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Nullius Imperium

A Missing Concept in the Constitutional Theory of Decolonisation

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Abstract. Comparative constitutional theory has a rich vocabulary for how states are designed — presidential or parliamentary, federal or unitary, rights-based or institutional — but a thin one for whether a state was legitimately founded at all, for the peoples it governs. This paper names the missing category. *Nullius imperium* — the presumption of an absence of government — is the political analogue of *terra nullius*. Where the latter fiction licensed the appropriation of customary land by denying prior ownership, the former licensed the appropriation of customary authority by denying prior governance: it treated the polities of Melanesia as politically blank, and so as requiring no treaty, no negotiation, and no settlement. We argue that this presumption was constitutive of the colonial state in the British Solomon Islands and was inherited intact by its post-colonial successor, producing not underdevelopment but a specific and diagnosable constitutional defect — a political order founded without the consent of the political formations it governs. We argue further that this defect is reversible, and that its reversal — Indigenous Constitutionalism — names an outstanding backlog of constitutional settlements. The concept generalises beyond Melanesia to any post-colonial order founded on the same fiction; that generalisation is set out here as a research programme, not a settled result.

Keywords: *nullius imperium · terra nullius · Indigenous Constitutionalism · Melanesia · Solomon Islands · first nations · customary governance · decolonisation · constitutional settlement*

Status & apparatus. This paper introduces the concept in summary form; the full argument, evidence, and scholarly apparatus are developed across a three-volume work cited here as forthcoming in the *Journal of Indigenous Constitutionalism* (Roughan, Foukona & Tagini, forthcoming). It is the concept's citable point of entry, not its complete statement. Claims are tiered: the historical and structural case is stated as established; the wider, planetary generalisation in §7 is stated as a research programme, not a result.

1. The missing concept

Comparative constitutional scholarship knows how to compare the machinery of states. It distinguishes presidential systems from parliamentary ones, federal architectures from unitary ones, entrenched bills of rights from parliamentary sovereignty. What it accommodates less readily is a prior question — not which institutional design is most efficient or most protective of rights, but what a constitutional order must satisfy to be legitimate in the first place for the peoples it claims to govern. That question is easy to overlook where the legitimacy of the state is not seriously in doubt. It becomes unavoidable where a state was assembled, at decolonisation, out of political communities that were never asked.

This paper introduces a concept for naming that condition: *nullius imperium*, the presumption of an absence of government. The term is deliberately built on the more familiar *terra nullius* — the doctrine, now widely repudiated, that territory belonging to no one was open to acquisition, and that the customary occupation of land by Indigenous peoples did not count as ownership (Borch, 2001; Fitzmaurice, 2007). *Terra nullius* has been dismantled in the courts and in the scholarship.

Its political twin has not been named, and so has not been dismantled. *Nullius imperium* is the presumption that pre-colonial societies possessed no supra-local, supra-cultural political organisation worth recognising: no polities, no sovereigns, no counterparts with whom the terms of rule had to be negotiated. Where *terra nullius* erased ownership, *nullius imperium* erased authority.

Our claim is that this second erasure did specific constitutional work, and continues to. It underwrote the unilateral proclamation of the British Solomon Islands Protectorate in 1893 without treaty or cession. It licensed the substitution of colonial administration for the governance systems already operating. And — this is the part that matters for the present — it was not repudiated at independence. The post-colonial state inherited the presumption along with the borders, the revenue system, and the administrative apparatus. The result is a state whose dysfunction is routinely misdiagnosed as immaturity, weak capacity, or cultural incompatibility with modern governance, when it is better understood as the predictable downstream consequence of a founding that never took place: a settlement, between the state and the first-nation polities it governs, that the founding fiction had declared unnecessary.

We develop the argument in six moves. We set the concept beside *terra nullius* and specify what the analogy carries (§2); make the historical case that functioning polities existed across the Melanesian archipelagos before and independently of European contact (§3); show how that internal fiction was compounded by the architecture of the international state system into which decolonisation delivered the new state — a double foreclosure (§4); trace the governance consequences that follow from the unreversed fiction (§5); set out the reversal, Indigenous Constitutionalism, as the constitutional response the fiction forecloses (§6); and finally state, and deliberately hold at the level of a programme, the wider claim that the concept travels beyond Melanesia (§7).

