

Modeling the State: Postcolonial Constitutions in Asia and Africa*

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Abstract

This essay examines the independence constitutions of Asia and Africa in the twentieth century through a macro-comparative lens. The examination focuses upon the intra-imperial isomorphic thesis which proposes that newly independent countries, in formulating their constitutions, merely imitated the constitutional form of their former mother country. I find that while independent constitutions indeed imitated the constitutions of their former mother country, this mimicry was neither universal nor whole scale. It occurred foremost in terms of the constitutional provisions for governmental system. Conversely, at least half of the independence constitutions in Asia and Africa had provisions for religion, rights, and/or political parties that ran counter to the constitutional model of the former mother country. These countervailing tendencies to the logic of intra-imperial isomorphism reveal crucial trans-imperial influences on the making of modern postcolonial constitutions.

Introduction

The decolonization of Asia and Africa since WWII appears at once as a novel and yet banal historical process. On the one hand, it was an intensified moment of state-building and frenzied constitutional activity. As the Western empires crumbled, they left behind a multitude of nascent states each seeking to institute a new constitutional order. The number of these new states, and especially its impact upon the configuration of the global political map, is staggering. In 1910 there were 56 independent countries in the world. By 1970, after the first major wave of decolonization, the number had increased to 142. In 1973 the constitutional scholar Ivo D. Duchacek thus noted that "Over two-thirds of the [world's] existing national constitutions were drafted and promulgated in the last three decades."¹ On the other hand, there is also a sense in which decolonization, and the postcolonial constitutions it spawned, marked something more banal—less a historical change than continuity. For like the anti-colonial nationalism which Partha Chatterjee [1993] has theorized, the independence constitutions of Asia and Africa have been haunted by the specter of

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1) Number of nations and constitutions from Boli-Bennett [1976: 82]; Duchacek quoted in Beer [1979: 8].

looking unoriginal. According to existing scholarship, the independence constitutions of Asia and Africa were little else than imitations of Western constitutions. More specifically, they appear to have been dysfunctional duplications of the constitutions of the former imperial master. The new African states, according to legal scholar Francois Perrin, “yielded to the temptation of trying to adopt the [constitutional] institutions of the erst-while imperial power” [quoted in Young 1965: 210]. The French scholar E. Brausch asserted similarly in 1963 that the independence constitutions of Africa were “too close to their Western models” [Brausch 1963: 85]. R. N. Spann has made similar claims about some of the independence constitutions of Asia: they bear the unflattering “mark of uninventiveness” [Spann 1963: 10]. It would seem that the more things change the more they stay the same. Postcolonial constitutions may have marked an historical novelty by their sheer number but, according to the existing literature, they merely imitated and thereby reproduced the constitutional models of the former colonizing power.

This story of intra-imperial isomorphism in independence constitutions, though, remains largely a proposition. As yet there are no macro-level studies of all of the independence constitutions in Asia and Africa. References to intra-imperial isomorphism in independence constitutions have been based on studies of a single case or, at most, a handful of cases from the same geographic region or empire.²⁾ Furthermore, most of the existing scholarship on the matter was written by observers or legal scholars in the immediate wake of decolonization, especially in the 1960s. Retrospective studies on independence constitutions, or works that synthesize the extant literature to compare across cases, remain forthcoming. Certainly this gap makes sense. Independence constitutions were altered or overturned completely after the first few years of their promulgation, and scholars since have directed their attention to issues of constitutional change (examining, for example, the convergence of African constitutions towards presidential systems of government). Other studies have interrogated the apparent failure of constitutionalism more generally. Indeed, the strength of constitutionalism in postcolonial societies remains a debated question.

In any case the gap remains. In the present essay I make one step towards filling it in. I return to the proposition that there was isomorphism between the constitutions of post-colonial state and their former imperial master, but I do so through an analysis of all of the independence constitutions of Asia and Africa since WWII, supplemented by extant secondary studies on one or another case.³⁾ Looking across different countries—and therefore across different empires, regions, and specific local conditions—to what extent can we maintain the claim that constitution-makers mapped their postcolonial states in accor-

2) The work of Nwabueze [1973] is an exception but nonetheless examines only African constitutions, not Asian ones.

3) I focus upon the original independent constitutions of Asia and Africa. I exclude later versions of these constitutions and the independence constitutions of the countries in other regions (e.g. Caribbean and the Pacific). This leaves a total of 65 constitutions. Copies of many of the consti- ↗

dance with the constitutional models of their former imperial ruler? Given the scope of the study, the analysis is extensive rather than intensive, exploratory rather than definitive. Constitutions are complex things. They are replete with subtle legal intricacies and they each bear the mark of various historical processes and conditions. To narrow the focus, I restrict the analysis to four basic elements of the constitutions: governmental form, provisions for religion, political parties, and fundamental rights. On these counts I look for patterns across the independence constitutions and ask whether or not these patterns can be explained by the imperial factor.⁴⁾

The analysis reveals two general processes at work. First, at the register of governmental form, there was indeed a trend towards intra-imperial isomorphism. When it came to choosing monarchical, parliamentary, or presidential forms, a great majority of postcolonial states—regardless of geographic location or particular colonial history—modeled their constitutions after the constitution of their former imperial ruler. But such intra-imperial isomorphism is not the whole story. Constitutional provisions for religion, parties, and human rights in at least half of the independence constitutions show influences that cannot be traced to their former imperial ruler. I argue that in these cases, postcolonial states turned to models that circulated across, rather than within, empires and regions. Such models often belied the models of the Western empires. They evidence a nascent set of transimperial, cross-colonial, and thus potentially globalizing influences.

Governmental Imposition, Imitation, and Isomorphism

Of course, there are a number of good reasons for thinking that the independence constitutions in Asia and Africa were isomorphic with metropolitan constitutions. One reason has to do with direct imperialist imposition.⁵⁾ According to MacKenzie and Robinson, imperial powers had a vital interest in ensuring that the independence constitutions followed their own constitutional model: “When the time comes to transfer power, the colonizer inevitably satisfies his conscience as to the integrity of his act by implanting a system

tutions are available in volumes compiled by Blaustein and Flanz [1971–1994] and Peaselee [1966], but since these volumes publish constitutions only at specific intervals, some of the original independence constitutions are missing and thereby had to be tracked down in various secondary sources.

