The New Dominion Model of Transitional Constitutionalism

This symposium has explored the phenomenon of New Dominion constitutionalism inductively, from the bottom up, sensitive to the nuance of local concerns and particularities, and as concerned with the late-imperial periphery as the metropolitan center. It has also analyzed the concept contextually, placing it within a historically nested set of ideas and practices from the Old (Settler) Dominions,[1] through the 'Bridge Dominion' of Ireland, before giving detailed attention to the 'tropical' New Dominions.[2] The symposium articles collectively form a rich basis with which to analyze the legal configuration of New Dominion status and its legacy by exploring the enduring links between New Dominion constitutional framing and post-independence design and practice.

This summative contribution builds on the insights of the case studies written by McDonagh, De, Malagodi and Abeyratne. Its principal contention is that New Dominion constitutionalism has a good claim to count as the first constitutional model of note designed to manage political transitions on a global scale. The historical context is that of post-WWII decolonization - the twilight of the British Empire. As such, the New Dominion constitutional model represents a crucial, but understudied, critical juncture for decolonizing nations and a key antecedent to the later post-Cold War constitutional transitions on which much academic literature has focused after 1990.[3] Both transitional and transnational, New Dominion status offered an interim frame of government for political transitions, the fuzzy center of which derived from Westminster-style conventions of political constitutionalism, as well as a template establishing the legal basis for constituting the fully independent state. The transnational character of the New Dominion 'constitutional mold' is reflected in the fact that this framework performed the

[1] Canada (1867), Australia (1901), New Zealand (1907), Newfoundland (1907), South Africa (1910).
[2] Harshan Kumarasingham, 'The "Tropical Dominions": The Appeal of Dominion Status in the Decolonisation of India, Pakistan and Ceylon' (2013) 23 *Transactions of the Royal Historical Society* 223.
[3] For recent work on post-Communist and post-conflict constitutional transitions see: ANDREW ARATO, POST-SOVEREIGN CONSTITUTION-MAKING (2016); *Global Constitutionalism*, Special Issue: Constitution-making and political settlements in times of transitions (2017) 6:1.

basic political functions of governing on the basis of foundations constructed across the boundaries between historically separated political units, Britain and the Dominions. As such, it operated through legal structures that although distinct cannot be normatively disentangled from each other: imperial and postcolonial constitutional institutions and principles. [4] New Dominion constitutionalism thus represents a modality of decolonization by constitutional means.

We further contend that the New Dominion model is consonant with the deep structure of British constitutionalism. True, the model's emphasis on explicit and detailed constitutional design at first sight seems rather alien to that tradition. But we should remember that by the mid-twentieth century British jurists, officials and statesmen had accrued decades of experience in writing constitutional texts outside the metropolitan sphere. 'A year never passes without several Constitutions or constitutional amendments being produced, mostly by the Colonial Office', Ivor Jennings and C.M. Young wrote in 1938. 'It may indeed be said that while the British choose to live under an "unwritten" Constitution, they are by far the most prolific makers of written Constitutions – for others'.[5] Core features of New Dominion constitutionalism replicate essential elements of traditional British constitutional praxis. The model is predicated on the idea of gradual and managed change, allied to a thoroughgoing pragmatism at the level of both conception and execution,[6] and seeks to normalize exceptional situations through the deployment of legal techniques.[7]

With these two key points in mind – positing New Dominion Constitution as a global model and one profoundly influenced by the British constitutional tradition - this article proceeds as follows. First, we place the insights from the four case studies within their wider historical context, which includes not only the end of Empire, but also the beginning of the Cold War. Second, we explain the disjuncture between intended goal of New Dominion Constitutionalism from the point of view of the British – retaining a measure of control over newly independent former colonies – and the aims of local actors, who made use of the transitional model to push for the maximum freedom from

[4] CHRIS THORNHILL, A SOCIOLOGY OF TRANSNATIONAL CONSTITUTIONS (2016), 2.
[5] W. Ivor Jennings and C.M. Young, *Constitutional Laws of the British Empire* (Oxford: Oxford University Press, 1938), 25.
[6] Martin Loughlin, *Public Law and Political Theory* (Oxford: Oxford University Press, 1992), chapter 4.
[7] Thomas Poole, *Reason of State: Law, Prerogative and Empire* (Cambridge: Cambridge University Press, 2015).

the UK. We note that in each case British hopes of maintaining control were largely dashed. Third, we interrogate eight specific elements of the New Dominion model, highlighting in particular the importance of the role of the judiciary in each territory, as well as the oversight of the Judicial Committee of the Privy Council. Finally, we examine the legacy of New Dominion Constitutionalism, linking the decline of the model to the later decolonization of other British Imperial territories and the consequent expansion of the Commonwealth to include new 'Realms'. We outline areas of possible future research, including questions about the imprint New Dominion Constitution may have left on the subsequent constitutional order, though we acknowledge this is particularly difficult to trace; not only does it involve consideration of counterfactuals, and sometimes narratives of denial on the part of the former colonial state, it also raises the question of what function a transitional constitution of the type the model offered ought to perform.

The Historical Context of New Dominion Constitutionalism

At the British Empire's apex, imperial constitutionalism relegated considerations of legal form subservient to questions of political substance. During the early to mid-20th century, this began to change. World War II may not have produced an immediate sea change in Britain's ambitions – it still aspired to be a 'third force' in world affairs – but it certainly left Britain materially weakened in financial terms and reduced in its geostrategic capacity. In some territories, the shared experience of war appeared for a time to consolidate the Empire, but the failure to protect imperial subjects in South-East Asia and elsewhere had a significant diminishing effect[8] that subsequent British imperial failures only served to reinforce.

