

Constitution Making and Decolonization

Dietmar Rothermund

In addition to its two world wars, the rapid decolonization after 1947 has been the most important phenomenon of the 20th century. The two wars led to the decline of the European colonial empires and speeded up decolonization. This process has spawned more than one hundred new nations which in many cases did not exist in this way before. It also fixed territorial boundaries, most of which have remained unaltered ever since. In the course of decolonization constitutions have been made which have also survived unless they have been suspended by military coups. Many of these constitutions bear the stamp of the process of decolonization because they were framed with a view to facilitating the transfer of power. Usually the grant of independence was preceded by various steps in the devolution of power which left their traces in the constitutional documents. Since this devolution implied the prescription of administrative procedures, these constitutional documents often contain a great deal of contingent detail, whereas 'normal' constitutions are restricted to statements of fundamental rights and basic principles. This led to ironies of fate such that the Independence of India Act, which subsequently formed the basis of the Indian constitution, is the longest act ever passed by the British Parliament, which is itself based on an unwritten constitution.

The formidable Independence of India Act and its impact on the Indian constitution is a typical example of the problem discussed in this paper. Except for the insertion of fundamental rights the constituent assembly which produced the Indian constitution added nothing of importance to the existing constitutional arrangement. Whenever the departments of government were asked for comments on the paragraphs debated in the constituent assembly they invariably endorsed the status quo because they were working within the framework predetermined by the British. In the course of the Indian freedom movement Jawaharlal Nehru had frequently asserted that the constitution of independent India would be framed by a constituent assembly based on universal suffrage and unfettered by the constitutional arrangements made by the colonial rulers. This remained a dream; the actual constituent

Copyright © ICPHS 2006

SAGE: London, Thousand Oaks, CA and New Delhi, <http://dio.sagepub.com>

DOI: 10.1177/0392192106070341

assembly was based on the limited franchise introduced by the British in the 1930s, and it proved to be completely fettered by colonial precedent.

The formative influence of the process of decolonization on the respective constitutions was more or less the same in all ex-colonies. With the exception of the Japanese, who lost their colonies – Korea and Taiwan – at the end of the Second World War, all colonial rulers bequeathed constitutions to their departing colonies. Even the Belgians, who left the Congo very hastily, convened a constitutional conference in Brussels before doing so. The present paper does not aim at a comparative study of all those constitutions – this would fill many volumes. The aim here is rather to illustrate with a few examples how constitution making played a role in the process of decolonization and to what extent the crucial decisions of that time have influenced the further course of political development. In the first part of the paper we discuss the basic functions of constitution-making, setting an agenda for how politics should be transacted, and delineating the arena in which political contests should take place. Frequently the constitution makers resorted to federalism in the process of decolonization; this is discussed in the second part of the paper. The final section is devoted to the blind spot in this process which concerned control of the armed forces. This proved to be a fatal oversight, as many of the carefully contrived constitutional arrangements were soon swept aside by military coups.

Agenda setting and arena setting

In functional terms a constitution is an agenda which regulates the transactions which are considered to be relevant in the political life of a nation. It can do this by formulating a few principles, leaving everything else to the 'due process of law', but it can also prescribe detailed rules of procedure. It must contain references to the structure of government which may sometimes be of cryptic brevity. Thus the Indian constitution contains the sentence: 'There shall be a Prime Minister'. This is meant to imply that the type of government will be a parliamentary one and that the conventions governing the powers of the Indian prime minister are the same as those of the British prime minister. But none of this is stated explicitly in the Indian constitution. There is nothing in the Indian constitution that would preclude the appointment of a prime minister of the present French type. Actually Jinnah, who inherited the same constitutional framework for Pakistan as Nehru did for India, opted for what may be called a 'Gaullist' interpretation of this constitution whereas Nehru followed the British precedent.