- 4) The analysis is based upon a reading and coding of all independence constitutions in Africa and Asia since WWII supplemented and contextualized with secondary studies of one or another case. Below I will discuss in detail only a handful of constitutions within the larger database. These constitutions are selected either for their representative character, the fact that they were the earliest independence constitution of a particular region or former empire, or for comparative purposes (e.g. comparing across regions, timing, empire, or conditions of constitutional enactment).
- 5) This argument as it applies to the independence constitutions in Africa has been raised by Ghai [1970: 10–12], Nwabueze [1973: 23], and Nyerere [1993: 9] among others.

modeled upon the democratic values and their structural embodiment which are cherished at home” [quoted in Young 1965: 176]. Young has noted similarly that “both colonial administrators and metropolitan opinion demanded that departure, if it had to come, should be honorable. Inevitably, honor was measured by the closeness of the apparent approximation of metropolitan institutions” [Young 1994: 210]. Imperial powers thus used various means to ensure constitutional isomorphism. Even a cursory examination of the processes by which independence constitutions were written is suggestive of this influence. For example, while some of the independence constitutions of the former British empire were written by constituent assemblies, they ultimately had to be approved by the British for independence to be granted. This was especially true for those African countries that joined the Commonwealth: the constitutions of Ghana, Kenya, Nigeria, and Tanganyika had to be signed by the British monarch with the same stroke that granted independence.⁶⁾ Similarly, the constitutions of the former British colonies in Asia were partially written by the British themselves, or at least by British appointees. The independence constitution of Malaysia was drafted by a committee appointed by the British Crown and chaired by the British jurist Lord Reid. There had been no constituent assembly [Ibrahim and Jain 1992: 507]. The independence constitution of India was drafted in part by an Indian Constituent Assembly, and Indian elites attended constitutional conferences in London, but the critical decisions were made by policy-makers in England [Jennings 1949: 57]. Other imperial powers also seem to have played a hand in the drafting of independence constitutions. American authorities allowed Filipinos to draft a constitution, but according to the Philippine Independence Act of 1934 it had to be approved by the US President [Fernando 1979: 168]. Belgian officials dictated the constitutional path towards independence in Burundi and played a hand in the early constitutions of the Congo [Webster 1964; Young 1965: 343].

Besides imperial imposition, another reason for predicting isomorphism has to do with imitation on the part of the colonized. According to this argument, the native political elite who took part in constitution-making or lent their support to the new constitutions were themselves eager to draw upon metropolitan models. This is the work of what Carl Friedrich once called, in reference to African constitutions, the “hidden impulse of a foreign (colonial) constituent power working through small groups of converts to Western constitutionalism” [quoted in Nwabueze 1973: 27].⁷⁾ Indeed, when the makers of the constitution were not representatives of the former imperial power, they were typically members of the colonial elite who were well-educated in (or at least exposed to) the political idioms of their former mother country. And they often saw much value in the metropolitan

6) On Ghana see Elias [1962]; on Kenya see Nyamweya [1964: 331]; on Nigeria see Williams [1983]; on Tanganyika see Robinson [1963: 264–267].

7) In the parlance of neo-institutional theory within sociology, we might call this a logic of “mimetic isomorphism” as opposed to “coercive isomorphism.”

political forms. Perrin thus notes that in the Congo during decolonization: “the political regime of Belgium [showed] itself to be endowed with a rather surprising prestige, even amongst certain Congolese leaders least suspect of indulgence toward the colonizing nation” [quoted in Young 1965: 210].⁸⁾

The story, in short, is that imposition and imitation led to intra-imperial isomorphism. This story bears out when we examine the governmental forms proscribed in the independence constitutions. By governmental form I refer to the basic institutions of state and the functional distribution of power among them, particularly the relations between the executive and legislative powers. All of the imperial powers at the time of decolonization had constitutions dictating one of three forms: (1) parliamentary, (2) constitutional monarchy, or (3) presidential.⁹⁾ England had the prototypical parliamentary form, also known as the Westminster system. One of the central aspects of this system is that the head of government is dependent upon the confidence of the legislature (e.g. the prime minister may be chosen by the legislature, typically as the leader of the dominant party, and can be removed from office by a vote of confidence). A bicephalic executive is compatible with, but not definitive of, this kind of constitutional system: besides the head of government there is a ceremonial head of state such as a monarch. Alternatively, two other European powers, Belgium and the Netherlands, had constitutional monarchies: the head of state is hereditary and exercises real legislative or executive powers, as opposed to merely ceremonial powers. Finally, France, the United States, and Portugal each had a presidential system. The president, as both the head of state and head of government, is elected by popular vote for a fixed term of office. The French system is somewhat unique. The constitution of the Fifth French Republic (1958) mixed some elements of both the parliamentary and presidential systems. Nonetheless, in this constitution the leaning was more clearly towards the Presidential [Duverger 1992: 142; Hoffman 1959].

All of the independence constitutions in Asia and Africa imitated these governmental forms, and most of them were direct imitations of the governmental form of their former imperial master. Indicative first are the constitutions of the earliest colonies to obtain independence from the British. In Africa, Ghana was the first to achieve independence, serving as “the torch bearer of independence for other African states still struggling against colonialism” [Biswal 1992: 57]. As a member of the British Commonwealth, its 1957 independence constitution made the Queen of England the official head of state who, in turn, acted through a Governor. The head of government was a prime minister responsible to an elected parliament [Elias 1962: 46]. This was an exact duplicate of the Westminster system. If we turn to Asia, we find that the independence constitutions of

8) Besides, constitution-writing often took place under extreme conditions, which meant that constitution-makers did not always have the luxury of time to seriously consider other options [Winton 1979: 185].

9) Here I follow the criteria laid out by Lijphart [1992], Riggs [1984: 136], Nwabueze [1974: 28–29] and Duchacek [1973: chapters 6–7].

Burma (1947) and India (1950), the earliest postcolonial Asian constitutions, also followed the Westminster model, however with slight modifications. For example, the executive in both countries was referred to as a President, but the President was elected by Parliament and was responsible to it (The Burmese Constitution, Arts. 45–84) [see also Maung 1963: 118–119]. The deviation was not enough to categorize these constitutions as presidential; they remain squarely within the Westminster model. Notably, we find a parallel to this in Africa with the 1966 Botswana constitution. That constitution called for a “President” but, as with Burma and India, the President was responsible to the legislature (Arts. 31, 57, 58) [see also Fawcus 2000: 197]. The same goes for Zambia. Its 1963 constitution named Kenneth Kaunda as president, but the next president was to be elected by parliament. Kaunda fashioned this constitution as “essentially our own—designed to suit our own needs and conditions and our own way of life.” Still, as even he later admitted, it was largely inspired by the British system [Kaunda 1966: 86].¹⁰⁾

A preliminary look at the constitutions of the countries from other empires also reveals imperial influence, despite variations in timing, region, and the conditions under which the constitution was written. Algeria, for instance, was somewhat unique in the French empire in that it won its independence through a protracted and violent struggle. Even then, however, its constitution imitated the French presidential system [Ottoway and Ottoway 1970: 77–79]. The independence constitution of the Ivory Coast (1959) also imitated the French presidential system and, more specifically, the constitution of the Fifth Republic which incorporated parliamentary and presidential elements but placed most emphasis on the latter [Zolberg 1964: 255–257]. The constitution of the Philippines (1935) also had a presidential system, though it was modeled after the US rather the French system as, indeed, the Philippines had been the only US colony in Asia.¹¹⁾ In Burundi there was isomorphism also. There the precolonial monarchical system found resonance with the Belgian monarchy: the 1962 constitution called for a King—“in direct, natural and legitimate descendance of S. M. Mwambutsa IV”—to serve as constitutional monarch (Art. 51) [see also Webster 1964: 1–2]. Cameroon is a somewhat interesting case, for it had been ruled by both the French and the British, but its independence constitution nonetheless ended up adopting the presidential system of the French. In fact, the legislative committee which drafted the constitution explicitly referred to the constitution of the French Fifth Republic as the central model [Le Vine 1963: 85–86].

All of these cases therefore imply a larger pattern of intra-imperial imposition and imitation, but there are some exceptions. The 1947 independent constitution of Cambodia is one of them. It deviated from the French presidential system by establishing a constitutional monarchy. The source of sovereign power rested in the King, the throne being “the

10) On how this system approximated the parliamentary form, see Winton [1979: 189–190].

