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“Imposed constitutions”

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1pm–2pm

Second floor, Room 224

Melbourne Law School

185 Pelham Street, Carlton



Abstract: The concept of an imposed constitution seems simple and clear. If a written constitution is imposed on a people without their full agreement, that is an imposed constitution, though opinion may differ over what constitutes the ‘full agreement’ of a people for this purpose. Strictly speaking, ‘full agreement’ will require that a majority of the people consent to a constitution through a formal procedure. However, it is unusual to regard every constitution lacking ‘full agreement’ in this strict sense as an imposed constitution. And we may say that, regarding every constitution, at least some part of people acquiesces in it, rather than consenting to it. Whether a constitution is imposed or not is a question of degree, not a question of kind.

Inherent in this concept of imposed constitution is the assumption that constituent power belongs to the people. Therefore, a constitution which a monarch concedes to his or her subjects (*constitution octroyée*) is also a kind of imposed constitution. The French Charter of 1814 is a model case which influenced the conceded constitutions of Southern German states of 1818-1820, and indirectly the Constitution of the Empire of Japan of 1889.

If a constitution is imposed, it is usually supposed that it lacks legitimacy because the people themselves, as the inherent holders of constituent power, should be able to establish their own constitution. The current Constitution of Japan has sometimes been attacked as an illegitimate constitution imposed by the occupying forces, though we can pose a question of whether it was imposed upon the people at all. Since the concept of the imposed constitution is predicated on the theory of constituent power (*pouvoir constituant*) of the people, this concept loses its pertinence if the validity and legitimacy of constitutions cannot be explained by the theory of constituent power.

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