In the British sphere much of this informal constitutional agenda setting preceded the final act of decolonization. Introducing legislative assemblies and appointing the head of the largest party as 'Leader of Government Business', was a step towards parliamentary government. African politicians like Kwame Nkrumah held this position before they became prime ministers in the next round of constitutional reform. Parliamentary democracy, which was the only form of government with which the British were familiar, had to be transferred gradually, because in its fully fledged form it would have left no room for the powers of a colonial governor. The introduction of incomplete parliamentary democracy, however, made those from whom its

complete form was withheld even more eager to get the genuine article. Accordingly most nationalists in British colonies never even thought of other forms of government. As we shall see, when the British experimented with federalism in the process of decolonization, this was usually resented by nationalists who saw in it a devious ploy by the colonial rulers. Parliamentary democracy basically implies a unitary state and federalism, therefore, was seen as counterproductive in this context.

While the British style of agenda setting was more or less uniform, it was nevertheless adapted to local conditions. The British produced tailor-made constitutions for each colony. Some of them fitted better than others. In some places they made interesting experiments of doubtful value. Ceylon provides a striking example of this procedure. The so-called Donoughmore Constitution of 1931 was in many ways 'progressive', but it also contained negative features as far as further political development was concerned. Universal suffrage was combined with communal representation, the model selected for the structure of the government was not the usual parliamentary one but that of the London County Council, with a committee system and seven 'ministers' in charge of their respective portfolios. This did not contribute to national interest aggregation but encouraged a kind of bargaining within the political elite. In the end this ensured a rather smooth transfer of power with no dramatic 'freedom struggle', the real conflicts emerged later on when Ceylon 'graduated' to a parliamentary system and interest disaggregation rather than aggregation became a persistent problem.

The French type of agenda setting was very different from the British one. The Cartesian mind of the French politicians and administrators projected a uniform pattern of imperial governance. When the machine had to be put into reverse gear, i.e. decolonization, it was operated with the same mindset. This was clearly expressed in the 'Loi Cadre' (Framework Law) which was applied to all French colonies in Africa in 1956. Under this law they were all blessed with universal suffrage, they all had elected territorial councils and they could send a limited number of representatives to the French national assembly. They were all considered to be part of a French Union, a concept which is discussed later on in the context of the uses and abuses of federalism. The number of representatives sent to Paris had to be severely limited, because otherwise the French 'natives' would soon have been governed by a black majority. The 'Loi Cadre' was a grand scheme, but it was bound to be a halfway house. It stimulated the demand for independence, but in Paris there was no plan for further agenda setting. This was also due to the lack of stability of the Fourth Republic which was much more directly affected by the problems of decolonization, including the Algerian problem, than the British government ever was. It was left to General de Gaulle to cut the Gordian knot. His idea of agenda setting was not at all clear to begin with, but he soon took surprising initiatives. Initially he just built on the foundation of the 'Loi Cadre' and held a referendum on the new constitution of the French Union of 1958, which he expected to be universally endorsed. When he was defied by Guinea he first reacted in a very vindictive manner. He also hoped that Guinea would collapse, thus demonstrating what happened to those who did not accept his agenda setting. When Guinea did not collapse and the Algerian problem became worse, he finally cut the Gordian knot completely and announced the grant of complete independence to all African

colonies in 1959, which was then achieved by most of them in 1960. This made an immediate impact on British agenda setting. Macmillan rushed to Africa in January 1960 and made his famous 'wind of change' speech. But for the British it was not that easy to decolonize with French speed. They had no 'Loi Cadre' supplemented by the constitution of 1958 and had to follow a piecemeal approach. Nevertheless they managed to release most of their African colonies in the course of the 1960s, for the most part on terms of fullfledged parliamentary democracy.