11) The 1935 constitution was for the Commonwealth of the Philippines, but it was used also as the constitution when the Philippines officially obtained complete independence in 1946.

Table 1 Independence Constitutions: Governmental Form in the Former British and French Colonies (N=42)

	Monarchy	Parliamentary	Presidential	Total
Former British Colonies	0	20	0	20
Former French Colonies	3	1	18	22

heritage of the male descendants of King Ang-Duong” (Arts. 1, 21, 25). Executive power was exercised by the King through his prime ministers; legislative power was exercised in the name of the King by the National Assembly (Arts. 22 and 23). If anything, this model was closer to the British system or, closer still, the Belgian system, despite the fact that it was largely drafted by the French. In fact, according to one historian, certain Middle Eastern texts rather than French constitutional texts served as the main model for the Cambodian constitution. Apparently this reflected “French paternalism” as much as it reflected the “authoritarian point of view” of the Cambodian prince [Chandler 1991: 29].

If Cambodia stands as an exception, it is an exception that nonetheless proves the rule. Coding the independent constitutions of the former French and British colonies into three categories—monarchical, parliamentary, or presidential—and cross-tabulating these by former empire, we find that the majority of independence constitutions followed the model of their former imperial ruler (see Table 1).¹²⁾

All of the independence constitutions of the former British colonies followed the British pattern and called for parliamentary systems. Of the former French colonies, four deviated from the French model.¹³⁾ One was Cambodia, already discussed, which had a monarchical system. Two others also deviated from the French model by adopting a monarchical system rather a presidential one: Morocco and Laos. The fourth deviation is North Vietnam, which had a parliamentary system. In the 1959 constitution, there was a President but he was responsible to the legislative assembly that elected him. This is primarily due to the socialist ideology behind the constitution: the legislative assembly was actually the base of the Vietnam Workers’ Party, and the President chosen by the assembly was therefore an organ of the party.¹⁴⁾ But again, these stand as exceptions. The other French colonies, 80 percent of them, adopted the presidential system.

12) This coding scheme follows Riggs who analyzes differences in presidential, parliamentary, and monarchical regimes in the Third World more generally [Riggs 1984]. Some countries, like Ghana, had a Queen (in this case the Queen of England) but are coded as “parliamentary” rather than monarchical because the Queen is not the real executive power and is instead ceremonial only.

13) It is not my purpose here to explain why more former French colonies deviated than former British colonies. But it may have had to do with the different approaches between the French and the British to decolonization. See Smith [1982] for a good discussion of these different approaches.

14) I discuss socialist constitutional models below.

The Influence of Religion

While most independence constitutions explicitly adopted the governmental form of their former imperial master, there is evidence of a counter-logic: no small number of them had peculiar provisions regarding religion. Fifteen of the independence constitutions, constituting 28 percent of all them, either: (a) explicitly name a specific religion as the official state religion, (b) make reference to a specific religion as providing certain legal principles, (c) have some kind of provisions which directly elevate a particular religion or (d) have some combination of these. None of the religions named are the religions of the former imperial master. They are either Buddhism or Islam. These cases thereby show the work of influences on independence constitutions besides that of the former colonial power.

The independence constitution of Pakistan is exemplary. On the one hand it was modeled after the British constitutional model. Like so many constitutions examined above, it incorporated key elements of the Westminster system of government even as it named the head of state a "President." On the other hand, the constitution contained certain articles with references to Islam, thus deviating significantly from the British system. Article 32(2), for instance, lays out the qualifications for the President and states that Presidential candidates have to be of the Muslim faith. Articles 197 and 198, under the heading "Islamic Provision," take the matter further. Article 197 states that the President must set up an organization for Islamic research and instruction in advanced studies to assist in the reconstruction of Pakistan society along Islamic lines. Article 198 calls for an appointed Commission of Experts to make recommendations "as to the measures for bringing existing laws into conformity with the Injunctions of Islam." Furthermore, the constitution makes the state responsible for enabling the Muslims "to order their lives according to the teachings of Islam, to make the teaching of the Koran compulsory, and to organize the collection and expenditure of the charitable religious tax (*zakat*)" (Art. 25) [see also Arjomand 1993: 89].

These provisions have little parallel in the constitutions of England or, for that matter, in the constitutions of any of the major Western imperial powers. True enough, there is a long history of religious influence upon written constitutions in the West. In fact, constitutionalism in Western civilization had always been intimately tied to religion, specifically Christianity. Canon law, as Arjomand reminds us [1993: 76–77] was a critical factor in the emergence of Western constitutionalism. And, of course, in England, Henry VIII established the Church of England and parliament made him head. The traces of this religious history are still seen in some modern European constitutions. The Basic Law of the Federal Republic of Germany (1949) states that it is the work of the German People "conscious of its responsibility before God and Men." The constitution of Ireland, dating from 1937, states that it was enacted "in the Name of the Most Holy Trinity, from Whom is all authority and to Whom, as our final end, all actions both of men and States must be referred" [Markoff and Regan 1987: 169]. In England, while the monarch is no longer the

head of the Church of England, Queen Elizabeth II is at least its “supreme governor.”

Still, the secularization of public law, and hence of constitutions, had been completed long before the twentieth century. Whether one goes back to the social contract theories of Hobbes and Locke or to Montesquieu's *Spirit of the Laws* (1748), reason had come to replace religion as the foundation of human laws. In Weber's classic formulation, written constitutions asserted rational-legal legitimacy over and above other forms of legitimacy, not least those associated with religious authority. Ultimately this process of legal-rational secularization led to the great importance given in most Western constitutions to the separation of Church and State [Arjomand 1993: 76–77]. The constitutional scholar Carl Friedrich in 1964, after tracing the religious origins of Western constitutions, was quite correct when he referred to his period (and therefore the time of decolonization) as “an age when the religious foundations of constitutionalism have almost vanished” [Friedrich 1964].

The religious provisions in the constitution of Pakistan thus stand in contrast to the British model and to the constitutional models of the major imperial powers more generally. Indeed, the specification that the President has to be a Muslim was not modeled after British constitutional orders of the far past, as when the King of England was head of the Church of England. When Muslim members of the Constituent Assembly tried to justify the article to non-Muslims of the Assembly, they referred to the constitutions of Afghanistan, Greece, Iran, Paraguay, Saudi Arabia, Syria, Thailand, noting that these constitutions had similar provisions for a religious executive. Further, and perhaps more importantly, proponents argued on principle, claiming that it was “a fundamental principle of an Islamic Constitution that a person who did not believe in ‘Allah’ could not be expected to rule over Muslims” [Iqbal 1960: 141]. Moreover, the decision to name Pakistan an “Islamic Republic” was legitimated by reference to Islamic principle, as well as to the constitution of the Soviet Union. At the constituent assembly, Sardar Abdur Rab Nishtar explained:

It is necessary to give some indication about the nature of our republic. According to the Objectives Resolution the character of *our constitution is to be based on principles of equality, democracy and tolerance as enunciated by Islam*. Therefore, it is quite natural that this Republic should be described as an Islamic Republic. Take the name of the great country U.S.S.R. It is described as Socialist Republics. . . . Islamic Republic of Pakistan means that this republic would be run in accordance with the principles laid down by Islam. [*ibid.*: 142]

