 and 1852 Acts suggests a legislative intent in the spirit of subsidiarity. The emphasis in both Acts is on the provinces rather than central government. This resulted in the provinces assuming the lead in political life.⁹⁶ Sections relating to the central government appear much later in the Acts, only after an anatomy of the provincial system is provided. Both Acts start by delineating the provincial system's structure and operation, which suggests that the provinces are the main scale of governance. The "centre of gravity" of both Acts is the vertical separation of powers between the provinces and the central government.

The New Zealand Constitution Act 1846 combined provincial and municipal ideas. Municipalities were combined into two provinces: New Ulster in the North and New Munster in the South.⁹⁷ In the Act, provinces are created under s 3. A "General Assembly" is established only later on, in s 5. This Assembly was constituted from the provincial governments. Moreover, later sections confer extensive powers on the governors of these provinces, such as issuing proclamations dividing the provinces into counties,⁹⁸ making grants of wastelands,⁹⁹ appointing judges,¹⁰⁰ administering

92 Wood, above n 1, at 64–65.

93 Morrell, above n 22, at 263.

94 (23 July 1875) 17 NZPD HC 50.

95 Wood, above n 1, at 29.

96 Wood, above n 1, at 2.

97 Morrell, above n 22, at 22.

98 New Zealand Constitution Act 1846 (Imp) 9 & 10 Vict c 103, s 13.

99 Section 14.

100 Section 16.

civil as well as military officers¹⁰¹ and granting free and unconditional pardon to convicted offenders.¹⁰²

Similarly, the 1852 Act established provinces in s 2. The "General Assembly" is established only in s 32. Now, however, provincial governors are referred to as "Superintendents", suggesting intent to shift power from the provinces towards the General Government. Notwithstanding, s 18 gave Superintendents and Provincial Councils powers to make law for the "peace, order, and good government" of their respective provinces. Section 53 confers similar power on the General Assembly to make laws for the "peace, order, and good government of New Zealand". The same section gave the General Assembly power to control and supersede any provincial laws found repugnant to the laws made by the General Assembly. The Act conferred wide law-making powers on the provinces, limited only in 13 areas reserved for the General Government.¹⁰³ Moreover, the House of Representatives was now constituted through direct elections rather than through the provinces.¹⁰⁴

There are important similarities between the structure of the New Zealand 1846 and 1852 Acts and constitutional Acts from other jurisdictions. In fact, these other Acts seem to suggest that the role of local government would have been emphasised more in the New Zealand Act, probably due to influences from the Treaty of Waitangi.¹⁰⁵ For example, the BNA Act 1867, which created a federal dominion in Canada, starts with sections creating the provinces.¹⁰⁶ However, it then moves directly to accentuate the powers of the Governor General and the central government. Hence, pts III and IV of the Act are dedicated to the horizontal separation of powers at the federal level. Only in pt V does the Act continue discussing the vertical separation of powers between the provinces and the central government. Sections 91 and 92 of the BNA perform a role similar to ss 18 and 19 in the New Zealand Constitution Act 1852 (giving the Provinces limited legislative powers).

The South Africa Act 1909 (Imp)¹⁰⁷ and the Commonwealth of Australia Constitution Act 1900 (Imp)¹⁰⁸ also have a very similar structure. Even the Federal Constitution of the Swiss

101 Section 18.

102 Section 19.

103 Section 19.

104 Section 41.

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

106 British North America Act 1867, ss 5 and 6.

107 South Africa Act 1909 (Imp) 9 Edw VII c 9.

108 Commonwealth of Australia Constitution Act 1900 (Imp) 63 & 64 Vict c 12.

Confederation of 1999 has a similar structure to New Zealand's 1852 Constitution. While Switzerland has federal, cantonal and municipal levels of governments, in New Zealand we had the General Assembly, the provinces and municipalities. The Swiss Federal Constitution starts with listing the canton constituting the federation.¹⁰⁹ The sovereignty of cantons is limited by the Federal Constitution.¹¹⁰ However, in a fundamental difference, the Federal Constitution was amended to include art 5a: "[t]he principle of subsidiarity must be observed in the allocation and performance of state tasks". This subsidiarity provision was adopted by a popular vote on 28 November 2004 and came into force on 1 January 2008. Federal authorities are discussed in detail only at the end, in title 5. Both New Zealand Constitution Acts of 1846 and 1852 have a similar contemplation of subsidiarity, where sections constituting the provinces are given precedence over those that deal with the General Government. Compare this with the New Zealand Constitution Act 1986, where the emphasis is exclusively on the central government and the horizontal separation of its powers.

V ENVOI

Some suggest the provinces were simply a pragmatic interim solution for the difficulties associated with establishing municipal governments at an early stage of colonisation.¹¹¹ In addition to the "governance problem" discussed above, technological advancement could hence be seen as precipitating the abolition of the provincial system.¹¹² Improvements in communication, partly due to the Public Works Policy carried out by the provinces and later on by the General Government – but also due to technological innovation ushering the advent of the steam engine and the telegraph – made the provincial system less of a necessity than in previous years.