2. From *terra nullius* to *nullius imperium*

The force of the analogy lies in a structural similarity, not a loose resemblance. *Terra nullius* operated as a legal presumption with three features: it declared a category of thing (land) to be unowned; it did so by refusing to recognise the form in which ownership actually existed (customary tenure); and it thereby licensed acquisition without the consent that recognised ownership would have required. Its repudiation — most famously in the Australian jurisprudence — turned precisely on showing that the middle step was false: customary systems were systems of ownership, and the emptiness of the land was a construction, not a discovery (*Mabo v Queensland* (No 2), 1992).

Nullius imperium has the same three-part structure, transposed from property to authority. It declares a category of thing (government) to be absent; it does so by refusing to recognise the form in which government actually existed (customary, often multilingual, polities of varying scale and reach); and it thereby licenses the assumption of authority without the negotiated settlement that recognised government would have required. The parallel is exact where it matters: in both cases a real and functioning Indigenous institution is rendered invisible by a category that admits only its European form, and in both cases that invisibility does constitutional work — it removes the requirement of consent.

Two clarifications guard the analogy against overreach. First, the claim is not that Melanesian polities resembled European states. It is the opposite: the presumption of blankness followed precisely from measuring Melanesian political order against the template of the centralised territorial state and finding it absent. Authority that was distributed, relational, plural, and exercised through kinship and exchange rather than through a bureaucratic apparatus was read as no authority at all. The error was not empirical carelessness so much as a category that could see only one kind of government. Second, the analogy is asymmetric in its present force. Terra nullius has been named and, in important jurisdictions, overturned; the work of nullius imperium continues, unreversed, because it has not been named. Naming it is the precondition of contesting it — which is why a constitutional field, rather than a historical footnote, is at stake.

3. Constructing political blankness: the historical case

If nullius imperium were an accurate description rather than a fiction, the argument would collapse at the first step. It is not, and the historical record is unusually clear on the point.

The founding instrument is a useful place to begin. The British Solomon Islands Protectorate was proclaimed in 1893 without treaty, cession, or negotiated instrument of any kind — an administrative act grounded in the Pacific Order in Council and the wider apparatus of the Foreign Jurisdiction Act, rather than an agreement with any local sovereign (Bennett, 1987). The absence of a treaty is not a technicality. In settler jurisdictions where treaties were made — however unequal, however dishonoured — the treaty at least records the recognition that there was a counterpart with whom to treat. Its absence in the Solomons, as across Melanesia, is the documentary trace of nullius imperium: there was no treaty because, on the presumption, there was no one to treat with.

Against the presumption stands a substantial body of archaeological, ethnohistoric, and ethnographic evidence for functioning pre-colonial polities. In the Western Solomons, the Roviana chiefdom presents material evidence of political complexity — monumental sites, the Maja Batu shrine complex, hereditary authority, social stratification, and cosmological legitimation of rule — consistent with a polity of considerable reach (Walter & Sheppard, 2000; Aswani & Sheppard, 2003). That reach was multilingual: political integration across language groups is precisely the supra-local, supra-cultural organisation whose absence the presumption asserts. The Spanish encounter of 1568 supplies an external witness, recording Indigenous governance in operation well before any colonial presence (Amherst & Thomson, 1901). Across the water in Malaita, the political history culminating in the twentieth-century Maasina Ruru movement demonstrates not only pre-existing authority but the capacity to generate an autochthonous constitutional project — an Indigenous attempt to constitute governance on its own terms, which the colonial administration suppressed rather than recognised (Akin, 2013).

The scholarly apparatus that grew up around Melanesia sometimes reproduced the presumption rather than testing it. The recurrent figure of the “big man” — authority as personal, transient, and unstructured — functioned in parts of the literature as an academic proxy for nullius imperium, translating the absence of a European state-form into the absence of political structure as such (Sahlins, 1963; Lindstrom, 1981). Read against the material record of Roviana, Isabel, and Malaita, the generalisation does not hold; but its influence helped keep the presumption of blankness respectable long after the evidence against it had accumulated.

The historical case, then, is not that Melanesia contained states in the European sense. It is that Melanesia contained government, in forms that were real, legitimate to those they governed, and in some cases extensive — and that the colonial and post-colonial denial of this was a construction with constitutional consequences, not a neutral observation about developmental stage. The point has been stated from within Melanesian constitutional practice itself: the Papua New Guinea Constitutional Planning Committee recorded that when Europeans settled in Papua New Guinea “they did not find a political vacuum”, finding instead well-organised, self-sufficient communities with governing systems of their own (Constitutional Planning Committee, 1974; see Kama, 2024).

4. The double foreclosure

The internal fiction was not the only barrier to a founding settlement. It was compounded, at the moment of decolonisation, by the architecture of the international system into which the new state was delivered — so that recognition of first-nation authority was foreclosed twice: once from within, and once from without.