One of the major goals animating the framers of the Pakistan independence constitution, then, was that it should incorporate the dictates of Islam, not the principles of British law. In fact, back in 1948, before the constitution was promulgated, the leader (Amir) of the Jama'at laid down four points which were to guide Pakistan's future constitution-making process:

- (1) “we Pakistanis believe in the supreme sovereignty of God”
- (2) “the basic law of the land is the Shari’ah”
- (3) all laws “in conflict with the Shari’ah will be gradually repealed and no . . . laws . . . in conflict with the Shari’ah shall be framed”
- (4) that the State . . . shall have no authority transgress the limits imposed by Islam.[Quoted in Arjomand 1993: 84]

The following year, in 1949, the Objectives Resolution continued along these lines. In phrasing that would later be incorporated into the preamble of the constitution, the Resolution proclaimed that the “sovereign independent State of Pakistan” would enable “Muslims . . . to order their lives in the individual and collective spheres in accord with the teachings and requirements of Islam as set out in the holy Quran and the Sunna” [Arjomand 1993: 85]. The Islamic influence here should be clear. The source of Islamic law (or “Shari’ah” in Arabic), akin to canon law in the Catholic tradition, had long been seen as laying primarily in the Koran and then, secondly, in the Sunna which describes the Prophet’s pronouncements and deeds [Bogdan 1994: 221–222]. Article 98, which set up a Commission to aid in legislation, was thus designed to help align earthly laws with their other-worldly source. The original idea of the Commission was that it should consist of members well-versed in the Shari’ah and should determine whether any new law conformed [Iqbal 1960: 139].¹⁵⁾ Further, Article 32(2), which dictated that the President had to be Muslim, was publicly legitimated in reference to other constitutions, but it can arguably be traced to the writings of Ibn Khaldun (1332–1406) who outlined principles of Islamic statehood. Khaldun wrote that any Head of State should be a Muslim of upright character [*ibid.*: 149].

Of course, it might not be surprising that many of Pakistan’s constitutional provisions were influenced by sources other than those emanating from the British. After all, the nation of Pakistan had been founded upon a religious issue: its separation from India was in large part predicated upon the Islamic character of the majority of the population. Further, the drafters of the Pakistan constitution were not Anglo-Saxons or representatives of England. By the time the first constitution was approved, it had been at least 10 years since British rule. Nonetheless, even in those cases where British representatives had indeed played a hand in constitution-making, there were significant religious-influenced provisions. The independence constitution of Malaysia, for instance, was initially drafted by a five-member Royal Commission appointed by the Queen of England and headed by Lord Reid, a distinguished Judge of the House of Lords. Also on the commission were representatives from other parts of the British empire, namely Australia, India, and Pakistan [Suffian bin Hashim 1979: 132]. Considering this it is not entirely surprising that the subsequent constitution of 1957 was inspired by the British system. “Malaysia

15) The origins of this was a Board of *Ulema*.

does not follow the American presidential system,” notes Ibrahim and Jain [1992: 517], “and instead follows the Parliamentary Cabinet System on the Westminster model; the head of State is the *Yang di Pertuan Agong* [Paramount Ruler, King], who is a constitutional monarch, much like the British Queen, who normally acts on the advice of the Cabinet or Minister.” Further, as in the Westminster system, this head of State, appoints the Prime Minister who is supposed to be the leader of the majority party in Parliament.¹⁶⁾ But despite this British influence, the constitution originally contained Islamic provisions. Part I, Article 3(1) states that “Islam is the religion of the Federation; but other religions may be practised in peace and harmony.” Article 3(2) states further that each of the Federation Rulers have to serve as the “head of the Muslim religion in his State,” while Article 3(3) says that the *Yang di Pertuan Agong* is to serve as “the Head of the Muslim religion” in the two other states of Malacca and Penang. Moreover, the Fourth Schedule of Part XIV, Article 181, dictates that in his oath of office the *Yang di Pertuan Agong* must declare that he shall “at all times protect the religion of Islam and uphold the rules of law and order in the country.”¹⁷⁾

These Islamic provisions were demanded by the Malaysian elite. The Royal Commission had spent a year traveling throughout the country to collect opinions and debate initial recommendations. It received 131 memoranda from various Malaysian organizations, held 81 hearings across the peninsula, and met with Malay officials [Groves 1964: 13]. During this time the Alliance Party demanded that Islam be the State Religion [Federation of Malaya 1957; Suffian bin Hashim 1979: 132]. Lord Reid noted his disapproval in his report, but the Pakistani member of the Commission, Mr. Justice Abdul Hamid, felt that since the demand among the Malaysian elite seemed unanimous it should be included. Hamid legitimated the move not by referencing the British system but other constitutions:

A provision like the one suggested above is innocuous. Not less than fifteen countries of the world have a provision of this type entrenched in their Constitutions. . . . Among the Muslim countries are Afghanistan (Art. 1), Iran (Art. 1), Iraq (Art. 3), Jordan (Art. 2), Saudi Arabia (Art. 7), and Syria (Art. 3). Thailand is an instance where Buddhism has been enjoined to be the religion of the King who is required by the Constitution to uphold that religion. If in these countries a religion has been declared to be the religion of the State and that declaration has not been found to have caused hardships to anybody, no harm will ensue if such a declaration is included in the Constitution of Malaya. In fact in all the Constitutions of Malayan States a provision of this type already exists. All that is required is to transplant it from the State Constitutions to embed it in the Federal. [Ibrahim 1978: 48–49]

16) Smith discusses this feature of the constitution in the context of the Commonwealth as a whole [Smith 1964: 93–96].

17) As translated in Ibrahim and Jain [1992: 521].

As with their Pakistan counterparts, the Malaysian writers found sources of influence other than that of their former imperial ruler. Indeed, the Islamic provisions could be traced, genealogically, all the way back to the period preceding British rule when Islam was having a strong impact upon Malaysian customary law [Groves 1964: 33]. Furthermore, the specific content of constitutional provisions can be traced to constitutional developments in the Ottoman empire during the late nineteenth century. In the 1870s, constitutional reformers in the Ottoman empire had hoped to create a new constitution modeled after the Belgian constitution but filled with Islamic content. The resulting Fundamental Law of 1876 declared Islam the religion of the state (Art. 11), just as Malaysia's constitution did later. Finally, the Sultan was declared the *padishah* (monarch) of the Ottoman state and the "protector of Islamic religion" in equal measure. This is similar to the Fourth Schedule of Part XIV, Article 181, in the Malaysian constitution which provided that the *Yang di Pertuan Agong* should declare himself "protector" of Islam.¹⁸⁾

Evidence of Islamic influence are found in other constitutions and not just those of the British empire or of countries in Asia. The 1959 constitution of Tunisia, a former French protectorate, was written by a Constituent Assembly elected by universal suffrage. It began with a Preamble declaring: "In the name of God, the merciful! We, the Representatives of the Tunisian people, meeting at the Constituent National Assembly, proclaim, that this people, who have liberated themselves from foreign domination . . . on remaining true to the teachings of Islam, to the ideal of a Union of the Great Maghreb, to their membership of the Arab Family, to their co-operation with the African peoples in building a better future and to all peoples struggling for justice and freedom." Accordingly, Article 1 states that "The Tunisian State is free, independent and sovereign. Islam is its religion, Arabic its language and the republic system is its regime." Article 3 further declared that "The Tunisian republic is a part of the Great Maghreb and is working for its unity, within the framework of common interests." Article 37 declared that the religion of the President of Republic is Islam. Thus, as Romdhane [1989: 5] argues, the Tunisian independence constitution was not strongly influenced by the French constitution. Its sources must rather be traced back to constitutional ideas of Islamic intellectuals who had been part of the *Nahda* reformist movement, a movement that once embraced Turkey, Egypt and Tunisia alike.