Notwithstanding, the abolition has been described in the New Zealand Parliament as a "revolution".¹¹³ Some commentators suggest that the abolition "was perhaps inevitable, but the failure to develop in their place a satisfactory system of local government is profoundly regretted now by most students of New Zealand history."¹¹⁴ Even today, some argue that the Local Government Act 2002 fails to put into practice the transfer of power that was originally envisaged.¹¹⁵

109 Federal Constitution of the Swiss Confederation 1999, art 1.

110 Article 3.

111 See the discussion in Morrell, above n 22, at 22.

112 Wood, above n 1, at 37; and Herron, above n 65, at 389.

113 (23 July 1875) 17 NZPD HC 49.

114 JB Condliffe *New Zealand in the Making: A Study of Economic and Social Development* (George Allen & Unwin, London, 1959) at 33.

115 See, for example, Philip McDermott "A View from the Antipodes: Comparing the Lombard and New Zealand Ways of Governance" in Alessandro Colombo (ed) *Subsidiarity Governance: Theoretical and Empirical Models* (Palgrave Macmillan, New York City, 2012) 73 at 92.

Today, New Zealand has a three-tier governance structure under the Local Government Act 2002 and its amendments, where regions are created by the authority of the central government. Local government in New Zealand has only the powers conferred upon it by Parliament.¹¹⁶ These powers have traditionally been distinctly fewer than in some other countries. For example, police and education are run by central government, while providing low-cost housing is optional for local councils. Many used to control gas and electricity supply, but nearly all of that was privatised or centralised in the 1990s.

The pragmatic aspects of the New Zealand experiment with subsidiarity need to be emphasised today. Today, sovereignty is limited by increasing global economic integration. States are no longer able to protect themselves from the negative actions of other states or external groups.¹¹⁷ Today, "[e]merging forms of 'complex sovereignty' [lead to the] emergence of polycentric centers of power within the state."¹¹⁸ This institutional jurisprudence:¹¹⁹

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

Conversely, some argue that "[t]he claim that globalization is undermining sovereignty is exaggerated and historically myopic".¹²⁰ Instead, while globalisation "has highlighted some tensions between norms and behavior ... there is no evidence that this is leading to some transformation of the international system".¹²¹ The argument suggests that, historically, states never enjoyed complete sovereignty. Moreover, the concept of sovereignty itself is too chameleonic to suggest that sovereignty *per se* is undermined. A more realistic understanding of the history of states suggests limitations all states have faced at all times. The claimed undermining of sovereignty by globalisation is usually asserted through an analysis of its effect on Westphalian sovereignty as a benchmark. In particular, the claim is that the universality of the human rights discourse promoted by globalisation has brought the Westphalian system under unprecedented assault by excluding

¹¹⁶ See Part 2 of the Local Government Act 2002.

¹¹⁷ Steven Lee "A Puzzle of Sovereignty" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate, Aldershot (Hampshire), 2006) 29 at 29.

¹¹⁸ Kanishka Jayasuriya "Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?" in Neil Walker (ed) *Relocating Sovereignty* (Ashgate, Aldershot (Hampshire), 2006) 367 at 367.

¹¹⁹ At 372.

¹²⁰ Stephen D Krasner "Globalization and Sovereignty" in David A Smith, Dorothy J Solinger and Steven C Topik (eds) *States and Sovereignty in the Global Economy* (Routledge, London, 1999) 34 at 34.

¹²¹ At 49.

external authority. However, historically (from the middle of the seventeenth century to the first part of the nineteenth century) such external scrutiny is evidenced through factors such as concerns about religious toleration. In fact, the Treaty of Osnabrück – part of the Peace of Westphalia in 1648 – was intended to end a series of religious (and other conflicts) within the Holy Roman Empire. Later on:¹²²

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

Others argue that the effect of globalisation on sovereignty is part of a cyclical process. The argument is that "advocates of the globalization thesis concur with critics in seeing present transformations as not novel except for their scale, scope and complexity."¹²³

The evolving global importance of local governments "manifests itself in international legal documents and institutions, transnational arrangements, and legal regimes within many countries".¹²⁴ Localities are now given domestic jurisdiction based on international law instruments.¹²⁵ Subsidiarity is promoted by international organisations such as the World Bank, and by supra-national entities such as the European Union. We are now evolving towards a new world order where local governments are becoming the key actors on the "international" stage.¹²⁶ This trend is increasing the need for coordination between localities and suggests a growing need for local governments to have a say in creating and adjudicating "international norms".¹²⁷ The question now is "who will grant [localities] the global 'charter' to incorporate, and under what conditions".¹²⁸ The principle of subsidiarity provides the platform for answering this question.

The trend towards global governance resurrects the principle of subsidiarity as a platform for constitutional design. Localities are taking the lead in this emerging world order, where nation states still have an influential role to play, but where local governments are becoming increasingly influential.

122 At 43.

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

124 Yishai Blank "Localism in the New Global Legal Order" (2006) 47 Harv Intl LJ 264 at 263–264.

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

126 Blank, above n 124, at 269.

127 At 272–273.

128 At 278.

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