In addition to the setting of the political agenda, the setting of the arena of political contests is of major importance. This means the delimiting of constituencies, the granting of the franchise, the election system, etc. Most constitutions contain no reference to this field at all. It is left to specific legislation by the respective parliaments. However, the best constitution may not work if the pitch is queered by restrictive or even deliberately contorted arena setting. Early American political practice has produced a term which graphically describes one aspect of arena setting: gerrymandering. It refers originally to the clever redrawing of the boundaries of a constituency in the district of Essex, Massachusetts, under the auspices of Governor Elbridge Gerry in 1812. Since the constituency had the irregular shape of the spots of a salamander, it was portrayed like that animal in caricatures which circulated throughout America. The term was soon applied in a more general way to all kinds of political cheating so as to serve party interests. In trying to secure a social base for their rule the colonial powers often resorted to such schemes. They limited the franchise in terms of property qualifications favouring those on whose support they thought they could rely. They vetted the lists of voters and controlled the registration of trade unions and political parties. They introduced communal representation by specific electorates. Finally they channeled political activities into arenas which would not directly affect their central control of the respective colony. The scheme of 'provincial autonomy' introduced in India in the 1930s is of special relevance in this context. It is discussed later on as part of the federal scheme of the Government of India Act of 1935.

All these attempts at 'gerrymandering' in the most general sense of the term originally played a role in the usual game of 'divide and rule' which characterized all colonial empires. The results of this type of arena setting were, of course, still very much in evidence when decolonization became the order of the day. They could not be suddenly eradicated and sometimes they were even continued and improved upon so as to assure a smooth transfer of power uninterrupted by oppositional forces. Special problems usually arose where the population of the respective colony did not have a homogeneous population but had been significantly affected by foreign immigration. This was the case in the sugar colonies, which depended on Indian labour, such as Mauritius, Guyana and Fiji, or in African colonies which had attracted white settlers, such as Algeria, Kenya, Rhodesia and Namibia. In the three sugar colonies Indian labourers and their descendants more or less outnumbered the indigenous population or other immigrants. The colonial powers then tried to contain these Indian majorities by means of communal representation, etc. This caused ethnic conflict which poisoned the political atmosphere even after independence had been achieved. The white settlers in Africa were small minorities. Here measures were adopted to artificially enhance their political weight. This often led to violent conflict

such as the war in Algeria or the Mau Mau rebellion in Kenya or the guerilla warfare of black nationalists against settler-dominated governments in Rhodesia.

Instead of going into the details of individual constitutions we now turn to the application of federal designs in the process of decolonization which have in some cases turned out to be of permanent importance but in other instances have been of a transitory nature.

The uses and abuses of federalism

Federal designs have been applied to different levels of political organization in the process of decolonization. At the highest level they concerned the linkages of the metropolitan power with its colonies which were supposed to survive decolonization by transforming imperialism into some kind of partnership. The model for this was the British Commonwealth of Nations which in a rather attenuated form did survive until the present day. Initially it was based on the Dominion status of ex-colonies like Canada and Australia. This status was also conferred on India and Pakistan at the time of their being granted independence. The same applied to Ceylon a year later. India insisted on becoming a republic which would no longer recognize the British monarch as head of state represented by a governor general. A new formula was then found which enabled India and Pakistan to remain members of the Commonwealth as republics, but acknowledging the monarch as head of the Commonwealth. Ceylon later on followed the same path when becoming a republic and adopting the name Sri Lanka.

The French Union was originally conceived in a similar way, but it did not provide for such an elegant form of attenuation as the Commonwealth did. In fact, it contained a great deal of uniformity and centralization which was exemplified by the *Loi Cadre* which has been mentioned earlier. As a consequence of this tendency the earlier quasi-federal structures of French West Africa with its Governor General at Dakar and French Equatorial Africa with its Governor General at Fort Lamy (N'Djamena) withered away to be replaced by more direct ties between Paris and the individual colonies. General de Gaulle's superimposition of the Constitution of the Fifth Republic on the *Loi Cadre* in 1958 at first seemed to produce a very strong tie which firmly attached the colonies to the French Union. But within a short time, de Gaulle had to abandon this construction, and what was left of the French Union in 1960 after most French colonies had attained individual independence was a mere figment. Actually this process contributed to the Balkanization of Africa, which many African leaders such as Félix Houphouët-Boigny and Barthélemy Boganda had wished to avoid.