Other African countries with Islamic provisions include Algeria, Libya, Morocco, Mauritania, Comoros, and Somalia. All of these countries declared Islam their state religion. But Islam was not the only religious influence on independence constitutions. The constitutions of Cambodia and Laos, for example, proclaimed Buddhism as their state religion. Both Cambodia and Laos were formerly of the French empire, and both were constitutional monarchies. Laos, however, went farther than Cambodia in its Buddhist provi-

18) On the Ottoman constitutions see Arjomand [1992: 51–52].

sions.¹⁹⁾ Article 7 of the Laos independence constitution declares Buddhism to be the religion of the state and the King as “is High Protector.” Article 8 stated that “His person is sacred and inviolable. He must be a fervent Buddhist.” Besides Cambodia and Laos, the constitution of Burma also had a religious provision. While it did not declare Buddhism the official state religion, Article 21(1) asserted: “The State recognizes the special position of Buddhism as the faith professed by the great majority of the citizens of the Union.” This was a compromise between conservative leaders who wanted to make Buddhism the state religion and other Burmese leaders such as Bogyoke Aung San who wished the state to be secular [Maung 1959: 98].

The narrative of imperial imposition and imitation cannot explain why all three of these Asian countries—Burma, Laos, and Cambodia—defied Western constitutional models by inserting religious provisions. They had been part of different empires: Burma had been a British colony, while Cambodia and Laos had been French colonies. The important similarity they shared was not their former imperial ruler, but the fact that they were the only three postcolonial countries of Southeast Asia that had been historically subjected to the influence of Theravada Buddhism, which had originally traveled from Sri Lanka through Burma to Cambodia and Laos.²⁰⁾ The diasporic factor, rather than imperial influence, thus becomes key. For example, while precise numbers are difficult to obtain, it is not entirely off the mark to state that all of the countries that had religious provisions in their constitutions also had a large proportion of inhabitants who adhered to the particular religion in question. Perhaps by the same token, what many of these countries shared was membership in particular sub-regions that then went into the making of a religious diasporic identity. For example, as Laos, Burma, and Cambodia were all Southeast Asian countries forming a geographic chain around Thailand, so too were Algeria, Morocco, Libya, and Mauritania countries that stretched across Northern Africa. These constitutions thereby reveal one critical way in which transnational influences, in this case religious influence, cross-cut any particular metropolitan-colony circuit to work against the logic of intra-imperial isomorphism.

Socialist Ideology and One-Party States

Religion formed one trans-imperial circuit of influence on some constitutions. Socialist ideology provided another. While, as Motala [1994: 120] notes, comparably little attention has been paid to the potential influence of these ideologies on independence constitutions,

19) See Chandler [1991: 28–29] for a discussion of the formation of the Cambodian constitution.

20) Thailand had also been influenced by Theravada Buddhism, but it had not been colonized and therefore is not in my database. Vietnam had seen a different Buddhist sect, Mahayana Buddhism, and it occupied a less prominent place in Vietnamese society than did Theravada Buddhism in Burma, Laos, and Cambodia [Steinberg 1985: 39].

their influence on some independence constitutions is indeed strong, lending towards the creation of novel constitutional forms. In Algeria, for instance, the constitution (1963) begins with a Preamble declaring:

Algerian people have waged an unceasing armed, moral and political struggle against the invader and all his forms of oppression. . . . In March 1962 the Algerian people emerged victorious from the seven and half year's struggle waged by the National Liberation Front. . . . Faithful to the program adopted by the National Council of the Algerian Revolution in Tripoli, the democratic and popular Algerian Republic will direct its activities toward the creation of the country in accordance with the principles of socialism and with the effective exercise of power by the people, among whom the fellahs, the laboring masses and the revolutionary intellectuals shall constitute the vanguard.

Having attained the objective of national independence which the National Liberation Front undertook on November 1, 1954, the Algerian people will continue its march toward a democratic and popular revolution.

This intimates a constitutional type that belies the standard Western constitutional model. For one thing, rather than merely reflecting the structure of state power or mapping out state institutions and functions, as is the case for Western constitutions, the Algerian constitution also appears to be an instrument of social transformation. It incorporates ideological goals. Thus, it proclaims loudly that the people will follow the program of the National Council of the Algerian Revolution and direct their activities "toward the creation of the country in accordance with the principles of socialism." Later in the Preamble definite economic and social programs are laid out, such as "the creation of a national economy whose administration will be ensured by the workers," "a social policy for the benefit of the masses to raise the standard of living of the workers, to accelerate the emancipation of women in order that they may take part in the direction of public affairs," and so on. Relatedly, there is a strong historical and temporal aspect to the constitution. The Preamble narrates a long story about Algerian resistance to French rule, situating the present independence moment in Algerian history, and then projects a socialist future. Finally, at the center of it all is a single political party: the National Liberation Front. The party is defined as the "revolutionary force of the nation," a "powerful organ of impulsion." The party duties are likewise laid out: the party "will mobilize, form and educate the popular masses," "perceive and reflect the aspirations of the masses," "draw up and define the policy of the nation and supervise its implementation," and so on. The party thus becomes the mover of history; its sovereignty replaces the sovereignty of the nation: "The National Liberation Front . . . will be the best guarantee of the conformity of the country's policy with the aspirations of the people." Accordingly, Article 23 declares it "the single vanguard party in Algeria." Articles 27 and 39(2) instruct the National Liberation Front to designate

presidential candidates who are then elected through universal suffrage.²¹⁾

Such constitutional features are traceable to a socialist or communist constitutional model exemplified in the constitutions of Soviet Union and China. In this model, constitutions are intended to map the historical progress of society, charting its movement towards the final state of communism. Accordingly, in this model, new constitutions are to be written at each stage in the evolution, reflecting the particular historical moment and projecting a future [Duiker 1992: 331]. This explains the strong temporal component in the language of the Algerian preamble. It is remarkably similar to the Preamble to the constitution of the People's Republic of China (1954). That Preamble begins by discussing the "century of heroic struggle" and the "great victory in the people's revolution against imperialism, feudalism, and bureaucratic-capitalism." It proceeds to discuss how China is in "a period of transition" and then ends by pointing to the future and "the progress of humanity" which it will bring. Second, in the socialist constitutional model, goals are explicitly laid out in the constitution, enumerating the projects, policies, and programs that need to be undertaken in order to evolve. Thus, similarly, the Algerian constitution lists various social and economic policies (Preamble and also Art. 10). Finally, in socialist political systems, constitutions are not so much intended to limit government as they are designed to express that the constitution is, in a sense, limited by the ruling party [Triska 1968: xi]. In the 1936 Soviet constitution, the Communist Party is "the leading and guiding force of Soviet society and the nucleus of its political system and of all state and social organizations" [Motala 1994: 117–118]. Likewise the Preamble to the Algerian constitution states that the FLN is the only vanguard party, leading the destiny of the nation. The Algerian constitution also has articles under the heading "National Liberation Front" that lay out the duties of the party (Arts. 23–26). Finally there are in the Algerian constitution articles to ensure that the party rules the executive and the government as a whole (e.g. Arts. 27 and 39(2)).