It was in this wartime and immediately post-war context that the principle of self-government was conceded for the colonial Empire (the timing of which usually remained unclear). Although initially a product of the late Victorian period,[9] the idea of a multinational commonwealth gained ground, eclipsing the Seeleyan vision of a global nation-state.[10] The Balfour Declaration, drafted at the Imperial Conference in 1926, had sought to recast the bilateral connection between Britain and the various (Old)

[8] Keith Jeffrey, 'The Second World War' in Brown and Louis, *The Twentieth Century*, 326.
[9] Duncan Bell (ed.), *Victorian Visions of Global Empire* (Cambridge: Cambridge University Press, 2007).
[10] Duncan Bell, *Reordering the World: Essays on Liberalism and Empire* (Princeton: Princeton University Press, 2016), 188.

Dominions as an intimate form of international association based on 'free association', though it studiedly avoided the term 'independence'.[11] 'The old club [would] become a rules-based association'[12] held together through informal ties of sentiment and self-interest.[13] Proponents envisaged the Empire transfigured with the help of new technologies into something else, a vast political-economic unit, whether a federation, transcontinental state or multinational commonwealth, that would offer stability and leadership to the world.[14] As such, Dominionhood represented another instantiation of the idea of Greater Britain, one in fact significantly more tangible than most.[15] Subsequent moves in the direction of independence for colonial territories, some of which this symposium has tracked, were contained within this vision of the Anglosphere.[16] As Duncan Bell has observed, almost all 'midcentury projects regarded the "Anglo" powers as a nucleus or vanguard' of the new global order.[17]

Thus, allowing for some variation across the political spectrum,[18] the central aim of British imperial policy immediately after 1945 was to move all but the smaller isolated colonies into self-government as soon as possible (though that was not expected to be all that soon) and, in doing so, to consolidate links with Britain on a permanent basis.[19] Taking Balfour and the Statute of Westminster 1931 forward, context the new model of Dominion constitutionalism emerged, viewed as the 'midwife for decolonization'.[20] New Dominion constitutionalism was, therefore, an instrumental legal platform intended to

[11] Philip Murphy, *Monarchy and the End of Empire: The House of Windsor, the British Government, and the Postwar Commonwealth* (Oxford: Oxford University Press, 2013), 17.
[12] David McIntyre, *A Guide to the Contemporary Commonwealth* (London: Palgrave, 2001), 69, 77.
[13] Darwin, *Empire Project*, 407.
[14] Duncan Bell, *The Idea of Greater Britain: Empire and the Future of World Order, 1860-1900* (Princeton: Princeton University Press, 2007).
[15] Seminal texts include John Robert Seeley, *The Expansion of England: Two Courses of Lectures* (London: Macmillan, 1883); Charles Dilke, *Greater Britain*, 2 vols (London: Macmillan, 1868); J.A. Froude, *Oceana, or England and Her Colonies* (London: Longmans, Green, 1907); L.T. Hobhouse, *Democracy and Reaction* (London: T.F. Unwin, 1904).
[16] 'Nor did British governments see decolonisation … as meaning an end of British influence … The Commonwealth, it was hoped, at least by some, would allow Britain to maintain many of the commercial, political and strategic advantages that it had enjoyed in its ex-colonies.' Richard Davis, 'Introduction' in Davis (ed.), *British Decolonisation, 1918-1984* (Oxford: Oxford University Press, 2013), 6.
[17] Bell, *Reordering the World*, 196.
[18] See e.g. the fascinating exchange of letters between Clement Attlee, then Prime Minister, and Winston Churchill, Prime Minister from 1940-45 and 1951-55, but at the time Leader of the Opposition [FIND]. On the domestic critics of empire see Gregory Claeys, *Imperial Sceptics: British Critics of Empire 1850-1920* (Cambridge: Cambridge University Press, 2010).
[19] Ronald Hyam, 'Bureaucracy and "Trusteeship" in the Colonial Empire' in Judith M. Brown and Wm. Roger Louis (eds), *The Oxford History of the British Empire: The Twentieth Century* (Oxford: Oxford University Press, 1999), 276.
[20] Timothy M. Shaw, *Commonwealth: Inter- and Non-State Contributions to Global Governance* (Abingdon: Routledge, 2008), 24.

facilitate a certain strategic goal: the aim was not to get rid of the Empire altogether so much as to reimagine it, the governing logic being that 'if we treat them strictly as a[n] [independent] dominion, they will behave very like a loyal colony'.[21] The conjunction of imperial nationalism and a Britannic Commonwealth held together by bonds of affection was not quite as quixotic as it now appears. The existence in the interwar period of self-governing 'British' states on three continents outside Europe lent a degree of substance to the conceit that the British were a 'world people' uniquely adapted to the founding of new nations.[22] That this was not a straightforward case of imperial delusion is supported by the operational effectiveness of this looser Britannic version of empire up to 1945, the lion's share of which[23] just about keeping together on the strength of old links forged through money, trade and in war. The subsequent dismantling of so diverse and far-flung an empire was always likely to be messy, but whatever the outcome the results would be presented to the public as the consequence of British policy. 'History would record a commitment to self-government that had been planned and fulfilled. The British aimed to control their own destiny, presiding if possible over the rebirth of the Imperial system rather than its dissolution.'[24]

Furthermore, the Dominion concept, reliant on convention and bilateral negotiation, always contained a strong element of plasticity that often proved useful in managing acute tensions, a point highlighted in each of our case studies in this symposium. Nonetheless, somewhere near its core the concept reflected a 'distinctive blend of national status and Imperial identity' and rested on a belief strongly held in the metropolis that in colonial societies without a common culture, adherence to British institutions and ideas was the most plausible foundation for nation building.[25] Surely, the persistence of British-style instructions would keep British concerns front and centre in the governance of former colonies?