The Union which the Dutch had created in order to contain the rebellious Republic of Indonesia was doomed to an even earlier demise. The Republic of Indonesia owed its origin to the unilateral declaration of independence proclaimed by Sukarno in 1945 at the end of the Japanese interregnum. For the Dutch, who returned to Indonesia as colonial rulers, this Republic was a natural enemy which they tried to contain by forging links with leaders of the outer islands the Republic did not yet control. Being themselves dependent on American aid, the Dutch could

not exterminate the Republic. The conservative elements in Dutch politics would have liked to do that so as to be able to impose their political will. Finally the design of the Union only served as a transitory figleaf at the time of granting independence to the Republic which soon scrapped the Union and asserted its control over the entire archipelago.

Whereas the colonial rulers introduced many federal schemes, the ambitious plans of colonial nationalists were doomed. Most African nationalists had been inspired by Pan-Africanism and Kwame Nkrumah had advocated the creation of a United States of Africa. But all that the African leaders could finally produce was the Organisation of African Unity (OAU). Julius Nyerere later on said about the OAU that it had become a trade union of African heads of government who jealously guarded their sovereign rights. The leaders of ex-colonies were caught in the cage of inherited constitutions and did not dare to transcend the limits imposed by those arrangements.

At an intermediate level, the British tried to use federal designs in regional contexts in the process of decolonization. The most successful one was the Union of India which has retained the federalism imposed by the colonial rulers until the present day. The Government of India Act of 1935 which contained this federal design was a clever piece of constitutional engineering for the purposes of a centrally controlled 'devolution of power'. It consisted of two parts, one concerned the newly introduced feature of 'provincial autonomy', the other a federal centre in which the Indian princely states were supposed to act as a conservative counterweight to the British Indian provinces, which were for the most part dominated by the Indian National Congress. 'Provincial autonomy' actually worked and to some extent did serve the purpose of diverting the attention of Indian politicians to this arena which had been set for them by the colonial rulers. The major leaders such as Gandhi, Nehru, Patel et al. did not descend to this arena and formed a 'High Command' which aimed at taking over power at the centre in due course. They were quite naturally anti-federalist as they saw in this construction a device to thwart their national ambitions. It so happened that the federal part of this constitution did not come into operation, because the required assent of at least 50 percent of the Indian princes was not forthcoming. As a consequence of this refusal, all powers of the federal centre were left in the hands of the Viceroy who was now more powerful than ever before. This constellation led to a strange amalgamation of centralism and federalism in independent India. A powerful centre was transferred to the 'High Command' which nevertheless did not abolish federalism, but weakened it by specific legislation embodying the heritage of the interventionist British colonial state which had emerged during the Second World War. In independent India, federalism has contributed to the stability of the Indian Union by setting a variety of political arenas.

Similarly the Federation of Malaya designed by the British produced a rather stable political structure. A first plan of a Malayan Union was scrapped very soon, rejected by the Malays. It would have provided equal citizenship to the Chinese settled in Malaya and it would have curtailed the powers of the Malay sultans. In 1948 the British introduced a new constitution for a Federation of Malaya which favoured the Malays and retained the powers of the sultans, one of whom would be the head of state, now called 'King of Malaya'. This high office was to be filled by rotation. This rather unique construction has stood the test of time and is still working.