This is not to say that the Algerian constitution replicated the Soviet or Chinese Constitutions exactly. To the contrary, the Algerian constitution incorporated some elements of the constitution of its former imperial master, France, primarily in regards to its presidential system. The constitution called for a President of Algeria and a National Assembly elected by universal suffrage (Arts. 27 and 39). By contrast, in the Soviet model, the closest thing to an "executive branch" is not a President but a Council of Ministers elected by the legislature cum "Supreme Soviet." The Algerian constitution thus forged a novel synthesis, for even though the constitution spells out a French-styled Presidential system, it contains provisions which gave the party full control over the Assembly and the President: the party is given the power to nominate Assembly candidates and Presidential candidates and thus dominates both branches. As one Algerian deputy explained at the time: "Well disciplined, the assembly executes the party's orders" [Ottoway and Ottoway

21) For more on the Algerian one-party constitution, see Arjomand [1992: 62–64]; Jackson [1977: 95–97]; Ottoway and Ottoway [1970: 77–79].

1970: 77].

Other African countries whose constitutions were influenced by ideologies of socialism include former Portuguese colonies: Angola, Cape Verde, Guinea-Bissau, Mozambique, and Sao Tome. All of these independence constitutions not only declared adherence to socialist principles but also provided for the dominance of a single-party. The constitution of Mozambique (1975), for example, begins with Article 1 stating: "The People's Republic of Mozambique, the fruit of the Mozambican People's centuries-old resistance and their heroic and victorious struggle, under the leadership of FRELIMO, against Portuguese domination and imperialism, is a sovereign, independent, and democratic state." Party dominance is secured by Article 3, which declares FRELIMO as the official party, and by other provisions such as Article 47 which makes the President of the Party also the President of the Republic. In the Guinea-Bissau constitution (1973), Article 3 declares that "the State shall have as its objective . . . the building of a society that shall create the political, economic, and cultural conditions needed to eliminate the exploitation of man by man and all forms of subordination for the human being to degrading interests for the benefit of any individual, group, or class." Article 4 declares the PAIGC (Partido Africano da Independencia da Guiné e Cabo Verde) the "leading political force in the society" and Article 6 states the party is "the supreme expression of the sovereign will of the people. [The Party] shall determine the political orientation of State policy and guarantee the implementation thereof by appropriate means." This constitution therefore followed the Soviet and Chinese model more closely than did the constitution of Algeria. For instance, duplicating the Chinese constitution, the Guinea-Bissau constitution called for a Council of State elected by the People's National Assembly rather than a President elected by universal suffrage (Arts. 36–41).²²⁾

The 1959 constitution of the Vietnam Democratic Republic is another one that adopted a socialist constitutional model, thereby revealing socialist influence on Asia.²³⁾ The preamble to the VDR constitution narrates the anti-colonial struggle and "the Vietnamese Revolution" which "advanced into a new stage" with the Indochinese Communist Party. The preamble then discusses the meddling of "French imperialists, assisted by the U.S. imperialists" over Vietnam in the early 1950s and declares: "The Vietnamese revolution has moved into a new position. Our people must endeavour to consolidate the North, taking it towards socialism; and to carry on the struggle for peaceful reunification of the country and completion of the tasks of the national people's democratic revolution throughout the country." Chapter II of the constitution, titled "Economic and Social System," lays out a plan for state-led socialist development (Arts. 9–21). Article 9 introduces the plan by

22) China had given aid to pre-independence socialist movements in parts of the Portuguese Africa [Maxwell 1982].

23) Vietnam had a provisional constitution in 1946 but it was intended to be temporary until a proper constitution was drafted.

stating “The Democratic Republic of Vietnam is advancing step by step from people’s democracy to socialism by developing and transforming the national economy along socialist lines, transforming its backward economy into a socialist economy with modern industry and agriculture, and an advanced science and technology.” Finally, provisions for the organs of government mimic the Chinese system almost directly, at times merely changing the names of the institutions but nonetheless reproducing the language almost verbatim. For example, the 1954 Chinese Constitution has provisions for a National People’s Congress, which is “the only legislative authority,” a Chairman of the Republic elected by the Congress, and a State Council, which is “the highest administrative organ of state” (Arts. 21, 22, 39, and 47). Likewise, in the Vietnamese constitution there are provisions for a National Assembly defined as “the only legislative authority,” a President elected by the Assembly, and a Council of Ministers which, just like the State Council in China, is defined as “the highest administrative organ of state” (Arts. 43, 44, 61, and 71).

The Vietnamese constitution shows that while all of the former Portuguese colonies, winning their independence after 1970, adopted the socialist model of constitutions, there is no one-to-one relationship between former colonial power and socialist constitutions. Portugal’s former colonies adopted the socialist model, but so too did some of the former colonies of other imperial powers. By a conservative estimate, at least two former French colonies (Algeria and Vietnam) and at least one former British colony (Seychelles) were strongly influenced by socialist constitutional models. What all of these countries share is not any single former imperial master but a common history of resistance. Most if not all of them had strong communist movements prior to independence, and they could be said to have achieved independence through violent, protracted struggle. This meant that during the struggle they formed revolutionary governments.²⁴⁾ Furthermore, these constitutions are not the only ones which were influenced by socialist ideology. Certain aspects of other independence constitutions were also influenced to varying degrees by socialist models, even if these constitutions did not provide for single-party states. Elements of the constitutions of Egypt, Tanzania, and Guinea, as well as Mali, Benin, and Togo could all be traced to socialist influence [Motala 1994: 120, 156]. And of course later, after the first years under their initial independence constitution, many other postcolonial states came to adopt one-party systems and advocate socialism.²⁵⁾ Thus socialist ideology, like religion, served as a transnational force which in some instances destabilized the logic of imperial imitation, imposition, and isomorphism.

24) Seychelles is the unique case here. Independence was gained peacefully in 1976, but the first real independence was not promulgated until much later (1979) due to a coup soon after independence had been granted.

25) There is a large literature on African states taking this path, but see, for example, Silveira [1976] for one exceptionally informative analysis.

Fundamental Rights

There has been a general trend over the past decades, evidenced around the globe, towards an increasing constitutional concern for rights. It has been noted by Lawrence Beer that by 1991, “168 of 173 states had a single-document national constitutions with substantial provisions about human rights” [1992: 708]. The independent constitutions of Asia and Africa surely contributed to this trend. All but three of them had provisions mentioning or enumerating fundamental rights.²⁶⁾ Of course the particulars are not uniform. Some of the constitutions cover more rights than others. Some enumerate rights in the preamble while others enumerate them in particular articles or chapters. But there is a clear predominance of provisions for rights in these independence constitutions, as the overwhelming majority has them. To what extent did direct imperial influence play a hand in this trend?