[21] Memo by Patrick Gordon Walker, Parliamentary Under-Secretary of State at the Commonwealth Relations Office, March 1948, quoted in John Darwin, *The Empire Project: The Rise and Fall of the British World System 1830-1970* (Cambridge: Cambridge University Press, 2009), 561.
[22] Darwin, *Empire Project*, 392.
[23] Obvious exceptions being South Africa, weakest link among Old Dominions, and Ireland, explored in McDonagh's individual contribution to the symposium.
[24] Wm. Roger Louis, 'The Dissolution of the British Empire' in Brown and Louis, *The Twentieth Century*, 329.
[25] John Darwin, 'A Third British Empire? The Dominion Idea in Imperial Politics' in Brown and Louis, *The Twentieth Century*, 85.

The four case studies – Ireland, India, Pakistan, Ceylon - presented in this symposium show how far from reality such hopes lay. The practical instantiation of the New Dominion model varied considerably from jurisdiction to jurisdiction, yet the symposium papers reveal a consistent story of the loss of imperial control. Here, it is important to acknowledge the significance of race and of 'national liberation movements' in each territory. In its earlier iteration, Dominion status had been reserved for the 'white' settler colonies – Ireland remained something of a case apart[26] – and as such fitted neatly with generally held assumptions about European civilizational superiority.[27] The more densely plural nature of post-1945 arrangements made New Dominion constitutionalism more complicated in race terms. On one hand, some soon-to-be-former colonies had reservations about the racial assumptions bound up with Dominionhood, and some rejected it partly on that basis, while others saw it as the clearest path to independence.[28] On the other hand, the substantial widening of the club of self-governing Dominions largely emptied the category of substance – a point made by Oliver in this symposium - while also threatening the associational potential of the New Commonwealth order. As we discuss in the final part of this article, the subsequent proliferation of Dominions, Commonwealth Realms and independent Republics meant not only the dissolution of the British Empire but also the final demise of old dreams of global order centered on British domination, a point hammered home by the Suez debacle in 1956.

So, from the British perspective, was New Dominion constitutionalism an entirely failed venture? The variety of the national independence trajectories in our four case studies makes it hard to draw general conclusions, and 'success' in this context is difficult to define with any precision. [29] At the same time, we acknowledge that in an attenuated and technical sense, all our case studies are stories of 'success' since the Dominion model was adopted in these jurisdictions, albeit sometimes only for a short interval. In other parts of

[26] Donal Lowry distinguishes Ireland by calling it the 'Captive Dominion': 'The Captive Dominion: Imperial Realities behind Irish Diplomacy, 1922-49' (2008) 36 *Irish Historical Studies* 202.
[27] These assumptions were held by liberals as well as conservatives: see e.g. Karuna Mantena, *Alibis of Empire : Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010); Cheryl Welch, 'Colonial Violence and the Rhetoric of Evasion' (2003) 31 *Political Theory* 235.
[28] Burma was given the choice of whether or not to stay within the British Commonwealth system but decided in 1947 to break the tie with Britain, becoming a sovereign and independent republic in January 1948. The Sudanese and Egyptians were also amongst those who believed that the phrase 'Dominion Status' implied further British domination: Roger Louis, 'Dissolution of the British Empire', 337-8, 341.
[29] Although up until the mid-1960s the Foreign Office kept a balance sheet of post-independence success and failures at least in east Africa: A.M. Palliser, 'Policy towards East Africa', Top Secret, 4 Feb. 1964, FO 371/176524, quoted in Roger Louis, 'Dissolution of the British Empire', 350.

the Colonial Empire, Dominion status was rejected outright. The most notable contemporary example is Burma, which became a republic in 1948, without passing through the Dominion stage, and promptly left the Commonwealth. During the 1950s and 1960s other former colonies, such as Sudan, took a similar path, something we reflect upon later in our consideration of the legacy of New Dominion Constitutionalism.

Another part of the historical picture is worth considering: after World War II the dismembering of the British Empire became inextricably intertwined with the Cold War.[30] When the Cold War turned 'hot' in Asia, with the success of the Communist Revolution in China in 1949 and the outbreak of the Korean War in 1950, South Asia acquired crucial tactical importance for the superpowers. It became a strategic imperative to retain the newly independent states of the Indian subcontinent within the US-dominated, Western sphere of influence. The aim of the British was to further Western interests in the region by influencing the constitution-making processes, and even constitutional litigation, in the decolonizing states - this can be observed from Sir Ivor Jennings' work as a constitutional consultant in, not only Sri Lanka and Pakistan, but also Malaya, the Maldives, and Nepal at key transitional moments.[31] Our case studies show that the New Dominion model had mixed success in achieving this goal: soon after independence India turned towards the Soviet Union and co-founded the Non-Aligned Movement; by contrast, in 1954 Pakistan became the foremost Western ally in the region as a member of SEATO (the Asian equivalent of NATO).

Finally, we note that while the transition from colonial territory to autonomous Dominion to fully sovereign state was not always achieved without violence, most obviously so in respect of the partition of India – the New Dominion model had some success in ushering various participants relatively peacefully along the path to independence.[32] But even if we are inclined to accept this, the case studies also suggest

[30] L. James and E. Leake (eds)[…] Intro, *Decolonization and the Cold War* (2015), 2.
[31] M. Malagodi 'Ivor Jennings' Constitutional Legacy beyond the Occidental-Oriental Divide' (2015) 42:1 *Journal of Law and Society* 102-126; J.M. Fernando, 'Constitutionalism and the politics of constitution-making in Malaya, 1956-1957' in CONSTITUTION-MAKING IN ASIA (Harshan Kumarasingham ed. 2016), 137-153; Mara Malagodi, 'Constitution Drafting as Cold War realpolitik: Sir Ivor Jennings and Nepal's 1959 constitution' in CONSTITUTION-MAKING IN ASIA (Harshan Kumarasingham ed. 2016), 154-172.
[32] The late-imperial wars, conflicts and breaches of the peace have tended to be rather marginalized. Interestingly, recent court cases have raised questions of the mistreatment of subject peoples from this era in both Malaya/Malaysia and Kenya: see *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69, discussed in Thomas Poole and Sangeeta Shah, 'A Very Successful Action? *Keyu* and Historical Wrongs at Common Law' (2016) 7 *UK Supreme Court Yearbook* [pp?]; *Ndiku*

that the price paid for peace was the ceding by the British of any residual authority to local elites much faster than they intended or had predicted. This central theme – of British failure, or at least the way things slipped very quickly from British control – emerges strongly from the case studies.