Another federation designed by the British for the purposes of decolonization was the West Indies Federation. The Commonwealth Caribbean consists of a string of small islands of which Jamaica and Trinidad are the biggest. The political leaders of the two big islands, Norman Manley in Jamaica and Eric Williams in Trinidad, were ardent supporters of the idea of a West Indies Federation. It was inaugurated in 1956 and if it had worked it would have led to the simultaneous grant of independence to all islands of the British Caribbean by 1960. Unfortunately, neither Manley nor Williams was ready to become Prime Minister of this federation and left this honour to Grantley Adams of Barbados. The federation was a weak construction; it was not even a customs union. The later Nobel laureate W. Arthur Lewis from St Lucia was the economic advisor to Adams and had high hopes for the future of the West Indies Federation. But the whole scheme collapsed before it could take off. Manley, who was sure of the great value of the federation, submitted the plan to a referendum for which the Jamaican opposition had clamoured. He lost the referendum and the subsequent elections. Jamaican nationalism had defeated the federation. Jamaica and Trinidad became independent separately in 1961. The smaller islands had to wait, some of them for a long time, before they could reach this goal.

A more enduring federation established by the British was the state of Nigeria which has retained its federal character until the present day. But this federation has been preserved with great difficulties and enormous sacrifices. These difficulties had their origin in the peculiarities of the constitutional development of colonial Nigeria. The British thought very highly of the system of indirect rule which they had established in Northern Nigeria, a region dominated by Muslim Amirs who were converted into 'native authorities' by the British. They tried to construct such native authorities also in Southern and Eastern Nigeria. The Ibo of Eastern Nigeria are Bantu people who have no chieftains but an elaborate system of age grades which regulated local governance. In such areas chieftains had to be invented by the British. In the process of decolonization the British tried to rely on the native authorities in the three regions and instead of taking steps towards creating a parliament for the whole of Nigeria, they diverted political activities to the three regional arenas. When they finally did create a federal parliament they queered the pitch by favouring the North, to which more seats were allocated than to each of the other two regions. This practically predetermined that the federal prime minister had to be from Northern Nigeria. Having set the arena in such a way that national interest aggregation could not be achieved and that the North would predominate, the British contributed to a violent power struggle which soon engulfed Nigeria. Finally there was even an attempt by the Eastern region to secede, which was suppressed in a bloody civil war. Instead of democratic interest aggregation, military dictatorship preserved the federal state. It is only recently that Nigeria has tried to retrace its steps by introducing democracy once more.

A rather infamous British federal scheme was the Federation of Rhodesia and Nyasaland. It owed its origin to the white North Rhodesian labour leader Roy Welensky, an engine driver who had earned fame as a boxer and then become a politician. The white settlers of North Rhodesia were a small minority and looked to the more powerful settlers of South Rhodesia as their main support in an uncertain future in which the black majority would play an important role. Welensky would

have favoured a merger of both Rhodesias, but his Labour Party friends in London told him that this would be impossible, whereas a federation which would also include neighbouring Nyasaland could find favour in London. Welensky returned home as an ardent federalist and managed to get the federation going in 1953. A senior South Rhodesian politician became its first Prime Minister, Welensky was his successor in 1956 and remained in charge of the federation until its bitter end in 1963. It was a complex construction; each of the three states had its own prime minister and its own British governor. The not so hidden agenda of this construction, the preservation of the political power of the white settlers, was soon affected by the 'wind of change' which Harold Macmillan conjured up in Africa in 1960. In North Rhodesia Kenneth Kaunda and in Nysaland Dr Hastings Banda led their respective African nationalist parties to democratic victories which could not be ignored by Macmillan. He knew that the Federation was doomed but tried to humour Welensky so as to prevent him from appealing to the British public. In 1963 Macmillan finally scrapped the Federation and soon thereafter Zambia (North Rhodesia) and Malawi (Nysaland) achieved their independence. South Rhodesia was left to its own devices and under the radical leadership of Ian Smith it then proclaimed a Unilateral Declaration of Independence in 1965. The Federation had been a halfway house. Its construction had not led to a smooth transfer of power. It had delayed the independence of two of its components and had prepared the ground for the radical reaction of the third component which gave the British a great deal of trouble.

