

Symposium

APSA-CP Vol 19, No. 2

7

Military Occupations and their Constitutional Residue

Zachary Elkins

University of Texas
Austin

zelkins@austin.utexas.edu



Tom Ginsburg

University of Illinois
Urbana-Champaign

tginsbur@law.uiuc.edu



James Melton

University of Illinois
Urbana-Champaign

melton@uiuc.edu



In February of 1946, General Douglas MacArthur gave members of his staff a week to produce a draft of a new Japanese constitution. That draft formed the core of a constitution that has stood, formally unchanged, for 62 years and counting. The Japanese case suggests that occupiers can alter the institutional course of the host country, perhaps for generations. But we know very little about constitutions written under such unusual circumstances. Given foreign control, one might expect that occupation constitutions are direct transplants, perhaps lifted from the occupier's own constitution. After all, even in ordinary times, drafters of constitutions borrow foreign ideas (and sometimes whole clauses, typographical errors and all) from abroad.² In this essay we report some findings from an investigation of the incidence, content, and durability

of constitutions written under foreign military occupation. The focus on this particular species of constitution is part of a much larger project in which we are identifying, collecting, and analyzing written constitutions since 1789.³ Occupation constitutions represent a small minority (roughly 5%) of constitutions since 1789, but knowing something about their structure and fate is illuminating, particularly with respect to states like current-day Iraq and Afghanistan, whose institutional future is widely discussed and debated. The Japanese case, as we shall see, is not at all typical of such cases.

Do Occupations Typically Result in Constitutional Replacement?

It seems obvious that occupiers would oversee a revision of host constitutions. Military occupations presumably arise from irreconcilable differences between states, some of which are likely to be political. But even if political change is not among the original motives for the conflict and its resulting occupation, it is likely to be part of the solution for occupiers intent on setting their host state on a new domestic and foreign policy course. Constitutions are often commissioned to serve such highly symbolic purposes. New documents signal a clean slate, allowing occupiers to mark publicly the birth of a new political order and to rally potentially resistant citizens around it. Citizens of the occupied state are often left without much choice, even if attachment to the old order is strong. In the Japanese case, for example, most elites after the war were reluctant to let go of the Meiji constitution, let alone replace it with a foreign transplant. Indeed, their hopeful reading of the rather vague Potsdam agreement was that constitutional revision was not necessary (Moore and Robinson 2002: 51). MacArthur squashed that hope but, nonetheless, some

Japanese remained comforted by the possibility that any new document could be replaced or dramatically amended after the "guests" left. The irony of that hope, of course, is that the Japanese constitution holds the record – among constitutions currently in-force – for the longest stretch of time without a formal amendment.

What does the history of military occupation tell us about the probability that occupiers will remake host constitutions? We have identified 107 instances of military occupation since 1789.⁴ We can compare these episodes of occupation to our chronology of constitutional revision for the countries in question. If we call "occupation constitutions" those documents that were written during and immediately after occupation (within two years), we observe twenty-six occupations that resulted in forty-two constitutions (some occupiers, like the Soviet Union in Afghanistan, oversaw multiple constitutions during their stay).⁵ 42 constitutions resulting from 26 of the 107 occupations is not a paltry output by any means, especially if we consider that only 800 constitutions or so have been produced worldwide since 1789. However, it does mean that a sizable majority of occupations do *not* result in new constitutions. Moreover, twelve of the 42 cases we identified as occupation constitutions occurred in the two-year window following occupation, and thus may not necessarily have been associated with the occupation after all. Further research should certainly delve into which kind of occupations (and occupiers) tend to produce new constitutions. Suffice it to say for now that constitutional replacement is not an automatic part of the script of occupying states.

Do Occupiers Transplant Their Own Institutions?