New Dominion Constitutionalism as a Template for Transitional Government

To substantiate the claim that New Dominion constitutionalism represents the first transnational constitutional template for securing transitional change on a global scale, we first observe that the model offered a technique or platform for transforming juridical relations from a condition of subordination to one of equality. This did not always necessarily imply full independence – we saw earlier how the Balfour Declaration, the canonical statement of Dominion status at an earlier stage of development, carefully avoided that term. Indeed, Old Dominion formulations deliberately left obscure the question of what the colony was transitioning to. Ambiguity had always been a feature of the politics of Dominion status – Prime Minister Lloyd George told the Commons in 1921 that it was 'difficult and dangerous to give a definition' of Dominion status[33] – and could still serve useful transitional functions after 1945.[34] Yet, New Dominion constitutionalism was clearer on the end point – the former colony was en route to full independence (not necessarily immediately), albeit with continued external links to Britain (or so metropolitan officials hoped). As such, New Dominion constitutional instruments were designedly transitional in a way that was not true of their predecessors. Significantly, the legal basis of all New Dominion constitutions rested on an Act of the Imperial Parliament. Although different routes were adopted, all the New Dominion legal structures remained sufficiently open to accommodate the agency of local political actors in the transition. A lesson was learned from the Bridge Dominion - the Irish Free State Constitution Act 1922 included as a schedule the document drafted by the Third

Mutua and Others v. The Foreign and Commonwealth Office [2011] EWHC 1913 (QB) and [2012] EWHC 2678 (QB) discussed in Devika Hovell, 'The Gulf Between Tortious and Torturous: UK Responsibility for Mistreatment of the Mau Mau in Colonial Kenya' (2013) 11 *Journal of International Criminal Justice* 223.

[33] K.C. Wheare, *The Constitutional Structure of the Commonwealth* (Oxford: Oxford University Press, 1960), 10.

[34] Kumarasingham, 'The "Tropical Dominions"', 226: 'The abstract and nebulous conception of being a Realm and Dominion suited the chaotic situation that Britain and its South Asian possessions found themselves in the 1940s when actions and decisions were needed rapidly'. W. David McIntyre, 'The Strange Death of Dominion Status' (1999) 27 *Journal of Imperial and Commonwealth History* 193, 199: 'Dominion status, then, proved a remarkably useful transitional device for speeding independence for India and Pakistan, as it had earlier for the "old Dominions".'

Dáil to serve as Ireland's Dominion constitution. Later, the India Independence Act 1947 amended the Government of India Act 1935 so that it could serve as India and Pakistan's Dominion constitutions and gave statutory basis to their respective Constituent Assemblies; and the Ceylon Independence Act 1947 allowed the Colonial Office to prepare by Order in Council the Dominion constitution of Sri Lanka.

In seeking to realize these transitional goals, New Dominion constitutionalism drew upon a grammar of public law and a set of institutional models that were characteristically British. British jurists and officials of the period generally formed the view that the British system of government not only provided a superior model, but also that this model could be exported to former colonies to help develop self-governing institutions and the normative environment needed to sustain them.[35] This differs from earlier juristic attitudes. In Victorian England, appreciation of the British constitutional *Sonderweg* often produced the opposite conclusion on the viability of transnational constitutional transplants. A.V. Dicey, for instance, writing under the influence of Maine,[36] opined at the turn of the century that it was 'in the highest degree doubtful how far English institutions can with success be transplanted to countries of which the development has been utterly different from the exceptional history of England'.[37]

Considerations of race fed into these calculations. The Old Dominion model was initially framed with an expectation that though (internal) legal sovereignty was being transferred, the settler Dominions would remain 'British' (or at least Britannic) not just culturally and socially but also in terms of trade, commerce and military cooperation. In other words, it was taken for granted that the White or Settler colonies would adapt over time to the Westminster-derived constitutional model (and vice versa). The opposite supposition tended to be made about the prospect of self-rule in territories such as India and Ceylon – and also Ireland, whose example acts as a point of disruption within the Dominion narrative. True, the Dominion model had been successfully applied there, even though it was only accepted in 1922 as a compromise; the ambiguity of the Old Dominion model once more proving its worth in squaring the circle between the aims and objectives of

[35] See e.g. W. Ivor Jennings, *The Approach to Self Government* (Cambridge: Cambridge University Press, 1958), 1-24.
[36] Dylan Lino, 'Alfred Venn Dicey and the Constitutional Theory of Empire' (2016) 36 *Oxford Journal of Legal Studies* 751, 764-5.
[37] A.V. Dicey, 'Will the Form of Parliamentary Government be Permanent?' (1899) 13 *Harvard Law Review* 67, 71.

the British government and Irish nationalists. Yet the very success of Irish self-rule after 1922 also tended to disprove previously held assumptions about the unsuitability of the Irish for self-government. The Dominion experience in Ireland acted as an aversive as well as aspirational example,[38] and also, from the Irish perspective, showed how it was possible to treat the Dominion constitution in a rough and ready way so as to secure a nationalist agenda determined by local elites. From the British perspective, although Ireland was an imperfect case, the bridge now existed to transform the Old Dominion model into the new one.