The external foreclosure has three elements. First, the decolonisation settlement conferred on Solomon Islands, at independence in 1978, the juridical shell of Westphalian statehood — territorial integrity, international legal personality, membership of the United Nations — without requiring the internal political compact that would have made that statehood legitimate to the polities enclosed within it. This is the condition the international-relations literature calls negative sovereignty: statehood constituted by external recognition rather than by internal legitimation (Jackson, 1990). Second, the doctrine of *uti possidetis juris* froze the colonial administrative boundary as an international frontier, converting a line drawn for administrative convenience into a container that enclosed multiple first-nation polities together without their consent — and made the container itself legally unquestionable (Ratner, 1996). Third, the financial settlement accompanying independence designed external dependence into the new state from the outset, anchoring its accountability to donors and external institutions rather than to the governed. International law, on this account, did not merely describe the post-colonial state; it produced it, in a form that made internal constitutional settlement not just unnecessary but structurally difficult to demand (Anghie, 2004).

The two foreclosures compound rather than merely coexist. The internal fiction removed the domestic requirement to settle with first-nation polities; the external architecture removed the international space in which such a settlement could have been registered, and handed the new elite a fully-formed juridical state that appeared to need no such settlement to be complete. A political order was thereby constituted that was, in a precise sense, internationally recognised and internally unfounded. The dysfunction that follows is not a failure of that order to work as designed; it is the order working exactly as its double foreclosure determined it would.

5. The governance consequences

If the state was founded without a settlement, the consequences should be visible not as random dysfunction but as a patterned logic running from the unreversed fiction through to recurrent conflict. They are.

The logic begins with a revenue imperative. A state that is internationally recognised but internally unfounded — and financially dependent by design — must nonetheless raise revenue, and it does

so from the one asset base available: the customary resources it governs but does not own. Because the founding fiction holds that there was no prior authority to consent, the extraction of value from those resources proceeds without the consent of the polities that hold them. The mechanism is what we term *involuntary resource taxation*: the state captures rents from legally customary resources at rates far exceeding the returns to the nominal owners, through a licensing and duty apparatus over which those owners have no control. The pattern is documented in detail for the Solomon Islands log-export economy, where over two decades the customary landowners who legally hold the land and the timber received on the order of one per cent of the true value extracted, while the state captured a far larger share through export duty and roughly a quarter of the value was lost offshore through transfer pricing (Islands Knowledge Institute, forthcoming, *The Anatomy of Extraction*). This is not a market outcome; it is the fiscal signature of a state extracting from resources it treats as effectively ownerless.

The consequences of unconsented appropriation are then routinely pathologised. Where communities resist — because a Timber Rights process was conducted without proper consultation, or because benefits flowed to a handful of intermediaries rather than to the tribe — the resulting conflict is read as tribal factionalism, criminality, or the failure of “traditional governance,” rather than as the predictable response of marginalised first-nation polities to an expropriating state. The dynamic is visible at ward scale in the record of logging conflict in Birao Ward, Guadalcanal, where an under-consulted Timber Rights process reignited post-conflict tensions while state institutions declined to intervene (Wairiu & Nanau, 2011). That this pattern was being documented by the Institute in 2011, well before the concept that now explains it was named, is itself part of the argument of this paper: the phenomenon preceded its theorisation.

The contrast between two post-conflict responses sharpens the point. The Regional Assistance Mission to Solomon Islands operated squarely within the logic of the inherited fiction: it restored the apparatus of the state and its capacity to keep order, without reopening the question of the settlement the state had never made. The Townsville Peace Agreement, by contrast, gestured — however partially — toward the settlement the fiction had foreclosed, treating the conflict as something to be resolved through negotiated political agreement between parties rather than through the reassertion of state authority over them. The two responses mark the fork the whole argument turns on: state-building within nullius imperium, or the beginning of its reversal.

6. Reversal: Indigenous Constitutionalism

If the defect is a founding without settlement, the remedy is not reform of the existing machinery but completion of the founding — a settlement, now, between the post-colonial state and the extant polities it governs. This is what we call Indigenous Constitutionalism (IC): not a better version of minority-rights protection within the inherited frame, but the constitutional recognition that first-nation political orders are prior, present, and co-foundational, and that the state owes them a settlement it has never made. The term has a parallel North American usage, describing the written constitutional tradition of Native nations within the United States (Allread, 2026); the Melanesian concept developed here is cognate but distinct, addressing the founding of the post-colonial state itself.