Some cases reveal direct imperial influence quite clearly. One example is the 1935 constitution of the Philippines. Rights in that constitution were enumerated in Article 3, known as the “Bill of Rights,” which closely resembled the first 10 amendments of the US constitution (also typically referred to as the Bill of Rights). Indeed, all of the rights enumerated in the US constitution, from freedom of assembly to free speech and press, were reproduced in the Philippine Bill of Rights. In fact much of the language is remarkably the same. Section 1(1), Article 3, of the Philippine Constitution states that “No person shall be deprived of life, liberty, or property,” thereby reproducing Amendment V of the US constitution verbatim. Section 1(3) reproduces Amendment 4: “The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause.” The reasons for such direct influence have to do with the processes of imitation and imposition already noted above. For one thing, the Filipinos who drafted the constitution were well-versed in US constitutional law and emulated the US system. The head of the committee was José P. Laurel, a graduate of Yale Law School; others had taken courses in American constitutional law taught by the American constitutional scholar George A. Malcolm at the University of Philippines [Fernando 1979: 169]. Thus as the President of the Philippine Constitutional Convention observed, all of the delegates to the convention believed that the US constitutional system should serve as the model [Espiritu 1990: 266]. Further, many elements of the US Bill of Rights had already been incorporated into colonial law through various organic acts and official instructions since the beginning of US occupation [*ibid.*: 262]. Finally, there were direct constraints imposed by the colonialists that readily led to isomorphism. By the Philippine Independence Act of 1934, the constitution had to be approved by the US President who, in turn, had to certify that it provided for a republican form of government and contained a bill of rights.²⁷⁾

The constitutions of the former colonies of other imperial powers also reveal imperial

26) The exceptions were Singapore, Tanganyika, and Vietnam.

influence on rights provisions. Some of the former French colonies borrow directly from the French Declaration of the Rights of Man of 1789. The preamble to the 1959 independence constitution of Upper Volta (before it became Burkina Faso) begins by stating explicitly: “The people of Upper Volta proclaims its attachment to the principles of democracy and the rights of man as defined by the Declaration of the Rights of Man and the Citizen of 1789.” This phrasing is almost identical to the phrasing of the preamble to the 1964 independence constitution of Dahomey (aka Benin), another former French colony: “The People of Dahomey . . . solemnly proclaim their attachment to the principles of democracy and the rights of man as defined in the Declaration of Rights of Man and the Citizen of 1789. . . .” At least 9 out of the 22 former French colonies explicitly refer to the French Declaration of 1789.²⁸⁾

Still, intra-imperial imitation is not the only story. The constitutions of the former British colonies are the most indicative. As is well-known among constitutional scholars, the British model of fundamental rights is unique. Unlike the US or France, human rights in Britain have arisen as common law or as statutory rights and have not been entrenched in a single-document written constitution. This is due to the principle of parliamentary sovereignty as laid out long ago by A.V. Dicey: parliament has the right to make or unmake laws, which means that no courts can overrule Parliament and that, therefore, there is no urgent need to have a formal constitution with a bill of rights.²⁹⁾ The same principle, and therefore the same absence of extensive constitutional guarantees for rights, applied as well to the older Commonwealth countries such as Canada, Australia, and New Zealand [Smith 1964: 170–171]. But if this is the British model, most of the British colonies did not follow it when formulating their independence constitutions. Except for three (Brunei, Singapore, and Tanganyika), all of the former British colonies had provisions enumerating fundamental rights in single-document written constitutions.³⁰⁾ This in itself is a deviation from the model of the imperial master. As Moderne [1990: 327] observes: “Great Britain introduced to its former colonies . . . constitutional guarantees of fundamental rights that it had not established at home.” In fact, unlike the US imperial-

27) Other former French colonies, while not referring explicitly to the French Declaration, nonetheless adopt the sequential form for rights in the French constitution. For example, the independence constitutions of the Central African Republic (1959), Madagascar (1959) and Gabon (1961), amongst others, follow the constitutions of the French Fourth and Fifth Republics by proclaiming attachment to rights and then enumerating them in the Preamble, as opposed to the US form whereby rights are enumerated in separate titles or chapters [Fernando 1979: 168].

28) On this French practice, see Nwabueze [1973: 43].

29) On this see Lester [1984]. There are, though, documents such as the Bill of Right (1689), the Magna Carta (1215), the Petition of Right (1628) and various Habeas Corpus Acts.

30) Brunei, rather than inserting rights provisions in its constitution (1959) seems to have adopted the British model in that rights have arisen from common law and statutory rights [Ibrahim and Winslow 1992: 370].

ists in the Philippines, many British imperialists opposed having constitutional guarantees of fundamental rights in both the pre-independence constitutions of the British empire and the independence constitutions. Sir Ivor Jennings opposed constitutional guarantees of rights when drafting various pre-independence and independence constitutions for former British colonies like Sri Lanka and Malaysia. He justified this by saying that while Britain has no Bill of Rights, and while “we merely have liberty according to law . . . we think—truly I believe—that we do the job better than any country” [Cooray 1973: 509–511]. Sir Jennings later said: “The ideal constitution . . . would contain few or no declarations of rights” [quoted in Smith 1964: 165]. The rights provisions in the constitutions of the former British colonies, then, are not traceable to direct imperial influence by the British. They must rather be traced to other sources.

Consider the independence constitution of India (1949), one of the first former British colonies in Asia to have rights provisions. Fundamental rights are laid out in Part III titled “Fundamental Rights” and are listed under headings such as the “Right to Equality,” the “Right to Freedom,” “Right to Freedom of Religion,” “Right to Property,” “Right to Constitutional Remedies.” The concern for these rights among India’s political leaders stretches back to at least 1924, when the National Convention prepared the Commonwealth of India Bill that contained a “declaration of rights” [Tripathi 1979: 74–75]. Later conventions and conferences among India’s political leaders affirmed the demand for such a declaration of rights, despite British opposition. The influence throughout these conventions and conferences, including the meetings of the Constituent Assembly that led to the formulation of India’s independence constitution, was the United States model, not the British model. In 1947, for instance, Sir B.N. Rau, one of the key advisors to the Indian Constitution, traveled to the US and held meetings with several members of the US Supreme Court and the Columbia Law School [Blaustein 1986: 21]. A year later, at the Indian Constituent Assembly, members of the Assembly consistently referred to the United States constitution during the discussion of rights provisions [Tripathi 1979: 72–73]. Finally, when it came time to draft the rights provisions, the sub-committee in charge made more direct references to the US constitution. One member, Sir Alladi, “advised the sub-committee to take the United States as model for the protection of the basic rights of citizens” [quoted in *ibid.*]. Thus, early drafts of the constitution as well as the final draft reveal the US influence. As Tripathi [*ibid.*: 80] shows, “almost every fundamental right which was included in these [early] drafts and which finally became part of the Constitution of India has its counterpart in the United States Bill of Rights.”