Elements of New Dominion Constitutionalism

Commentators tend to focus on the pragmatic and flexible nature of the New Dominion constitutional framework. Our case studies indeed reveal considerable variety across territories – even within the same region – in the way the Dominion constitutional framework was adapted to suit local circumstances. And it is impossible to understand the constitutional politics of Dominion status without acknowledging the significance of gaps and ambiguities in the relevant documents and legal arrangements.[39] But it remains the case that the New Dominion model can be characterized as a 'constitutional mold' with a baseline common to all the jurisdictions in which it was deployed. As such, it both favored and encouraged the development of certain forms of institutional politics. As an expression or derivation of British constitutional principles, we can identify eight core elements of the New Dominion model as a 'snapshot' of that constitutional form at the time in which Dominion Status was granted. The first three relate to government structures, the next three go to the Dominion's relationship with Britain, while the last two capture more specifically transitional features.

1. *Responsible government*, centered on a *Parliament* directly or indirectly elected, substantiating the meaning of independence in institutional terms.[40] The belief in the

[38] Kim Lane Scheppele, 'Aspirational and Aversive Constitutionalism: The Case for Studying Cross-Constitutional Influence through Negative Models' (2003) 1 *International Journal of Constitutional Law* 296.
[39] For analysis of vagueness as a general feature (and virtue) of constitutions see Timothy Endicott, 'The Value of Vagueness' in Vijay K. Bhatia, Jan Engberg, Maurizio Gotti and Dorothee Heller (eds), *Vagueness in Normative Texts* (Peter Lang 2005).
[40] The British constitutional tradition was more comfortable with unitary states than with federal structures. Dicey thought that the constitutional rigidity typically necessitated by federalism was ill-suited to the demands of imperial rule. For him, federalism 'meant both weak and conservative government'. See Lino, 'Dicey and the Constitutional Theory of Empire', 769.

validity and effectiveness of a Westminster-derived majoritarian parliamentary form of government was such that alternative proposals, such as an element of consociationalism in Ceylon that may have secured minority interests, were roundly rejected. Often, as in Ireland and Pakistan, the Dominion Parliament's dual role as legislator and Constituent Assembly proved problematic. The flexible nature of Westminster-derived New Dominion constitutionalism, which emphasized political rather than legal controls, often failed to hold the executive to account during the transitional period. Parliamentarism could easily amount in this context to elective dictatorship (e.g. Pakistan).

2. A *strong representative executive at the center*, featuring extensive Prime Ministerial (prerogative) powers but having its chief institutional expression in *Cabinet government*. Indeed, part of the reason local leaders (e.g. in India) instrumentally accepted Dominion status was because of the transformative potential inherent in a flexible constitutional framework in which power was streamlined and centralized. We have seen this potential utilized in all four jurisdiction-specific case studies to consolidate power at the center and advance a centripetal state-building process.

3. Emphasis on the *rule of law*, initially based on a British, Diceyean, model - guarded by an independent judiciary and given shape through a non-entrenched constitution devoid of justiciable fundamental rights. The aim was to perpetuate the metropolitan doctrine of parliamentary sovereignty and tradition of political constitutionalism. [NOT SURE: that included what on paper seemed to be relatively strong powers of judicial review of executive actions, but no chapters on fundamental rights. Despite these judicial powers, whose novelty (e.g. in Dominion-era India) is often overlooked by commentators what do you mean here? The courts in post-1947 India and Pakistan had no writ jurisdiction and in my understanding acquired it thought amendments of the Dominion constitutions made by the C.A./Parliament], the immediate bequest of British constitutionalism tended to be courts that deferred to the political branches of state on constitutional matters (e.g. *The State (Ryan) v Lennon*[41] in Ireland, the *Tamizuddin* litigation in Pakistan, and cases on illiberal legislation in Ceylon in 1948, 1949 and 1956). Constitutional litigation during the

Commented [ML1]: This definitely needs to be clarified. My (fudged) suggestion would be as follows:

Although the New Dominion courts quickly developed powers of judicial review of executive action, the immediate bequest of British constitutionalism tended to be courts that deferred to the political branches of state on constitutional matters…

[41] [1935] 1 I.R. 170.

Dominion period revealed the existing gulf between substantive and procedural understandings of the rule of law across the various jurisdictions.

4. The *incapacity of the British Parliament* to legislate for the Dominion, substantiating the meaning of independence in terms of law-making capacity. This was the function of the Statute of Westminster 1931, passed after the imperial conferences of 1926-30 to stabilize legal relations between various units of the Empire, and then reiterated in the various Independence Acts. From the metropolitan perspective, the Statute's self-limiting properties gave rise to a constitutional conundrum concerning the absolute nature of parliamentary sovereignty.[42] But from a more cosmopolitan angle, the self-limiting of the Imperial Parliament was a pragmatic tool that operated so as to allow the self-governing polity to amend the Dominion constitution and draft the new permanent constitution on whatever terms it pleased.

5. The *retention of a constitutional link to the Crown*, a connection given expression in the office of the Governor General as Head of State appointed by the British monarch.[43] A relic of Britain's monarchical tradition, the Governor General as the hereditary executive was expected to perform symbolic and ceremonial functions within the self-governing polity, but often played an active role in constitutional politics, escaping the weak and informal accountability mechanisms of Dominion constitutionalism.[44] For instance, the Governor General of Pakistan (allied with the developing bureaucratic-military axis) used his prerogative powers to dissolve that country's first Constituent Assembly, whereas in India Lord Mountbatten acquiesced in the government's decision to retain draconian laws that enabled the quashing of dissent. The semblance of an ongoing linkage between the national government and the British Crown proved useful in India in a different way, facilitating the assimilation of the princely states within the new state structure. From the British

[42] See *British Coal Corporation v The King* [1935] AC 500, 520-22, discussed in Peter Oliver's contribution. For more on that conundrum see another seminal Privy Council case arising from a decolonizing context of a slightly later vintage: *Madzimbamuto v Lardner-Burke* [1969] AC 645.
[43] For analysis of what became an incredibly complex area of jurisprudence see Anne Twomey, 'Responsible Government and the Divisibility of the Crown' [2008] *Public Law* 742. The question continues to bedevil UK courts: see *R (Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs* [2005] UKHL 57 *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No. 2)* [2008] UKHL 61; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.
[44] Anne Twomey, *Discretionary Reserve Powers of Heads of State* in CONSTITUTION-MAKING IN ASIA (Harshan Kumarasingham ed. 2016), 55-78.

perspective, the link to the Crown was instrumental in retaining the Dominions within the Commonwealth and most importantly within the British sphere of influence, which was crucial in the Cold War international context.

