New Philosopher Writers' Award

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(Suggestions for a heading welcome)

For many Australians, mention of the 'constitution' elicits an almost Pavlovian rejoinder. "It's the vibe", typically followed by a wry smile and expectant pause. For many, this is the extent of their knowledge of Australia's highest legal instrument. But what *is* the vibe of the constitution? Perhaps more importantly, what *is* a constitution? When I attempt to teach my students constitutional theory, I start by positing that the study of constitutional law and constitutional theory is the study of power. A few heads nod slowly in acknowledgment. Others stare blankly ahead. For law students, any discussion of power, whether it be legislative, executive or judicial - is grounded in a discussion of constitutionality. That is, does power have a constitutional basis? The constitution, if you like, is the wellspring or source of legitimate power. At least for lawyers. At least in theory.

For many law students, if power is grounded in the constitution that is good enough. We can pass go and collect $200 dollars. No need for further inquiry. To enquire beyond this point and to press the issue of sovereign legitimacy, in the ordinary course of things, is likely to see me lose a good portion of the cohort to cat videos or Instagram photos of their friends' culinary exploits. It's hard to compete with photos of coffee and toasted sandwiches on a Tuesday afternoon. But it is in asking these deeper questions where the really interesting stuff begins.

At its simplest, constitutional law is the study of power. It is the study of the laws that regulate the relationship between the state and citizen. And, as is likely apparent, there is a pronounced power imbalance in this equation. It's the study of the division of power, and of the devices, doctrines and theories deployed in an attempt to constrain the arbitrary exercise of state power. An attempt, if you like, to level the playing field. After all, absolute power corrupts absolutely, as Lord Acton would caution us.

But how did the state come to such power, and why can governments wield such power over its people? And that is a serious question. Well, the simple answer is that we all agreed to it. Or so the story goes. Social contract theory presupposes that, at some time immemorial (before iPhones and menulog), we all decided in our collective wisdom to surrender some of our power – our unfettered liberty – to a central authority. In return, we receive safety and protection from the central authority we call the state. Furthermore, as part of this agreement or contract, it is the state that gets to decide (through its laws) who is included as part of this agreement. If you are included in the fold, you are deemed to be a citizen. This may be automatic or acquired. As Hannah Ardent put it, citizenship is the *right* to have rights. With this recognition flows the full complement of rights, duties and obligations. It is a reciprocal relationship, after all. Social contract theory is an *ex post facto* idealised conception of the origins of the state. Put more simply, it's a made up story to explain what already is. A fairy tale with a very real bearing on reality.

"But why would we decide to do this?" one of my students in the second row retorts. Well, it's all about the good life. If you were to ask Aristotle, he would likely say that as human beings we are

inexorably political. As political beings, we need the state to truly flourish. Hobbes is less romantic about our prospects. For him, without government, we would find ourselves in a state of nature whereupon we would experience war upon war, reprisal upon reprisal. In this state of nature, fig-leafed and frostbitten, Hobbes contends that life would be 'solitary, poor, nasty, brutish and short'. That is, of course, assuming we do not live with Bear Grylls. It is therefore in our best interests, Hobbes conjectured, to live under the protection of the state. And it is the constitution that legitimises the existence of the state, and by extension, the state's power. A constitution 'constitutes' the state. It sets up the machinery of government. It is a nation's highest law, the wellspring from which all other laws originate. It espouses a nation's core values and highest aspirations. It is an intergenerational compact, and for that reason the closest approximation of the social contract.

Constitutional law is study of the origin, distribution and exercise of power. A constitution binds in perpetuity unless formal amendment is sought. In Australia, that is by referendum and only 7 out of 44 referenda have been successful since the Constitution's inception in 1901, and that statistic doesn't look like changing anytime soon. Formal change is difficult. Revolution might indeed prove an easier. But what if we decide we want to opt out of the system? What if our own conception of the good life doesn't require a state and the centralisation of power? What if we want to live a life free of constraint, behind our fig leaves in unfettered liberty? Shy of moving to Byron Bay, or setting up our own Hutt River principality – there is not much we can do. There is no 'opt out' clause for the social contract. Not very social of it. To do so would be to live outside of the law, beyond the reach of the state. One would be rendered an *outlaw*. Surprisingly, the taxation office doesn't recognise this option.

When we peel back the layers of the constitutional onion further in the search of legitimacy, we encounter the concept of sovereignty. It is the concept of supreme power or authority. But if the constitution derives its legitimacy from the sovereign, where does the sovereign derive its legitimacy? This is where we start to approach the abstract. God? The Church of the Flying Spaghetti Monster? Others may more seriously posit that the source of sovereignty is justified by and through a *divine* right to rule. You may be sceptical. Once peeled, this is what the layers of the onion reveal.

More pragmatic answers may be found at international law. For context, we must return to a time when the world was smaller, when the cartographer's tool kit was the quill, much less the satellite. Back to a time when the Pope was busy dividing the world between Spain and Portugal by papal decree, when uncharted territories where marked out by serpents and cliffs. At this time, international laws were developing to frame the activities of the maritime superpowers of the day as they continued to expand their empires across the globe, and sought to justify and govern emerging relationships with non-Europeans.