When new constitutions are commis-

sioned by the occupier (or, requested by the newly empowered group of hosts), it seems likely that the constitution of the occupying state would serve as a highly relevant model. Presumably, the occupiers think highly enough of their own institutions to see them replicated elsewhere, notwithstanding the need for adapting them to their new context. Some imitation of the occupier's charter seems probable even if design is left to domestic actors, who are likely to be handpicked by the occupiers or at least interested in appeasing them. Aside from any ideological or instrumental inclination for transplantation on the part of the hosts, it is quite possible that informational constraints propel them in this direction (Weyland 2005). World powers, understandably, are well represented among the historical list of occupiers and the constitutions of such powers are likely to be among the most prominent and available models for off-the-shelf adoption. Of course, the exalted stature of these powers might render their constitutions less attractive, as smaller, perhaps fledgling states might view the models of world powers as inappropriate or irrelevant to their own needs. Indeed, such a pattern is evident in the case with the United States, whose constitution was widely copied (especially in Latin America) in the 1800s, but which has become less and less influential since then.

Our data allow us to test the possibility of occupational inheritance in rather comprehensive fashion. Our approach is to estimate the similarity between each constitution in the year of its adoption and all the contemporary and historical constitutions that may have served as models, including previous constitutions from the host country. Thus, for example, the Japanese constitution of 1946 can be compared with all 74 constitutions then in force, as well as the 346 constitutions that had been adopted in

the world since 1789. Among such dyads we should expect occupation dyads (the host constitution and that of the occupier) to have a higher similarity score than that of the average constitutional dyad, ideally controlling for a set of other factors that would predict similarity.⁶

Our dataset records over 600 characteristics of constitutions, thus making it possible to calculate constitutional similarity along numerous dimensions. We start simply (or at least broadly), by calculating similarity based on the "inventory" of each constitution. We identify 112 topics that have historically been included in constitutions (ranging from such modern topics as the regulation of telecommunications, to seemingly trivial aspects like the motto for the state, to central institutional topics like the selection process for the executive). For each constitutional dyad, we then calculate the percentage of the 112 topics that both constitutions either include or exclude. This measure, then, captures the degree to which any two constitutions address the same topics, and *not* whether they make the same choices under those topics, although the two measures will likely be highly correlated. To illustrate, consider some non-occupation examples. The French constitution of 1791 and that of the United States adopted two years earlier mutually address or ignore 72 percent of the 112 topics, leaving 28 percent of topics for which one is silent and the other expressive. Fast forward 167 years – through a period pocked with periodic constitutional revision in France –and we observe that the French constitution of 1958 shares only 58 percent of the same topics as does with the little-changed United States constitution. Across all non-occupation dyads in the data, the average similarity score is 0.70 (70 % agreement) and ranges from 0.41 (Mozambique 2004 and Liberia 1825)

to 0.97 (Bolivia 1948 and Venezuela 1857).⁷ (The years mark the date of promulgation of the state's constitution and are also the time points at which the constitutions are compared).

The similarity scores for the constitutional dyads exhibit a modest convergence effect, albeit with a fair amount of dispersion, when compared with the larger sample. Across 29 of the 42 occupational dyads for which we have data, the average similarity score is 0.75, ranging from 0.58 (Afghanistan (2004) and its occupier the United States (1789)) to 0.88 (Albania (1939) and its occupier Italy (1848)).⁸ Other occupation dyads with high similarity scores include Poland (1952) and its occupier the Soviet Union (1936) at 0.82, Laos (1991) and its occupier Vietnam (1980) at 0.79, and Lithuania (1938) and its occupier Germany (1919) at 0.79. Most of the similarity scores for the eight cases in the data (of a total of fourteen) in which the United States played the role of occupier are considerably *lower* than the non-occupation average of 0.70. The exceptions are Japan 1946 (0.73), Germany 1919, (0.74), and the Dominican Republic 1924 (0.76). Sadly, we do not yet have data on the 1918 constitution of Haiti, which a young Franklin Delano Roosevelt allegedly claimed to have written while serving as Assistant Secretary of the Navy during the US occupation.⁹ Turning towards another superpower and frequent occupier, we see that the record of the Soviet Union is also not one of constitution imposition. Except for Poland 1952 (0.82) and its predecessor, Poland 1947 (0.75), the constitutions of Soviet-occupied states are not especially similar to that of their occupier. A good, or at least intriguing, comparison is Afghanistan. While the United States-Afghanistan (2004) dyad marks the extreme with respect to dissimilarity (0.58), the

Soviet-Afghanistan (1987) dyad also exhibits below-average similarity (0.67).