6. The *retention of the Joint Committee of the Privy Council*, the old imperial court, as the highest court of appeal when Dominion status was granted. This jurisdiction was brought to an end within a few years of independence in Ireland, India and Pakistan, though it was retained in Ceylon until the new republican constitution (of Sri Lanka) was adopted in 1972. We assess the transnational judicial conversations that took place under Ceylon's New Dominion constitution shortly. Moreover, even in jurisdictions in which the link with the Privy Council was rescinded, forms of transnational constitutional dialogue between the Dominion and the metropolis endured as local courts found themselves interpreting the Dominion constitution both in light of the common law and the post-independence legal developments.

7. A *vague or non-existent legal framework* for drafting the permanent constitution. As a platform for transitional constitutionalism, the New Dominion model is noteworthy for its lack of specific transitional arrangements for constitution making. Or rather, the arrangements it made tended to be institutional or structural rather than legal or substantive. The absence of a blueprint for constitution making, on the one hand, facilitated national ownership of the independent constitution, as the various drafting processes can be regarded as autochthonous, even if with the input of foreign actors. On the other hand, the political settlement enshrined in the Dominion constitution represented a compromise between the British and the anti-colonial leadership, but was virtually silent on the intra-local elites balance of power that the new constitution was to embody. We can see this vagueness as the external manifestation of a style of (political) constitutionalism that dominated the British constitutional thought of the period. Otherwise divergent writers like Dicey and Jennings could agree that constitutions were ideally flexible and political, with most matters left open for parties operating in a robust institutional context and within a matrix of sufficiently agreed upon conventions to resolve. Exported to New Dominion settings, the flexible and political became ambiguous and diplomatic, a situation which the absence of either well-grounded institutions or sufficiently agreed upon conventions made ripe for exploitation. As such, Dominion status as a 'constitutional laboratory'

presented the serious risks, on the one hand, of creating path-dependencies in the new permanent constitution (e.g. a dominant unaccountable executive) and, on the other hand, of triggering instances of aversive constitutional borrowing (e.g. the creation of strong judicial review powers and justiciable fundamental rights).

8. An *emphasis on evolution and managed change*, admittedly more implicit to New Dominion constitutions than textual. The enduring belief in the value of open-textured constitutions and the virtue of ambiguity seems to be have been predicated on the notion that elites, both local and British, could work together to secure a harmony of interests between metropolitan interests and those of the self-governing polity.[45] So understood, New Dominion constitutionalism becomes an elaboration of an essentially eighteenth-century constitutional philosophy. According to Burke's canonical statement, constitutions were fundamentally moral orders that served ideally to iron out discontinuities between past and present and to find an overarching balance capable of transcending potential conflict between social orders. As such, Dominion constitutions remained open to the contextual specificities of the various jurisdictions, explaining the different trajectories of the various case studies. Moreover, the constitutional experiences under the umbrella of New Dominionhood occurred in deeply divided polities and can be regarded as instances of incrementalist approaches to constitution making as illustrated by Hanna Lerner.[46]

Transnational Judicial Conversations on the New Dominion Constitution

A striking feature of the narratives related in this symposium, not least to contemporary students of comparative constitutional law, is the prominence of transnational conversations on matters of importance relating to the New Dominion constitutions.[47] Such matters were not new to the metropolitan court concerned, the Judicial Committee of the Privy Council, which had long been at the heart of a complex legal web of empire[48] and for whom the 'difficulty of distance'[49] and the need to juggle a plurality of

[45] Roger Louis, 'Dissolution of the British Empire' (page?).
[46] HANNA LERNER, MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES (2011).
[47] The obiter comments of Lord Sankey in *British Coal Corporation v The King* [1935] AC 500 (PC) are of interest here.
[48] See in particular the Judiciary Committee Acts of 1833 and 1844.
[49] Paul Mitchell, 'The Privy Council and the Difficulty of Distance' (2016) 36 *Oxford Journal of Legal Studies* 26.

laws and perspectives were all but conditions of its existence.[50] In the immediate post-war period, the Dominion structure itself was not new,[51] although cases from the Old Dominions were on the decline.[52] More novel was the self-conscious transitional nature of the legal regimes that the Privy Council was tasked with supervising, a process that added an extra dimension to the ongoing 'legal decentralization of the British Empire'.[53]

Yet, if the British hoped that continuing Privy Council supervision would tether the Dominions to the British legal system, these hopes were dashed. The right of appeal to the Judicial Committee of the Privy Council was abolished quite soon after Dominion status was granted in three of our case study states – 1933 in Ireland,[54] and in 1950 in India[55] and Pakistan.[56] The timing meant that there was no supranational element to the seminal constitutional cases that arose in those jurisdictions during the Dominion period, notably *The State (Ryan) v Lennon*[57] in Ireland and *Tamizuddin*[58] in Pakistan. Yet, evevn without direct British jurisdiction, in both cases a strong element of judicial deference to the executive, influenced by the British tradition, is observable.