A blind spot: the civilian control of the armed forces

One item which was missing from the constitutional debates preceding the transfer of power was the control of the colonial armed forces. Their existence was taken for granted both by the colonial rulers and by the politicians who would inherit their power. Some constitutions made in the process of decolonization contained references to the conditions of service of the bureaucrats and judges. But the armed forces which soon proved to be of crucial importance in the life of the newly independent nations were of no concern at the time of decolonization. A cynical expression of this neglect was the formula 'After Independence = Before Independence' which the Belgian commander of the Force Publique of the Congo wrote on a blackboard for the instruction of his black soldiers. He caused a mutiny in this way which determined the future course of the history of the Congo. A civilian reaction to the stark facts of military power after independence is best exemplified by that of Mahatma Gandhi in India. He had reluctantly agreed to the partition of India but was surprised when he was told that this would also mean the partition of the British Indian army. He had not given any thought to this at all and when he was compelled to do so, he clearly predicted that the two armies which would come into existence in this way would soon fight each other. This prediction came true within a short time when Indian and Pakistani troops faced each other in Kashmir.

India under Prime Minister Jawaharlal Nehru then managed to keep its large army under strict civilian control whereas Pakistan was ever again subjected to military rule. Both countries had inherited the British tradition of politically neutral

professional armed forces. The difference in the further development was only due to the strength and stability of the civilian government or the lack of it. Most newly independent nations had inexperienced and unstable governments and could thus easily fall prey to military dictatorship. Object lessons were the mutiny of the Force Publique mentioned above and the East African mutinies of 1964. The latter could only be repressed because the ex-colonial power sent in troops for disarming the mutineers. Moreover, the mutineers did not yet have trained leadership and could be easily overcome. Wherever an indigenous command structure had been fully developed, military coups succeeded and usually led to the permanent replacement of civilian government. There were only a few instances where the civilian government was resourceful enough to build up an army tied to it by means of patronage: the government of Forbes Burnham in Guyana is a case in point. Burnham was also defence minister and recruited his army almost exclusively from his own Afro-Guyanese community. He saw to it that everybody in these armed forces owed him a debt of gratitude. Other political leaders were not so circumspect. Sylvanus Olympio of Togo, for instance, was murdered by disgruntled soldiers of the small colonial army whom he had to demobilize in the interest of balancing his budget. If he had acted like Burnham he would have remained alive and powerful – at the expense of his nation. There were also cases of highly irresponsible and unconstitutional actions by civilian politicians which paved the way for their own overthrow by a military dictator. Milton Obote of Uganda, for instance, who was Prime Minister in 1966 ordered his military commander, Idi Amin, to storm the palace of the Kabaka of Buganda who was the President of Uganda. The Kabaka fled and Obote himself became President and Prime Minister, but he enjoyed his power only for a short time. Idi Amin overthrew him and subjected Uganda to a regime of brutal terror.

A very special case are the politicized armies of Southeast Asia which owed their existence to the Japanese interregnum of 1942–5. The Japanese trained about 6000 Indonesian officers in this short period of time and thus left a legacy to this nation which proved to be of great importance for its subsequent political development. The Indonesian army then had to fight the returning colonial rulers and could claim credit for freeing the nation. It thus felt entitled to play a political role.

In most other decolonized countries the armed forces had not been involved in fighting for national freedom. One important exception is Algeria, but there the military who captured power had actually been prevented from fighting the French colonial rulers. Colonel Boumedienne's well organized troops were bottled up in Tunisia during the Algerian war, they entered Algeria only after the war and then enabled Boumedienne to seize power and to retain it for a long time.

The lesson to be derived from all these examples is that the internal command structure of an army provides a 'constitution' which is simple and stable. It also has clear operational rules within the limited sphere of its action. But 'constitution' does not refer to the more complex tasks of civilian government. This means that once the army takes over, these tasks will be neglected or performed in an arbitrary manner, but nobody can complain about this because the military 'constitution' does not permit insubordination.

Dietmar Rothermund
University of Heidelberg