The United States constitution influenced other independence constitutions besides India. The “Fundamental Liberties” section of the Malaysian constitution was modeled after India’s independence constitution, thereby adopting, however indirectly, the US model. Indeed, that section of the Malaysian constitution contained language very similar to the US Bill of Rights [Groves 1964: 34; Suffian bin Hashim 1979: 131]. Part II, Article 5(1), for example, stated that “no person shall be deprived of his life or personal liberty

save in accordance with the law,” while Article 6(1) declared that “No person shall be held in slavery.” The constitutional guarantees for rights in Indonesia’s 1945 independence constitution also had US influence, in this case as direct as the influence on the Indian constitution. Mohamed Yamin, one of the key framers, referred to various US documents in the midst of the drafting process: “Before me is the structure of the Republic of the United States of America, which time and again has been used as an example for several constitutions in the world, for this is the oldest constitution existing the world and contains three elements: (1) Declaration of Rights in the city of Philadelphia (1774); (2) the Declaration of Independence of July 4, 1776; (3) and finally, the Constitution of the United States of America” [quoted in Adji 1979: 104]. The fact that India, Malaysia, Indonesia, and the Philippines all followed the US model in drafting their constitutional guarantees for rights, despite that only one of them was a former US colony, thus attests to trans-imperial rather than intra-imperial circuits of influence.³¹⁾

Besides the US constitution, there were other non-imperial circuits of influence. The constitution of Nigeria is exemplary. Like India, the 1960 Nigerian constitution belied the British model by including provisions for fundamental rights. Articles 18–31 of Chapter III make reference to fundamental rights while Article 165 contains definitions. The concern for constitutional guarantees emerged out of the sociopolitical situation at the time. Nigeria had been fundamentally divided into three regions each with different ethnic groups, and each of the three major political parties represented one of the three regions. This situation meant that some Nigerian leaders were cautious of possible oppression by the other regional-ethnic groups upon the withdrawal of the British. Definite constitutional provisions for rights (along with federalism) became one of the solutions [Elias 1967: 141–143; Smith 1964: 178–179]. This is not unlike the situation in India, where communal minorities had desired some constitutional guarantees of rights to protect themselves [Retzlaff 1960]. Unlike India, though, the influence was not so much the US constitution as it was the influence of a document forged by a transnational organization that had been unavailable to the Indian framers: the European Convention on Human Rights (1950), ratified under the auspices of the Council of Europe. Indeed, the Minorities Commission, appointed for the purpose of determining how to handle the fears of minority populations, stated explicitly that the European Convention of Human Rights should serve as the model.³²⁾ Thus, the Nigerian Constitution and the European Convention share crucial similarities that together stand in contrast to the US constitution. Both documents have provisions detailing freedom against torture and inhuman treatment, for instance; and both

31) The 1972 constitution of Bangladesh also contained rights provisions inspired heavily by the US constitution [Chowdhury 1979: 29–31].

32) Smith [1964: 180]; Udoma [1994: 207]. A discussion of the European Convention can be found in Moderne [1990: 324–327].

have provisions explicitly protecting the right to family life.³³⁾ Furthermore, rather than working from concepts of equality before the law, equal protection, and due process, both incorporate guarantees of freedom from discrimination and lay out “the implications of due process in terms of explicit procedural safeguards and detailed substantive restrictions on the permissible content of legislation” [Smith 1964: 184].

The European Convention served as a model for rights provisions in the independence constitutions of many other African countries also, either through direct influence or indirectly through the Nigerian constitution serving as a precedent. These include, in chronological order after Nigeria, Sierra Leone, Uganda, Kenya, Malawi, Gambia, Botswana, Lesotho, Mauritius, Swaziland, the Seychelles, and Zimbabwe [see Moderne 1990: 326 for a discussion]. There seems to have been a strong diffusion effect: once Nigeria adopted the European Convention as a model, so too did many others. As Smith has put it, “the trickle became a cascade” [Smith 1964]. Mr. Iain Mcleod, Secretary of State to the colonies, intimated this Nigerian influence already in 1960, noting that leaders from other British African colonies were already interested in using Nigeria as a model. The code of fundamental human rights in the Nigerian constitution, he said, “has been extremely useful because it has proved a model for many of the conferences I have presided over since [1958, when the code was first formulated]. I have found people from many countries read to accept as, for example, the delegates from Kenya and Sierra Leone did, the Nigerian proposals as a model for the future” [quoted in Morgan 1980: 24].

As the former British colonies drew upon trans-imperial influences, so too did former French colonies. As said already, many of the former French colonies imitated the French constitutions of the Fourth and Fifth Republics: their independence constitutions referred directly to the Declaration of the Rights of Man of 1789. But just as many French colonies also referred to the Universal Declaration of Human Rights of 1948 (which had been part of the Charter of the United Nations). Most often these constitutions referred to both documents in one and the same sentence. The preamble to the independence constitution of Niger (1959), for example, read: “The people of Niger proclaims its attachment to the principles of democracy and the Rights of Man as defined by the Declaration of the Rights of Man and the Citizen of 1789, by the Universal Declaration of 1948 and as they are guaranteed in this Constitution.” The constitutions of Cameroon, Chad, Dahomey (aka Benin), the Ivory Coast, Mauritania, Niger, Senegal, and Upper Volta (aka Burkina Faso) had similar references. Meanwhile, other former French colonies eschewed reference to the French Declaration altogether and instead referred only to the Universal Declaration of Human Rights of 1948. One example is Algeria’s constitution (1963). Article 11 states:

33) For torture and inhumane treatment, see Article 3 of the European Convention, Article 18 of the Nigerian Constitution. The US constitution which does not have an article explicitly laying out freedom from torture or inhumane treatment. For right to family life, see Article 12 of the European Convention, Article 22 of the Nigerian Constitution.

“The Republic adheres to the Universal Declaration of the Rights of Man. Convinced of the necessity of international co-operation, it will give its support to any international organization which corresponds to the aspirations of the Algerian people.” Other former French countries with constitutions which referred only to the Universal Declaration are Comoros (1975), Congo-Brazaville (1958), Djibouti (1977), Guinea (1958), Madagascar (1958), and Mali (1958).

The impact of the Universal Declaration by the United Nations was indeed wide-ranging and not only restricted to former French colonies. Togo, which had been both a French and British colony, referred to it in its independence constitution. The independence constitutions of the former colonies of Belgium (Rwanda, Burundi, and Congo/Zaire) and Spain (Equatorial Guinea) explicitly referred to it also. One former colony of Italy (Somalia) referred to the Universal Declaration in its independence constitution, while the independence constitution of another former colony of Italy (Libya) was heavily influenced by it even though it did not refer to it directly [for the influence on Libya see especially United Nations Office of Public Information 1962: 26–27]. In such manner, discourses of rights in the US constitution, the European Convention, and the United Nations—like religion and socialist ideology—all served as trans-imperial influences on independence constitutions, short-circuiting direct imperial influence.

Conclusion

My attempt to transcend existing studies and look comparatively has only been exploratory. There are a number of aspects to the independence constitutions which I have not been able to cover here. The provisions for court systems, for example, have yet to be examined; further research might explore these other aspects of the independence constitutions. Future research might also pay closer attention to certain innovations in these independence constitutions, such as synthetic or hybrid elements in them which resulted from an interaction between localized and imperial influence. But despite its limits, my macro-level analysis already shows that the story of intra-imperial isomorphism needs to be amended. On the one hand, at the level of governmental form, constitution-makers indeed looked to the constitutional models of their imperial master, not least due to the constraints of imperial imposition and logics of imitation. On the other hand, constitution-makers at times looked elsewhere for certain provisions, circumventing direct imperial influence to find other sources that circulated in between and across countries, geographic regions, and empires. In this sense, these independence constitutions did in fact mark something new, for in them lie the marks of a post-imperial, if not globalizing, constitutional politics.³⁴⁾

34) A telling analysis of how global political culture impacts new constitutions, see Arjomand [1992]. See also Boli-Bennett [1976].

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