The only New Dominion where the Privy Council was a significant constitutional agent was Ceylon. Even here, however, the Privy Council's rulings did not have the positive impact the British expected. Taking their lead from the British tradition, Ceylonese courts were highly deferential to the national executive and legislature, even when illiberal electoral laws were passed. On this, the Privy Council, clearly aware it was

[50] For analysis of some of its more recent activities see Tracy Robinson and Arif Bulkan, 'Constitutional Comparisons by a Supranational Court in Flux' (2017) 80 *Modern Law Review* 379.
[51] See e.g. W. Ivor Jennings, 'The Statute of Westminster and Appeals to the Privy Council' (1936) 52 *Law Quarterly Review* 173.
[52] 'Decline of the Judicial Committee of the Privy Council. Current Status of Appeals from the British Dominions' (1947) 60 *Harvard Law Review* 1138, discussing *Attorney-General of Ontario v. Attorney-General of Canada* [1947] 1 All Eng 137 (PC) in which the Privy Council upheld the Canadian Supreme Court's decision that the Canadian Parliament possessed the power to abolish appeals to the Privy Council on all civil matters.
[53] 'Decline of the Privy Council', 1139.
[54] Constitution (Amendment No. 22) Act 1933. The seminal 1935 Privy Council judgment of *Moore v the Attorney General of the Irish Free State* [1935] 1 I.R. 472 and [1935] A.C. 484 confirmed that due to the Statute of Westminster, the Irish Dominion had the power to remove the right of Privy Council appeal. See also T. Mohr, 'Law without loyalty: The abolition of the Irish Appeal to the Privy Council' (2002) 37 *Irish Jurist* 187.
[55] The Abolition of Privy Council Jurisdiction Act 1949 came into effect with the creation of the Supreme Court of India in January 1950.
[56] The Privy Council (Termination of Jurisdiction) Act 1950.
[57] [1935] 1 I.R 170.
[58] Maulvi Tamizuddin Khan PLD 1955 FC 240.

walking a tightrope, initially tended to uphold Ceylonese Supreme Court decisions.[59] But even when Privy Council attempted to assert itself, the national courts in Ceylon largely ignored, or found ways around, elements of Privy Council rulings they disagreed with.[60] Moreover, within national political discourse the Privy Council came to be viewed as a 'colonial court' and its continuing jurisdiction led to calls not only to end the link with the court, but to create an entirely new republican constitution, which occurred in 1972.

Legacies of New Dominion Constitutionalism

From an international perspective, we argue that the experiences of the New Dominions shaped the modality of decolonization of the remaining colonies and dependencies of the British Empire. The year 1949 represents a watershed in the history of the Commonwealth: within ten days in April Ireland became a Republic and left the Commonwealth, while India remained in the Commonwealth notwithstanding the republican turn. In the immediate term, these changes translated into a new role for the Crown within the Commonwealth. The 1949 Conference produced what is known as the London Declaration, which adopted the following formula: 'the King is the symbol of the free association of its independent members and as such the Head of the Commonwealth'.[61] This political agreement found legal expression in the Royal Titles Act 1953. A perusal of the parliamentary debates at the Bill's second reading in the House of Commons reveals the importance of enshrining in statute the equality of the Commonwealth members at that time. To do so it was necessary for the expression "Dominion" to be superseded. Gordon Walker, the MP for Smethwick, clearly expressed the changed mood with these words:

> I welcome the disappearance of the words "Dominions beyond the seas", which, I hope will mark the formal disappearance of the word "Dominions" from the vocabulary of the Commonwealth. This word is disliked in many parts of the Commonwealth because it suggests a distinction of status between the United Kingdom and other parts of the Commonwealth. The words "other Realms" in the title will give the word "realm" a greater currency than it has today, and it is a more

[59] *Govindan Sellappah Nayar Kodakan Pillai v Punchi Banda Mudanayake* [1953] AC 514.
[60] See, e.g., *Bribery Commissioner v Ranasinghe* [1965] A.C. 172 and *Liyanage v Queen* [1967] 1 AC 259.
[61] Op. cit. McIntyre 1999, 202.

acceptable word.[62]

As a result, the expression "Commonwealth Realms" came to substitute the term "Dominion". However, the substance of the model remained relevant: the majority of British colonies from the 1950s onwards continued to acquire independence via a transitional constitutional arrangement in the same vein as the South Asian Dominions. The African Commonwealth Realms were: Ghana (1957-1960); Nigeria (1960-1963); Sierra Leone (1961-1971); the Gambia (1965-1970); Tanganyika (1961-1962); Uganda (1962-1963); Kenya (1963-1964); and Malawi (1964-1966). In the Mediterranean Malta retained this status for a decade (1964-1974). In the Indian and Pacific Ocean respectively, Mauritius (1968-1992) and Fiji (1970-1987) also adopted transitional constitutional arrangements. Instead, in the Caribbean (Antigua and Barbuda 1981, Bahamas 1973, Belize 1981, Dominica 1978, Grenada 1974, Jamaica 1962, Saint Christopher and Nevis 1983, Saint Lucia 1979, and Saint Vincent and the Grenadines 1979) and in the Oceanic islands (Papua New Guinea 1975, Solomon Islands 1978, and Tuvalu 1978), the majority of countries have retained their constitutional status as "Commonwealth Realms" to this day – with the two notable exceptions of Guyana (1966-1970) and Trinidad and Tobago (1962-1976).

All these former British colonies obtained 'fully responsible status within the Commonwealth' on the basis of Independence Acts passed by Westminster on the basis of Commonwealth Realm constitutional arrangements, which clearly derived from the earlier New Dominion constitutional framework.[63] For instance, Malaya became independent in 1957 but remained a Commonwealth member as an 'independent sovereign country within the Commonwealth' under the Federation of Malaya Independence Act 1957. Northern Rhodesia (later Zambia) and the Bechuanaland Protectorate (later Botswana) followed the same pattern and became republics in 1964 and 1966 respectively, but chose to remain Commonwealth members. Interestingly, only a small number of decolonizing nations saw the option of a transitional constitutional deal as an unsuitable or unnecessary accompaniment on the path to independence. In fact, after 1949, when the term Dominion fell into disuse and was substituted by the expression "Commonwealth Realm", the majority of British former colonies and

[62] Hansard HC Deb 03 March 1953 Vol. 512 cc193-257.