Under international law, the roadmap to unfettered power was as follows. Simply put, when you happen upon distant shores in your flotilla with flags at the ready, you are confronted with one of two possibilities. There are either people there, or there are not. Enter international law's prescribed modes of territorial acquisition, its rule book if you will. If people are there, you either conquer them (sovereignty by conquest) or you agree to share territory (sovereignty by cession). The latter, however, is usually preceded by some show or demonstration of force. Or, of course, a third option is you could just leave.

On the other hand, if people are not there, you declare the foreign land to be *terra nullius* (land belonging to no one). This was the moral and legal justification for acquiring territorial sovereignty

over new lands by way of settlement. But what happens if you declare lands to be *terra nullius* where there are people there, say for instance, the longest continually surviving culture in the world? And not just a few. It has been estimated that prior to the British colonisation of Australia, Aboriginal Australians lived on the continent for 70,000 years, with a cumulative population over that time of 1.6 billion people. No problem though. If you are the mighty empire upon which the sun never sets, you simply erect your union jack on terra firm, declare *terra nullius*, and hope no one notices. Then, as if by magic, all the laws of your nation apply. That magic, unfortunately for the empire, does not extend to making the inhabitants of the land you have declared devoid of people disappear. As Jared Diamond suggests, guns, germs and steel are a particularly effective means to that end.

In 1841, over one hundred and fifty years before Eddie Mabo took his case to the High Court of Australia, a lesser-known case of *R v Bonjon* concerning the murder of an Aboriginal man (by another Aboriginal man, Bonjon) was decided in the District of Port Phillip. The issue revolved around whether the Court (and by extension the British Crown) could exercise jurisdiction over Bonjon, given he and the victim where both indigenous. Judge Willis went on to opine that, 'the colonists and not the aborigines are the foreigners; the former are exotics, the latter indigenous, the latter the native sovereigns of the soil, the former uninvited intruders.' After this bold pronouncement, Willis was promptly sent back to Britain where he would do less damage, never to work as a judge again.

In 1975, the International Court of Justice (ICJ), the world court with a jurisdiction to resolve matters between nation states, considered the issue of *terra nullius* as it related to the territory formally known as the Spanish Sahara in North-west Africa. In the Western Sahara Case, the ICJ gave an advisory opinion on whether or not, at the time of Spanish colonisation, the territory in question was *terra nullius*. The request for the opinion was in response to a referendum on the matter of self-determination to be held in the region. Neighbouring Morocco and Mauritania had a vested interest in this determination given the power vacuum to be left in the wake of Spain's decolonisation process and subsequent exit from the region. Both states purported to have had pre-existing legal ties with the local inhabitants prior to Spanish colonisation. In its opinion, the ICJ specifically *rejected* the notion that lands inhabited by nomadic peoples may be acquired on the basis of *terra nullius*. Revelatory, to be sure. The law has never been fast to develop or evolve, and this is true of international law also. If law were an animal or a business, one may safely assume it would have gone the way of the dodo or Kodak. So slow was international law in this regard that the race had already been run and everyone has packed up and gone home. Regarding Spain, that was quite literally the case.

In 1992, the landmark constitutional case of *Mabo (No2)* addressed the legal elephant in the room. The Australian High Court, relying on the Western Sahara case, stated, 'if the international law notion that inhabited land may be classified as terra nullius no longer commands general support, the doctrines of the common law that depends on the notion…can hardly be retained…'. But the very power of the High Court to decide this case, and all other cases, is sourced from the Constitution, the validity of which derives from legitimate assertions of sovereignty. Herein lies a critical problem, to say the least. The High Court stopped tantalisingly short of making a declaration of sovereign illegitimacy, as the inference is obvious for all to see. As Nietzsche stated, 'all things are subject to interpretation, whichever interpretation prevails at a given time is a function of power and not truth'. If the court had found that British claims to sovereignty were illegitimate, we would have been in a Grandfather paradox staring into a legal abyss. In a parallel universe, at the moment the ink of the judgement dried, the High Court would have theoretically disappeared into thin air. The source of its very existence rendered illegitimate. At this point, we enter the realm of

the Dolorean and Marty McFly. To return to when Australia was truly *terra nullius*, would require 70,000+ years of Delorean time-travel to a time before people inhabited the great southern land. Notwithstanding, the High Court continues to operate, the constitution remains, the state continues to exercise its power and life continues as 'normal'.

How do we fix this? Can we fix this? Can we render a constitution that derives its legitimacy from an illegal claim to sovereignty *ex post facto* legitimate? Does popular assent and subsequent affirmation remediate a poisoned wellspring? Thomas Jefferson stated that, 'every constitution … and every law, naturally expires at the end of nineteen years. If it be enforced longer, it is an act of force, and not of right'. His reference to nineteen years approximated a generational gap at the time of writing. The sentiment remains. The social contract must be reaffirmed by each subsequent generation if it is indeed to remain 'social' at all.

Returning to that Pavlovian rejoinder, and to quote lawyer Dennis Denuto in full as he so eloquently addressed the bench trying to save the Kerrigan's home from compulsory acquisition, 'In summing up, it's the constitution, it's Mabo, it's justice, it's law, it's the vibe and aah no that's it, it's the vibe. I rest my case.'

Indeed, it is all of those things. But most importantly, it is the vibe. And the vibe is, and always has been, power.