Thus, on average, the constitutions of occupied states seem to inherit little from their occupier.¹⁰ This surprises us. Equally surprising is the degree of continuity between the occupied state's previous constitution and the occupation product. Generally, constitutional revisions compare with their predecessor by a score of 0.81. With occupation constitutions, this score averages only a tad below this at 0.80 and ranges from 0.62 (Hungary 1949 and 1946) to 0.97 (Dominican Republic 1924 and 1908) across twenty-two occupation constitutions. The Japanese case is telling. While MacArthur's staff undoubtedly had a heavy hand in crafting the Japanese charter, their product bears striking similarity to the Meiji constitution of 1889 (0.81). Indeed, of the 62 constitutions in force at the time of drafting for which we have data (out of a universe of 74), the Meiji constitution is the eighth most similar. This is a startling reminder that, while externally imposed, the Japanese constitution of 1946 bears a distinctively domestic stamp.¹¹ And, as the distribution of scores suggests, the Japanese case is not unique. To return to the Afghan cases of 1987 and 2004, both constitutions – supervised by the Soviet Union and the United States, respectively – were quite similar to their home-grown predecessor (0.82 and 0.80, respectively).

“[...] on average, the constitutions of occupied states seem to inherit little from their occupier.”

Taken together, these results suggest

that occupiers neither impose their own institutions nor disturb terribly the institutional trajectory of the occupied state. Nonetheless, it is evident that the average effects obscure some interesting variation in both of these senses – variation that merits further scrutiny. Moreover, occupations may have more targeted, but consequential, effects on the occupied state's constitution. We speculate about some such effects in our discussion below.

How Long Do Occupation Constitutions Last?

Who would have thought that a Japanese constitution promulgated at gunpoint and, in part, crafted by a group of American military officers in 1946 would still be in effect (not to mention formally unchanged) in 2008? After all, the life expectancy of constitutions – regardless of how they are produced – is roughly seventeen years.¹² For any number of reasons, one would expect transplanted institutions to be more vulnerable. This would seem to be especially so for constitutions, wrapped up as they are with national identity. Surely, the Japanese case must be exceptional in its longevity.

Indeed, it is. At thirteen years, the expected lifespan of occupation constitutions is shorter than that of other constitutions. Moreover, this life expectancy may even be an overestimate as it includes the years that constitutions were in effect under the protection of the occupier. The “natural” life expectancy (that is, excluding the years under formal occupation) of occupation constitutions is only 5 years. In this sense, one might suspect that the security umbrella that the US has extended over Japan over the years has indirectly preserved its constitution. Of course, it may also be that the drafters of the 1946 document stumbled upon a remarkably

stable balance between domestic interests in Japan. Whatever the case, the document's durability is fairly exceptional. Several other post-WWII constitutions have also proved comparatively resilient (e.g., Austria and Italy) as well as several constitutions resulting from situations of occupation in Latin America in the 19th century (Mexico's constitution of 1867 and Paraguay's of 1870). However, these cases are – like the Japanese 1946 document – atypical.

“[...] the expected lifespan of occupation constitutions is shorter than that of other constitutions. Moreover, this life expectancy may even be an overestimate as it includes the years that constitutions were in effect under the protection of the occupier.”