[63] An analysis of "Commonwealth Realm" constitutionalism as a transitional and transnational constitutional mold to facilitate decolonization after New Dominion constitutionalism fell into disuse is beyond the scope of this essay, but remains an area of constitutional history worth exploring in a comparative fashion.

dependencies still adopted transitional constitutional frameworks similar to the New Dominion constitutional model.

From a national perspective, Dominion status in Ireland, India, Pakistan and Sri Lanka ought to be regarded both as a specific constitutional form and a critical juncture in the constitutional developments of these jurisdictions. As noted by McDonagh, De, Malagodi and Abeyratne one striking feature of New Dominion constitutionalism is the historical elision of this period in the national consciousness – a deliberate, and almost official, policy of minimizing - forgetting – that such a transitional phase occurred. This is particularly significant because all the case studies reveal that the New Dominion constitutional framework was actually a crucial instrument of state-building for the various decolonizing nations. In this respect, the open textured and incrementalist nature of Dominion status allowed for the agency of local elites to influence their countries' structures and institutions of government. This is observable in three main areas. First, local political leaders exploited the strong executive powers under the various Dominion constitutions during the transitional period to consolidate their influence at the center, eliminate political rivals, and strengthen the structures of the postcolonial state. This profoundly shaped the making of the subsequent republican constitutions, which all featured Westminster-derived dominant executives. This trend was then exacerbated in the cases of Pakistan and Sri Lanka, which both feel prey to recurring bouts of authoritarian rule.

Second, the non-prescriptive nature of the New Dominion constitutional arrangement with regard to the permanent constitution-making process allowed for national ownership of the new independent constitutions, thus fostering the legitimacy of the new constitutional frameworks. This approach also explains e.g. the issue of 'temporality' that so clearly emerges from India and the consequent deliberate elision of the Dominion period from the mythology of independence in Pakistan and Sri Lanka. It also helps to explain why the legitimacy of the 1937 constitution in Ireland has never been seriously questioned.

Third, the lack of legal counter majoritarian checks under the various Dominion constitutions led to a series of instances of aversive constitutional borrowing and to the adoption of entrenched constitutions featuring extensive and justiciable fundamental

rights in Ireland, India and Pakistan. This is the most significant departure from the Westminster model that Dominion constitutionalism had come to encapsulate. In fact, the Indian constitutional treatment of rights 'owed little to British influence, drawing instead on the bills of rights in the American, French and Irish constitutions'.[64] In fact, demands in British India for justiciable fundamental rights had arose as early as 1885, but had been rejected time and again, even in Government of India Act 1935. Significantly, Sri Lanka remained firmly within the Westminster tradition of non-justiciable rights with a limited scope for judicial review – and this area remains one of the most contentious features of the country's constitutional arrangements. From a metropolitan perspective, as Parkinson elegantly illustrated, since 1962 there was a radical shift in British attitudes to bills of rights as the Colonial Office developed policy of mandating bills of rights for overseas territories [find ref in Parkinson's book].

Commented [ML2]: We need a concluding sentence. Perhaps we could say something here about the British later adopting the HRA and becoming more attuned to rights-based arguments?

Conclusions

In this concluding article, we have posited New Dominion Constitution as a global model of transnational constitution, and one profoundly influenced by the British constitutional tradition. Yet, as we have shown, the British dream of using this associational model to retain a measure of control over the newly independent territories was largely dashed. The precarious condition of imperial power after 1945 helps to distinguish New Dominion constitutionalism from earlier versions of Dominionhood; Britain's relative weakness made it more reactive to events than it had been before, and more likely to follow the direction suggested (or stipulated) by local elites. New Dominion constitutionalism consequently offers a clearer sense of constitutional arrangements being transitional, and as a result more open-textured.

We also take into account considerations of race. Until New Dominion Constitutionalism, the term Dominion had previously been reserved for the 'white' settler colonies – Ireland remained something of a case apart[65] – and as such fitted neatly

[64] C. Parkinson (2016). 'British constitutional thought and the emergence of bills of rights in Britain's overseas territories in Asia at decolonisation' in Constitution-Making in Asia, 41.
[65] Donal Lowry distinguishes Ireland by calling it the 'Captive Dominion': 'The Captive Dominion: Imperial Realities behind Irish Diplomacy, 1922-49' (2008) 36 *Irish Historical Studies* 202.

with generally held assumptions about European civilizational superiority.[66] The more densely plural nature of post-1945 arrangements made New Dominion constitutionalism more complicated in race terms. On one hand, some soon-to-be-former colonies had reservations about the racial assumptions bound up with Dominionhood, and some rejected it partly on that basis.[67] On the other hand, the substantial widening of the club of self-governing Dominions emptied the category still further of substance while also threatening the associational potential of the New Commonwealth order. Subsequent proliferation of Dominions, Commonwealth Realms and independent Republics meant not only the dissolution of the British Empire but also the final demise of old dreams of global order centered on British domination.

[66] These assumptions were held by liberals as well as conservatives: see e.g. Karuna Mantena, *Alibis of Empire : Henry Maine and the Ends of Liberal Imperialism* (Princeton: Princeton University Press, 2010); Cheryl Welch, 'Colonial Violence and the Rhetoric of Evasion' (2003) 31 *Political Theory* 235.
[67] Burma was given the choice of whether or not to stay within the British Commonwealth system but decided in 1947 to break the tie with Britain, becoming a sovereign and independent republic in January 1948. The Sudanese and Egyptians were also amongst those who believed that the phrase 'Dominion Status' implied further British domination: Roger Louis, 'Dissolution of the British Empire', 337-8, 341.