IC rests on an ontology the working-paper record shows the Institute developing well before the doctrine was named: the **Village/Community/Kastom (VCK) domain**, the proposition that

the real unit of governance and economic life in much of Melanesia is not the individual or the state but the embedded social order of village, community, and *kastom* (Roughan, Tagini, Wairiu & Allen, 2011; see also World Bank, 2019). The VCK domain is what *nullius imperium* renders invisible and what IC restores to view: it is the government whose supposed absence the founding fiction presumed. Recognising it is not an act of accommodation — fitting custom into the spaces the state allows — but a reversal of the ontology, treating the VCK order as the constitutional baseline against which the state's authority must be justified, rather than the reverse (cf. Boege, Brown, Clements & Nolan, 2009).

The reversal has a characteristic sequence, which the Melanesian record already illustrates: political agreement is reached first, and the legal instrument follows to register it, rather than the law being imposed and consent presumed. It also carries a characteristic risk, which we state plainly: the pursuit of recognition from the very institutions that produced the foreclosure can reproduce the subordination it seeks to escape. IC is therefore not a request to be accommodated within the northern constitutional order but a claim that the constitutional materials for recognition already exist within Melanesian constitutions — most clearly in the Papua New Guinea constitutional settlement of 1975 (Constitutional Planning Committee, 1974; Narokobi, 1980) — and require completion rather than importation. The reversal, in short, is a constitutional argument made from inside the tradition it restores, not an appeal made from outside it.

Understood this way, IC names an agenda with concrete content: a backlog of outstanding settlements between the state and the polities it governs without legitimate constitutional foundation, and the constitutional means by which that backlog might be addressed. It is that backlog, not any single grievance, that the concept of *nullius imperium* brings into view. The institutional forms of completion can be stated in outline: treaty-level political settlement between the state and first-nation polities, constitutional recognition of the VCK domain as a foundational order rather than a delegated one, and negotiated instruments that register agreement already reached — forms of which the Melanesian record already contains working examples. This paper deliberately stops at the diagnosis; the institutional design of the reversal is the work of the volumes this paper introduces, and of the settlements themselves.

7. A wider claim, stated as a programme

The argument to this point has been made at the level of Melanesia, and the evidence is Melanesian. But the concept of *nullius imperium* is not, in principle, confined to Melanesia, and intellectual honesty requires stating both the wider claim and the limits of what has so far been shown.

The wider claim is this. The class of constitutional failure that *nullius imperium* names — the founding of a political order without the consent of the political formations it governs — is not unique to the Melanesian case. It is a general form, of which Melanesia offers a particularly clear instance because the treaty void there is so complete and the customary order so intact. Wherever a post-colonial state was assembled over first-nation polities that were presumed absent rather than settled with, the same defect should be expected, and the same reversal should in principle apply. If that is right, then Indigenous Constitutionalism identifies not a regional peculiarity but a category in comparative constitutional theory that the field has lacked.

We hold this claim deliberately at the level of a research programme rather than a result. What has been established here is the Melanesian case; the generalisation to other post-colonial

constitutional orders is argued in outline, not demonstrated across cases, and the theoretical work of specifying which orders exhibit the defect, and how the reversal operates under different conditions, remains to be done. We flag it as an open programme, and as an explicit invitation, rather than folding it into the evidenced argument — both because the Melanesian case does not need the generalisation to stand, and because a claim of this reach earns its place in the comparative field only by being discharged, not asserted. That discharging is among the tasks the Journal of Indigenous Constitutionalism is established to undertake.

8. Coda

Nullius imperium is a small addition to the vocabulary — two words — but the concepts a field lacks are precisely the ones whose absence is hardest to notice. *Terra nullius* did its work for as long as it went unnamed; naming it was the precondition of its undoing. The wager of this paper, and of the larger project it introduces, is that the same is true of its political twin: that a post-colonial constitutional order founded on a presumption of blankness can be contested only once the presumption has a name. This is that name, and the beginning of the case for its reversal.

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On the series. This is Working Paper 03 in a series begun in 2011. Working Papers 01 (Wairiu & Nanau, 2011) and 02 (Roughan, Tagini, Wairiu & Allen, 2011) established, respectively, the empirical study of logging conflict and the Village/Community/Kastom domain on which this paper draws. Their dates are part of the record this paper relies on: the concepts developed here have a working life in the Institute's output that predates their naming.

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Full apparatus appears in the forthcoming JIC volumes; the list below is indicative for this working paper.

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