Conclusion and Discussion

An exploration of the incidence, content, and stability of occupation constitutions suggests that the occupier's effect on their host's core institutions is fairly modest. To summarize: (1) only one quarter of occupations actually result in new constitutions; (2) those constitutions that are produced are, as we might expect, short lived; (3) contrary to our expectations, occupation constitutions bear only a slightly resemblance to the constitution of the occupying country and more closely a far greater resemblance to their own prior laws. Nonetheless, it is

possible that this analysis misses more subtle, but still consequential, effects of occupation. In particular, it could be that the occupier's alterations are more targeted, leaving alone the basic structure of governance but tweaking a particularly critical provision. We see this to some extent in each of the cases that we have examined in any detail. In the Japanese case, for example, the "peace clause" (Article 9) represents a key United States demand for military demobilization. In other cases, we see that occupiers have implanted provisions in constitutions that guarantee the occupier's material interest in trade or investment. The provisions for treaty approval in the Iraqi constitution, which are conducive to oil agreements with the United States, are critical in this sense. Similarly, FDR's 1918 Haitian constitution eased land holding rights for foreigners, an opening that would allow American investors to acquire lands for highly anticipated agriculture ventures (Schmidt 1995: 111). Perhaps, these more targeted impositions make sense from an occupier's strategic perspective. Given the long odds of transplants' surviving, insisting on a limited number of crucial principles or provisions might very well maximize their impact. In his instructions to his staff, General MacArthur had scribbled three requirements for the new Japanese constitution in a short memo, among them military demobilization. Certainly, the product of that limited approach has endured.

Notes

¹ We thank the editors, Michael Coppedge and Anthony Messina, for their helpful comments.

² Elkins is completing a manuscript that describes the global spread of constitutional ideas under more voluntary circumstances in addition to

the more coercive context we describe here.

³ The Comparative Constitutions Project. For details, see the project website at comparativeconstitution-project.org.

⁴ We limit ourselves to cases of foreign military occupation in which a sovereign state is occupied by one or more other states, thus excluding cases of colonialism and occupation by multilateral forces.

⁵ We include here only "replacements," and not amendments, of constitutions. This is sometimes a blurred distinction. We reserve the term amendment for those changes in which drafters follow the amendment process of the old constitution and call replacements those changes in which they work from scratch. In practice, we do not always know the details of the adoption process and, in such cases, we go by what historians and constitutional scholars identify as a new, or replaced, constitution.

⁶ For cases in which multiple states occupied another, we select only that dyad that includes the primary occupier.

⁷ Not counting comparisons of constitutions within states, whose similarity can reach 0.99 in places.

⁸ Again, years represent the date of the constitution's promulgation.

⁹ Hans Schmidt (1995: 111) suggests that there is little basis for FDR's claim (allegedly made during his first presidential campaign) and credits the Office of the Solicitor in the State Department for most of the drafting.

¹⁰ But even this small effect may be spurious since the occupier's constitution might be more influential for reasons other than its political domin-

ion over the guest. A more relevant comparison is one between occupation dyads and those dyads that compare the same occupiers' constitutions with those of non-occupied states. However, the average similarity score for these latter dyads (0.70) is no different from the overall mean, thus corroborating the previous estimate of the average occupation effect.

¹¹ This finding accords with the filigreed account of Moore and Robinson (2002), who emphasize the cooperative role of Japanese actors in constitutional re-design.

¹² Baseline survival estimate from a model of the 821 constitutions written since 1789. See Elkins, Ginsburg, Melton (forthcoming) for more details.

References

Elkins, Zachary, Tom Ginsburg, and James Melton. Forthcoming. *The Lifespan of Written Constitutions*. Cambridge University Press.

Moore, Ray A. and Donald Robinson. 2002. *Partners for Democracy: Crafting the New Japanese State under MacArthur*. Oxford University Press.

Schmidt, Hans. 1995. *The United States Occupation of Haiti, 1915-1934*. New Jersey: Rutgers University Press.

Weyland, Kurt. 2005. "Theories of Policy Diffusion." *World Politics* 57:2.